

1951

# Knudsen Music Co. v. Jack Masterson : Brief of Appellant

Utah Supreme Court

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Skeen, Thurman & Worsley; Verl C. Ritchie; Attorneys for Appellant;

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Case No. 7696

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

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KNUDSEN MUSIC COMPANY, a  
corporation,

*Plaintiff and Respondent,*

vs.

JACK MASTERSON,

*Defendant and Appellant.*

---

**BRIEF OF APPELLANT**

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**SKEEN, THURMAN & WORSLEY and**  
**VERL C. RITCHIE,**

*Attorneys for Appellant.*

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## BRIEF OF APPELLANT

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### STATEMENT OF FACTS

(All italics, unless otherwise noted, are appellant's).

In this action, plaintiff, Knudsen Music Company, sued the defendant, Jack Masterson, to recover damages for the breach of a conditional sales contract, after the coin operated music machines sold to defendant had been repossessed (Ex. A, R. 3). The contract sued upon is a title retaining contract containing the usual provisions for remedies of the vendor in case of default (Ex. A).

For the convenience of the Court, the following portion of paragraph six of the contract relating to rights after repossession is set out below :

“In the event of such repossession seller may resell the said property at either public or private sale without demand for performance, with or without notice to purchaser (if given notice by mail to address below shall be sufficient) with or without having such property at the place of sale, and upon such terms and in such manner as seller may determine; seller may bid at any sale. The proceeds of any such sale, after deducting all liens, expenses for retaking, repairing and selling such property, including a reasonable attorney fee or other expense incurred, shall be applied to the amount due under this contract and the surplus, if any, shall be paid to purchaser; in the event of a deficiency remaining after the exercise of any of the remedies herein provided for, purchaser agrees to pay the amount of such deficiency forthwith and any reasonable attorney fee and court costs incurred for the recovery of such deficiency.”

The case was tried before the Court and plaintiffs given judgment for the sum of \$748.11, representing the balance due on purchase price after allowing defendant a credit for the repossessed machines of \$1,185.00, and allowing plaintiff \$30.00 for services in picking up the music machines and \$42.15 finance charges. In addition, plaintiff was allowed \$200.00 attorney's fee and costs, a total judgment of \$964.51. Defendant appeals from this judgment.

The final contract was entered into on February 27, 1950, upon the transfer of two Model 1100 Wurlitzer Phonograph machines, included in a previous title retaining contract, to the vendor by the vendee in exchange for two Model 1080 Wurlitzer Phonographs. These 1100's were replaced by 1080's because of complaints that the 1100's were defective (Tr. 45, 69, 89, 90). The defendant had already in his possession two Model 1015 Wurlitzer Phonograph machines and one Gismo, which were included in the contract (Ex. A, Tr. 6, 9, 10, 42, 44).

The two Model 1080 Phonograph machines, Serial Nos. 1949532 and 1950227, were picked up by the defendant on February 27, 1950, in Provo, Utah, at plaintiff's place of business.

The Model 1080 machines were represented to the defendant as new machines and according to plaintiff's testimony, the plaintiff did not examine the machines before shipment to defendant and didn't know of their condition (Tr. 42, 43, 51). After defendant, Jack Masterson, had taken the two Model 1080's to Panguitch, he noticed that upon unpacking the crates, the mechanical portions of these phonographs were covered with rust and corrosion (Tr. 69).

After spending three or four days on each machine in removing the rust and corrosion (R. 69), defendant placed the machines on location, one at Ruby's Cafe,

Escalante, Utah, and the other at the Big Rock Candy Mountain in Marysvale Canyon. The machines were out on location for approximately five weeks, when the defendant removed the same because they did not operate satisfactorily (Tr. 71).

Defendant testified that one or two extra service calls were required each week on the Model 1080's after they were placed on location (Tr. 72). He testified that the trouble was caused principally by the changer jamming (Tr. 73). In April of 1950, Knudsen, the president of plaintiff, had a conversation with defendant regarding the jamming of the machines, and Knudsen advised him to use some oils to rectify the situation. Later, defendant wrote the plaintiff stating that he was going to lose his two best locations if the Model 1080's were not removed (Tr. 76).

The testimony is uncontradicted that the machines would not operate until the rust and corrosion was cleaned off (Tr. 84), and that the machines would not retain an adjustment. The evidence is also uncontradicted that the changers, which are an integral part of the machines, would jam continually, requiring additional service calls at a great expense to defendant (Tr. 86). The testimony of Perry Masterson, defendant's son, who was employed by his father for a short time in servicing the machines, was also to the effect that



the changer jamming was the main cause of the trouble, and that it was necessary to make one or two extra service calls per week in keeping the two machines operating (Tr. 95, 96, 97).

Wesley Knudsen, president of plaintiff company, testified that the machines were repossessed in April of 1950, due to the non-payment of installments as provided for in the contract (Ex. A).

On June 30, in preparing an inventory for tax purposes, the plaintiff testified that it utilized what is known as a cash-box price list, giving the average retail value of the various types of coin operated music machines, and set up the value of the inventory solely on the basis of the average prices according to the cash box list (Tr. 29, 31, 40), but no cash box price list was received in evidence. The value of the repossessed machines as of June 30, the end of plaintiff's fiscal year, was arrived at arbitrarily by giving a credit to the defendant on plaintiff's books of a certain amount supposedly representing the value of the property at the time (Ex. E, Tr. 29, 31).

After repossession, the music machines were put on the floor of plaintiff's sales room and offered for sale to anyone that came into the sales room (Tr. 25). The machines were not differentiated from the other machines on the floor and were offered for sale along with regular merchandise. Plaintiff, Wesley Knudsen,

testified that he didn't know where the machines had gone until we checked on the price on the list (Tr. 26). The machines were not marked as separate machines on repossession (Tr. 26). The Gismo machine was arbitrarily given a value of \$35.00 without any reference to a market value at the time or without any evidence of a resale value (Tr. 15, 16).

One Model 1015 Wurlitzer phonograph could not be traced and plaintiff testified that it was not known how much it had sold for, but he thought that it had been sold. Plaintiff also testified that they could not trace this particular machine inasmuch as it had no serial number by which it could be traced (Ex. A, Tr. 19, 20, 50, 55). Wesley Knudsen, president of plaintiff company, testified that, after the machines were repossessed, he acted as owner and tried to sell the machines to anyone that came along and that the same were resold over a period of four or five months after repossession (Tr. 47), but all evidence of resale was stricken from the record upon plaintiff's motion (Tr. 39). After repossession of the machines, plaintiff filed this action to recover damages for the breach of the contract. At the trial of the case the only evidence adduced as to the value of the machines at the time of repossession was a journal entry from plaintiff's books, showing a credit of \$1,150.00 for the four music boxes, plus \$35.00 for the Gismo machine (Ex. E). The price or value of these machines, except the Gismo, was arrived at without reference to

the actual resale value of the particular machines involved. The credit was given defendant as of June 30, at the time of making the inventory, which was prepared primarily for the purpose of ascertaining the amount of taxes due by plaintiff (Tr. 15, 16, 26, 27). The defendant in his answer denied that the contract was ever completed and alleged that the contract was rescinded (R. 6).

The Court in its findings at page 115, stated that the plaintiff sues to recover damages for breach of contract (Tr. 115). The Court further found that the contract is a title retaining obligation (117), and that, although there were some minor defects in the machines, the Court found that there was no representation on the part of the plaintiff as to the condition of the machines, and that any representation made or defect in the machines is immaterial (Tr. 117).

At page 119 of the record, the Court stated its findings as follows:

“The Court therefore finds that the plaintiff has been damaged in a breach of the contract in the sum of \$748.11.”

Defendant appeals from the judgment entered.

## STATEMENT OF POINTS

### POINT I.

THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF PLAINTIFF, SAID JUDGMENT BEING CONTRARY TO THE LAW AND THE EVIDENCE.

## POINT II.

THE TRIAL COURT ERRED IN MAKING AND ENTERING FINDING OF FACT No. 4, TO THE EFFECT THAT THE PLAINTIFF HAS DONE AND PERFORMED ALL OF THE STIPULATIONS AND CONDITIONS OF THE CONTRACT TO BE PERFORMED BY IT, SAID FINDING BEING CONTRARY TO THE EVIDENCE.

## POINT III.

THE TRIAL COURT ERRED IN MAKING AND ENTERING FINDING OF FACT No. 9, TO THE EFFECT THAT THE SUM OF \$1,185.00 WAS THE REASONABLE VALUE OF THE MACHINES, SAID FINDING BEING CONTRARY TO THE EVIDENCE.

## POINT IV.

THE TRIAL COURT ERRED IN MAKING AND ENTERING FINDING OF FACT No. 10, TO THE EFFECT THAT ANY DEFECT IN THE MACHINES IS IMMATERIAL, AND FINDING OF FACT No. 11, TO THE EFFECT THAT THERE IS NO EVIDENCE OF A RESCISSION OF THE CONTRACT, SAID FINDINGS BEING CONTRARY TO THE EVIDENCE.

## POINT V.

THE TRIAL COURT ERRED IN MAKING AND ENTERING CONCLUSION OF LAW No. 1, TO THE EFFECT THAT PLAINTIFF IS ENTITLED TO A JUDGMENT AGAINST THE DEFENDANT IN THE AMOUNT OF \$1,860.96, THERE BEING NO FINDING OR EVIDENCE TO SUPPORT THE SAME.

## ARGUMENT

## POINT I.

THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF PLAINTIFF, SAID JUDGMENT BEING CONTRARY TO THE LAW AND THE EVIDENCE.

Appellant's first point is that the trial court erred in entering judgment in favor of the plaintiff, and that the judgment is contrary to the law and the evidence.

The trial court found, in effect, that plaintiff, after repossession of the machines, had been damaged by defendant's breach of contract and was entitled to the difference between the contract price and the market value of the machines at the time of the alleged breach. It is defendant's contention that the rights of parties after such repossession were to be determined solely by the terms of the contract, and after the goods are re-taken by the seller, the buyer shall not be liable until the goods have been resold and insufficient realized therefrom to pay the balance due seller. There was no evidence that any of the machines had been re-sold (Tr. 39), and it is defendant's further contention that plaintiff's suit was prematurely filed and should be dismissed because of failure to sell any of the machines in question prior to instituting this action. In the case of *Rhodes v. O'Neil, et al.* (Wash.), 265 Pac. 737, the court, in construing a similar provision in a conditional sales contract, stated at page 738 of Vol. 265 of the Pacific Reporter:

"The note provided for a resale at public or private sale and an agreement to pay any balance remaining after the net proceeds had been applied. There had been no sale of the automobile, and therefore could be no application of net proceeds as provided in the note. The contingency named

in the note had not yet arrived, even if it be assumed, as appellants contend, that MacDonald was bound by his note to pay the balance due.

“The judgment is affirmed.”

Under the contract sued upon, the rights and remedies of the parties after repossession are clearly set out. Paragraph 6 of Ex. A provides in part as follows:

“In the event of such repossession seller may resell the said property at either public or private sale without demand for performance, with or without notice to purchaser (if given notice by mail to address below shall be sufficient) with or without having such property at the place of sale, and upon such terms and in such manner as seller may determine; seller may bid at any sale. The proceeds of any such sale, after deducting all liens, expenses for retaking, repairing and selling such property, including a reasonable attorney fee or other expense incurred, shall be applied to the amount due under this contract and the surplus, if any, shall be paid to purchaser; in the event of a deficiency remaining after the exercise of any of the remedies herein provided for, purchaser agrees to pay the amount of such deficiency forthwith and any reasonable attorney fee and court costs incurred for the recovery of such deficiency.”

The above provision is identical, word for word, to a clause construed in the case of *Hampton v. Commercial Credit Corporation, et al* (Mont.), 176 P. (2d) 270. See page 274 of Vol. 176 of the Pacific Reporter, 2nd Series,

where the court sets out in full paragraph 6 of the contract there being considered, which is identical to paragraph 6 of Exhibit A. The question arose in that case as to when the rights of a buyer under the conditional sales contract were terminated. The following language appears at page 274 of the Pacific Reporter:

"Appellants' contention that plaintiff had no interest in the automobile or in the conditional sale contract after the automobile had been repossessed by the Commercial Credit Corporation on July 25, 1942, cannot be sustained. The conditional sale contract reads in part as follows:

'The undersigned Seller hereby agrees to sell, and the undersigned Purchaser agrees to purchase, subject to the terms and conditions hereinafter set forth, \* \* \*'

'6. Time is of the essence of the contract and if Purchaser defaults in complying with any of the terms or conditions hereof, or Seller deem himself insecure or the property in danger of misuse, depreciation or confiscation, \* \* \*. *The proceeds of any such sale, after deducting all liens, expenses for retaking, repairing and selling such property, including a reasonable attorney fee or other expense incurred, shall be applied to the amount due under this contract and the surplus, if any, shall be paid to Purchaser; in the event of a deficiency remaining after the exercise of any of the remedies herein provided for, Purchaser agrees to pay the amount of such deficiency forthwith and any*



reasonable attorney fee and court costs incurred for the recovery of such deficiency.' (Emphasis ours.)

"The defendants exercising a right or option under the contract, to-wit: The sale of the automobile on December 22, 1942, to Seavey; the plaintiff under the terms and conditions of the contract would have been entitled to receive any surplus of the proceeds of the sale, consequently *the contract was not terminated before the date of the sale*, which date was subsequent to the enactment of the amendment to the Soldiers' and Sailors' Civil Relief Act."

In the case at bar, the defendant's rights in the contract were not terminated until a resale of the music machines, and the plaintiffs could have no right to damages at the time of the alleged default. In the case of *Hampton v. Commercial Credit Corporation*, supra, the Supreme Court of Washington issued a supplemental opinion on rehearing as to the question of when the buyer's rights terminated. At page 279 of the Pacific Reporter, 2nd Series, appears the following:

"On rehearing the appellants contend that the repossession of the automobile on July 25, 1942, after the default of Hampton, completely terminated the conditional sale contract and that, consequently, the Soldiers' and Sailors' Civil Relief Act as amended October 6, 1942, 50 U.S.C.A. Appendix, § 501 et seq., has no application.

"With this contention we cannot agree.



*"After the repossession of the automobile the contract (subject to applicable statutes) still measured the rights and remedies of the parties thereto, and it was to the terms of the contract that the parties had to resort, or rely upon, in asserting any claims or rights after repossession.*

"It follows that the rights and remedies of the parties under the contract were not completely extinguished at the time of the repossession of the automobile. 'When the law speaks of a right or obligation as extinguished, it means that it is put out; taken away, destroyed.' 35 C. J. S., Extinguish, page 293.

"It also follows that the contract was not completely terminated by the repossession of the automobile. 'Termination' or 'cancellation' of a conditional contract means to abrogate so much of it as remains unperformed, doing away with an existing agreement upon the terms and with the consequences mentioned in the writing \* \* \*." *Sanborn v. Ballanfonte*, 98 Cal. App. 482, 277 P. 152, 155.

"The termination of a conditional contract, as stated in the case of *Sanborn v. Ballanfonte*, 98 Cal. App. 482, 277 P. 152, means to put an end to all of the unperformed portions thereof." *Blodgett v. Merritt Annex Oil Co.*, 19 Cal. App. 2d 169, 65 P. 2d 123, 125.

*"It is clear that the conditional sale contract was not fully terminated prior to December 22, 1942, for the reason that the defendants having sold the automobile on the above date, the rights,*

*liabilities and remedies of the parties were not fully determined or terminated under the contract until that time and therefore the Soldiers' and Sailors' Civil Relief Act applies."*

Plaintiff's rights after repossession were governed by the provisions of the contract (Ex. A.). There is no evidence of a resale to the account of the buyer. The plaintiff took the merchandise back into his display room and treated the repossessed stock as he would any other (Tr. 26). He testified that he acted as owner of the same, and there was no evidence of a resale within any reasonable period after repossession, or at all. Knudsen, president of plaintiff company, testified that he had no idea what happened to the music machines after being placed on the sales floor, until he checked his records (Tr. 26). In preparing an inventory of his complete stock of merchandise for tax purposes, Knudsen arbitrarily placed a value on all items and equipment used in his business, among which were included the machines repossessed from defendant. It is defendant's contention that such conduct, and refraining from selling the machines to the account of buyer for a reasonable time, precludes any recovery whatsoever, and further, that the buyer is not bound to accept as credit the value of the repossessed property at the time of taking. The burden of showing a resale is upon the seller.

In a syllabus prepared by the court in the case of *Hargett v. Muscogee Bank*, Court of Appeals of Georgia,

124 S.E. 541, the court stated the general rules applicable to the above facts, as follows :

“3. In a suit by the seller against the purchaser to recover the unpaid purchase money, where the seller has retaken the property, the evidence will not authorize a recovery for the plaintiff in any amount whatever until the plaintiff has carried the burden of showing a resale of the property under the terms of the contract and the amount realized by him upon such resale. \* \* \*

“4. It is the purchaser’s right under the contract to have the property resold after it has been retaken by the seller, and therefore the purchaser is not bound to accept, as a credit upon the unpaid purchase money, an amount representing the value of the property at the time it is retaken by the seller.

“5. \* \* \* Where, however, the seller, after retaking the property for the purpose of resale as provided in the contract, refrains from selling it for an unreasonable length of time, and devotes it to a use inconsistent with an intention upon his part to resell it as the agent of the purchaser, the inference that the seller has converted the property to his own use and has thereby rescinded the sale is authorized.”

It is admitted that in a proper case, a deficiency can be recovered, but only after a resale, if the contract so provides. The general rule is set forth in Volume 3, Jones on Chattel Mortgages & Conditional Sales, Bowers Ed., Sec. 1327, as follows :

“§ 1327 *Recovering deficiency after resale.*—There are numerous forms of conditional sale contracts which have caused many divergent opinions relating to questions arising under them. Many of such contracts provide that on default of the buyer the seller may take possession and sell the property on account of the buyer, crediting him with the proceeds of the resale, and hold him liable for any deficiency in the price. As a general rule, the validity of such a stipulation is given full effect by the courts, *and the seller is held entitled, after a resale in accordance with the provisions of the contract, to sue and recover any balance remaining after crediting on the purchase-price the proceeds of the sale.* This effect has been given to a stipulation authorizing the seller to retake possession and resell, as this necessarily implies that the resale shall be on account of the buyer, and that any deficiency toward the satisfaction of the price shall be paid by the buyer.”

With respect to the right of the vendor under a conditional sales contract to recover damages, see Vol. 3, Jones on Chattel Mortgages and Conditional Sales Supra, Section 1372:

“§ 1372. *Against vendee for breach of contract.*—\* \* \* It is obvious that his remedy may not be in damages for the mere default of the vendee in performing the condition of the contract for any action he then takes is either upon the contract or as a rescission of it. He may, however, be entitled to damages for a wrongful detention of the goods.”

One of the questions to be determined on this appeal, according to appellant's view, is whether a conditional vendor, who after retaking goods does not sustain the burden of proving a resale in accordance with the stipulations of the contract, is entitled to recover any portion of the balance due under the contract. A resale by the conditional vendor is not required by the contract, but failure to resell materially affects the rights of the parties. It is submitted that under the contract sued upon the buyer is not liable until the goods retaken have been sold to his account, and in the absence of showing a resale, the seller has no other remedy.

The trial court substituted its own remedies in place of those the parties to the contract had agreed upon. This it can not do. Regardless of the theory we attach to plaintiff's case, it is submitted that the judgment cannot be sustained, and is contrary to the law and the evidence.

## POINT II.

THE TRIAL COURT ERRED IN MAKING AND ENTERING FINDING OF FACT No. 4, TO THE EFFECT THAT THE PLAINTIFF HAS DONE AND PERFORMED ALL OF THE STIPULATIONS AND CONDITIONS OF THE CONTRACT TO BE PERFORMED BY IT, SAID FINDING BEING CONTRARY TO THE EVIDENCE.

Because of their defective condition, defendant had returned two Model 1100's to plaintiff in exchange for two new Model 1080's, at the time of entering into the contract sued upon. A brief perusal of the record will

indicate the difficulties encountered by defendant in attempting to operate these supposedly new machines. These 1080's were rusted and corroded to the extent that they would not operate properly, and jammed continually. Defendant finally took them off location when circumstances became such that he could not operate them further. These were supposedly *new* machines (Ex. A).

It is appellant's position that the plaintiff did not perform its contract in that the machines were not new machines, and because of plaintiff's breach there could be no default on the part of the defendant. See *Estrich on Installment Sales*, Sec. 305, which reads as follows:

“Until seller has complied with his agreements, there can be *no* default on the part of the buyer entitling the seller to take possession.”

See *Jones on Chattel Mortgages and Conditional Sales*, *supra*, Vol. 3, Sec. 1285:

“*Where seller is at fault.*—Analogous to the equitable principle that he who seeks equity must do equity, is the legal rule pertinent to the present discussion, *that a conditional vendor who asserts rights based on the alleged default of his vendee can not maintain them if he himself is in default in the performance of some phase of the contract obligatory upon him.*

It is submitted that said finding is contrary to the evidence.



## POINT III.

THE TRIAL COURT ERRED IN MAKING AND ENTERING FINDING OF FACT No. 9, TO THE EFFECT THAT THE SUM OF \$1,185.00 WAS THE REASONABLE VALUE OF THE MACHINES, SAID FINDING BEING CONTRARY TO THE EVIDENCE.

Appellant's point three raises the question of whether there is sufficient evidence to sustain a finding that \$1,185.00 was the reasonable value of the machines at the time the credit was entered on plaintiff's books. From appellant's viewpoint the value of the machines as of June 30, 1950 has no bearing on the rights of the parties involved, and becomes of importance only if it can be said that the trial court proceeded under the correct theory of law.

There is no evidence of the value of the "Gismo" machine, except that a value of \$35.00 was placed on it in the journal entry, without reference to its actual market value or resale value at the time (Tr. 15, 16).

There is no evidence that the value placed on the music machines in the journal entry corresponded to Cash Box Price Lists, or that the actual resale value, or mechanical condition at the time, of each machine was considered. Further, there was no evidence whatsoever as to the value of one of the Model 1015's repossessed by plaintiff. One of the Model 1015's could not be traced by serial number, and the matter of its value was left entirely to conjecture (Tr. 19, 20, 50, 55).

It is submitted that plaintiff failed in its burden of proof, and that said finding is contrary to the evidence.

#### POINT IV.

THE TRIAL COURT ERRED IN MAKING AND ENTERING FINDING OF FACT No. 10, TO THE EFFECT THAT ANY DEFECT IN THE MACHINES IS IMMATERIAL, AND FINDING OF FACT No. 11, TO THE EFFECT THAT THERE IS NO EVIDENCE OF A RESCISSION OF THE CONTRACT, SAID FINDINGS BEING CONTRARY TO THE EVIDENCE.

Considerable testimony was received in support of defendant's contention that the Model 1080's were defective, and the trial court held that any defects were immaterial. The machines were put on location in the early part of March, 1950 (Tr. 70). During the early part of April, 1950, defendant testified that he advised plaintiff of the defective condition of the machines in a phone call (Tr. 75). Later in April, 1950, defendant wrote plaintiff a letter to the effect that he was going to lose his two best locations if the Model 1080's were not removed, and that he just couldn't go further with them (Tr. 76). Defendant also testified as to a conversation in plaintiff's office during the latter part of April, 1950, relative to picking up the machines (Tr. 77). Defendant testified that he would not pay for the truck to come down and pick up the machines because of a previous misunderstanding with plaintiff about a shipment of machines from Denver where he was stuck for a big freight bill (Tr. 77). The evidence is uncontradicted that con-



tinual jamming of the machines was due to the corrosion and pitted condition, which defendant was unable to correct.

It is appellant's contention that the defects in the machines were material, and that defendant was entitled to, and did, rescind the sale, and his liability under the contract ended. The general rules as to a defense to an action of this type are set out in *Jones on Chattel Mortgages and Conditional Sales*, Vol. 3, Sec. 1331:

“§ 1331. *Defenses and counterclaims to purchase-price action.* — \* \* \* Rescission of the contract is a defense to an action for the purchase-price, if the facts show the essential elements of a rescission and prompt and sufficient acts of the vendee thereunder. *The rescission may have been on account of failure of the vendor to do something promised*, or of fraud or false representations in the making of the contract and which induced its making. Thus, neglect of the conditional vendor to keep a typewriter in repair as promised was held sufficient ground for a rescission. One of the essentials of a rescission is that the vendee must return, or offer to return, the goods to the vendor or show why such return can not be made. Moreover, the right of rescission must be exercised promptly upon discovery by the vendee of the facts which give rise to it, as where the vendor is claimed to have made false representations concerning the property.”

Further, it is appellant's contention that an implied warranty of fitness for a particular purpose existed, and

upon breach of this, defendant was entitled to, and in fact rescinded the contract. In the case *Battle Creek Bread Wrap. Mach. Co. v. Paramount Baking Co.*, 88 Utah 67, 39 P. (2d) 323, the Supreme Court of Utah stated, at page 72 of Vol. 88, Utah Reports, as follows:

“The parties apparently recognized that the use of the trade-name of the machine was purely a matter of convenience in designation. These facts, considered along with the fact that the replacement arose out of complaints of defectiveness in the first machine, are rather substantial evidence of the fact that no reliance was placed upon the name of the article, but rather that the parties were concerned with its fitness to accomplish its purpose. \* \* \*

“However, we are of the opinion that there was an implied warranty of fitness as to the substituted machine. It is hard to believe otherwise when replacement arises out of defects in the machine replaced.”

The taking of possession of the machines by plaintiff, and exercise of dominion over them as owner, and failure to resell, precluded any other remedy. See *I. X. L. Stores Co. v. Moon*, 49 Utah 262, 162 Pac. 622.

It is submitted that the court erred in finding that the defects in the machines were immaterial, and that the contract was not in fact rescinded.

## POINT V.

THE TRIAL COURT ERRED IN MAKING AND ENTERING CONCLUSION OF LAW No. 1, TO THE EFFECT THAT PLAINTIFF IS ENTITLED TO A JUDGMENT AGAINST THE DEFENDANT IN THE AMOUNT OF \$1,860.96, THERE BEING NO FINDING OR EVIDENCE TO SUPPORT THE SAME.

The court found, in its conclusions of law, that after repossession of the machines, plaintiff was entitled to a judgment in the sum of \$1,860.96, *the balance due on the contract*. It is submitted that the court was clearly erroneous in so making and entering this conclusion of law. The general rule of law is well settled that a conditional vendor cannot retake and repossess the property and then recover the full balance of the contract price, as though there had been no retaking. *I.X.L. Stores Co. v. Moon*, supra. The proposition is so well settled as to require no further citation of authority, and it is submitted that the court erred in making and entering said conclusion of law, there being no finding or evidence to support the same.

## CONCLUSION

In conclusion, it is submitted that the judgment of the trial court was in error, and that the judgment should

be reversed and an appropriate order entered dismissing the action, and that appellant should be awarded its costs on this appeal.

Respectfully submitted,

SKEEN, THURMAN & WORSLEY and  
VERL C. RITCHIE,

*Attorneys for Appellant.*