

1951

# The Commercial Bank of Utah v. Leonard A. Madsen v. Bob Jeppsen : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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P. N. Anderson; Eksayn Anderson; Attorneys for Plaintiff and Appellant;

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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.

FILED

NOV 13 1951

Clerk, Supreme Court, Utah

Case No. 7584

PETITION FOR REHEARING  
AND BRIEF IN SUPPORT THEREOF

P. N. ANDERSON,  
EKS AYN ANDERSON

Attorneys for Plaintiff and  
Appellant

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PETITION FOR REHEARING  
AND BRIEF IN SUPPORT THEREOF

*To the Honorable Members of the Supreme Court of  
Utah:*

Comes now the plaintiff who is the appellant in the  
above entitled causes and respectfully petitions this

Court to grant plaintiff and appellant a rehearing of the above entitled cause for the following reasons and upon the following grounds;

That the Court erred in affirming the order of the lower Court denying plaintiff's petition to set aside sale of real estate on the ground of inadequacy of sale price coupled with irregularity on the part of the sheriff in giving notice of sale, and therein failing to recognize and apply the rule accepted by the great weight of authority and applicable to cases such as the case at bar.

WHEREFORE, your petitioner respectfully prays that this Court re-examine the evidence and the law in this case to the end that the opinion correctly reflects the evidence, and the law applicable thereto, and the order of the lower Court be reversed.

P. N. ANDERSON,

*Attorney for Plaintiff and  
Appellant.*

#### CERTIFICATE OF MERIT.

I, P. N. Anderson, hereby certify that I am one of the attorneys for the plaintiff and appellant named in the foregoing case, that I have carefully re-examined the evidence in the above entitled cause and the law applicable thereto, and in my opinion the foregoing Petition for Rehearing is meritorious and that the evidence and law applicable should be re-examined by this Court to

the end that the errors alleged in the petition are corrected.

P. N. ANDERSON,  
*Attorney for Plaintiff and  
Appellant.*

BRIEF IN SUPPORT OF PETITION  
FOR REHEARING

THE COURT ERRED IN AFFIRMING THE ORDER OF THE LOWER COURT DENYING PLAINTIFF'S PETITION TO SET ASIDE SALE OF REAL ESTATE ON THE GROUND OF INADEQUACY OF SALE PRICE COUPLED WITH IRREGULARITY ON THE PART OF THE SHERIFF IN GIVING NOTICE OF SALE, AND THEREIN FAILING TO RECOGNIZE AND APPLY THE RULE ACCEPTED BY THE GREAT WEIGHT OF AUTHORITY AS APPLICABLE TO CASES SUCH AS THE CASE AT BAR.

This Court recognizes that the evidence in the case shows that the property involved was security for an indebtedness up to the sum of \$1950.00; that it sold for only \$501.00; that plaintiff's evidence showed its value between \$1400 and \$1500; and that plaintiff in its petition to set aside the sale submitted its bid in the sum of \$1950.00 for the property. Further, and this is significant in the light of the remarks in the dissenting opinion, this Court recognized that it was defendant's evidence to the effect the value was only \$475 to \$500.

There can be no equivocation as to the sheriff having been instructed to fix the time of sale at 11 A.M., which

would give plenty of time for the *interested parties to be over to bid on the property*; and that plaintiff's place of business was 43 miles distant. (Italics writer's) And that it was the understanding that he, the sheriff, make the time for sale at 11 A.M., but that he forgot. Also that he, the sheriff, never notified the attorney for, or any officer of the Bank that the sale was set for 10 A.M. instead of 11 A.M. Those facts are established by the testimony of the sheriff. And this Court concedes that an agent of the Bank appeared, wanting to bid, a few minutes after the sale.

The foregoing facts definitely shows (1) an inadequacy of sale price, and (2) a serious irregularity in the proceedings on the part of the sheriff. We also have the circumstance of the defendants depreciating the value of the property which will warrant not just a little suspicion.

The Bank as mortgagee had a special interest in the sale. *Dewey vs. Linscott*, 20 Kan. 684. (And this interest was reflected in the instruction to the sheriff.) That case was cited on the proposition of interest in an old leading case, *MEANS ET AL VS. ROSEVEAR*, (Kan) 22 Pac. 319, page 321, wherein the rule contended for by petitioners is laid down as follows:

“Inadequacy of price, taken alone, is seldom, if ever, sufficient to authorize the setting aside of sheriff's sale; but great inadequacy of price is a circumstance which Courts will always regard

with suspicion, and in such case slight additional circumstances only are required to authorize the setting aside of sale." *Citing Bank vs. Huntoon*, 35 Kan. 577, 11 Pac. 369.

42 C. J. 235—Sec. 1876. Inadequacy of Price. "...The general rule against setting aside a foreclosure sale for inadequacy of price does not apply where there are other circumstances connected therewith having a tendency to cause such inadequacy."

Original brief of appellant is replete with authorities sustaining the foregoing propositions.

The Writer takes cognizance of the suggestions of this Court of negligence on his part in relying upon the understanding specifically had with the sheriff, but having known the officer for so many years as such officer there was full warrant for such reliance, as evidenced by his frank testimony,—that it was the understanding he, the sheriff, make the time for sale at 11 A. M., but that he forgot and never notified the writer or his client. There was no careless mistake of time, but even in case of mistake of time on the part of the attorney it was held in *WRIGHT VS. CAPRARELLA*, 205 App. Div. 559, 199 N. Y. S. 864;

"...Where the attorney of the mortgagor had noted the time of sale on his calendar at 2 P.M. when the order of sale fixed it at 10 A.M., in consequence of which the property, in the mortgagor's absence, was sold at an unconscionably low amount the sale will be set aside."



The writer respectfully urges that the laws as framed by the weight of authority entitles the Appellant to a rehearing and a decision in its favor on the circumstances of this case. However, while so viewing this matter the writer is reminded of a commentary of Blackstone: COOLEY'S BLACKSTONE Vol. 1, 4th Ed, page 55 (Original Sec. 61);

“But, lastly, the most universal and effectual way of discovering the true meaning of the law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the treatise inscribed to Herennius. There was a law, that those who in a storm forsook the ship should forfeit all property therein; and that the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who, by reason of his disease, was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and claimed the benefit of the law. Now here all the learned agree, that th sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel; but this is a merit which he could never pretend to, who neither staid in the ship upon that account, nor contributed anything to its preservation.”

We may surmise that the plaintiff was sick about its security, but, unlike the sick personage in the commentary, it has purposely tried to save it, because of its belief that by virtue of the reason and spirit of the law it is entitled to prevail.

We believe, in the words of the dissenting Justices, that as a matter of fair play plaintiff should be granted a rehearing and the sale should be set aside.

Respectfully submitted,

P. N. ANDERSON,  
EKS AYN ANDERSON  
*Attorney for Plaintiff and  
Appellant.*

By P. N. Anderson  
Address: 67 South Main, Nephi, Utah.