

1950

The Commercial Bank of Utah v. Leonard A. Madsen v. Bob Jeppsen : Brief of Respondents

Utah Supreme Court

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Don V. Tibbs, Jr.; Attorneys for the Respondents;

Recommended Citation

Brief of Respondent, *Commercial Bank of Utah v. Madsen*, No. 7584 (Utah Supreme Court, 1950).
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Case No. 7584

IN THE SUPREME COURT
of the
STATE OF UTAH

THE COMMERCIAL BANK OF UTAH,
a corporation,
Plaintiff and Appellant,

vs.

LEONARD A. MADSEN, and ARDETH
MADSEN, his wife, also known as
ARDITH MADSEN,
Defendants and Respondents,

vs.

BOB JEPPSEN,
Purchaser and Co-Respondent.

BRIEF OF RESPONDENTS

DON V. TIBBS, JR.,
Attorney for the Respondents.

FILED
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Clerk, Supreme Court, Utah

Appellant's Point 1

That the sale was not made of the property in two parcels as required by Utah Rules of Civil Procedure 69 (e) 3, resulting in grossly inadequate bids, to the prejudice of plaintiff..... 5

Appellant's Point 11

That the preceeding by the Sheriff in failing to notice sale at eleven o'clock A.M., as instructed by plaintiff and as understood by plaintiff and sheriff, and his failing to notify plaintiff of his failure to comply with the instruction and conform with such understanding and thereby precluding plaintiff from being present, resulted in grossly inadequate bids and sale price of the property, and constituted a prejudicial irregularity..... 12

Appellant's Point 111

That the sale price accepted by the Sheriff was grossly incommensurate to the fair market value of the property sold..... 13

TABLE OF CONTENTS

	Page
ADDITIONS TO STATEMENT OF FACTS	2
ADDITIONS TO TESTIMONY	2
ARGUMENT	5
Point I	5
Point II	12
Point III	13
AUTHORITIES	
Utah Rules of Civil Procedure 69 (e) 3	5
33 C. J. S. Section 210, page 449	6
33 C. J. S. Section 210, page 450	9
33 C. J. S. Section 228, page 485	9
23 C. J. Section 589, page 633, Note 23	8
23 C. J. page 633, Note 34	6
23 C. J. page 669, Note 91	10
50 C. J. S. Section 59, page 677	11
50 C. J. S. Section 59, page 682	11
50 C. J. S. Section 59, page 681	13
59 C. J. S. Section 750, page 1382	13
Colver v. W. B. Scarborough Co., Calif., 238 P. 1104	9
Conley v. Redwine, 109 Ga. 640, 35 S.E. 92, 77 AmSR 389	7
Fox v. Curry, Mont. 29 P 2nd 663	9
In re Roach, Del., 130 A. 676	6
Lynn v. New England Mortg. Sec. Co., Ga. 26 S.E. 750, 98 Ga. 442	10
Nelson v. Bronnenburg, 81 Ind. 193	9
O'Bryan v. Davis, 103 Ala. 429, 15 S. 860	9
Palmour v. Roper, Ga., 45 S.E. 790	6, 7
Schweitzer v. Stroh, 30 S.E. 2nd 689	11
Security Trust Co. v. Sloman, Mich. 233 N.W. 216	6

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BRIEF OF RESPONDENTS

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ADDITIONS TO STATEMENT OF FACTS

The respondents agree with the Statement of the Case so made in Appellant's Brief. That an Order of Sale and Certified Copy for Foreclosure Decree prepared by the Attorney for the Appellant was filed. That the Sheriff noticed the sale, made the same according to the Order and Decree, filed his return showing that the property stated in the decree was sold as one parcel for the sum of \$501.00 to the named purchaser.

ADDITIONS TO THE TESTIMONY

The appellant in presenting the testimony at the hearing has stressed parts of the evidence and passed over much other evidence and omitted some entirely; so, the respondents at this time will submit the following for the court's attention:

The Sheriff, Ulysses Larsen, testified that on the 12th day of April, 1950, in his office, he had conversation with P. N. Anderson, attorney for the Appellant, concerning the Order for Sale and Decree for Foreclosure in the above entitled case. Mr. Anderson had put in the Order that the time of the sale was to be 10:00 A.M. on May 8th, 1950. They allegedly decided during this conversation that the time for the sale should be changed to 11:00 A.M. on the same day. Due to a misunderstanding who was to change the Order, it was never changed either by the Sheriff or the Attorney for the Appellant. That on the 8th day of May at 10:00 A.M. the Sheriff held the sale, but only after having gone through the statutory requirements and having given

notice for the sale to be at 10:00 A.M. (Tr. Rec. pp. 3, 4, 5, 6, 7).

Mr. Paul Smith made the first bid for the sum of \$49.00. The Sheriff refused this bid telling Mr. Smith, that it was unreasonable. Mr. Smith then asked the Sheriff what sum was a reasonable bid. He stated about \$1000.00. Mr. Smith then offered \$500.00. Mr. Jeppson bid \$501.00 and the property was struck off to him. When asked why he sold the property in one parcel or piece, the Sheriff stated that it had the appearance of being in one parcel even though the description was in two lots. None of the bidders present, nor the defendants, objected to the sale in one parcel. None of the bidders nor the defendants had any notice of the Conversation between the Sheriff and Attorney for the Appellant on the 12th day of April. All orders and publications stated the sale to be at 10:00 A.M. on the day in question.

Witness C. H. Beal, a real estate broker, testified that he owned a lot in the same block as this property. That in his opinion the market value of the land was what they could get out of it. His opinion was what they could get out of it. His opinion was that the value would be about \$1400.00 or \$1500.00. He stated that there was a crude fence separating the two lots (Tr. Rec. pp. 8, 9, 10, 11).

Mr. P. N. Anderson, Attorney for the Appellant, made a statement confirming the Sheriff's testimony. That he prepared the Order and Notices for the sale set for 10:00 A.M. That he had a conversation with the Sheriff concerning changing the time to 11:00 A.M., but that due to a misunder-

standing the change was never made. That he never told any of the other interested parties concerning this conversation, and he never checked to determine if the Order and Notices were so changed (Tr. Rec. pp. 11, 12).

Witness Paul M. Smith, a resident of Manti, and owner of four lots in Manti, was at the Sheriff's sale on the 8th day of May. He is the State of Utah appraiser in this area, and has had considerable experience as appraiser for the District Court of Sanpete County. Mr. Smith states that after an apparent stall by the Sheriff the sale was opened for bids. That he bid \$49.00, but tht Sheriff refused to accept it because the bid was unreasonable. Mr. Smith then asked the Sheriff what sum was reasonable. The Sheriff answered that a reasonable sum was one thousand dollars. Mr. Smith said it wasn't worth one thousand dollars, and he thereafter bid \$500.00. At the same time Mr. J. B. Peacock of Manti, Utah, bid \$475.00. The property was finally sold to the purchaser, Mr. Jeppson, for the sum of \$501.00 (Sup. Tr. Rec. pp. 3, 4, 5).

Witness J. B. Peacock, a resident of Manti and owner of real property, was also at the sale. He bid \$475.00 for the property treating both lots as one parcel. He stated that there was no fence on the land but there were several strands of wire. He stated that the rental value was probably about \$7.50 a month (Sup. Tr. Rec. pp. 5, 6, 7, 8, 9, 10, 11, 12, 13).

The Defendant Leonard Madsen, was at the sale, and he states that he had no reason to object because the land

was sold as one parcel. That he had no other notice of the sale than that published in the papers for 10:00 A.M. He had no knowledge of any conversation between the Sheriff and the Attorney for the Appellant concerning time of sale (Sup. Tr. Rec. pp. 13, 14, 15).

ARGUMENT

The respondents will argue the points as set out in the Appellant's Brief.

Appellant's Point I

THAT THE SALE WAS NOT MADE OF THE PROPERTY IN TWO PARCELS AS REQUIRED BY UTAH RULES OF CIVIL PROCEDURE 69 (e) 3, RESULTING IN GROSSLY INADEQUATE BIDS, TO THE PREJUDICE OF PLAINTIFF.

The part of Rule 69 (e) 3, which we are concerned with reads as follows:

"And when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold."
- - - - "The judgement debtor, if present at the sale, may also direct the order in which the property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the officer must follow such directions."

It is the Appellant's contention that the fact the description was of lots 1 and 2, that they are therefore two separate parcels, and should have been sold separately to conform with the rule stated above (Rec. pp. 31, 32, 33, 34, 35, 27).

The respondents rely upon the contention that you can have two or more lots and still only have one parcel containing them. Often a building will be placed on several lots, it would seem reasonable that in such a situation all of these lots would constitute only one parcel. To say that the Rule 69 (e) 3, intended that each of these lots be sold separately would be placing false construction on the rule.

33 C.J.S. Section 210, page 449, states as follows:

"What constitutes separate tract, lot, or parcel. It has been held that it is the title of the debtor himself, as fixed by his deed, which determines whether the property shall be considered as one lot or several for the purpose of an execution sale, but it cannot be said that because a deed describes the property conveyed as certain numbered lots that such lots do or do not constitute separate parcels (Pal-mour v. Roper Ga. 45 S.E. 790). An owner may convert two or more lots into one known parcel by his use of the land (In re Roach, 130 A. 676 Del., Security Trust Co. v. Sloman, Mich. 233 N.W. 216), and a parcel may be single although divided by a street (Mich. Security Trust Co. v. Sloman, 233 N.W. 216)"

In 23 Corpus Juris, Section 589, page 633, Note 34, it states the reason for such a rule:

"Palmour v. Roper, 119 Ga 10, 45 SE 790; Conley v. Redwine, 109 Ga. 640, 35 SE 92, 77 AmSR 389.

(a) REASON FOR RULE. It is well known fact that land lots are laid off purely for purposes of location and description, and have no reference to divisions of land into what are known as tracts, or parcels, except as the two may arbitrarily chance to coincide. Palmour v. Roper,

(b) ILLUSTRATION. Although a tract of land has in fact been laid off into streets and town lots, and is within the limits of an unincorporated town, yet, where there are no visible marks on the surface of the tract to indicate the metes and bounds of the lots, and the only thing in the nature of the street appearing thereon is a recognized public road of the county, a levy upon and sale of the entire tract as one parcel is proper and legal. Conley v. Redwine."

Under our present case the land consists of lots 1 and 2, a house on one lot and the other vacant. The lots of the property adjoin each other and constitute the South half of Block 28, Plat A, Manti City Survey. At the sale all the parties treated the property as a single parcel. Even the Sheriff, witness for the Appellant, when asked why he sold as one parcel, answered that the property has the appearance of being one parcel, though the description covers two lots (Tr. pp. 7). So, also, the bidders each treated the property as one parcel (Sup. Tr. Rec. pp. 4, line 13, page 6 line 14, pp. 7 line 20). From the above evidence it would therefore appear that the property though described in two lots is actually one parcel, and the sale was therefore made according to Rule 69 (e) 3. There was some evidence that a fence

was dividing the lots; giving Mr. Beal (Tr. pp 9, line 16, Tr. pp. 10, line 22), there was also evidence given by Mr. Peacock saying there wasn't a fence (Sup. Tr. Rec. pp. 11, line 18). There was no evidence to show if the alleged fence was on the line dividing the lots. If there was such evidence it would appear that the bidders at this sale would have asked the Sheriff if the sale included property beyond the fence, or that the defendants would have raised the question. The only parties who feel that this consisted of two separate parcels are the Appellant Bank and it's attorney, and there were no such instructions in the Order of Sale which was prepared by them (Rec. pp. 31, 32, 33, 34, 35, 27).

It is therefore the contention of the Purchaser Respondent that the sale was made in conformity with the Rule 69 (e) 3, of Utah Rules of Civil Procedure, and the Appellant has failed to state any Cause of Action against him. Appellant does not plead or claim any wrongful act on the part of the respondent.

For the purpose of this argument however, let us assume that because this property was described as lots 1 and 2, it is two different parcels. What would be the effect on appellant's contention? It has been held that the statutory provision for a division of property is merely directory (23 C.J. p 633 note 23) and that the propriety of a sale en masse is a matter within the discretion of the officer, having in view the object to make the property bring the best possible price, as is also the question as to the divis-

ibility of the property and the size and value of the parcels offered, and the officer's determination of this question is, in the absence of fraud, conclusive (Ind. Nelson v. Bronnenburg, 81 Ind. 193). In this case the Sheriff sold the property the way he did because it had the appearance of being in one parcel, and because there were no instructions to the contrary in the order prepared by Attorney for the Appellant. So also, by the actions of the bidders it is doubtful that the Sheriff could have received a higher bid even though offered in two parcels. Defendant states that he does not think it could have been sold for more money (Sup. Tr. Rec. pp. 14, line 8).

It can also be argued by the Purchaser Respondent that both the plaintiff and the defendants waived their rights to object to the procedure used by the Sheriff in selling this property.

33 C. J. S. Section 210, c, page 450, states:

"As the rule requiring a sale in parcels is intended for the benefit of execution defendant, compliance with it may be waived by him (Clover v. W.B. Scarborough Co. 238 P. 1104 Calif., Mont. Fox v. Curry, 29 P 2nd 663, 23 CJ p 635, note 55, O'Brien v. Davis, 103 Ala. 429, 15 S. 860, where it was intimated that by being present at the sale and failing to make any objection defendant waives any irregularity in selling en masse).

33 C.J.S. Section 228, page 485 under c. Execution Creditor it is stated:

“When not transcending the mandate of his writ, the Sheriff may be considered in some degree as the judgement creditor’s agent, and the latter is as a rule estopped from assailing the validity of a sale made by virtue of such writ (Ga. Lynn v. New England Mortg. Sec. Co., 26 S.E. 750, 98 Ga 442, 23 C.J. p 669 note 91).”

In this case the attorney for the Appellant prepared the Order of Sale and also the Decree for Foreclosure, if he desired that the property be sold in separate lots he should have so notified the Sheriff in the respective Order and Decree. Instead Appellant advertised the two lots for sale as one parcel, to-wit, “Lots 1 and 2 of Block 28, Plat “A” of Manti City Survey” (Rec. pp. 32). If the Appellant had intended the Sheriff to sell the property in two parcels, he would have advertised them for sale as Lot 1 of Block 28, Plat “A” of Manti City Survey, and Lot 2 of Block 28, Plat “A” of Manti City Survey. To allow the Appellant to come in and get the sale set aside because the Sheriff acted according to his own Order would be without merit. Therefore it appears to the Respondents that the Appellant has waived any right to object to this sale.

The Appellant states that the property was sold at a sum grossly inadequate. May the Court recall that at the time of the sale there were three bidders present, each a resident of Manti, one with experience as an appraiser (Sup. Tr. Rec. pp. 3), and the other owners of property. None of their bids were over \$501.00. Appellant has one witness which states the property to be worth \$1400.00 or

\$1500.00, but that the market price is what he can get out of it.

This witness, a real estate broker, was not however at the sale, although he had an opportunity to so be. He also owned a piece of property in the same block with a house on it, and he sold it for \$1000.00, he did not state what he paid for it.

50 C.J.S. Section 59, p 677 states as a general rule:

"A judicial sale usually will not be vacated or set aside for mere inadequacy of price, unless the inadequacy is so gross as to raise a presumption of fraud, or to shock the conscience of the court."

Page 682 states:

"Ordinarily, the highest bid made at an open judicial sale fairly conducted, after full notice, in the face of such competition as can be attracted, is a fair and just criterion of the value of the property at that time, (Va. Schweitzer v. Stroh, 30 S.E. 2nd 689) and opinions, affidavits of undervaluation, and the like, are entitled to little weight in comparison with the fact established by the sale and it's results. The mere tender of an upset bid of substantially more than the sum realized at the sale is not conclusive that the property sold for an inadequate price."

For the above stated reasons the Sale price of \$501.00 was an adequate bid for the property sold.

That the Sale made by the Sheriff was conducted according to Utah Rules of Civil Precedure 69 (e) 3, in that the property was but one parcel.

Appellant's Point II

THAT THE PROCEEDING BY THE SHERIFF IN FAILING TO NOTICE SALE AT ELEVEN O'CLOCK A.M., AS INSTRUCTED BY PLAINTIFF AND AS UNDERSTOOD BY PLAINTIFF AND SHERIFF, AND HIS FAILING TO NOTIFY PLAINTIFF OF HIS FAILURE TO COMPLY WITH THE INSTRUCTION AND CONFORM WITH SUCH UNDERSTANDING AND THEREBY PRECLUDING PLAINTIFF FROM BEING PRESENT, RESULTED IN GROSSLY INADEQUATE BIDS AND SALE PRICE OF THE PROPERTY, AND CONSTITUTED A PREJUDICIAL IRREGULARITY.

The question here seems to be whether a private conversation between the Sheriff and the Attorney for the Appellant should be binding upon the court and the purchaser. To allow such a conversation to be grounds for setting aside a Foreclosure sale involving innocent third parties would be to say that Purchasers at Execution Sales and Foreclosure Sales have no rights what-so-ever. The evidence is pure hearsay as to the purchaser and is not binding on him or anyone.

If the conversation did take place, it would appear that the Appellant's remedy would be against the Sheriff for failing to act according to instructions. None of the respondents nor the court had any knowledge of this alleged conversation until after a valid Sheriff's sale had been completed, nor until Appellant made it's motion to set aside the sale. If a mistake was made, it was made by the careless-

ness of the Attorney for the Appellant, or the Sheriff, and the remedy should be against them. To allow the Appellant to come in and complain against this innocent third person, the purchaser, would be to give authority to private conversations, and to ignore the Order of the Court. The Sheriff's duty is to act according to the Order of the Court (Rec. pp. 31, 32, 33, 34, 35, and 27), and in the present case he so acted.

Appellant's Point III

THAT THE SALE PRICE ACCEPTED BY THE SHERIFF WAS GROSSLY INCOMMENSURATE TO THE FAIR MARKET VALUE OF THE PROPERTY SOLD.

The respondents have argued this same statement under it's discussion of Appellant's Point No. 1.

50 C.J.S. Section 59, page 681, states:

"d. Proof The burden of proving inadequacy of price sufficient to warrant setting aside a judicial sale rests on the complaining party, and the court may consider all proper and relevant circumstances in determining the matter."

The District Court of Sanpete County after hearing the witnesses for the Appellant and the witnesses for the Respondent held that the sale was consistent with the value of the property on the execution sale (Rec. pp. 46).

59 C.J.S. Section 750, page 1382, states as follows:

"Notwithstanding alleged additional circumstances,

however, setting aside the sale may not be proper or necessary in a particular case, as where the superior equity still remains with the purchaser, or where the mistake, irregularity, or other circumstance had nothing to do with the price the property brought, or the price obtained is not shown to have been inadequate. Each case depends largely on its own peculiar facts, and whether the circumstances, coupled with inadequacy of price, are sufficient to warrant setting aside the sale is a matter largely within the discretion of the trial court."

The appellant would have the Court believe that the value of this property is the price a judgement creditor would bid in his debt on a foreclosure sale. That is not so. A judgement creditor may pay a very high price if he figures that his deficiency judgement is worthless, and may pay a very low price if he has no competition and he knows the deficiency judgement is valuable. To say therefore that the bid in the present case is the value of the land, when there was an actual sale and competition between three bidders to find the purchase price, would not be true.

The value of the property sold on Foreclosure Sale is the amount the purchaser paid for it, and may be much less on such sale than on the open market. The reason being that the purchaser doesn't necessarily get good title and his title is also subject to redemption. This appeal is a good example of the additional costs a purchaser is required to go to in the protection of the title purchased.

The Appellant would have the Court believe that justice lies only on the side of the Appellant. They state

on page 10 of their Brief:

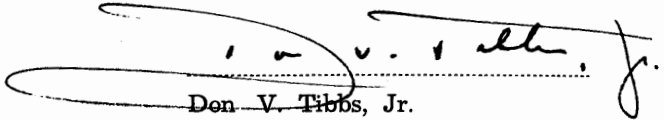
“The writers do not intend to impute malfeasance on the part of the Sheriff in this instance. But will it be wise on the part of this Court to affirm the dereliction on the part of this Sheriff and set a precedent?”

The respondents submit the decision and the order appealed from, and desire the Court to realize that there is no dereliction of duty on the part of the Sheriff. He followed the Order of the Court in performing this sale. He noticed the property for sale in accordance with the written Notice of Sale given to him by the Appellant's Attorney. He used his best judgement in selling this property in one parcel. He accepted the highest bid from the bidders present at the sale. He made a correct return according to law. The only precedent that will be made in sustaining this decision and order, is that of sustaining a Foreclosure Sale made according to the Rules of Civil Procedure for the State of Utah. To make any other decision would be to cause injustice to the purchaser, and to set a precedent for setting aside Foreclosure Sales based upon private conversations outside the knowledge or jurisdiction of the Court, and upon the carelessness of the Appellant in failing to attend the sale at the time the property was advertised for sale. Certainly the Appellant is bound by the advertised notice of sale, as all other persons are so bound.

In conclusion, there is only one question to decide. Should a judgement creditor be able to set aside a Valid

Foreclosure Sale because he allegedly made a mistake,
and forgot to come to the sale.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Don V. Tibbs, Jr.", is written over a horizontal dotted line. The signature is stylized with a large loop at the end. Below the dotted line, the name "Don V. Tibbs, Jr." is printed in a serif font.

*Attorney for the
Respondents.*

Manti, Utah