

1977

# Henry Maas v. Kenneth J. Allred And Arvel Allred v. Utah Bank & Trust Company : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

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HENRY MAAS,

:

Plaintiff and  
Respondent,

:

:

vs.

:

Case No. 14808

KENNETH J. ALLRED and  
ARVEL ALLRED,

:

Defendants,

:

and

:

UTAH BANK & TRUST COMPANY,

:

Defendant and  
Appellant.

:

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BRIEF OF RESPONDENT

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FILED

JUN 20 1977

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OF THE STATE OF UTAH

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	:	
Plaintiff and	:	
Respondent,	:	
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KENNETH J. ALLRED and	:	
ARVEL ALLRED,	:	
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Defendants,	:	
	:	
and	:	
	:	
UTAH BANK & TRUST COMPANY,	:	
	:	
Defendant and	:	
Appellant.	:	

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BRIEF OF RESPONDENT

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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HENRY MAAS,	:	
	:	
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	:	Case No. 14808
KENNETH J. ALLRED and	:	
ARVEL ALLRED,	:	
	:	
Defendants,	:	
	:	
and	:	
	:	
UTAH BANK & TRUST COMPANY,	:	
	:	
Defendant and	:	
Appellant.	:	

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BRIEF OF RESPONDENT

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NATURE OF THE CASE

This is an action by Plaintiff-Respondent against Defendant-Appellant, Utah Bank & Trust Company and others seeking a money judgment for the wrongful repossession and commercially unreasonable sale of a 1972 Mack tractor.

### DISPOSITION IN THE LOWER COURT

This case was submitted to the jury on special interrogatories. Based on the jury's answers, the court entered judgment in favor of the plaintiff and against Utah Bank and Trust in the sum of \$14,839.31 plus interest. A Judgment of No Cause of Action was entered in favor of the individual defendants Kenneth J. Allred and Arvel Allred. A Notice of Appeal was filed by plaintiff against the two individual defendants, but this case has subsequently been settled as to them and that portion of the appeal has been dismissed. The plaintiff-respondent has reserved its rights against the defendant-appellant, Utah Bank & Trust Company.

### RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the Judgment of the trial court against appellant Utah Bank & Trust.

### STATEMENT OF FACTS

On or about November 11, 1971, Kenneth Allred signed a note and entered into an Installment Sale and Security Agreement with appellant Utah Bank & Trust Company (hereinafter "Bank"). [Ex 3-P] The collateral for that Agreement was a 1972 Mack Tractor, Serial No. RL765LST9476 (hereinafter "1972 Mack"). [Ex 3-P]

Approximately one year later, Kenneth Allred and respondent Henry Maas (hereinafter "Maas") entered into an



agreement by which Maas was to lease the 1972 Mack for a thirty-two month period, and then, at the end of that time, the lease money would be used as payment on the 1972 Mack. [Ex 1-P, Tr 7] An additional balance of \$6,000.00 was to be paid Kenneth Allred by Maas. [Ex 1-P] Maas was to make the payments directly to the Bank, which payments were to be in the exact amount of Allred's monthly payments on the Installment Sale and Security Agreement. [Tr 6-7, 11] In August, 1974, and in conjunction with other arrangements between the parties, the remaining balance to be paid Kenneth Allred by Maas was reduced from \$6,000.00 to \$3,500.00 by mutual agreement. Kenneth Allred specifically agreed that when the smaller amount was paid, Maas would receive full ownership and title to the 1972 Mack. [Ex 2-P, Tr 21-23]

Kenneth Allred informed the Bank that Maas had possession of the 1972 Mack. [Tr 87] In January, 1973, Maas began making the monthly payments to the Bank [Tr 87], and eventually made a total of twenty-six such payments. [Tr 10, 90] Those payments were always late but always accepted by the Bank. [Tr 73, 82, 91-92, 97] At no time did the Bank ever tell Maas that it would not accept future late payments. [Tr 93] The total amount of the payments made by Maas was \$18,720.00. [Tr 10-11, Ex 6-P] The account balance on the contract was reduced from \$23,072.36 at the time that Maas began making the payments to \$4,346.38 by February 1, 1975. [Ex 6-P, Tr 89]

By early February 1975, Maas was behind in making two monthly payments. [Ex 6-P, Tr 29] He contacted a Bank loan officer, Gary Kotter, and agreed to make up the past due payments on February 21, 1975, and then to make another payment on March 1, 1975. Kotter, in those conversations, gave Maas no indication that the Bank would repossess the 1972 Mack without notice to him. [Tr 33] In conversations during the month of February, 1975, Kotter only indicated the matter would have to be resolved before the end of February, 1975. [Tr 95]

On February 14, 1975, Kenneth Allred took the 1972 Mack while it was parked on the lot of F-B Truck Lines Company in Salt Lake City [Tr 39, 41, 123] while Maas was inside the F-B Terminal. [Tr 39, 123] Maas did not authorize this taking and received no prior notice of it. [Tr 42]

Not knowing what had happened to the 1972 Mack, Maas called Kotter to see if the Bank had repossessed it. [Tr. 93] Kotter replied in the negative. [Tr 93] On February 18, 1975, Maas personally came in to see Kotter about the tractor. [Tr 93] Kotter told him that the delinquent payments would have to be made before the end of February, 1975. [Tr 95]

Subsequently, Maas discovered that Kenneth Allred had the 1972 Mack. [Tr 41] Thereupon, Maas and Kenneth Allred entered into an agreement on February 25, 1975, which in some particulars amended the November 21, 1972 agreement. [Ex 4-P]

Under the terms of the agreement of February 25, 1975, Kenneth Allred was to return the 1972 Mack to Maas [Tr 46, 124], and Maas agreed to give Kenneth Allred the right to repossess if all future payments were not made by the first day of any succeeding month. [Ex 4-P]

On the very day Maas signed that agreement, February 25, 1975, Kenneth Allred informed the Bank of the agreement and of his obligation to return the truck to Maas at the F-B lot. [Tr. 95] Without notice to Maas, Kotter met Kenneth Allred at the place where Maas was to receive the truck, and Kotter requested Allred to drive away the 1972 Mack before Maas could resume possession. [Tr 96] Kotter accompanied Kenneth Allred as he drove the truck to Bountiful. [Tr. 96, 126]

When Maas arrived at the designated exchange point, he discovered that the tractor had been taken away. Maas contacted Kotter who told him that the Bank would keep the 1972 Mack until the delinquency was cured. [Tr 46-49, 98] Maas informed Kotter that he would return to his home in California and get the money for the past-due installments. [Tr 49, 51-52, 98] Maas returned to the Bank with the money on February 28, 1975, but Kotter refused to take the payments, and told him that the vehicle had been sold. [Tr 49, 98]

On or about February 28, 1975, the Bank had received a check from Arvel Allred, the father of Kenneth Allred, for the

payoff amount owing on the unpaid balance. [Tr 98-100, 127, 190] Maas never received notice of any private sale. [Tr 50] No public sale was held. [Tr 100] The bank released its lien on the 1972 Mack. [Tr 119] Subsequently Kenneth Allred transferred his interest in the tractor to Arvel Allred. [Tr 130] At the time of trial the title of the vehicle was still in the name of Arvel Allred although he had leased the 1972 Mack back to Kenneth Allred who had possession of it. [Tr 128]

The case was submitted to the jury on special interrogatories. The questions pertinent to this appeal were answered as follows: (R. 320)

PROPOSITION NO. 6

The disposition of the 1972 Mack Tractor on February 27th or 28th by the Utah Bank & Trust Company was a commercially unreasonable disposition of the tractor.

True   x        False             No preponderance of the  
evidence either way       

PROPOSITION NO. 7

The Utah Bank and Trust Company by its acts and conduct through its employees and officers, waived payment of the three payments due on the promissory note until the end of business hours of the bank on February 28, 1975.

True   x        False             No preponderance of the  
evidence either way

PROPOSITION NO. 8

The Fair Market Value of the Mack Tractor on the 25th of February, 1975, was in the sum of \$20,500.00.

PROPOSITION NO. 9

The defendant, Utah Bank and Trust Company, wrongfully converted the 1972 Mack Tractor on February 25, 1975.

True \_\_\_\_\_ False   x   No preponderance of the  
evidence either way \_\_\_\_\_

In effect, the jury found that although the 1972 Mack had a fair market value of \$20,500.00, the Bank disregarded Maas' interests and disposed of the unit in a commercially unreasonable manner for the \$4,346.38 pay-off sum. The jury also found that the Bank waived payment of the past-due payments until the end of the February 28 business day. The actions of the bank caused Maas, who was not in default under the lease-purchase agreement, as amended, to lose his equity in the 1972 Mack and his right to purchase it.

Based upon the jury's answers to the special interrogatories and upon the evidence produced at trial, the trial judge entered judgment in favor of Maas in the sum of \$14,839.31, plus interest which amount represented his equity in the 1972 Mack. [R 385-386] The Bank's Motion to Amend or Alter Judgment and Motion for New Trial were denied. [R 397] This appeal followed.

## ARGUMENT

### POINT I

I. BY HABITUALLY ACCEPTING LATE PAYMENTS; BY LEADING MAAS TO BELIEVE HE HAD TIME TO CURE THE DEFAULT; AND BY FAILING TO GIVE HIM A SPECIFIC DEADLINE TO MAKE THE PAYMENTS AND/OR BY FAILING TO INFORM HIM OF THE BANK'S CHANGED POSITION; THE APPELLANT BANK CONVERTED THE 1972 MACK:

A. BY THE REPOSSESSION OF FEBRUARY 25, 1975;  
and/or

B. BY DELIVERING THE TRUCK TO KENNETH ALLRED  
AFTER HAVING RECEIVED THE PAYOFF FROM ARVEL  
ALLRED.

A. The Appellant Bank Converted The 1972 Mack When It  
Repossessed That Vehicle On February 25, 1972.

This court has generally described the tort of conversion as follows:

A conversion is an act of willful interference with a chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession. The measure of damages of conversion is the full value of the property. It requires such a serious interference with the owner's right that the person interfering therewith may reasonably be required to buy the goods. Although conversion results only from intentional conduct it does not however require a conscious wrongdoing, but only an intent to exercise dominion or control over the goods inconsistent with the owner's right.  
... Allred v. Hinckley, 8 Utah 2d 73, 76,  
328 P.2d 726, 728 (1958).

A converter is liable to a person entitled to immediate possession of the chattel as well as to the person in actual possession. Restatement of Torts 2d §§ 224A and 225 (1965).

Respondent contends the evidence compels the conclusion that on February 25, 1975 he was entitled to immediate possession of the 1972 Mack as to both Kenneth Allred and the Bank. On that date Maas signed the amendment to the lease purchase agreement between himself and Kenneth Allred. By virtue of the express language of the amendment, Kenneth Allred had a conditional right to repossess only if Maas failed to make future payments to the Bank after the first day of any future month. [Tr 84-85] Even if Maas failed to make the February payment, Kenneth Allred could not have legally repossessed until after March 1, 1975.

Maas also had rights to immediate possession insofar as the Bank was concerned. Although there were unpaid installment payments which Maas needed to make, he was in contact with the Bank. On or about February 18 or 19 he talked with Kotter. The transcript reflects the following testimony by Mr. Maas:

"Question: What did you say in this conversation?

Answer: We went in and talked to Mr. Kotter, asked him if we could get the payments for the truck and could we get the truck back.

Question: And what did he say.

Answer: He said yes.

Question: What did Mr. Kotter say about whether or not the bank would accept late payments?

Answer: He did not say they would not accept late payments.

Question: What deadline if any did he give you to make those payments?

Answer: He didn't give me any deadline.  
[Tr 42-43]" (emphasis added)

Based upon this and other conversations in which the Bank said the matter would have to be resolved by the end of February, Maas assumed he had at least until February 28, 1975 to make the payments. And the jury specifically found as a fact that the Bank waived payment until the end of the business day of February 28, 1975. [R. 320]

Of critical significance is the fact that the Bank had dealt with Maas for more than two years. It knew he was making payments on the 1972 Mack [Tr 87] and that Maas had the truck (Id.) It knew on February 25, 1975 that Allred had an agreement with Maas to return the truck and where the truck was going to be delivered [Tr 95]. Even more importantly, the Bank had habitually accepted late payments from Maas. All twenty-six of the payments were past due when received, but the Bank accepted each one of them. [Tr 92]

The following testimony by Kotter clearly establishes a pattern of dealings which had been well established by February 1975:

"Question: You knew that the Bank had habitually accepted late payments from Mr. Maas didn't you and never repossessed before?

Answer: Yes.



Question: You knew that Maas had made a number of payments?

Answer: Yes.

Question: You knew the account was paid down from about \$2,300.00 (sic) to \$4,350.00 since the date of the lease transaction.

Answer: Yes.

Question: And yet you never made a specific demand on Mr. Maas for payment by a specific deadline date?

Answer: No. [Tr 97-98]" (emphasis added)

From the testimony of Mr. Kotter it also appears that when the Bank learned that Kenneth Allred was bringing the truck to F-B Truck Lines, Mr. Kotter had a conversation with Mr. Atwood, the Bank's executive vice-president. [Tr 103] In this conversation it was determined that the Bank would repossess the 1972 Mack when Kenneth Allred drove it into the F-B yard. Although Allred was informed of the conversation with Mr. Atwood and the change in the Bank's position by deciding to repossess, Maas was not. [Tr 104]

This lengthy fact recitation has been included to show that the appellant Bank led Mr. Maas to reasonably believe he had until the end of the business day, February 28, 1975, to make the payments. On February 28, 1975, Maas, by Mr. Kotter's own admission, appeared at the Bank and offered to make the past due payments. [Tr 98] Mr. Kotter had previously agreed to hold

the truck until the payments were made. (Id.) Yet when Maas came in to make the payments, Mr. Kotter refused to accept them since the Bank had, without notice to Maas, accepted the pay-off from Arvel Allred.

Numerous decisions of this Court emphasize that where one party establishes a course of dealings with a payor wherein strict compliance is not followed, if thereafter the party wishes to insist upon rigid compliance, he must reasonably inform the payor and give him time to comply. In Williamson v. Wanlass, 545 P.2d 1145 (Utah 1976), this Court held in an installment note case that where the defendant payors were given insufficient notice that plaintiffs would insist on strict performance, a judgment in favor of the plaintiffs would be reversed. In that case, it was noted that the plaintiffs had accepted late payments in the past.

In the course of the opinion the Court wrote:

The clause which allows for acceleration in case of default, if strictly enforced, is a severe covenant, the invocation of which has similarity to other forfeitures. The imposition of such severe conditions is not favored in the law; and one who seeks to impose them must not, either by acts or omission permit another to assume that the covenant will not be strictly enforced, then "crack down" on the obligor by rigidly insisting on enforcement, without giving some reasonable notice and opportunity to comply. This is a doctrine of equity which is firmly established in our law by numerous decisions. A foundational case is Christy v. Guild to the effect that when one has accepted overdue payments so that the payor has reasonably relied on such course of

conduct and been led to believe that the payee will tolerate a failure of strict performance, the latter cannot abruptly change course and insist upon strict adherence to the covenant imposed and enforce a harsh forfeiture. Id. at 1147-1148. (emphasis supplied).

In the earlier decision of Calhoun v. Universal Credit Co., 106 Utah 166, 146 P.2d 284 (1944), plaintiff entered into a contract with the defendant for the purchase of a car. All of the installment payments were late in some degree. Without giving plaintiff clear prior notice, the defendant repossessed. Plaintiff contended that conduct of the defendant constituted a waiver of strict performance. This Court agreed, noting and citing with approval other decisions:

' . . . Having given appellee an extension of time for the payment of the amount due it thereby waived all right to forfeit the contract until the time of the extension had expired. It could not on the next day and before the time had expired, assume an inconsistent position . . . ' [citing Commercial Credit Co. v. Macht, 89 Ind. App. 49, 165 N.E. 766]

Thus until notice of intention to enforce the forfeiture provisions of the contract was given, and a reasonable time to comply with the demand for payment allowed, an indefinite extension of time would not expire, and defendants could not repossess the automobile. Calhoun, supra at 174, 146 P.2d at 287.

See also Columbia Airways, Inc. v. Stevens, 80 Utah 215, 14 P.2d 984 (1932); Munson v. Apartment & Hotel Inv. Co., 62 Utah 13, 218 P. 109 (Utah 1923). And see Price v. Ford Motor Credit Co., 530 S.W.2d 249 (Mo. App. 1975); Sales v. Liberty Mutual Fire Insurance Co., 273 So. 96 (Fla. App. 1973).

Of course there was no written contract between Maas and the Bank. But, during their more than two-year dealings with each other, a rather definite course of conduct had been established. The Bank had accepted late payments. It did not attempt to repossess. Statements of its agents or employees reasonably led Maas to assume he had until after February 25 to make the past due payments. The conduct of the Bank and Maas created an implied agreement between them. Maas knew the Bank looked to him for, and accepted payments on the vehicle. The Bank knew Maas was using the truck in his business. Each was aware of specific interests of the other and a standard of business dealings was created and followed. If the Bank intended to disturb or alter that course, it was obligated to give plaintiff notice and an opportunity to comply with the altered course of business dealings. It did neither.

And, even if there were no agreement or standard created by past conduct, at a minimum, the Bank knew that Maas had an interest in the 1972 Mack. [Tr 87] Maas discussed with Bank personnel the fact that he was buying the truck from Kenneth Allred. [Tr 10] All of these either demonstrated or should have demonstrated to the Bank that Maas had legitimate, viable interests in the 1972 Mack. Normally, the term lease implies a term and a revision to the lessor or landlord after its termination. Consolidated Uranium Mines v. Tax Commission,

4 Utah 2d 236, 291 P.2d 895, 897 (1955). However, during the term of the lease the lessee has a vested interest in, Harding v. Sinclair Oil & Gas Co., 172 Kan. 724, 243 P.2d 199, 203 (1952), and exclusive possession of the leased property. Lichty v. Model Homes, 211 P.2d 958, 966 (Wyo. 1949).

Plaintiff does not admit he merely had a lease interest in the 1972 Mack. But, even if that were all he had, the normal rights inherent in a lease arrangement coupled with the representations and course of conduct of the Bank required that the Bank give some notice of its intention to take and opportunity to pay the past due installments before it repossessed. And, the fact that the payments to the Bank were to be credited against plaintiff's eventual purchase of the 1972 Mack from Allred heightened the need for the Bank to consider Maas' interests.

Respondent respectfully urges that the cited facts show as a matter of law that the defendant Bank converted the 1972 Mack on February 25, 1975 and that the judgment of the trial court should be affirmed.

B. By Delivering The 1972 Mack To Kenneth Allred After Accepting The Payoff From Arvel Allred, The Bank Converted The Vehicle Afresh.

Although the trial jury found in Proposition No. 7 that the Bank had waived payment by Maas of the three past due

payments until the end of the Bank's business hours on February 28, 1975, the jury also answered as "False" Proposition No. 9 which read:

"The defendant, Utah Bank and Trust Company, wrongfully converted the 1972 Mack Tractor on February 25, 1975." (emphasis added)

Respondent urges the facts require a conclusion that the Bank did convert the vehicle on that date. It is possible the jury became confused about the term "wrongfully" and assumed that the word involved a violation of criminal law, (and, of course, respondent concedes this is not a criminal case).

However, respondent believes that propositions No. 7 and 9 can be reconciled. Mr. Kotter testified he told Mr. Maas after the February 25, 1975 repossession that the Bank would hold the truck until the past due payments (not the payoff) were made. [Tr. 98]. Maas thereafter agreed to come up with those payments and actually tendered them to Kotter on the 28th. The jury might have found either: 1) that Maas conditionally acquiesced in the February 25 repossession provided the Bank delivered the truck to him if he made the payments by the 28th, or; 2) that the Bank agreed to give Maas until the 28th to make the payments after repossession, but converted the vehicle by delivering it to Kenneth Allred before the time expired for Maas to bring the account current.

That a special verdict should be reconciled if possible is so widely accepted as to need no extended citation of

authorities. C.f. Pace v. Parrish, 122 Utah, 141, 146, 247 P.2d 273, 275 (1952) where this Court wrote:

" . . .Wherever there is uncertainty or doubt in connection with the correlation of interrogatories with each other and their answers, they should be so interpreted as to harmonize with the findings of the jury if that can reasonably be done."

In this case the jury determined the fair market value of the truck; it found that there had been waiver by the Bank until after the close of the banking day of February 28, 1975. If the jury felt there were no "wrongful" conversions on February 25, there still could have been a conversion after that date, but before March 1. Evidence introduced at trial could have been found by the jury as facts of a past February 25 conversion by the Bank. The verdict is not inherently inconsistent and should be upheld.

## POINT II

II. EVEN IF THE REPOSSESSION BY THE BANK OF THE 1972 MACK ON FEBRUARY 25 WAS NOT A WRONGFUL CONVERSION, IT NONETHELESS DISPOSED OF THE UNIT IN VIOLATION OF THE PROVISIONS OF THE UTAH UNIFORM COMMERCIAL CODE.

A. The Acceptance Of The Payoff Sum From A Stranger, Arvel Allred, Was Not A Commercially Reasonable Disposition As Required By Section 70A-9-504 Of The Utah Code Annotated, 1953, As Amended.



Regardless of any possible inconsistency of the jury interrogatories on the conversion issue, the unambiguous finding in proposition No. 6 was that the Bank had disposed of the 1972 Mack in a commercially unreasonable manner. (R. 320) From the evidence it appeared that while Maas was attempting to obtain the past due payments and in the absence of the Bank giving Maas a deadline in which to make the payments, the Bank accepted the payoff sum from a single inquirer, who was a stranger to prior transactions [Tr 99]. No private sale was held [Tr 100]. And Mr. Maas never received prior notice to bid in, be present at or object to the disposition of the 1972 Mack. [Tr50]. He was not in default under the lease purchase agreement, as amended, but the Bank's disposition of the 1972 Mack deprived him of the right to use that vehicle, of his equity in it, and of his right to purchase it after all monthly payments had been made. The payoff accepted by the Bank was less than one-quarter of what the jury determined the value of the 1972 Mack was.

Section 70A-9-504 of the Utah Uniform Commercial Code provides that after default a secured creditor may dispose of the collateral, but requires that "every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable." 70A-9-504(3) Utah Code Annotated, 1953, as amended.



In its recent decision, Chrysler Credit Corporation v. Burns, 562 P.2d 223 (Utah 1977), this Court appears to have held that a sale is commercially unreasonable if no notice of the time, date, place and manner of sale is given to the debtor by the secured party. Burns, supra at 234.

Decisions in other jurisdictions have imposed rather stringent requirements on a secured creditor holding a sale or disposition. The creditor must exercise due diligence in attempting to get the best price obtainable for the collateral. Luxurest Furniture Manufacturing Co. v. Furniture Warehouse Sales, Inc., 15 UCC Reporting Service 546 (Ga. 1974). At least one court has held that a sale of a car at wholesale for less than 50 percent of its wholesale bluebook value was commercially unreasonable as a matter of law. Credit Bureau Metro, Inc. v. Mims, 45 Cal. App. 2d 12, 119 Cal. Rptr. 662 (1975). And a minimally advertised sale of collateral at a low price to a single bidder who had no knowledge of local market values has also been held to be commercially unreasonable. Mercantile Finance Corp. v. Miller, 292 F. Supp. 797 (D.C. Pa. 1969).

B. Respondent Was Not Given Notice Of The Disposition In Time To Protect His Interests And Equity In The 1972 Mack.

Section 70A-9-504(3) of the Utah Uniform Commercial Code provides as follows:

Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known by the secured party to have a security interest in the collateral. . . . (emphasis added).

Section 70A-9-105(d) defines "debtor" rather broadly:

"Debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts, contract rights or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the chapter dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the contest so requires. . .

Decisions in other jurisdictions interpreting these sections of the Uniform Commercial Code have included as "debtor" one other than a party signing the security agreement who is entitled to notice of a disposition of secured property. In Atlas Thrift Co. v. Horan, 104 Cal. Rptr. 315, 11 UCC Reporting Service 417 (1972) it appeared that the plaintiff finance company

had had prior dealings with the defendant. Defendant represented to plaintiff he was a silent partner in his son-in-law's business, but defendant did not sign the security agreement. The plaintiff did not rely on the defendant and made a secured loan to the son-in-law. When default occurred, the plaintiff repossessed the security but did not give notice to the defendant. Defendant successfully argued that the failure to give him notice, even though he did not sign the contract, precluded the plaintiff from obtaining a deficiency judgment against him. See also Hepworth v. Orlando Bank & Trust Co., 18 UCC Reporting Service 542 (Fla. App. 1975) (guarantors of a note held to be a "debtor" entitled to notice under the Code). In Franklin National Bank v. Katzel, 4 UCC Reporting Service 124 (N.Y. Sup. Ct. 1967) a lessee of an airplane who did not have an option to purchase at the end of the lease was held not entitled to UCC protection. However, the opinion strongly suggests that had the defendant had an option to purchase, he might have been protected. The pertinent language is as follows:

The lease does not afford defendant an option to acquire the plane at the expiration of the lease, therefore, the provisions of the Uniform Commercial Code respecting a buyer's rights upon a retaking are not applicable. (emphasis added).

It should be noted that a number of authorities have indicated that where a lease of equipment with an option to purchase is such that where the lessee's only sensible course is

to exercise the option, the lease is in economic reality a security agreement. In re Washington Processing Co., Inc., 3 UCC Reporting Service 475 (1966) one rented a piece of equipment for 36 months for almost \$14,000.00. The lease gave him an option to purchase the equipment at the end of the term for less than \$1,500.00. The court held that under the UCC where the price of the option to purchase was only about 10 percent of the total rental and substantially less than the market value of the equipment, and debtor's only sensible course was to exercise the option, and the lease was in economic reality a conditional sales contract.

The similarities of the case before this court and the Washington Process case are evident. Maas' only sensible course had he been permitted to maintain the lease was to have exercised the option. He had intended to do so. He told the Bank he eventually wanted title to the 1972 Mack. For reasons set forth earlier, plaintiff was either a "debtor" or a holder of a security interest within the meaning of 9-504(3) and 9-105(d) and was entitled to notice he never received.

For failing to conduct a commercially reasonable sale for failure to give notice and for failure to meet the good faith obligation of section 70A-1-203 of the Code, the defendant Bank is liable to plaintiff for the loss of his equity in the 1972 Mack and for damages attendant thereto. Section 70A-9-501 provides as follows:

Secured party's liability for failure to comply with this part.--(1) If it is established that the secured party is not proceeding in accordance with the provisions of this part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten percent of the principal amount of the debt or the time price differential plus ten percent of the cash price. (emphasis supplied).

In the decision of this court in Chrysler Credit Corporation v. Burns, supra, it was held that the debtor was entitled to damages against the secured party for a commercially unreasonable sale pursuant to Section 70A-9-507 of the Utah Code Annotated, 1953 as amended.

Regardless of whether the actions of the Bank constituted a "sale" in the narrow meaning of the word, its delivery of the truck to Kenneth Allred after accepting the payoff from Arvel was a "disposition" within the meaning of Section 70A-9-504(3) of the Utah Uniform Commercial Code. For its improper disposition of that vehicle, the Bank should be liable to Mr. Maas and the jury findings and the lower court verdict can rest independently on that basis.

## CONCLUSION

The evidence is clear that the Bank repossessed the 1972 Mack, after it had habitually accepted late payments from Maas, and without telling him that the Bank in the future would require strict performance of the payment schedule. Indeed the Bank's actions were contrary to its representations to Maas that he had until the end of February to make the payments. The jury so determined when it answered the special verdict finding that the Bank waived payment of the delinquency until the end of business hours on February 28, 1975. These facts create a conversion of the 1972 Mack by the Bank as a matter of law.

Further, the Bank's action of disposing of the 1972 Mack to Arvel Allred for approximately one-quarter of its value and without holding a public sale or giving Maas notice of a private sale was a commercially unreasonable disposition under the Utah Uniform Commercial Code. Again the jury determined this to be the case when, after instruction on the law, it found that the disposition of the 1972 Mack Tractor on February 27 or 28 by the Bank was commercially unreasonable.

Under either or both of the above jury findings, the Judgment awarding Maas his equity in the 1972 Mack should be affirmed.

RESPECTFULLY SUBMITTED this 20 day of June, 1977.

RAY, QUINNEY & NEBEKER

  
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a copy of the foregoing Brief of Respondent was served this 20<sup>th</sup> day of June, 1977 by mail on said date a copy thereof by United States Mail, first class postage prepaid addressed to Layne B. Forbes, Esq., Attorney for Appellant, Post Office Box 331, Bountiful, Utah 84010.

Karen Benson