

1978

# Henry Maas v. Kenneth J. Allred And Arvel Allred v. Utah Bank & Trust Company : Respondent's Brief In Answer To Petition For Rehearing

Utah Supreme Court

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## Recommended Citation

Brief of Respondent, *Maas v. Utah Bank & Trust*, No. 14808 (Utah Supreme Court, 1978).  
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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

UTAH BANK & TRUST COMPANY,

:

Defendant and  
Appellant.

:

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RESPONDENT'S BRIEF IN ANSWER  
TO PETITION FOR REHEARING

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FILED

MAY -1 1978

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Clerk, Supreme Court, Utah

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RESPONDENT'S BRIEF IN ANSWER  
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RELIEF SOUGHT BY PLAINTIFF-RESPONDENT

The plaintiff-respondent, Henry Maas, contests the defendant-appellant, Utah Bank & Trust's petition for rehearing.

STATEMENT OF FACTS

The essential thrust of the defendant-appellant's petition for rehearing is that no commercially unreasonable disposition of the subject truck occurred because the defendant-appellant Bank merely afforded Kenneth Allred the right to redeem the collateral.

Appellant's Petition for Rehearing p.5. The appellant-Bank claims the collateral was redeemed by Kenneth Allred even though his father, Arvel Allred, paid the balance owing on the note relevant to this lawsuit. Id.

Plaintiff-respondent strongly disputes that Kenneth Allred ever redeemed the collateral. Kenneth Allred specifically denied that he asked his father to pay off the outstanding balance (Tr. 127). He further denied that Arvel Allred's making the payoff was in his behalf (Tr. 132). Arvel Allred said he paid the Bank the \$4,338.00 payoff "To protect this investment I had. What my son owed me and to get some collateral for this." (Tr. 192 emphasis added).

Any residual question as to Arvel Allred's purpose in making the payoff payment is dispelled by the following colloquy from the transcript:

Question [Mr. Felt]: You did pay this money to the bank to protect your investment in this truck; is this true.

Answer [Arvel Allred]: That is true. (Tr. 193 emphasis added).

Respondent believes the foregoing testimony refutes the argument of the bank that Kenneth Allred redeemed the truck relevant to the lawsuit.

## ARGUMENT

### POINT I

I. THE MAJORITY OPINION OF THIS COURT AND THE TRIAL JURY CORRECTLY FOUND THAT THE DEFENDANT-BANK DISPOSED OF THE 1972 MACK TRUCK IN A COMMERCIALY UNREASONABLE MANNER:

- A. COMPETENT, SUFFICIENT EVIDENCE INTRODUCED AT TRIAL SUPPORTED THAT FINDING
- B. APPELLANT OWED A LEGAL OBLIGATION TO PLAINTIFF TO DISPOSE OF THE COLLATERAL IN A COMMERCIALY REASONABLE MANNER.

A. Competent, Sufficient Evidence Introduced at Trial Supported A Finding That The Defendant-Appellant Disposed Of The 1972 Mack Truck In A Commercially Unreasonable Manner.

Evidence introduced at trial indicated that in November, 1972 the defendant Kenneth Allred and plaintiff-respondent entered into a lease with option to purchase the 1972 Mack Truck (Tr. 4, 7, Ex. 1-P). In a supplemental agreement of August, 1974 those parties agreed that if respondent paid a reduced sum of money from the original agreement, Maas would receive title to the truck. During the time plaintiff-respondent had possession of the truck he made twenty-six payments on the truck directly to the defendant-appellant all of which were accepted (Tr. 10, 73, 82, 87, 91-92, 97). Mr. Maas told the Bank he had bought the truck from Allred. Respondent claims a Mr. Picket of the appellant-Bank accepted that fact (Tr. 15). Mr. Maas talked to Mr. Kotter of the Bank about title to the 1972 Mack and another vehicle (Tr. 16).

Plaintiff's wife normally made the payments to the Bank by enclosing the actual payment together with a payment coupon printed on the Bank's own form (Tr. 197). Plaintiff obtained the coupon book from Kenneth Allred (Tr. 80-81). At a minimum the Bank knew Mr. Maas had "operating rights" in the truck (Tr. 87, 267).

After the appellant-Bank accepted the payoff from Arvel Allred, plaintiff testified Mr. Kotter told him "the truck had been sold." (Tr. 49). From the earlier quoted testimony of Kenneth Allred it is clearly his position that Arvel Allred's payoff payment was not made at Kenneth's request or for his benefit (Tr. 127, 132). And Arvel said he made the payment to protect his own investment (Tr. 192, 193).

The appellant-Bank, notwithstanding its knowledge that Maas was making payments on the truck, and notwithstanding its admitted awareness that Maas had operating rights to the truck, failed to give plaintiff notice of sale or disposition or opportunity to object (Tr. 50). It disposed of that truck for a sum less than one quarter of what the trial jury found the fair market value of the truck was (Tr. 190-191, R-320 Answer to Proposition No. 8).

Respondent respectfully contends that the above recited facts constitute evidence upon which a trier of fact could reasonably conclude that the defendant-appellant's disposition of the 1972 Mack truck was commercially unreasonable. The finding of the trial jury and the holding of the majority of this court are both amply supported by the evidence

and should be sustained without reargument.

B. Appellant Had A Legal Obligation to Plaintiff To Dispose Of The Collateral In A Commercially Reasonable Manner.

Article Nine of the Utah Uniform Commercial Code, both as it reads now and as it read at the time of the Bank's disposition of the 1972 Mack truck, clearly provides and provided that even a secured party can only dispose of collateral if there has been a default. Utah Code Annotated 70A-9-504(1) (1977 Supp.), Utah Code Annotated, 1953, as amended. The trial jury specifically found that the appellant Bank waived the three payments due on the promissory note until the end of the business hours of the Bank on February 28, 1975 (R-320; Proposition No. 7). It follows that if plaintiff was not in default, any disposition of the truck by the Bank would be wrongful, and, by definition, commercially unreasonable.

By habitually accepting payments from Maas the appellant Bank chose to substitute plaintiff for Kenneth Allred as the contract debtor. Section 9-504(3) of the Utah Uniform Commercial Code in its present form and in the form it existed at the time the Bank disposed of the truck required a secured party to give reasonable notice of public or private sale to the "debtor." And the version of 9-504(3) in effect in 1975 required that notice (except for consumer goods) also be given to "any other person who has a security agreement in the collateral and who has duly filed a financing statement



indexed in the name of the debtor or who is known by the secured party to have a security interest in the collateral."

Section 70A-9-105 (of the Utah Uniform Commercial Code defines "debtor" broadly. That version of the Code in effect in 1975 provided:

'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 obligation, and may include both where the context so requires; (emphasis added)

See also Section 70-9-105(d) (1977 Supp.), Utah Code Annotated, 1953, as amended.

Respondent respectfully urges that because the Bank habitually accepted payments from Mr. Maas, looked to him for payments, recognized his "operating rights" in the truck and generally acquiesced in his performance of the agreements which gave him use of that truck, it regarded Maas as, and Mr. Maas in fact was, a "debtor" within the meaning of the Utah Uniform Commercial Code. Mr. Maas was entitled to notice of and opportunity to bid in at the Bank's disposition of the 1972 Mack truck.

Respondent further believes appellant's reliance on Section 70A-9-504, regarding a debtor's right to redeem, is misplaced. Indeed, that Section enforces this courts and trial jury's findings that a commercially unreasonable disposition occurred since plaintiff-respondent, as a debtor,


was entitled to a right to redeem which the Bank never gave him. Not only was the disposition or sale price of the 1972 Mack grossly inadequate, but there was also an utter failure of respondent to give notice and opportunity to bid to plaintiff who was entitled to both.

#### CONCLUSION

The majority opinion of this court and the trial jury correctly determined that the appellant-Bank's disposition of the 1972 Mack truck was commercially unreasonable. Appellant's petition for rehearing should be denied. Further Respondent prays for his costs for filing his brief in answer to petition for rehearing.

Respectfully submitted,

RAY, QUINNEY & NEBEKER

  
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Respondent

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a copy of the foregoing Respondent's Brief in Answer to Petition for Rehearing was served this \_\_\_\_ day of April, 1978 by mailing 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.

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