

1980

Utah Bank & Trust v. James H. Quinn and James H. Wuinn, Jr. : Brief of the Respondents

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

UTAH BANK & TRUST,
a Utah Corporation,

Plaintiff-Respondent

vs.

JAMES H. QUINN and
JAMES H. QUINN, Jr.,

Defendants-Appellants

Case No.
16788

RESPONDENT'S BRIEF

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Clerk of Court

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JAMES H. QUINN, Jr.,

Defendants-Appellants

Case No.
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RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action by plaintiff against defendants seeking to recover a deficiency judgment after disposition of collateral.

DISPOSITION BELOW

The Court entered judgment for the plaintiff based upon the verdict of the Jury granting plaintiff a deficiency judgment in the sum of \$148,387.61 plus costs and attorney fees.

RELIEF SOUGHT ON APPEAL

Decision affirming lower court judgment.

STATEMENT OF FACTS

The appellants are the Defendants, Dr. James H. Quinn and his son, James H. Quinn, Jr. (Jay Quinn) The respondent is the Plaintiff, Utah Bank & Trust.

Jay Quinn was the President of Alpine-Rennsport, a car dealership in Salt Lake City. The plaintiff provided financing for much of the inventory of the company on a trust receipt basis. Dr. Quinn

signed a Continuing Guaranty in favor of the plaintiff to guarantee the obligations of the company.

It is worthy to report in this sequence two seemingly unrelated matters that become material at a later time:

—The first is that Plaintiff had previously granted unto Jay Quinn a personal loan of \$8,500.00. (Tr. 19)

—The second incident occurred in May 1977 wherein Jay Quinn came into the bank and requested that the bank wire the sum of \$41,400.00 to an eastern location. The check that Quinn used in paying for the wire which was drawn on another bank, was not honored and was never paid. (Tr. 19, 20)

In December 1977, the corporation sold some of the cars out of trust in that they, upon receiving the sales price from various cars, failed to pay any of the proceeds to the bank. (Tr. 13, 219) The amount that was sold out of trust was in the sum of \$57,500.00. (Tr. 220)

On December 17, 1977, Mr. George Cook, Branch Manager of plaintiff, after notifying Jay Quinn and others, repossessed the car inventory of the corporation—which consisted of thirteen cars. A boat was also repossessed. (Tr. 12, 22) Two of the cars were returned to Jay Quinn so that he could trade them in on a car for his personal use. (Tr. 22)

On December 23, 1977, Cook and Mr. M. H. Atwood, Executive Vice-President of the plaintiff, met with Jay Quinn and Dr. Quinn to discuss the matter. At this time the following pertinent events occurred:

—The Defendants signed a Promissory Note in the amount of \$198,240.00 payable April 21, 1978. (Tr. 18, 19) The amount of the note was based upon the following:

\$ 41,400.00	Dishonored check given to bank to pay for a bank wire. (Tr. 19, 20)
8,500.00	Personal loan (Tr. 19)

57,500.00	Amount sold out of trust. (Tr. 220)
90,840.00	Remaining amount of flooring obligation.
<u>\$198,240.00</u>	

—All present discussed the matter of disposition of the automobiles and boat. Jay Quinn indicated that he had a number of friends that were car dealers and he preferred that the cars be placed with one or more of them for sale. (Tr. 22, 86) It was mutually decided that the automobiles be sold through local car dealers.

—Jay Quinn pledged his interest in a house, by way of an Assignment of Real Estate Contract, as security for the note.

—There was a discussion and understanding among the parties that there would be a deficiency even after applying the sales proceeds of the collateral. There was some mention by Dr. Quinn that he would sell some property in Texas to cover the remaining deficiency. (Tr. 86)

Shortly after the December 23, 1977, meeting the parties undertook to sell the cars and the boat. With respect to the efforts to do so, these pertinent events transpired:

—A few days after the December 23 meeting, Jay Quinn called George Cook and informed him that he had made arrangements with Dewey Wood Motors to display and sell some of the cars on their lot. (Tr. 22) Accordingly, seven of the eleven cars were moved to the Dewey Wood Motors' lot. One car was sold. (Tr. 23)

—The cars were thereafter moved to other lots in order to obtain better prices. (Tr. 24)

—Jay Quinn left for Arizona shortly after December 23 and was there until approximately January 2, 1978. He was in Arizona during some of January 1978 and moved to Arizona finally in February 1978. (Tr. 198)

—There were a number of expenditures for repairs of the cars to make them ready for sale. The cars were all used and in less than top condition. (Tr. 68-74)

—At the time the boat was picked up it was reported by Jay Quinn that it had been winterized. (Tr. 35) Jay Quinn's manager also verified that Jay Quinn reported to him that the boat was prepared for winter. (Tr. 211)

—At the time the boat was being prepared for sale, it was noticed that there was a cracked block.

—The boat was advertised for sale in the newspaper on three different occasions and by word of mouth. (Tr. 33) Plaintiff received many phone calls and much interest was shown concerning the boat. The boat was sold on March 26, 1979, for \$3,000.00 as is; which was based upon the highest offer given.

—By way of recapitulation the cars were sold as follows:

Date (1978)	Description	Automobile Dealer Location of Sale	Amount
Jan. 19	1975 Ford Granada	Dewey Wood Motors	\$ 1,500.00
Feb. 17	1973 Jaguar	Aagaard Motors	8,500.00
Mar. 13	1973 Porshe	Ride-a-Way Motors	7,600.00
Mar. 21	1975 Ferrari	Aagaard Motors	13,500.00
Mar. 21	1974 Audi	Ride-a-Way Motors	2,500.00
Mar. 21	1975 Porshe	Aagaard Motors	11,500.00
Apr. 25	1975 Alfa Romeo	Aagaard Motors	4,500.00
May 5	1973 Porshe	Aagaard Motors	7,100.00
June 20	1975 Toyota P/U	R. Kingsland*	2,600.00
June 27	1973 BMW	Aagaard Motors	2,500.00
July 13	1973 BMW	Aagaard Motors	3,000.00

*R. Kingsland was not a car dealer but an individual who purchased the car after reading an ad in the newspaper.

—Jay Quinn acquired a buyer for the house which was pledged as security, and the house was sold on March 27, 1978. The net equity realized from the sale of the house was in the amount of \$23,854.60 which was applied to the reduction of the note. (Tr. 37, Ex. 17-P)

—After applying the proceeds from the sale of all of the cars, the boat, and the house to the promissory note and adding appropriate interest, the balance due as of September 5, 1979, was in the amount of \$148,387.61. (Tr. 41, Ex. 17-P)

ARGUMENT

POINT I

THE FAILURE OF THE PLAINTIFF TO GIVE NOTICE OF THE SALE OF THE COLLATERAL DOES NOT PRECLUDE THE PLAINTIFF FROM OBTAINING A DEFICIENCY JUDGMENT.

At trial the court held as a matter of law that the Plaintiff did not give Defendants written notice of the sale of the collateral. As previously indicated, the collateral was repossessed on December 17, 1977. On December 23, 1977, both of the defendants met with representatives of the bank during which time a discussion was held concerning disposition of the collateral. It was suggested by Jay Quinn, and there was a consensus among the parties, that the automobiles should be sold by display on used car lots. Seven of the automobiles were originally displayed on the Dewey Wood's car lot at the initial suggestion of Jay Quinn. All but one of the automobiles were sold on used car lots after display.

The jury found as fact by way of special verdicts the following:

PROPOSITION NO. 1

Was the disposition of the collateral by Utah Bank & Trust made in a commercially reasonable manner? Yes.

PROPOSITION NO. 3

The court has instructed you that the plaintiff failed to give written notice to the defendants of the proposed sale of the collateral. Please answer the following: What loss, if any, was caused to the defendants by the failure to give notice of the sale of the collateral?

Amount: None.

Statutory references applicable to this case are from the Uniform Commercial Code, Title 70 A, Utah Code Annotated, 1953, as amended:

70 A-1-106. Remedies to be Liberally Administered.

(1) The remedies provided by this act shall be *liberally administered* to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or *special nor penal damages* may be had except as specifically provided in this act or by other rule of law. (Emphasis added)

70 A-9-501. Default

(3) To the extent that they give rights to the debtor and impose liabilities on the secured party, the rule stated in the subsections referred to below may not be waived or varied except

as provided with respect to compulsory disposition of collateral (subsections (1) of Section 70 A-9-505) and with respect to redemption of collateral (Sections 70 A-905(6) *but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable.* (Emphasis added)

70A-9-504. Secured Parties Right to Dispose of Collateral After Default—Effective Disposition

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. (3) 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 and 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 and place of any public sale or 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, if he has not signed after default a statement renouncing or modifying his right to notification of sale . . .

70A-9-507. Secured Parties 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 . . .

(2) The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of the sale, or if he has otherwise sold in conformity with reasonable commercial prac-

tices among dealers in type of property sold he has sold in a commercially manner . . .

In dealing with the question of whether a creditor is entitled to a deficiency judgment after having sold the collateral without notice to the debtor there is a split of authority.

Some jurisdictions hold that failure to give notice to the debtor of the sale of the collateral constitutes an absolute bar to a deficiency judgment. The state jurisdictions that have so held are California, Florida, Georgia, Maine, Nebraska. There are cases that have also held in Iowa, Illinois, and New York. However, in these last three jurisdictions there are also other cases that have allowed a deficiency judgment.

In an analysis of the cases of these jurisdictions that do not allow a deficiency judgment the following reasons have been given: (1) Solution to the question is found in Pre-Code Law where under comparable circumstances a deficiency judgment was denied. See *Skeels v. Universal C.I.T. Credit Corp.* 222 F. Supp. 696 (W.D. Pa. 1963). (2) Several state statutes contain provisions denying deficiency judgments when notice of the resale is not given: See: White, *Representing the Low-Income Consumer In Repossession, Resales, and Deficiency Judgment Cases*, 3 UCC L. J. 224. (3) Deficiency judgments have not been allowed where the secured transactions is in the form of an installment sale contract, particularly where the contract did not provide for a deficiency judgment.

Other jurisdictions permit a recovery of a deficiency judgment even though notice is not given by the creditor to the debtor of the disposition of the collateral. The following jurisdictions have so held:

- Alaska: Kobuk Engineering and Contract Services, Inc., v. Superior Tank & Construction Co.—Alaska Inc., 22 UCC Reporting Service 854
- Arkansas: Universal CIT Credit Company v. Rone, 453 S.W. 2d 37, (1970)
- Colorado: Community Management Assoc. of Colo. Springs v. Tousley (1973) 11 UCC Reporting Service 1101

Conn.:	Savings Bank of New Britian v. Booze, (1977) 23 UCC Reporting Service 556
Del.:	Ruston v. Shea (1976) 22 UCC Reporting Service 274
Kansas:	Barbour v. United States 22 UCC Reporting Serv- ice 850
Illinois:	Tauber v. Johnson (1972) 22 N. E. 2d 180
Indiana:	Hall v. Owen State Bank (1977) 23 UCC Re- porting Service 267
Iowa:	Beneficial Financing Company of Black Hawk County v. Reed (1973), 212 N.W. 2d 454
Nevada:	Levers v. Real King Land & Investment Co. (1977) 21 UCC Reporting Service 344
N. Mex.:	Clark Leasing Corp. v. White Sands Forrest Products, Inc. (1975) 87 N.M. 451, 535 P. 2d 1077
N. Y.:	Security Trust Company of Rochester v. Thomas (1977) 22 UCC Reporting Service 1305
Wash.:	Merchants Leasing Company v. Clark (1975) 14 Wash. app. 317

From the jurisdictions allowing a deficiency judgment as noted above, there has emerged a number of distinct positions regarding the effect of a failure to notify. Some courts suggest that Section 9-507 of the Uniform Commercial Code (*supra.*) which provides that the debtor has the right to recover from the secured party any loss occasioned by a failure to comply with the provisions relating to the disposition of collateral is a sole, sufficient and adequate remedy. In *The Merchants Leasing Co. v. Clark* 14 Wash. App. 317, 540 P. 2d 922 (1975) the court held that the creditor did not lose his right to a deficiency judgment against the debtor by selling the repossessed equipment without giving notice, but the debtor would be entitled to have any damages caused to them by such lack of notice credited against the deficiency judgment.

There are other jurisdictions that hold that a denial of the de-

ficiency judgment deprives the secured party to be put in as good a position as if the other party had fully performed. See: 409 *Ore. L. Rev.* 65, 69 (1969).

Still other jurisdictions, such as Arkansas, announce the rule that failure to give notice does not result in a bar to a deficiency judgment but creates a presumption that the collateral was worth at least the amount of the debt—that the burden is then placed on the secured party to prove what would have been realized from a commercially reasonable sale. If the secured party is unable to overcome the presumption, he recovers no deficiency. If the presumption is rebutted by the secured party proving the amount which would have been realized from a commercially reasonable sale, such amount forms the basis for computing the deficiency which the secured party will be allowed. See *Norton v. National Bank of Commerce*, 240, Ark. 143, 398 S.W. 2d 538 (1966).

The no deficiency rule has been criticized by a number of law review articles. In *Valparaiso University Law Review*, Vol. 7, 1973 p. 474 it is stated:

The Code must function on the theory that the overwhelming number of commercial transactions are executed in good faith, and this assumption is most likely accurate. In those relatively few instances in which the secured party, for what ever reason, has failed to comply with section 9-504 (3) notice requirements, it is better to adopt a flexible standard which would allow the secured party to be made whole and yet which would protect the debtor on a case-by-case basis. This protection is already afforded by 9-507: Such protection does not require an additional judicially created penalty denying the secured party's right to a deficiency judgment.

In *University of Colorado Law Review*, Vol. 44, 1972, p. 230 it is stated:

The absolute defense approach produces a result which goes beyond compensating the debtor for his loss and thus seems to penalize the creditor. The debtor is relieved of the deficiency under this approach without even showing the loss. This would seem inconsistent with the Code's policy against punitive damages since it may place the debtor in a better

position than he would have been had the creditor met the requirements, all at the creditor's expense.

In *Utah Law Review*, Vol. 3, 1979 at p. 580 it is stated:

From the debtor's standpoint an automatic denial of a deficiency judgment for failure to notify is preferable to producing evidence of what would have happened had he been notified or to proving the damage sustained through being denied the right to redeem. This recognition merely exposes the major shortcoming of the no deficiency rule. It creates a great potential for giving the debtor an undeserved remedy, thereby imposing a penalty on the secured party, and undermining the U.C.C.'s announced policy against windfalls and penalties. The realization that the no deficiency rule applies indiscriminately to even inadvertant or accidental omissions to notify only magnified the inadequacy of that position.

This jurisdiction has decided a number of cases in which the matter of giving notice to the debtor was at issue. In *Zion's First National Bank v. Hurst*, 570 P. 2d 1031 (Utah 1977) the secured creditor, Zion's First National Bank, sued the defendant to recover \$50,000.00, the amount of a Guaranty Agreement which the defendant had executed. The plaintiff's loan was secured by collateral which included five airplanes. The airplanes were sold and realized the sum of \$72,500.00, which was applied to the total debt of \$250,893.20, leaving a deficiency of \$178,393.00. The extent of the defendant's guarantee was in the amount of \$50,000.00. On appeal the defendant alleged that the plaintiff did not notify him of the time and place of the sale of the five airplanes and thus urged that the plaintiff should be precluded from obtaining any deficiency judgment against him. Although the matter of notice was not raised in the pleadings, the court stated in disposing of this issue:

More importantly, the usual rule is that failure to so notify does not release the debtor from any deficiencies that may arise: but upon such failure he may get credit for (or recover) only for any loss caused by the failure to so notify. In that connection, inasmuch as the airplanes sold for \$72,500.00, they would have to have brought nearly three times that amount, that is \$200,000.00 or more, before the pro-

ceeds therefrom would have relieved the defendant from any liability under his Guaranty.

In *Cessna Finance Corp. v. Meyer*, 575 P. 2d 1048, (Utah 1978) the creditor brought an action against the guarantors to recover a deficiency following repossession of the collateral. The debtor claimed that the notice of the sale of the collateral was insufficient. The court held that it was and stated:

An earlier case, *Zion's v. Hurst*, is dispositive of some of the issues in this case This court held that Hurst had not been damaged or prejudiced by the sale and cited the general rule that a failure to notify does not release the debtor—it merely affords him credit for any loss caused by the failure to notify. This common law has been codified in the Utah Uniform Commercial Code.

The court then cited Section 70 A-9-507.

In *FMA Financial Corporation v. Pro-Printers et. al.*, 590 P. 2d 803, (Utah-1979) the secured creditor asked for a deficiency judgment in the amount of \$21,975.96. The secured creditor repossessed some equipment and appraised the equipment at \$10,250.00 on its repossession report. Four months earlier an appraiser in behalf of the debtor appraised the equipment between \$15,000.00 and \$17,000.00. The equipment was stored in a garage for eight months and finally purchased by a third party for \$4,500.00. The court held that the secured creditor did not give notice of the sale and did not dispose of the collateral in a commercially reasonable manner and stated:

Because FMA did not give the required notice *and* did not conduct the sale in a commercially reasonable manner, it is barred from receiving a deficiency judgment. (Emphasis added)

What do the Utah cases say? It has been noted that the Utah rule has not been fully enunciated. See *Utah Law Review*, Vol. 3 (1979) page 567. The *Cessna* case, *supra.*, and the *Zion's* case, *supra.*, hold that failure to notify the debtor of the sale of the collateral does not release the debtor from any deficiency that may arise, but upon such failure, the debtor may receive credit for any loss occasioned by the

failure to give notice. The *FMA* case, *supra*, holds, at least on those particular facts, where the secured creditor did not give notice *and* did not dispose of the collateral in a commercially reasonable manner, they are not entitled to a deficiency.

To hold that failure to give notice constitutes an absolute bar in *every* fact situation creates windfalls, forfeitures and penalties. By way of a hypothetical to illustrate, assume that a loaning institution grants a loan to a debtor in the sum of \$100,000.00. The debtor had a substantial net worth. The bank did not require full security but did take a security agreement wherein \$10,000.00 worth of collateral was pledged.

The debtor defaults, and the creditor repossesses the collateral, but neglects to give notice of the sale of the collateral. The collateral is disposed of in a commercially reasonable manner. The creditor thereupon has a deficiency in the amount of \$90,000.00. To bar a deficiency judgment in this hypothetical case for failure to give notice would be a windfall to the debtor and would constitute a forfeiture and penalty—all contrary to the spirit of the UCC.

The facts in the present case are similar. Defendants signed a promissory note in the amount of \$198,240.00. This amount included a dishonored check in the amount of \$41,400.00 and a personal loan in the amount of \$8,500.00. The amount also represented \$57,500.00 sold out of trust. There was a discussion and understanding among the parties that there would be a deficiency even after applying the sales proceeds of all of the collateral. There was some mention by Dr. Quinn that he would sell some property in Texas to cover the remaining deficiency—which was never done.

As to the disposition of the collateral, the jury found that the collateral was disposed of in a commercially reasonable manner, and the facts are more than sufficient to show that the collateral was disposed of in a commercially reasonable manner.

In *American State Insurance Co. v. Miller, Adams and Crawford*, 557 P. 2d 756 (Utah 1976) sureties obtained a deficiency judgment against defendants who were parties to a construction bond. The judgment was obtained by default, but the defendants later on made a motion to compel satisfaction of the default judgment on the basis that the surety failed to notify the defendants of the sale of

certain collateral that was pledged as security for the surety bond. The motion was denied. Justice Crockett, in a concurring opinion stated:

It is undoubtedly true that the requirement of Section 7 A-9-504 (3) that the secured creditor (plaintiff) give the debtor (defendants) notice of sale of the collateral is to afford the debtor an opportunity to see that a fair price is paid therefor and that he get adequate credit on his debt.

It strikes me as unrealistic and unfair to rule that, regardless of actual value, the sale of the pledged property is worth only a small fraction of the judgment and thus the plaintiff would be cheated out of the remainder of his debt. On the other hand, to permit the creditor to sell the pledged property without notice may result in its being sold for much less than its fair value and thus deprive the debtor of credit he is entitled to.

It is my view that the court should not apply any unvarying and rigid rule, but should examine the total situation and determine what is fair and reasonable. Justice requires the rule to be that if the sale of the collateral is not conducted according to the requirements of the statute, that should neither automatically and conclusively bar the plaintiff from claiming payment of the rest of the judgment, nor should the amount received at the sale be regarded as conclusive evidence that the fair value of the property was received, and thus determine the amount which the defense are entitled to as credit on the judgment.

POINT II

FAILURE TO GIVE NOTICE REQUIRED BY SECTION 70A-9-504 DOES NOT AS A MATTER OF LAW MAKE THE SALE OF COLLATERAL COMMERCIALY UNREASONABLE.

Appellants urge in their brief that since the Respondent did not give written notice to Appellants of the sale of the collateral, that the sale, therefore, was not made in a commercially reasonable manner.

This is not so and is not in accordance with the law. Section 70A-9-504(3) provides:

(3) Disposition of the collateral may be by public or private proceedings and made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and 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.* (Emphasis added)
Section 70A-9-507(2) provides:

(2) If the secured party either sells the collateral in the usual manner in any resognized market therefor or if he sells at the price current in such market at the time of his sale *or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner.* The principles stated in the two preceeding sentences with respect to sales also apply as may be appropriate to other types of disposition. (Emphasis added)

The foregoing strongly and clearly indicates that the requirement of notice to the debtor is separate and apart from the requirements of disposition of collateral in a commercially reasonable manner. In *North Carolina National Bank v. Burnette*, 247 S.E. 2d 648, (N.C. 1978) the court held that the notice that is required to be given regarding the sale of collateral is separate and distinct from the requirement of commercial reasonableness.

Apparently the Utah court also recognizes that the notice requirement and the requirements of commercial reasonableness are distinct and separate. In the *FMA* case, *supra*, the court stated:

Because FMA did not give the required notice *and* did not conduct the sale in a commercially reasonable manner, it is barred from receiving a deficiency judgment. (Emphasis added)

POINT III

THE COURT DID NOT ERR IN FAILING TO GIVE DEFENDANTS' REQUESTED INSTRUCTION NO. 7 RELATING TO THE ELEMENTS OF A COMMERCIALY REASONABLE SALE.

Appellants further urge that the Court erred in failing to give Appellants' requested jury instruction No. 7. The court did give the following instructions relating to commercially reasonableness:

INSTRUCTION NO. 15

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 and at any time and place and on terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable . . .

INSTRUCTION NO. 16

The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner.

INSTRUCTION NO. 17

While the requirement that the collateral must be disposed of in a commercially reasonable manner may not be waived. Utah State law provides that the parties may by agreement determine the standards by which the fulfillment of this requirement is to be measured if such standards are not manifestly unreasonable.

The foregoing instructions comport with the statutory provisions relating to commercial reasonableness and include the basic elements of that principle.

POINT IV

THERE IS SUFFICIENT EVIDENCE THAT THE APPELLANT DISPOSED OF THE COLLATERAL IN A COMMERCIALY REASONABLE MANNER.

There is more than adequate evidence that the Appellant disposed of the collateral in a commercially reasonable manner. When the collateral was repossessed there was a joint discussion and agreement between the parties that the collateral should be sold and that the cars should be displayed on car dealer lots. (Tr. 22, 86) The

automobiles were displayed on various lots and sold for the highest available prices. (Tr. 52, 67, 73) One of the vehicles was sold to a private party after advertising in the newspaper. (Tr. 28) Prior to the respective sales some of the automobiles (as were needed) were repaired. (Tr. 30, 69, 70, 71) The Appellant and the various car dealers which were displaying the automobiles for sale, advertised in local papers. (Tr. 28, 29) The prices realized from the sale of the automobiles were fair and reasonable. (Tr. 73)

Appellants suggest that since the Respondent did not advertize in trade journals such as Road & Track and Auto Week, that the cars were not sold in a commercially reasonable manner. But, it is worthy to note that Appellants' own expert witness, Ray Pellow, stated: that he sold for Bavarian Motors who deal solely with European, sports and exotic cars; and that their sales offices are located in Salt Lake City; and further—

Q. And isn't it true, that the majority of their sales are to people within the Utah area?

A. That's right. (Tr. 130)

An expert called by Appellant, Randall Aagaard, (who incidentally sold some of the cars for Appellant) testified on cross examination: (Tr. 81)

Q. Would it be fair to state that in order to reach the best market for an exotic foreign car, the best place to advertise would be in Road and Track magazine or Auto Week?

A. Well, I thought that, but I done quite a bit of advertising in both of them and never had any luck whatsoever in either publication.

Q. You've never sold a car through either publication?

A. No.

The disposition of the collateral was disposed of consistent with 70A-9-501 which provides:

The parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable.

In Mount Vernon Dodge, Inc. v. Seattle-First National Bank, 570 P. 2d 702, (Wash. 1977) the secured creditor repossessed among other things, an automobile inventory and sold the same at a private sale. The court stated:

Answering the additional contention of the debtor, we note that a private sale rather than a public sale was permissible. The collateral disposed of consisted of new and used cars, trucks and campers. These items are customarily sold in a recognized market and are subject of widely distributed standard price quotations. . . . We disagree with the assertion that the disposition was not commercially reasonable due to the failure to display and sell the vehicles as a retail dealer. Section 9-507, Official Comment 2 of the Uniform Commercial Code states:

One recognized method of disposing of repossessed collateral is for the secured party to sell the collateral to or through a dealer—a method which in the long run may realize better average returns since the secured party does not usually maintain his own facilities for making such sales. Such method of sale, fairly conducted, is recognized as commercially reasonable under the second sentence of sub-section 2.

. . . . The creditor was not engaged in retail automobile sales, and is not required to be so engaged to dispose of such collateral under RCW 62A 9-504 and 507.

POINT V

THERE WAS LEGAL CONSIDERATION GIVEN BY DR. QUINN FOR EXECUTION OF THE NEW NOTE.

Appellants suggest that there was inadequate consideration given by Dr. Quinn for the new note. Initially Dr. Quinn signed a Continuing Guaranty in the amount of \$180,000.00. After the repossession of the collateral a promissory note was prepared by the Respondent and signed by the Appellants representing the total amount due of \$198,240.00. Appellants argue that this note is not supported by legal consideration. This point needs little argument as the long standing uniform rule is that a note given to pay a third person's debt is supported by valuable consideration. See *11 Am Jur*

2d, Bills and Notes, Sec. 227, Southern Frozen Foods v. Hill, 129 SE 2d 420.

CONCLUSION

Accordingly, Respondents respectfully urge that judgment of the lower court in awarding Respondent a deficiency judgment be affirmed.

Respectfully submitted this 11th day of April, 1980.

Layne B. Forbes

Attorney for Plaintiff-Respondent