

1949

# Seaboard Finance Company v. L. V. Shire and Bank of Vernal : Brief of Bank of Vernal, Respondent and Cross-Appellant

Utah Supreme Court

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Critchlow, Watson & Warnock; Attorneys for Respondent and Cross-Appellant;

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## Recommended Citation

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# In the Supreme Court of the State of Utah

No. 7299

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SEABOARD FINANCE COMPANY, a  
corporation,

*Plaintiff,*  
Appellant and  
Cross Respondent,

vs.

L. V. SHIRE, doing business as Shire  
Motor Company,

*Defendant,*

BANK OF VERNAL, Garnishee,  
Respondent and  
Cross Appellant.

FILED  
CLERK SUPREME COURT UTAH

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## BRIEF OF BANK OF VERNAL, RESPONDENT AND CROSS APPELLANT

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BRIEF OF BANK OF VERNAL, CROSS  
APPELLANT, AND REPLY BRIEF OF  
RESPONDENT

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## INTRODUCTION

This is an appeal by the plaintiff Seaboard Finance Company and a cross appeal by the Bank of Vernal, Garnishee, from a judgment of the District Court of Salt Lake County against the garnishee, in favor of the defendant Shire, for the use of the plaintiff in the sum

of \$163.58 with costs which were taxed at \$48.00. The plaintiff has appealed on the judgment roll. The cross appeal of the garnishee was taken upon the entire record including Bill of Exceptions, which preserves and presents for consideration by the court exceptions taken to rulings, orders during the course of the trial and to Findings of Fact not supported by the evidence.

Since the entire record is now before the Court, it will be more convenient to combine under one cover the Reply to the Brief of the Appellant Seaboard Finance Company with the Brief of the Cross Appellant Bank of Vernal in support of its cross appeal and assignments of cross errors.

## **STATEMENT OF FACTS**

### **The Pleadings**

The original action out of which these proceedings grew was commenced by the plaintiff against the defendant Shire by the filing of a Complaint on February 21, 1948 to collect \$3,839.77 on three checks drawn by the defendant in favor of the plaintiff on the garnishee Bank of Vernal (Record pp. 1-4).

Writs of Attachment and Garnishment were issued on the same day upon affidavits of the plaintiff (Record pp. 5-6) and the Writ of Garnishment was served on the garnishee at Vernal, Utah on February 24, 1948. The garnishee answered under date of February 27th, answering; 1st, that it was not indebted to the defendant Shire; 2nd, that it had property of the defendant consisting of one new Frazer car, miscellaneous merchandise

and an old car all worth perhaps \$2,500.00 which it held as security for \$2,076.67 and interest, attorney's fees and cost of collection on three notes held by the Bank against the defendant; and, 3rd, that it knew of no debts owing to the defendant or property in which he was interested (Record p. 9).

The plaintiff filed a reply traversing the answer, denying upon information and belief the answers of the garnishee and alleging, also upon information and belief, that the garnishee had "unlawfully and wrongfully offset an indebtedness claimed by the garnishee to be due and owing from the defendant to the garnishee against credits and property of the defendant in possession or under the control of the garnishee, that the indebtedness so offset was secured by mortgage, pledge or otherwise and that the garnishee did not resort to or exhaust the security according to law before offsetting the indebtedness (Record p. 15).

In view of the statute (104-19-11) no further pleadings were filed and the issues thus joined came to trial.

### **The Facts**

L. V. Shire, the defendant, was an automobile dealer in Vernal, Utah. During the month of November, 1947 he had a checking account with the Bank of Vernal, the garnishee herein, and had borrowed small sums from that bank (Tr. p. 16, Exhibit "B"). On December 3, 1947 he applied to the Bank for a loan to finance the purchase of five Kaiser Manhattan sedans from the Frank Hines, Inc. of Salt Lake City, the Kaiser-Frazer distributor for the territory (Tr. p. 40). The Bank

agreed to make the loan upon a trust receipt basis (Tr. p. 44) under which the Bank would pay the cost to the dealer (Shire) and have the cars delivered to Shire to be held by him as Trustee for it as Entruster under the terms and conditions of a Trust Receipt which was executed by Shire at the time. The Trust Receipt (Exhibit "D") reads, so far as is pertinent to this proceeding, as follows:

"The undersigned as Trustee holds in trust for Bank of Vernal, Vernal, Utah, Entruster, as its property, the following described property, complete with all attachments and equipment:"

(Here the five automobiles are listed with the Serial and Motor numbers of each. The form of Trust Receipt contains a column for the entry of the minimum sale price of each car, but in the form executed in this case no amount was entered under this column.)

The Trust Receipt continues:

"\* \* \* in which property a security interest remains in or is hereby transferred to the Entruster as security for the payment of, and Trustee promises to pay Entruster on demand, the sum mentioned above together with interest thereon from date at the rate of eight percent per annum, and as security for such other amounts as are herein provided and all other obligations of Trustee to Entruster whether heretofore or hereafter incurred. Trustee agrees to deliver said property to Entruster on demand. \* \* \*

"Trustee shall not lend, rent, mortgage, pledge, encumber, operate or use any of said property. So long as Trustee is not in default hereunder Trustee may, in the regular course of his

business, sell said property for cash, or on terms approved in advance by Entruster for not less than the minimum sales prices hereinabove set opposite said respective property plus a pro rata part of the accrued interest and charges hereunder. Trustee agrees in case of each sale to hold in trust for Entruster the proceeds of such sale together with any property taken in trade, separate from his funds and property and immediately to pay over and deliver said proceeds and trade property to Entruster.

\* \* \*

“Shire Motor Co.

Trustee

“By L. V. Shire, Mgr.”

At the time of the execution of this instrument Shire and the Bank agreed that the minimum price at which each car was to be sold and accounted for was \$2,504.84 (Tr. p. 44-47).

The distributor Frank Hines, Inc. drew a draft on the Bank of Vernal for the total cost of the cars to Shire (\$12,524.20), all of which was paid by the Bank. Ten percent of the cost was paid by Shire and the balance of \$11,270.00 was represented by the loan from the Bank to Shire. The invoices (pink sheets) for the cars were delivered to the Bank and then Shire obtained possession of the cars from Hines and took them to his salesroom in Vernal (Tr. pp. 44-46).

At the same time as the execution of the Trust Receipt, Mr. Shire signed a promissory note to the Bank for the \$11,270.00 payable on demand (Exhibit “C”, Tr. p. 17) and at the same time he executed a chattel mort-



gage to the Bank covering these same cars (Exhibit "E", Tr. p. 18). This mortgage was not filed for record until February 17, 1948.

This loan of \$11,270.00 brought the total indebtedness of Shire to the Bank up to \$11,675.00, \$405.00 being evidenced by two unsecured notes previously given by Shire (see Exhibit "B").

Shire paid off one note and interest on December 22, 1947 and on the same day accounted for the minimum sale price of one of the Frazer cars, reducing his indebtedness to \$8,970.16 (Exhibit "B"). On December 30th he borrowed \$300.00 on a sixty day note. On January 6, 1948 he accounted for the minimum sale price of a second Frazer car, which was credited on the note, reducing the balance on the \$11,270.00 note to \$6,260.32 (see endorsements on Exhibit "C") and his total indebtedness to the Bank to \$6,765.32.

On January 22, 1948 Shire borrowed from the Bank \$1,500.00 upon a thirty day note secured by a chattel mortgage upon certain accessories, including car radios, heaters, air conditioners, etc. (Exhibit "F", Tr. pp. 20-21). This chattel mortgage was filed for record in the Recorder's office of Uintah County on February 10, 1948. This loan increased Shire's indebtedness to the Bank to \$8,265.32 (excluding accrued interest). On January 28th and 29th Shire paid off the two smaller notes of \$205.00 and \$300.00 reducing the indebtedness to \$7,762.32 (Exhibit "B").

On January 29, 1948 Shire had the Bank buy for him from Hines, Inc. a 1948 Kaiser sedan for which it

paid \$1,992.07 and from a finance company in Albuquerque, New Mexico a used Ford car which the Bank had repossessed on behalf of the New Mexico finance company, for \$265.00, a total of \$2,257.07 (Tr. pp. 21-22). Shire repaid the Bank at the same time \$192.07 and signed a demand note (Exhibit "G") to the Bank for the difference, \$2,065.00 (Tr. p. 24) which was unsecured (Tr. p. 23). This transaction increased Shire's indebtedness to \$9,825.32 at which point it stood until February 3, 1948 when Shire accounted for the third Frazer car listed in the Trust Receipt. The minimum sale price received from this car was applied as follows: \$114.34 to accrued interest on the \$11,270.00 note and the balance of \$2,390.50 upon the principal, reducing the balance of principal on that note to \$3,869.82 with interest paid in full to that date (February 2nd), (see Exhibit "B" and the endorsements on Exhibit "C").

No further payments or credits were made on these obligations until February 13, 1948, at which time the obligations stood as follows:

1. On the note of \$11,270.00 ostensibly secured by two Frazer cars held in trust by Shire for the Bank under Trust Receipt, principal.....\$3,869.82  
 Plus interest accrued from February 3, 1948 at 8%.
2. On the note of \$1,500.00, secured by chattel mortgage on accessories, principal ..... 1,500.00  
 Plus interest accrued from January 22, 1948 at 8%.

3. On the unsecured note of \$2,065.00,  
 principal ..... 2,065.00  
 Plus interest from January 29, 1948  
 at 8%.

---

Total principal.....\$7,434.82

Meanwhile Shire had maintained a checking account with the Bank, the balance of which fluctuated from day to day by reason of credits (deposits of checks or cash, and credits from the Bank loans above referred to) and charges by checks drawn by Shire and other charges made by the Bank for service charges, check books and other charges (see Tr. pp. 13 and 62). The ledger sheet for the month of February, 1948 is in evidence (Exhibit "AA") and shows items charged and credited to this account for the period from February 5, 1948 as follows:

		<i>Balance</i>	
Cr. Balance at close of business—Feb. 5..		\$3,173.47	
<i>Date</i>	<i>Charges</i>	<i>Credit</i>	
Feb. 6	7 items totalling \$313.37.....	\$ 41.41	2,901.51
Feb. 7	5 items totalling 202.31.....	89.29	2,788.49
Feb. 8	Sunday		
Feb. 9	14 items totalling 590.49.....	824.08	3,022.08
Feb. 10	5 items totalling 329.91.....	91.00	2,783.17

(Following the conversation between Mr. Shire and Mr. N. J. Meagher, Jr. for the Bank on February 6, 1948, which will be referred to later in detail, the checking account was "frozen" against withdrawals to the extent of \$2,504.84, the minimum sale price on one of the five Frazer cars included in the Trust Receipt but which had been sold by Shire prior to February 6th

and the proceeds had not been accounted for by him to the Bank.)

On February 11th five items against the account aggregating \$4,313.25 were received from the Federal Reserve Bank by the Bank for payment (Exhibit 2). All these were turned back by the Bank (Tr. p. 58) for the reason as explained by Mr. Meagher (Tr. p. 65) they could not favor one check over another, all of them having been received at the same time, and if all had been honored the account would have been overdrawn by \$1,550.08, not including such checks as may have been presented at the window on that day and payment refused, of which no record was kept by the Bank.

The following day, February 12th, was a holiday, but on the following business day, February 13th, the account was charged with the sum of \$2,783.17, the entire credit balance to the account at the close of business February 10th and 11th. This was credited on the \$11,270.00 note as follows: \$9.46 to interest from February 2nd to February 13th and \$2,773.71 on principal, leaving a balance of principal on this note of \$1,096.11 (Tr. p. 25). On the same day there was a credit to the checking account of \$25.66 and a charge against it of \$10.00, leaving a balance of \$15.66 at the close of the day.

On the following day, February 14th, two checks aggregating \$2,564.00 payable to the Bank or to Shire or Shire Motor Company and endorsed by it were handed to Mr. Barr, the cashier of the Bank, before banking hours. These checks were put through for collection and the amount credited to Shire's account which with an-

other deposit or credit of \$25.90 made the credit balance on the ledger of \$2,605.56 (Exhibits "AA", "B", "G" and Tr. p. 25).

Meanwhile on February 13th four checks aggregating \$406.60 had been presented through the Federal Reserve and payment refused by the Bank. Other checks may have been presented at the window but no record of these were kept. No checks seem to have come through from Federal Reserve on Saturday, February 14th, but on Monday, the 16th, eight checks aggregating \$4,045.77 and including the three checks for \$3,230.69, \$509.08 and \$100.00 upon which the plaintiff brought this suit, were presented through Federal Reserve. All these were refused by the Bank (Exhibit 2, Tr. p. 68).

On February 18th four checks totalling \$4,577.00 were presented and refused, and between then and February 27th eleven more checks totalling \$388.50 were presented and refused.

The checks for \$2,564.00 received by the Bank on February 14th as above stated were ultimately collected (Tr. p. 71) and on February 21st the Bank posted to the account the debit in that amount plus the \$41.66 remaining from the credit of \$25.66 and \$25.90 on February 13th and 14th, equaling \$2,615.56, thus closing out the account. This amount was applied on the notes as follows:

On the \$2,062.00 note, \$10.56 on interest	
to Feb. 21st, on principal \$1,800.00,	
total .....	\$1,810.56

On the \$1,500.00 note, \$10.00 on interest

to Feb. 21st, on principal \$795.00,	
total .....	805.00
	<hr/>
	\$2,615.56

After these credits were applied the obligations to the Bank stood, on February 21, 1948, as follows:

On the \$11,270.00 note (Trust Receipt), interest paid to February 3th, bal- ance principal .....	\$1,096.11
---	------------

On the \$2,065.00 note, interest paid to February 21st, balance principal.....	265.00
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On the \$1,500.00 note (chattel mortgage), interest paid to February 21st, bal- ance principal .....	705.00
--	--------

Total principal.....	\$2,066.11
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### **The Security**

On February 6th Mr. Meagher, Jr. for the Bank made an inspection of the trustee cars and mortgaged property remaining in Shire's possession. Three of the trustee cars had been sold and accounted for to the Bank. He found only one of the five cars left. Mr. Shire told him that the other one had been sold. Mr. Meagher demanded the minimum sale price agreed upon and said, "Where is the money? Do you have the money?" Mr. Shire answered, "Yes, it is in the bank." Mr. Meagher then said, "Then give me a check for it." Mr. Shire demurred saying that he had a few small checks out that he wanted paid, but that he would have the money for the car on Monday (February 9th) or Tuesday (February 10th) at the latest, (Tr. p. 48).

At the same time Mr. Shire told him that the Kaiser car which the Bank had bought for him on January 29th and for which he had given the \$2,065.00 note had also been sold (Tr. p. 48) to Milan R. Rogers and that Seaboard Finance Company (the plaintiff here) had agreed to take the contract which he showed to Mr. Meagher at that time (Exhibit 5). He said that he was going into Salt Lake and that Seaboard would make the check for the Rogers contract to the Bank (Tr. p. 49).

Mr. Meagher then checked the accessories which were the security for the \$1,500.00 note and found that more than half of them were missing. Mr. Shire told him that the missing accessories had been attached to various cars that he had sold and some to his demonstrators. Mr. Meagher demanded payment for the missing chattels (Tr. pp. 50-51) and Mr. Shire said he would clean up the accounts the following week. In answer to Mr. Meagher's statement that the Bank wanted payment for the Kaiser car and the missing accessories, Mr. Shire said, "Okay. That is okay Monday or Tuesday." (Tr. p. 55).

The following Monday, which was February 9th, Mr. Meagher talked on the long distance telephone to Mr. Harrah who was an assistant manager of the Seaboard Finance Company. Mr. Harrah asked him for some credit information on one Tom Alplanalp whose paper he held and on Mr. Rogers, the purchaser of the Kaiser car. Mr. Meagher gave him some information about each and then told him that the Bank had an interest in the Kaiser car—the pink slip from Hines—

and that the check for the contract should come to the Bank. Mr. Harrah told him the check would be made payable to the Bank and Shire Motor Company (Tr. p. 57).

The Bank heard nothing more from Shire until February 12th when Mr. Barr called Shire in Salt Lake and told him the Bank had turned down some of his checks. Mr. Shire told him that he had over \$8,000.00 of checks in his pocket and that he would be out the next day and pay the Bank in full. Mr. Barr said, "That is exactly what we want." Barr also told him that he had just been over to check the accessories and found that most of them were gone. Shire said he understood that and said, "I am coming out in the morning, I will straighten everything up." (Tr. p. 70).

The following day Shire called up from Salt Lake and said his bookkeeper had told him the Bank had turned down a \$300.00 check. Barr told him that was correct and that they were not paying any more checks until the account was cleared up. Shire said, "Well, I don't like that." (Tr. p. 71)

The next day, February 14th, before the Bank was open in the morning, one of Shire's employees came to the Bank and motioned for Barr to let him in. Barr went to the door and the man handed him two checks and said, "Mr. Shire phoned and said to give these checks to you." There was no deposit slip with them (Tr. p. 71). The two checks aggregated \$2,564.00, the amount credited on the ledger sheet (Exhibit "AA")



under date of February 21st, after they had been collected.

Mr. Shire did not contact the Bank by telephone or otherwise after February 14th. On the evening of February 14th he returned to Vernal and skipped out taking with him several cars and other property. The Seaboard Finance Company's representative in Denver located him there and made arrangements to bring him back, but Shire eluded him and has not been heard from since. He was served by publication in this suit by the plaintiff on the three checks Shire had given it, and default judgment was entered. Consequently his testimony was not available to either the plaintiff or the Bank on the trial of the issues in this proceeding.

The plaintiff also attached the interest of Shire in the trusted Frazer car which had been left by Shire and taken into possession of the Bank. The Sheriff released it from the attachment, taking a bond from the Bank. Plaintiff also attached other property, including the contract of sale of the Kaiser car to Rogers. After judgment execution was levied on these cars and the plaintiff bid in for \$30.00 the Rogers contract under which Rogers had agreed to pay \$2,329.12 in installments of \$97.04 per month. At the time of the trial the plaintiff had collected some \$680.00 on this contract (Tr. p. 137).

The Frazer car was kept in storage by the Bank pending the settlement of this litigation from February 21st until September 24, 1948 when it was sold for \$1,925.00 pursuant to stipulation under which the pro-

ceeds are held in lieu of the car (Tr. p. 111). The charges incurred by the Bank for the storage of this car were \$160.00. The court, however, refused to allow this amount as a charge against the proceeds of sale and allowed only the sum of \$35.00.

After the Writ of Attachment and Garnishment was served on the Bank, the Bank foreclosed the chattel mortgage on the accessories by action for the balance due on the \$1,500.00 note after the credit of \$805.00 thereon. In this action the court found the sum of \$736.96 to be due thereon together with costs of \$30.00 and \$150.00 attorney's fees, and ordered the sale of the accessories. The accessories were sold at Sheriff's sale to the garnishee Bank for \$350.00 leaving a deficiency on the debt of \$576.71 with interest from the date of the judgment, September 13, 1948 (Tr. pp. 114-121).

The Bank also sold the Ford car which it had purchased from the New Mexico finance company for \$340.00, from which there was deducted \$30.00 repossession charges and about \$40.00 storage charges, leaving \$272.00 which was applied upon the remainder of the \$2,065.00 note.

To recapitulate, the subsequent charges and credits made by the Bank on the Shire obligations are as follows:

Balance of obligation as of February 22, 1949....\$2,066.11

	<i>Debit</i>	<i>Credit</i>	<i>Balance</i>
Sept. 23, 1948 By storage on Frazer car .....	\$160.00		\$2,226.11
By interest on \$1,- 096.11 to 9-23-48	12.53		2,238.64
By proceeds of sale of Frazer car .....		\$1,925.00	313.64
Sept. 13, 1948 At- torney's fees and costs of foreclo- sure .....	180.00		493.64
Costs of sale— Sheriff .....	9.75		503.39
Interest on \$705.00 2-21 to 9-13-48....	31.36		535.35
By sale of acces- sories .....		350.00	185.35
Cost of reposses- sion of Ford car	30.00		215.35
Storage on Ford car .....	40.00		255.35
Interest on \$265....	2.00		257.35
Proceeds of sale of Ford car.....		345.00	87.65 (Credit)

### STATEMENT OF ERRORS AND CROSS ERRORS RELIED ON

1. The court erred in denying Garnishee's motion for non suit at the close of plaintiff's case for the reason and upon the ground that the only evidence before the court conclusively established that at the time of the service of the Writ of Garnishment upon the Garnishee

the defendant Shire was indebted to the garnishee Bank in the sum stated in the garnishee's answer to the Writ of Garnishment herein and that the garnishee had no credits owing to the defendant Shire on said date and that there was no evidence that the charges made against Shire's account and application thereof to the notes held by it were not authorized by the said defendant Shire.

2. The court erred in finding as a fact that the garnishee Bank of Vernal on February 13, 1948 charged the defendant's checking account in said Bank with the sum of \$2,783.17 and applied the same on the note for \$11,270.00 "without any authority from the defendant", for the reason that said Finding is not supported by the evidence in the case and is contrary to the uncontradicted evidence (Finding No. IV, Record p. 80).

3. The court erred in finding as a fact that on February 21, 1948 said Bank charged the defendant's checking account with the sum of \$2,605.00 and applied the same upon the notes "without any authority", as stated in Finding of Fact No. IV, for the reason and upon the ground that said Finding is not supported by any evidence in the case and is contrary to the uncontradicted evidence.

4. The court failed to find that the minimum sale price of each of the Frazer cars referred to in the Trust Receipt given by the defendant Shire to the Bank was the sum of \$2,504.84 (see Tr. pp. 46-47).

5. The court erred in denying Garnishee's motion for judgment and quashing the Writs of Garnishment and Attachment and in failing to find that the plaintiff

had no right to the Writs, for the reason and upon the ground that it affirmatively appears from the affidavits for attachment and garnishment (Record pp. 5-7) and from the uncontradicted evidence that at the time of the commencement of the action by the plaintiff the plaintiff's claim against the defendant was secured by a Trust Receipt upon certain automobiles executed by the defendant to the plaintiff and that plaintiff had not exhausted said security.

6. The court erred in failing to allow to the garnishee the storage charges actually incurred in caring for the Frazer automobile from the time of its attachment to the date of sale.

7. The court erred in awarding the plaintiff costs against the garnishee, and in denying garnishee's claim for mileage and fees.

8. The court erred in refusing to admit in evidence Garnishee's Exhibit No. 10, a letter from the Bank of Vernal to L. V. Shire, dated April 2, 1948, notifying Shire of the Bank's intention to sell the Frazer car pursuant to the provisions of the Trust Receipt.

## ARGUMENT

Passing for the time the question of law argued by the Appellant, we will first discuss the errors assigned on the Bank of Vernal's cross appeal, which, we submit, clearly show that the judgment is erroneous in determining that "after all mutual demands between the garnishee and the plaintiff are adjusted" the garnishee was liable to the defendant Shire for the use of the plain-

tiff in the sum of \$163.58, or any sum in excess of \$87.65, and in assessing the garnishee with the costs of the proceeding.

### **Specification of Error No. 1**

At the trial the plaintiff called Mr. Barr, cashier of the garnishee Bank, who produced the ledger sheet of the defendant Shire's checking account with the Bank for the month of February, 1948 and the garnishee's liability ledger showing the defendant's liability on loans to him covering the period from November 22, 1947 to and including the date of the last entry thereon, February 21, 1948. These documents showed that on February 21, 1948 there was no balance in the defendant's checking account, and that on that day the defendant owed the Bank \$2,076.67 (later adjusted by the correction of an error to \$2,066.11), Exhibits "AA" and "B".

In explanation of the documents, Mr. Barr, the cashier, pointed out two items on Exhibit "AA", the checking account, for \$2,605.00 on February 21 and \$2,783.17 on February 13, and stated that these indicated charges made by the Bank to the account (Tr. p. 12) and that these sums were applied on the obligations which the Bank held against Shire at the time.

This was the sum and substance of the evidence upon which the plaintiff rested its case.

The garnishee then moved the court for a non suit upon the ground that the evidence at that time conclusively showed that Shire was indebted to the Bank in the sum of \$2,066.11 at the time of the service of the Writ,

and that he had no credit balance to his account subject to attachment or garnishment. All that the evidence showed at that time was that certain sums had been charged to Shire's accounts and credited upon his obligations. There was not a scintilla of evidence that these charges and credits had not been made at Shire's direction or with his consent.

We need not cite legal authority to support the statement that it is perfectly legal and proper for the Bank to debit Shire's account and to credit the amounts on the note if Shire so instructed, and in fact, if a depositor, having the right to reduce his obligations to the Bank instructed the Bank to charge his account and so apply them, and the Bank failed to do so, it would be held liable to the debtor-depositor for any loss or damage which he might sustain.

It is equally axiomatic that Shire might have known of the action of the Bank and acquiesced in and ratified it. In either case the charges and credits would have been legitimately made and no one would have had a right to complain.

In the state of the evidence at the close of plaintiff's case, there was and could be no presumption or inference that the charging of the account was wrongful or illegal. In fact, the only presumption that would be indulged in was that it was legal and proper and done in the regular course of business and by Shire's direction or acquiescence.

“ \* \* \* The condition of the account between the bank and the depositor at the time process is served determines whether there is a credit

balance or excess which may be reached in the garnishment or execution proceeding.”

*Walters v. Bank of America Ass'n.* (Cal.), 59 Pac. (2d) 983.

Nevertheless, the court denied the motion for a non-suit, which was clearly error.

### **Specification of Errors No. 2 and No. 3**

In Finding of Fact No. IV the court found that the charge made against Shire's account on February 13th was made by the Bank “without any authority”.

We submit that such Finding is without support in the evidence and in fact is contrary to the evidence given by Mr. Meagher, which is abstracted in the Statement of Facts contained in this Brief. The testimony may be summarized to the effect that when on February 6th Meagher demanded a check for the minimum sale price of the Frazer car which had been sold by Shire, for the value of the accessories which he had diverted, and for the amount loaned for the purchase of the Kaiser car, Mr. Shire demurred only, asking for a delay of a couple of days as he had a few checks out and that he would be back in Vernal on Monday or Tuesday at the latest when he would clear up his account.

Mr. Meagher testified as follows (Tr. p. 109) :

“Q. Yesterday you mentioned the conversation with Mr. Shire on February 9th. Was anything said in that conversation about charging the Shire account with some of these obligations?



“A. Yes. \* \* \*

“Q. All right now, what was said and who said it?

“A. I said \* \* \* ‘Mr. Shire is it okeh, or is it not, to charge your account for that Frazer car and the parts on it, on Monday?’ And he said, ‘It is okeh.’ Then I said, ‘When can we expect the rest of this cleaned up?’ And he said, ‘Monday or Tuesday.’ I said, ‘Well we are counting on that for sure.’”

On cross examination on this subject Mr. Meagher testified (Tr. p. 124):

“Q. You now say that he said that you might charge his account on Monday?

“A. For the one Frazer car.  
\* \* \*

“Q. Didn’t you remember that yesterday?

“A. Sure I did.

“Q. You didn’t say that yesterday, did you?

“A. That is what I thought I said—if I did not say it exactly that way.  
\* \* \*

“Q. So you say, now, that he gave you a right to charge his account as of Monday? (Tr. p. 125)

“A. He said he would have the money, or he was apparently expecting money Friday that would be in there Monday, and on the one car he said it was all right. I asked him if it was all right to charge his account for that car Monday, and he said, ‘Yes, that

is okeh' then I asked him how about the rest of the parts (accessories) and he said, 'We will wait on those and I will clear that up when I get back there Monday or Tuesday.' \* \* \* I asked him for a check at that time for the Frazer and for the parts that were missing.

"Q. And he would not give it to you?

"A. He said, 'No, I would rather not, because I have a few little checks outstanding, but the money is in the bank.' He did say that."

Mr. Meagher gave the only evidence in the case of conversations with Mr. Shire regarding the charging of his account for the Frazer car and the application of the amounts charged. The clear implication of this evidence is that Mr. Shire authorized the charge and the subsequent events indicate that he ratified it.

In addition, it is clear that the sale price of the missing Frazer car was a trust fund for the Bank. It will be recalled that in the Trust Receipt the Trustee (Shire)

"agrees in case of each sale to hold in trust for Entruster (Bank) the proceeds of such sale and \* \* \* immediately to pay over \* \* \* said proceeds \* \* \* to Entruster."

Mr. Shire stated that the money was in the Bank, and of course there was at the time over \$2,900.00 in the account (Exhibit "AA").

The proceeds of the sale of the Frazer car were clearly due and owing to the Bank at the time of the charge on February 13th and were not secured in any

way. Under the circumstances the Bank had the right to charge the account for the amount, even against Shire's wishes, and would have been derelict in its duty to its depositors had it failed to do so.

Specification of Error No. 3 relates to the charge appearing on the ledger (Exhibit "AA"), on Exhibit "B" under date of February 21st and in the endorsement on the notes (Exhibits "F" and "G").

It is clear from the evidence that the \$2,065.00 note (Exhibit "G") was not secured by chattel mortgage, Trust Receipt or otherwise, and the Appellant so concedes (Appellant's Brief p. 2). That being so, the Bank undoubtedly had the right to offset the debt evidenced by the note with a charge of the same amount against the account. The right of a bank to look to the deposits of its depositors in its hands for the repayment of a matured unsecured debt owing to it from the depositor is universally recognized (*Corpus Juris*, p. 673, Banks and Banking, section 351) and seems also to be recognized by the Appellant here.

The note (Exhibit "G") was a demand note and its payment had been demanded by the Bank (see the testimony of Mr. Meagher).

The right to offset the debt and the deposit in garnishment proceedings in such case is also clear. Regardless of the rule of law contended for by the Appellant herein, the debt evidenced by the note would have been a "demand against the defendant (Shire) of which the Bank (the garnishee) could have availed itself if it had not been summoned as garnishee" within the terms of

the statute, Section 104-19-13, even if it had not been discharged or reduced by the previous application of the deposit and even if it had not been due at the time of the service of the Writ.

In addition to the foregoing there is a clear implication from the evidence that the application of the \$2,564.00 proceeds of the checks represented in the amount credited as a deposit to Shire's account on February 14th were intended by Mr. Shire to be credited upon his obligations to the Bank. It will be recalled that Mr. Shire had told both Mr. Meagher and Mr. Barr that he would clear up his account.

Mr. Meagher testified (Tr. p. 49) :

“ \* \* \* I said, ‘You know what Mr. Meagher told you, that we had to have all money, or the cars here.’

“ ‘Well,’ he said, ‘they are still here, or else I got the money.’ I said, ‘Can you show me the insurance policy on this one Frazer car that was out?’ He said, ‘No, but I have arranged with Seaboard Finance to take care of all my paper, and I am taking this contract, the Rogers contract,’ who was the fellow who purchased this black four door Kaiser. He said, ‘You can have this contract in payment for it, or if you want to let Seaboard have it, I am going into Salt Lake in the morning.’

“ ‘I said, ‘Well, it does not matter to me so long as you pay us for it.’ Then I said, ‘But I do want payment on that Frazer.’ He (Shire) said, ‘Those guys take too blasted long in Salt Lake, to get our money back. We don’t know where we are standing with these contracts.’ He

said, 'You have the money there.' I said, 'Then give me a check for it.' He said, 'No, I am going into Salt Lake. I will discount all of these contracts and I will settle up with you.' "

The following Monday or Tuesday Mr. Meagher talked with a Seaboard man in Salt Lake over the telephone. This was probably Mr. Harrah although Mr. Meagher could not recall his name. As to the conversation, Mr. Meagher testified (Tr. p. 37):

"On the Kaiser car I said, 'We are interested in that car. Will you make the check from Seaboard Finance Company payable to the Bank of Vernal and Shire Motor Company?' and he said, 'Yes.' "

Mr. Barr testified that on February 12th, a holiday, he talked to Shire over long distance to Salt Lake and Mr. Shire said (Tr. p. 70):

"I am going out in the morning. I will straighten everything up."

Mr. Barr then explained to Shire that the Bank had turned down a number of checks on his account, and that Shire said, "That is all right. I will take care of those." He told Barr that he had over \$8,000.00 of checks in his pocket and he would be out the next day and pay the Bank in full.

Mr. Shire did not show up the next day but on the following day, February 14th, an employee of Mr. Shire, Mr. Barr didn't know his name, came to the Bank before the Bank was open and motioned to Mr. Barr to let him in. Barr went to the door and the man handed him

two checks and said, "Mr. Shire phoned and said to give these checks to you." That was all that was said. These were the checks making up the item of \$2,564.00 credited to the Shire account on that day. There was no deposit slip or instructions of any kind. The checks were put through for collection and after collection was made the amount was applied on the two notes (Exhibits "F" and "G"), as indicated by the endorsements.

From this evidence the only legitimate inference to be drawn is that Mr. Shire, being unable to come back to Vernal himself, sent the checks in for application upon his loans as he had promised he would.

While Mr. Barr testified that no deposit slip was given him with the checks, a deposit slip (Exhibit "H") for the two check items was produced and identified as bearing the initial of Mr. Winkler, a teller in the Bank. The handwriting on the slip, other than the initial "W" was not identified. Mrs. Kirby, Shire's bookkeeper, said that it was not hers and she could not identify the writing. The slip was a carbon bearing the number "48". The book of deposit slips used by Shire and his bookkeeper was received in evidence (Exhibit 6) and it was shown that this book still contains the original and carbon, unused, which is numbered "48". It is obvious that Exhibit "H" was not one from the book used by Shire or his bookkeeper in the regular course, and the rational inference is that it was a record made by someone in the Bank as a memorandum for Shire and the Bank to identify the checks received and the fact that they had been received by the Bank for collection for Shire's

credit. Certainly the existence of the receipt does not militate against the inference which Barr drew and was entitled to draw that the checks were turned in by Shire in fulfillment of his promise to clear up the deficiencies in his obligations.

That the Bank not only had the right, but that it was its duty to its depositors to charge Shire's account and apply it to his obligations to the Bank, is self evident. He had disposed of trust property, in violation of his agreement, he had disposed of mortgage property in violation of his contract, and had sold the Kaiser car, title to which belonged to the Bank. On February 11th when the balance in his account stood at \$2,783.17 checks against it aggregating \$4,313.25 were presented by the Federal Reserve Bank. If these checks had been honored by the Bank his account would have been overdrawn by \$1,530.08. The following (banking) day checks totalling \$406.60 were presented, which if paid would have increased the overdraft to \$1,911.02, and on February 16th checks totalling \$4,045.77 were presented and refused. These figures do not include the checks which may have been presented at the windows or otherwise than through the Federal Reserve System. Later over \$4,900.00 in checks were presented (Exhibit 2). It is obvious that Shire was insolvent, the Bank's security was depleted, and that its recourse was to the account with what remained of the security as salvage.

We submit that the evidence does not warrant or justify the finding of the court that the charge of \$2,-605.00 on February 21st and application of this amount

to the Shire obligations was "not authorized", but to the contrary we submit that the evidence fully warrants a finding that they were legal and proper.

### **Specification of Error No. 4**

In Finding No. I the court purports to set out a copy of the Trust Receipt. An examination of the exhibit of which it purports to be a copy (Exhibit "D") shows that the original contained a column opposite the spaces in which the trustee cars were listed which was headed "Minimum Sale Price". The spaces under this heading were not filled out on the exhibit. The omission of these important figures, referred to in the body of the instrument as "minimum sales price", was obviously an oversight in filling out the form, and the figures which should have been inserted were agreed to orally by Mr. Shire and the Bank at the time the arrangement was made, as testified to by Mr. Meagher on pages 44-47 of the Transcript. The insertion of minimum sales prices of \$2,504.84 for each of the trustee cars gives meaning to the subsequent paragraphs of the Trust Receipt and if inserted explains the evidence relating to the obligation of Shire, his default in performance with respect to accounting for the fourth Frazer car, and the right of the Bank in charging his account as of February 13th.

### **Specification of Error No. 5**

At the close of this case the Garnishee moved to quash the Writ of Garnishment upon the ground that from the affidavits of the plaintiff for the Writ it affir-



matively appears that at and prior to the time of the commencement of the action the plaintiff's claim against the defendant was secured in exactly the same way that the plaintiff now claims that the indebtedness from Shire to the Bank was secured, and that if the latter was secured so also was the plaintiff's and the Writ was improperly and improvidently issued prior to foreclosure of plaintiff's lien and the security exhausted.

For some reason the reporter's Transcript does not contain the Garnishee's motion, but the fact that it was made is apparent from the paragraph of the trial judge's opinion appearing at page 154 of the Transcript in which he said:

“As to whether the plaintiff had the right to bring an action in garnishment, the Court makes no finding at this time and is of the opinion that it is not necessary to make a finding because the issues are determined upon the right to apply the assets held by the bank to its obligation.”

It was clearly the intention of the Garnishee from the beginning of this case to object to evidence upon this ground and to move the quashing of the writs should the evidence show anything affecting the plaintiff's right to the writ, as is shown by the statements of counsel on pages 5 and 6 of the Transcript, and the paragraph of the opinion above quoted shows clearly that the objection and motion were actually made.

The facts supporting this motion and objection are given in the affidavits for the writ and in the testimony of Mr. Brothers, the plaintiff's manager. From his testimony it appears that the Seaboard Finance Company

had financed the floor planning of at least two Frazer cars by Shire, taking his Trust Receipt for \$5,049.68 (Exhibit 4). Shire had sold and paid the stipulated minimum price of \$2,524.84 for one of the cars and prior to February 12th had sold the other one. On that day he gave to Seaboard his check on the Bank of Vernal for \$3,230.69. On that date the balance due on that account was \$3,215.30 on principal and \$15.39 interest (Tr. p. 80 and Exhibit "K"). The plaintiff Seaboard took the check and applied it to payment of the obligation subject to collection and retained the original trust receipt and original invoice for the trustee car pending clearance of the check (Tr. p. 89). The check for \$509.08 which was the basis for one of the causes of action sued upon by the plaintiff was also taken by it to reduce the floor planning on the same car (Tr. p. 90). The Trust Receipt, if it was a chattel mortgage, pledge or other lien, was never foreclosed. The checks which Shire gave them were two of those which were turned down by the Bank and two of the three checks upon which suit was brought.

It is obvious that with respect to this obligation of Shire to the Seaboard Finance Company it was in the same situation as was the Bank of Vernal with respect to Shire's obligations to it under the Trust Receipt. In each case one of the trustee cars had been sold and not accounted for. In each case the creditor retained the documents, although the security had been disposed of by the debtor. Under the theory advanced by the plaintiff, the Bank may not apply the debtor's deposit to the

obligation because, as it says, it is secured and therefore not one "of which he (it) could have availed itself if it had not been summoned as garnishee", yet at the same time plaintiff claims that its claim is not secured and therefore it may maintain the original action and attach property and debts owing to the defendant. We submit that if the obligation under the Trust Receipt owing to the Bank is secured by the missing Frazer car, then also is the obligation owing by Shire to the plaintiff under its Trust Receipt similarly secured, and no action could be maintained against Shire on this obligation except to foreclose and realize upon the security.

*Blue Creek Land & L. S. Co. v. Kehrner*, 60 Utah 62, 206 Pac. 287.

With respect to the Kaiser car the situation is similar. It appears from the evidence that the plaintiff Seaboard knew that the Bank had purchased the Kaiser car and claimed an interest, that Shire had sold it to Milan Rogers under a title retaining contract (Tr. pp. 54, 57 and Exhibit 5) which he had assigned to Seaboard and that Seaboard had agreed to make the check for the contract payable to the Bank. This contract recited a balance of purchase price payable to Shire at the office of Seaboard of \$2,329.92 payable in monthly installments of \$97.08 each. The Frazer car described in the contract was registered with the State Tax Commission under date of February 9th in the name of Milan Rogers as registered owner and Seaboard Finance Company as legal owner, and at the date of the trial Seaboard had collected at least eight payments on the contract from

Rogers totalling some \$680.00 (Tr. p. 137).

The plaintiff claims now that it did not accept the Rogers contract from Shire and that it subsequently acquired it by purchase at Sheriff's sale for \$30.00 after having attached it in the hands of the C. I. T. Corporation in this same action. It seems to be a rather fortunate coincidence that the contract which it attached was one which was written on a Seaboard form, the payments payable at Seaboard's office, and which bore the assignment to Seaboard by Shire on the back of the document. Under the circumstances it appears that Seaboard was at least indebted to the Bank for the discounted value of the Rogers contract rather than that the Bank should be required to pay Seaboard the original purchase price of the car to which Seaboard now has acquired the legal title under the conditions above related.

### **Specification of Error No. 6**

The Frazer car was attached and about to be taken by the Sheriff of Uintah County when the Bank put up a bond and had it released to it. The car remained in its custody, subject to the attachment, from February 24th to September 25th when it was sold under a Stipulation between the plaintiff and the Bank that the proceeds would be held by the Bank to abide the event of these proceedings. The sale price was \$1,950.00. Meanwhile the Bank had incurred charges for storage of the car to protect it from loss and depreciation in the sum of \$160.00. Testimony to the effect that no storage facili-

ties in Vernal during the period involved were available at any lesser figure. The court, however, determined that \$35.00 only was a reasonable charge and allowed that amount as a charge to be deducted from the proceeds.

We submit that under the circumstances of the case the charge of \$160.00 was actually and necessarily incurred by the garnishee Bank for the protection and preservation of the attached property and that that sum should have been allowed, regardless of the court's opinion of its reasonableness. We think the Court may take judicial notice of the fact that during the winter and summer of 1948 Vernal was the business center of an area of great oil activity, that housing and other business facilities were scarce and that the cost of accommodations was limited only by what the traffic would bear. There was certainly no duty upon the Bank to haul or drive the car to Heber or Price, or to store it in some barn or hayshed in the country.

### **Specification of Error No. 7**

This specification relates to the award of costs against the garnishee. Section 104-19-22 provides:

“The court may order the costs of proceedings in any garnishment to be paid by the plaintiff, or out of the effects or credits garnished, or by the garnishee, or may apportion the same as shall appear to the court to be just and equitable. The garnishee shall be entitled to fees and mileage as a witness where he does not improperly resist or make costs.”

Section 104-19-7 provides, in part:

“\* \* \* in no case shall the garnishee be chargeable with costs, unless his answer shall be successfully controverted as hereinafter provided.”

In this case the Garnishee answered the Writ, denied that it was indebted to the defendant, but admitted that it held as security for \$2,076.67 and interest, attorney's fees and costs owing by the defendant to it one new Frazer car, an old car, and miscellaneous merchandise all worth probably \$2,500.00.

The court held that the garnishee was entitled to hold and apply the security upon sale upon the obligations owing, and after disallowing \$125.00 of the actual storage charges found that there remained a surplus of \$163.58 applicable to the plaintiff's claim.

Notwithstanding the fact that the answer in effect concedes that there may be some surplus belonging to the defendant which could be reached by the garnishment, and the plaintiff by its traverse upon information and belief put the garnishee to the trouble and expense of litigating the question and proving that there was a surplus only of \$163.00, the court disallowed the garnishee's claim of costs and mileage in the sum of \$44.10 (Record p. 90), denied its motion for an order directing that the costs be paid by the plaintiff or out of the effects or credits garnisheed, and also assessed the plaintiff's costs against the Garnishee.

We submit that there is nothing in the record to justify a finding that the garnishee “improperly resisted or made costs” and in all justice and equity its mileage

and fees should have been allowed. For the same reason, the plaintiff's costs in the garnishment proceedings should have been deducted from the proceeds or assessed against it, and it was an abuse of discretion to charge them to the garnishee.

### **Specification of Error No. 8**

The Trust Receipt (Exhibit "D") contains the following provision:

"In event of the repossession of any of said property, Entruster may on or after default give notice to Trustee of intention to sell and may at any time or times not less than five (5) days after the giving of such notice sell said property, or any of it, at public or private sales, with or without notice \* \* \* The proceeds of any such sale shall be applied, first, to the payment of the expenses thereof; second, to payment of the expenses of retaking, keeping and storing said property, including reasonable attorney's fees; and, third, to the satisfaction of Trustee's indebtedness secured hereby. \* \* \*"

This provision is specifically authorized under the Uniform Trust Receipts Act (Laws of 1945, Chapter 131, Section 6).

The garnishee gave notice of its intention to sell the Frazer car, which it had repossessed prior to the attachment, by mailing the letter, Exhibit 10, in the envelope attached, to Shire at his last known business address. Shire having left for parts unknown, the letter was returned undelivered. The possession of the Bank, the Entruster, had the effect of the filing of the Trust

Receipt and gave priority to the Bank's lien (Uniform Trust Receipts Act, Section 7) and it had the right to apply the proceeds of the sale to the payment of the indebtedness.

The rejection of the proffered Exhibit was therefore error.

### REPLY TO APPELLANT'S BRIEF

The Appellant relies for reversal of the judgment and entry of judgment against the garnishee upon the theory that under Section 104-55-1, Utah Code Annotated 1943 a debt secured by mortgage cannot be offset against a debt owing by the mortgagor until the security has been foreclosed in the manner provided by Chapter 55, and a deficiency realized, citing the case of *Zions Savings Bank & Trust Company v. Rouse*, 86 Utah 574, 49 Pac. (2d) 618.

The action in the *Rouse* case, however, does not involve the right of a creditor to garnishee the claim of the debtor against the garnishee, and we submit the rules applicable to this proceeding are governed by a statute which is quite different from the California laws referred to in the *Walters* cases, cited by Appellant here.

In considering this question the following provisions of the Utah law relating to garnishments must be kept in mind:

“104-19-13. Every garnishee shall be allowed to retain or deduct out of the property, effects or credits of the defendant in his hands all demands against *plaintiff* and all demands against the *defendant* of which he could have availed himself if he had not been summoned as garnishee, whether the same are at the time *due or not*, and



he shall be liable for the *balance only* after all mutual demands between himself and plaintiff and defendant are *adjusted, not including unliquidated* damages for wrongs and injuries \* \* \*."

"104-19-18. When any personal property, choses in action or effects of the defendant in the hands of a garnishee are mortgaged or pledged, or in any way liable for payment of a debt to him, the plaintiff may, under an order of the court for that purpose, pay or tender the amount due to the garnishee, and thereupon the garnishee shall deliver the personal property, choses in action and effects to the sheriff as in other cases."

It will be noted that the statute (104-19-13) allows to the garnishee offsets for demands against the defendant "whether the same are at the time due or not." It also provides that the garnishee is "liable for the balance only after all mutual demands between himself and plaintiff and defendant are adjusted, not including unliquidated damages for wrongs and injuries."

These clauses indicate that the rule applied in the *Rouse* case and in the California cases cited therein is not the rule to be applied in garnishment proceedings under our statute. The words "mutual demands" as used in Section 104-19-13 cannot be restricted to those which could be asserted only as a counterclaim, since by the very terms of the statute they include demands which are not due.

Again, the words "adjusted" and "not including unliquidated damages for wrongs and injuries" further indicate that the garnishee is entitled to retain its claims against the defendant until its demands are fully settled

and adjusted. "*Expressio unius est exclusio alterius.*" Here the demands of the Bank and the defendant cannot be fully adjusted until the security has been foreclosed and the deficiency determined as was done in this case.

It may be argued that the chattel mortgage on the Frazer car was never foreclosed by suit. Just why the chattel mortgage was given by Shire was never explained. Apparently it was not relied upon by the Bank because it was never filed for record until after the first charge against the account had been made and until after Shire had decamped. Moreover, it is difficult to understand how the plaintiff can take advantage of the fact that it was not foreclosed "as provided in this chapter" (See Section 104-55-1) since the Frazer car was sold under a stipulation between it and the Bank and it does not appear that Shire has objected in any way. Incidentally, Section 104-55-1 cannot mean precisely what it says since the chapter on chattel mortgages specifically provides for foreclosure by advertisement and sale without suit, and the Uniform Trust Receipts Act (Chapter 131, Laws of 1945) likewise provides a method of realization upon security without suit. The Chattel mortgage on the accessories (what remained of them) was foreclosed, and only \$350.00 realized on the sale. If the \$805.00 applied on the note is eliminated the deficiency would have been \$1,581.71 instead of \$576.71.

There is no evidence in the record that the plaintiff ever applied for or obtained an order to pay or tender the amount due the Bank on either the Frazer car or the accessories as provided in Section 104-19-18. This section

also shows quite clearly that the garnishee is entitled to the balance of its debt, before releasing its lien on pledged security. This is precisely what the judgment of the Court in this case allowed, and except for its error in disallowing the cost of storage and charging the garnishee with the costs, the judgment should be affirmed. As it is, the judgment should be modified by allowing the full amount of storage and ordering the costs assessed against the plaintiff.,

Respectfully submitted,

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Cross Appellant*