

# In the United States Bankruptcy Court

## for the Northern District of Iowa

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CARL M. SIMON and  
DIANE L. SIMON

Bankruptcy No. 94-21591KD

*Debtor(s).*

Chapter 12

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MORRIS L. ECKHART JAMES R. Adversary  
No. 94-2173KD

Adversary No. 94-2173KD

KOBY AND BARRY J. HAMMERBACK

*Plaintiff(s)*

vs.

CARL M. SIMON DIANE L. SIMON  
ROBERT L. SIMON

Executor of the Estate of  
Ralph J. Simon Deceased and  
TRI-STATE COMMUNITY CREDIT  
CORP.

*Defendant(s)*

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### RULING RE MOTION FOR AMENDMENT OF FINDINGS

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Defendants Carl M. and Diane L. Simon filed a Motion to Amend the Findings of this Court in the above captioned adversary proceeding on October 6, 1995. Plaintiffs Morris L. Eckhart, James R. Koby and Barry J. Hammarback filed a resistance thereto on October 11, 1995. The primary issue to which this motion is addressed is the Court's finding that Defendant was not the owner of a particular herd of livestock on October 29, 1993. Defendants also ask the Court to amend its findings as to the amount of certain loans from Tri-State Community Credit Corporation which the parties have stipulated to be secured by a lien prior and paramount to Plaintiffs'. Oral argument would be of no benefit on these issues and the Court now issues its order regarding Defendants' motion.

Defendant Carl Simon gave sworn testimony in October of 1993 in state court (the "Tri-Vets" case), in which he categorically denied that he was the owner of the livestock. Defendant now argues that this Court should not believe nor rely upon that testimony in making its factual findings in the present proceeding. Defendant contends that on cross-examination in the Tri-Vet case, he was confronted with documents which effectively impeached his testimony as to the ownership of the livestock. In other words, Defendant now argues that it ought to have been so obvious that his testimony in the state court action was unbelievable that this Court should not rely upon that testimony of Defendant, but rather should rely upon Defendant's current testimony, that he in fact did own the livestock on October 29, 1993.

The Court finds it ironic and extremely troubling that Defendant is defending the credibility of his current, contradictory testimony by asserting that his prior testimony on the same question was

obviously untrue. Defendant's present argument raises significant concerns about his obedience to his obligation while under oath.

As noted in this Court's ruling, Defendant had no financial interest in having his testimony believed in the Tri-Vet case, in fact his testimony was contrary to his financial interest if Defendant actually owned the livestock at that time, as he now claims. Conversely, Defendant now has a strong financial interest in having his testimony in this matter believed. This militates heavily in favor of finding the prior testimony to be credible and the latter not.

Defendants contend that the Court did not consider certain documents which they claim establish their ownership of the livestock prior to October 29, 1993. The Court fully considered all evidence, including Defendants' Exhibits B, C, D and E. The Court found these documents to be unpersuasive on the issue of the ownership of the livestock as of October 29, 1993, particularly in light of Defendant's contradictory testimony.

Finally, Defendants request that the Court amend its finding regarding the amount of indebtedness to Tri-State which is secured by a prior and paramount lien to that of Plaintiffs'. The Court finds that it made no factual finding as to the amount of the Tri-State's debt and/or lien. The Court merely ordered that Plaintiffs' lien was subject to that of Tri-State, in accordance with the stipulation entered into between Plaintiffs and Defendants'. Any discussion in the ruling of a particular amount of debt owed to or number of loans from Tri-State was not a factual conclusion but merely a recitation of testimony given at trial.

**WHEREFORE**, Defendants' entire motion for amendment of findings is DENIED.

**SO ORDERED** this 18th of October, 1995.

Paul J. Kilburg  
U.S. Bankruptcy Judge