

1951

Knudsen Music Co. v. Jack Masterson : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Jackson B. Howard; Attorney for Respondent;

Recommended Citation

Brief of Respondent, *Knudsen Music Co. v. Masterson*, No. 7696 (Utah Supreme Court, 1951).
https://digitalcommons.law.byu.edu/uofu_sc1/1528

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

**In the Supreme Court of the
State of Utah**

**KNUDSEN MUSIC COMPANY, a
corporation,**

Plaintiff and Respondent,

vs.

JACK MASTERSON,

Defendant and Appellant.

CASE

NO. 7696

FILED

OCT 25 1951

Clerk, Supreme Court, Utah

BRIEF OF RESPONDENT

**JACKSON B. HOWARD,
Attorney for Respondent**

NEW CENTURY PRINTING CO. PROVO, UTAH

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS.....	7
Point No. I. The trial court did not err in entering a judgment in favor of the plaintiff, said judgment being in accordance with the law and evidence	7
Point No. II. The trial court did not err in making and entering the finding of fact Number Four to the effect that the plaintiff had done and performed all the steps and conditions of the contract to be performed by it at the time and the manner therein specified	7
Point No. III. The trial court did not err in making finding of fact Number Nine, that the sum of \$1185.00 was the reasonable value of the machines at the time of the repossession, said finding being in accordance with the evidence.....	7
Point No. IV. The trial court did not err in making and entering finding of fact Number Ten, that any defect that there may have been in the machines is immaterial, said finding being in accordance with the evidence and defendant not alleging any claim for breach of warranty.....	7
Point No. V. The trial court did not err in making and entering the conclusion of law Number One to the effect that the plaintiff is entitled to a judgment against the defendant in the amount of \$1860.96, there being sufficient evidence to support the conclusion	8
ARGUMENT:	
Point No. I	8
Point No. II	13
Point No. III	14

(INDEX (Continued))

	Page
Point No. IV	15
Point No. V	19
Conclusion	20

CASES AND AUTHORITIES CITED:

American Jurisprudence, 3 A.J. 350, Sec. 806....	18
American Jurisprudence, 3 A.J. 432, Sec. 880....	9
Angerman Co., Inc. v. Edgemont et. ux., 76 Utah 394, 290 Pac. 169.....	19
Burningham v. Burke, 67 Utah 90, 245 Pac. 977..	20
Guedon v. Rooney, 160 Ore. 621, 87 Pac. 2d 209..	9
Jones on Chattel Mortgages and Conditional Sales, Vol. 3, Sec. 1331.....	16
Jorgensen v. Gessell Pressed Brick Co., 43 Utah 31, 141 Pac. 460.....	19
Ketchum Coal Co. v. District Court of Carbon County, et. al., 48 Utah 342, 159 Pac. 737.....	20
Nelson v. Chicago Mill and Lumber Corp., 100 A.L.R. 87, 76 F. 2d 17.....	17
Northwestern Traveling Men's Association v. Crawford, 126 Ill. App. 468, 480.....	10
Pulsifer v. Walker, 85 N.H. 434, 149 A. 426.....	9
Pussley v. McLanahan Bros., 14 Ga. App. 366, 80 S.E. 902	11
Smith v. Columbus Buggy Co., et. al., 123 P. 580, 40 Utah 580	17, 18
State v. Stepp, 59 S.E. 1068, 63 W. Va. 354.....	11
Wall v. Zynda, 283 Mich. 260, 278 N.W. 66.....	17
Words and Phrases	10
Zindell v. Central Mutual Insurance Co., 22 Wis. 575, 269 N.W. 327.....	9

In the Supreme Court of the State of Utah

KNUDSEN MUSIC COMPANY, a
corporation,

Plaintiff and Respondent,

vs.

JACK MASTERSON,

Defendant and Appellant.

**CASE
NO. 7696**

BRIEF OF RESPONDENT

STATEMENT OF FACTS

(All bold face, unless otherwise noted, are respondent's)

The respondent believes that the appellant's statement of the facts is misleading because it fails to include certain essential facts and mis-states others so as to leave inferences that are not directly warranted; consequently, with the following revisions to the appellant's facts, a more true and accurate statement will be had.

Plaintiff and defendant entered into a contract on February 27, 1950, under which the defendant refinanced three machines he had in his possession, two Model 1015's and

one Gismo model and under which he traded in two older model 1100's on two new Model 1080's (Tr. 6, 7, 9, 10, 92).

The appellant states on page three of his brief that the new contract of February 27, 1950, was made because the two 1100 machines were defective. This mis-states the facts in that it fails to show that the primary purpose for the new contract was because the defendant found it necessary to refinance his machines, and because he had been notified that the machines would be repossessed unless he took steps to rectify his delinquent payments (Tr. page 6).

Counsel infers, by stating on page three of his brief, that the No. 1080 machines "were represented as new machines"; that they were not new machines. It is uncontradicted that these machines, the 1080's, were new and that they were packed in their original cases and had not been opened when delivered to the vendee (Tr. 10, 42, 44, 51).

Attached to each machine was a warranty by the manufacturer warranting the workmanship and the working parts of the machine and which warranty the defendant read and knew about (Tr. 78, 79).

The defendant, at the time of picking up the new machines at the plaintiff's Provo office, had every right and opportunity to open and inspect the machines (Tr. 78).

The defendant testified that he read the contract and was familiar with the terms thereof and that he knew of Paragraph Four, which is set out as follows:

"No warranties, representations or agreements have been made by Seller unless specifically set forth herein, and this contract may not be enlarged, modified, or altered except by endorsement hereon by the parties hereto."

He testified that there was no representation made by the plaintiff as to the condition of the machines (Tr. 81).

The defendant, on page two of his brief, sets out provisions which he says relate to the rights after repossession. In addition to the portion of paragraph six that he sets out on page two, paragraph eight of the contract (Ex. A) is also applicable.

Counsel for the defendant states on page three that the mechanical portions of the phonograph were covered with rust and corrosion. This is disputable and is not conclusive, as shown by the testimony of the plaintiff (Tr. 108, 109).

The defendant had these machine for five weeks or longer and during this time he did not complain of their service and did not notify the seller of any defects in the machines (Tr. 54, 80), nor make any attempts to enforce the warranty (Tr. 78, 79) on the machines made by the manufacturer (Tr. 554, 80).

The appellant states on page four of his brief that he removed the machines because they did not operate; however, he does not include in his brief the fact that the vendor, Mr. Knudsen, called him in the first part of April, five weeks after the machines had been on location, and told him that unless he made a payment the machines would be repossessed, and at that time Mr. Masterson first informed Mr. Knudsen that the machines were not operating to his satisfaction (Tr. 75). Mr. Knudsen testified that the vendee at this time, did not tell him that there was anything materially wrong with the machines other than they needed oiling when he received them (Tr. 54). Subsequent to this conversation the machines were removed from location.

Counsel states on page four of his brief that the defendant wrote the plaintiff that he was going to lose his best locations. There is no evidence that the defendant wrote to the plaintiff or that the plaintiff ever received any word from the defendant by letter as stated on page four (Tr. 98, 99).

The defendant testified that the machines were in good enough shape to place them on location in the first place and that they were apparently serviceable and that "he could get by with them" (Tr. 91, 92).

After the machines had been on location four or five weeks, the plaintiff notified the defendant that no payments had been made on the contract, and that unless he did make up the delinquent payments it would be necessary to repossess the machines (Tr. 10, 11, 75, 88). Not until that date did the defendant notify the plaintiff of any defects in the machines themselves (Tr. 92).

No payment having been received, the plaintiff, in the latter part of April, found it necessary to send a man to Panguitch to repossess the machines from the defendant (Tr. 59). The plaintiff's president, Mr. Wesley Knudsen, testified that when the machines came back he personally made a careful inspection of them and that it was necessary to service these machines so as to make them saleable, but that the machines were serviceable and that they were placed in good working condition by mere adjustments, and that he could find no evidence of "rust or corrosion" and that there was nothing wrong with the machines other than normal wear and tear (Tr. 49, 54, 108, 109, 110).

The plaintiff testified that his company's fiscal year ended June 30 and that it was necessary to set these machines up on the books of the company, for they were as-

sets of the company and were in its possession; consequently, they had to be inventoried at a true value.

The plaintiff introduced evidence as to the method of establishing the value of property repossessed, and the facts show that the value was not arbitrarily reached as stated in appellant's brief, page five, but was based upon taking the average of the high and low monthly selling price of these machines for the period as determined by statistics supplied in the price list of "Cash Box," a periodical published for the music industry, and that these prices fairly and accurately indicated the true value of the machines and that this was the common and usual practice of valuation in the industry (Tr. 30, 31).

The plaintiff, Wesley Knudsen, testified that after repossession, the machines were put on his sales floor and that they were not differentiated from any other machine. He stated, contrary to the appellant's brief, page six, that all the machines were sold and that he had records of sale except for one machine, a Model 1015 which, through an error in bookkeeping, the serial number had not been taken but that he knew it had not been sold for more than \$275.00 for that was the highest amount for any time that year that a Model 1015 had been sold for (Tr. 12, 19, 21, 23, 25).

The respondent also refutes the facts as the defendant states them as to evidence of resale on page six of his brief. The plaintiff offered in evidence invoices of sale on every machine but the 1015 mentioned supra and with the names of those who purchased and their addresses and the amount on the four different machines, and that they were sold for a total of \$815.00 (Tr. 12, 19, 21, 23, 25). He testified that the other 1015 machine, without serial num-

ber, could not have been sold for more than \$275.00 and allowing a \$275.00 amount as a credit in addition to the \$815.00, it totals \$1090.00, which is merely a matter of calculation as the court indicated (Tr. 25). However, he gave the defendant a credit on his books of \$1185.00 as per the "Cash Box" value, (Tr. 17, 26) which was the reasonable value of the machines at the date of repossession (Tr. 27).

The appellant's brief, page six, states that the evidence of resale is stricken from the record upon the plaintiff's motion (Tr. 39); however, this is not true and all evidence of resale was stricken from the record upon the defendant's motion (Tr. 39).

The defendant, in his answer and counterclaim to the plaintiff's complaint, alleges merely a rescission of the contract or denies that the contract was performed. The defendant did not appeal to the equity of the court and did not, in any way, allege any breach of warranty.

The court found that there was no evidence of rescission and that the plaintiff did perform his contract (Tr. 116, 117); that the defendant, in the case below did find some minor defects in the machines but that there was no representation by the plaintiff as to the condition of the machines (Tr. 117).

The court also found that the vendee was experienced in this type of business and that it was not until the second payment was past due that the defendant repudiated the contract (Tr. 117).

The court found that the contract had been completely negotiated (Tr. 115) and that the defendant signed the same with full knowledge of its terms and provisions (Tr. 116).

The court found that the plaintiff, shortly after the

repossession of the machines, made a careful examination of the local market value of the machines and gave the defendant, Jack Masterson, a credit of \$1185, the then reasonable value of the machines (Tr. 118).

From this judgment the defendant appeals.

STATEMENT OF POINTS

POINT I

The trial court did not err in entering a judgment in favor of the plaintiff, said judgment being in accordance with the law and evidence.

POINT II

The trial court did not err in making and entering the finding of fact Number Four to the effect that the plaintiff had done and performed all the steps and conditions of the contract to be performed by it at the time and the manner therein specified.

POINT III

The trial court did not err in making finding of fact Number Nine, that the sum of \$1185.00 was the reasonable value of the machines at the time of the repossession, said finding being in accordance with the evidence.

POINT IV

The trial court did not err in making and entering finding of fact Number Ten, that any defect that there may have been in the machines is immaterial, said finding being in accordance with the evidence and defendant not alleging any claim for breach of warranty.

POINT V

The trial court did not err in making and entering the conclusion of law Number One, to the effect that the plaintiff is entitled to a judgment against the defendant in the amount of \$1,860.96, there being sufficient evidence to support the conclusion.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN ENTERING A JUDGMENT IN FAVOR OF THE PLAINTIFF, SAID JUDGMENT BEING IN ACCORDANCE WITH THE LAW AND THE EVIDENCE.

It is true that the trial court found that the plaintiff had been damaged by the defendant's breach of contract and was entitled to the difference between the contract price and the value of the machines at the time the defendant was given a credit on the books of the plaintiff's company. The respondent contends like the appellant that the rights of the parties after repossession are to be determined by the terms of the contract; however, the appellant fails to consider the entire terms of the contract in his argument on the first point.

The defendant assumes that all evidence of resale was stricken upon the plaintiff's motion. He is in error in this assumption. The transcript (p. 39) definitely shows that all evidence of resale was stricken on defendant's motion in the trial court and upon his objection that such evidence of resale was too remote from the date of repossession.

The law is not confused as to a party's position on an objection such as this on appeal. There have been similar

cases where a party has tried to take advantage of an error of his own making. In *Guedon v. Rooney*, 160 Ore. 621, 87 Pac. 2d 209, the court said:

“A party is not in a position to claim error in respect to the exclusion of evidence to the admission of which he has objected.”

In another similar case, *Zindell v. Central Mutual Insurance Co.*, 22 Wis. 575, 269 N. W. 327, the court said:

“Defendant in an action for damages to a building by tort cannot take advantage of the failure of the trial court to limit the damages recoverable to the amount of the diminished value as the result of the tort if such amount is less than the cost of the repair, where upon his objection the court excluded the plaintiff's offer to prove the diminished value by proving the value of the building as it was before and after collision.”

There is ample authority on this question; however, American Jurisprudence has put it in the following language:

“On the same principle, a party cannot complain of the exclusion of evidence and consequent defect in the proof if it was excluded upon his request. Similarly one who has brought about the erroneous exclusion of documentary evidence is not in a position to complain of the introduction of secondary evidence.”
3 American Jurisprudence 432, Sec. 880.

American Jurisprudence cited *Pulsifer v. Walker*, 85 N. H. 434, 149 A. 426 as authority for the above textual material.

It is the respondent's contention that this is perhaps

not the true solution to the matter, but it does rebut the appellant's contention on point one.

The appellant sets out what he considers to be the rights and remedies of the parties after repossession; however, he fails to include Paragraph 8 of the contract which is quoted below and which also sets out the rights of the parties after repossession:

“Seller shall have the right to enforce one or more remedies hereunder, successively or concurrently and such action shall not stop or prevent the seller from pursuing any other remedy hereunder, and any repossession, retaking, or sale of the property pursuant to the terms hereof shall not release the purchaser until the purchase price has been paid in full in cash, nor shall the institution of suit for the purchase price prevent seller from later retaking possession of said property by action or otherwise. Purchaser hereby waives the right to remove any legal action from the court originally acquiring jurisdiction.”

Appellant's entire contention overlooks the fact that in Paragraph 6, Ex. A., which says that in the event of such repossession, the seller “may” resell. You would assume from the appellant's argument that “may” is mandatory, but this is not true. “May” is a discretionary word. It allows an option to the seller to either resell or not to resell. Words and Phrases sets out the following definitions of the word “may”:

“‘May’ does not mean ‘shall’ and is not so construed in private contracts. It is only in the case of statutes by which public rights are involved that this construction is sometimes adopted *ex debito justitiae*.” *Northwestern Traveling Men's Association v. Crawford*, 126 Ill. App. 468, 480.

“The word ‘may’ is usually only permissive or discretionary.” *State v. Stepp*, 59 S. E. 1068, 63 W. Va. 254.

The defendant also ignores the fact that if the seller sells, he may sell at a private sale and without notice to the purchaser, and the seller may bid at such sale. Giving the words their full and natural import, it is evident that the seller may repossess the property in behalf of the purchaser and sell it to himself at a private sale, crediting the amount to the account of the purchaser. The result would not be different than that of the principal case. The plaintiff repossessed the property from the defendant, took it into his workshop, repaired and serviced it, put it on his sales floor, and gave the defendant a credit for it at its actual market value. This, in fact, constitutes a sale to himself, which he could do under the terms of the contract, and it is clearly within the rights of the seller after repossession. From that time on, the plaintiff has the right to damages between the amount credited to defendant and the original contract price.

The language of the contract is intentionally broad enough to cover this situation. Such a transaction is usual in this type of business and constitutes a private sale without notice, and at which sale the seller was the purchaser. All the law requires is that the sale be fair, and the record clearly indicated that in this case the amount credited to the defendant was the actual value of the machines and more than they eventually sold for. In *Pussley v. McLanahan Bros.*, 14 Ga. App. 366, 80 S. E. 902, the court said:

“It has been held in a case involving a contract provision for resale, that a sale by the vendor to himself, even though the sale is free from fraud, is void-

able at the option of the vendee, providing the vendee tenders the payment of the debt secured by the property."

It will be noted in this case that the vendee has never tendered payment of the purchase price so, consequently, has never avoided such sale.

By Paragraph 8, quoted *supra*, the seller may enforce any of his remedies successively or concurrently. That paragraph mentions particularly that any repossession, re-taking or sale shall not release the purchaser until the purchase price has been paid in full.

The defendant, in his brief, page 14, misquotes the facts. The plaintiff's president, Mr. Knudsen, testified that he **did** know what happened to the machines, and that he knew that they had been sold, and the price received for each sale. However, the evidence of resale was excluded upon motion of the defendant. Plaintiff testified and introduced evidence showing that his valuation of the machines and his credit to the defendant on the books of the company was not an arbitrary figure, but was arrived at by taking averages of the high and low sale price of each machine during the period immediately prior to the entry made on the books of the company. His calculations and figures were based upon nation-wide statistics as furnished in "Cash Box," a periodical circulated in the music industry. It is apparent that the court considered this to be a private sale to the plaintiff, and allowed it as a fair sale. Regardless of this, the defendant cannot take advantage by claiming no evidence of resale when such evidence was excluded upon his own motion.

POINT II

THE TRIAL COURT DID NOT ERR IN MAKING AND ENTERING THE FINDING OF FACT NUMBER FOUR TO THE EFFECT THAT THE PLAINTIFF HAD DONE AND PERFORMED ALL THE STEPS AND CONDITIONS OF THE CONTRACT TO BE PERFORMED BY IT AT THE TIME AND MANNER THEREIN SPECIFIED.

The plaintiff had sold three machines to the defendant on a prior contract. These machines had become used and dated and also the defendant was behind in his payments. The plaintiff required the defendant to bring his payments up to date or he would have to repossess the machines. In order to prevent this from hapening, the defendant made arrangements with the plaintiff to refinance the contract with the Lockhart Company, and at this time, trade in his two old Model 1100's on two new Model 1080's (Tr. 6, 7, 9, 10, 92). This contract was dated February 27, 1950. There is no evidence that the Model 1100's were traded for any other reason other than that they were used machines and not working as satisfactorily as new machines would. The defendant's argument is such as to infer that this new contract was made because of some defect in the 1100 machines. The evidence clearly rebuts this inference.

There is abselutely no doubt that the Model 1080's sold to the defendant were new machines (Tr. 10, 42, 44, 51). The evidence that they were rusted or corroded was not convincing and did not impress the trial court, nor was it sufficient to overcome the testimony of the plaintiff that the machines were in good working condition, and that

there was no evidence of rust or corrosion having been on them at any time.

We assume that the citations quoted by the defendant are correct; however, they are misapplied. There is absolutely no evidence that the plaintiff failed to perform any condition of the contract. He made no warranties (Ex. A Paragraph 4) and the appellant stated that he read the contract and that he was familiar with its terms, that he had been in the business for a number of years, and that he had purchased under this type of contract many times before. The seller did everything it was required to do under the contract. It delivered to the defendant the new machines. Any statement by the appellant that these Model 1080 machines were not new is contrary to the evidence. The defendant testified that there was a manufacturer's warranty on the machines, that he read the warranty, and that it protected him from any defects, workmanship or parts and that there was no warranty made by the plaintiff in any respect. It is submitted that this finding is in accordance with the evidence.

POINT III

THE TRIAL COURT DID NOT ERR IN MAKING FINDING OF FACT NUMBER NINE, THAT THE SUM OF \$1,185.00 WAS THE REASONABLE VALUE OF THE MACHINES AT THE TIME OF THE REPOSSESSION, SAID FINDING BEING IN ACCORDANCE WITH THE EVIDENCE.

Wesley Knudsen, President of the plaintiff corporation, testified as to the method of determining the value of the machines at the time the credit was given to the de-

fendant (Tr. 30, 31). This sum was not an arbitrary figure, but was based upon statistics found in "**Cash Box**", a monthly periodical circulated in the music industry. These figures show the high and low sale prices of particular makes of machines in certain areas of the country, and by taking an average of these figures the true representative value of the machines was found, which the court stated was the fair and reasonable value of the machines. As the transcript indicated, the credit was actually more than the machines resold for. As stated supra, the plaintiff attempted to introduce evidence of the final resale of the machines, but this evidence was excluded upon objection of the defendant. There is no doubt that this finding is in accordance with the evidence.

POINT IV

THE TRIAL COURT DID NOT ERR IN MAKING AND ENTERING FINDING OF FACT NUMBER TEN, THAT ANY DEFECT THAT THERE MAY HAVE BEEN IN THE MACHINES IS IMMATERIAL, SAID FINDING BEING IN ACCORDANCE WITH THE EVIDENCE AND DEFENDANT NOT HAVING ALLEGED ANY CLAIM FOR BREACH OF WARRANTY.

The defendant testified that he knew of the terms of the contract; that he was aware of Paragraph 4 of the contract (Ex. A) which stated:

"No warranties, representations or agreements have been made by Seller unless specifically set forth herein, and this contract may not be enlarged, modified, or altered except by endorsement hereon signed by the parties hereto."

The plaintiff did not make any warranties either oral or in writing. In fact, the plaintiff made no warranties at all. The defendant testified that he knew of the warranty made by the manufacturer as to the workmanship and the working parts of the machine. The evidence indicates that he felt the machines were satisfactory enough to put on location, and he felt that they were serviceable because he made no complaint to the plaintiff that the machines were defective until Mr. Knudsen called him by phone and asked him to make a payment on the contract or the machines would be repossessed. Even at this time, Mr. Knudsen testified, the only defect the defendant mentioned was that the machines needed oiling when he received them.

We would submit that the authority cited by the appellant is correct, Jones on Chattel Mortgages and Conditional Sales, Vol. 3, Sec. 1331; however, he does not emphasize that particular part of his citation which is quoted as follows:

"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."

The evidence would indicate that the defendant's contention that the machines were defective was an afterthought, arrived at as a defense to payment after threat of repossession was made by the plaintiff.

There was no evidence of rescission introduced by the defendant. If the defendant had intended to rescind, he is

required to act promptly. The following is submitted as authority on this point:

“One having the right to rescind a contract must assert it without delay.” Wall vs. Zynda, 283 Mich. 260, 278 N. W. 66.

“A right to rescind, abrogate or cancel a contract must be exercised promptly on discovery of the facts from which it arises; and may be waived by continuing to treat the contract as a subsisting obligation.” Nelson vs. Chicago Mill and Lumber Corporation, 100 A.L.R. 87, 76 F. 2d 17.

“A party to a contract cannot avail himself of the benefits of it and at the same time deny the responsibilities imposed by it.” Nelson vs. Chicago Mill and Lumber Corporation, 100 A.L.R. 87, 76 F. 2d 17.

In this case the defendant knew about the alleged defect upon opening the crates. If these defects were so material as to justify a rescission, he should have acted then, but he states that he felt the machines were good enough to put on location, and he did put them on location and kept them there for over five weeks. No notice of rescission was tendered to the plaintiff, and not until the plaintiff had called the defendant on the phone to demand payment on the contract did the defendant mention any defect in the machines, but even at this time he did not indicate a rescission, as the facts show. The Utah Supreme Court has put it as follows:

“While the buyer need not rescind the sale immediately upon discovering the grounds therefore, he must rescind within a reasonable time after discovering the facts justifying rescission; what is a reasonable time depending on the circumstances. * * * Whether the right to rescind was exercised with a

reasonable time is usually regarded as a question of fact for the jury." *Smith vs. Columbus Buggy Co. et al.*, 123 P. 580, 40 Utah 580.

Here, if the defendant had a right to rescind, he certainly did not exercise it promptly and he offered no explanation for his use of the equipment for the period of five weeks after knowledge of the defects, if any, was had upon opening the crates. In fact, there was no rescission.

There was no meeting of the minds, no agreement that the sale would be rescinded or anything of that nature decided upon by the plaintiff and defendant. The plaintiff had performed everything that he was required to perform under the contract.

The defendant had never made a payment upon the contract. The machines had been in service and on location for over five weeks before the defendant even conversed with the plaintiff in regard to the machines, and this conversation was at the plaintiff's bequest and at his expense, during a telephone call made by the plaintiff to the defendant asking for payment on the contract. If the appellant relies upon an implied warranty of fitness for a particular purpose, he did not state so in his answer, and consequently, did not raise any issue nor put the plaintiff to any proof in this respect. American Jurisprudence states:

"In civil cases it is a well-recognized rule that questions not advanced on the original hearing will not be considered on the petition for a rehearing." 3 A. J. 350, Sec. 806.

But supposing that there is some evidence of the machines being defective, nevertheless, there certainly was

evidence introduced that the machines were useable and serviceable. The amount of the defect is disputable; however, the trial court found that they were minor. The Utah court has ruled in *Jorgensen v. Gessell Pressed Brick Company*, 43 Utah 31, 141 p. 460, and as stated in the syllabus said:

“Findings based on conflicting evidence will not be disturbed on appeal.”

In *Angerman Co., Inc. v. Edgemont, et. ux.*, 76 Utah 394, 290 p. 169, the court stated on p. 403 as follows:

“The Supreme Court could not interfere with finding of negligence, where evidence was such that reasonable minds might draw opposite inferences from it.”

Based upon the above argument the respondent will submit that there was no evidence of a rescission and that the finding of the trial court as to the condition of the machines cannot be disturbed because of the nature of the evidence before it.

POINT V

THE TRIAL COURT DID NOT ERR IN ENTERING A JUDGMENT IN FAVOR OF THE PLAINTIFF, SAID JUDGMENT BEING IN ACCORDANCE WITH THE LAW AND EVIDENCE.

The defendant fails to take into consideration that although in the conclusion of law, the court states that the plaintiff is entitled to a judgment in the sum of \$1,860.96, the balance due on the contract, that it also said that the defendant is entitled to a credit of \$1,185.00, and that these

two provisions must be read together to determine what the court meant as a final judgment. The net judgment rendered shows that it is not for the full contract price, but merely for the amount due the seller after the buyer had been given credit for the value of the merchandise repossessed.

CONCLUSION

The appellant states that the trial court's findings were contrary to the evidence in every one of his Points for Argument. Assuming, without admitting, that there may be some merit in the appellant's contention, the ultimate question before the appellate court is whether the trial court has arrived at a correct conclusion. It is interested only incidentally, if at all, in the process of reasoning by which such conclusion was reached. The Utah Court has said in *Ketchum Coal Co. v. District Court of Carbon County, et al.*, 48 Utah 342, 159 P. 737:

“We need not concern ourselves with all that the court may have said. Its reasons for dismissing the action against the company are not controlling. The controlling question is whether the dismissal can be sustained in law.”

In *Burningham v. Burke*, 67 Utah 90, 245 P. 977, this same court has said:

“Though the Court erred in granting the motion on the particular ground on which it was granted, still if it ought to have been granted on one or more of the other grounds of motion, the ruling will nevertheless be upheld.”

The respondent submits that the judgment of the trial court is correct and that the judgment should be sustained,

and that if there is any error committed by the trial court, it is an error of which the appellant cannot take advantage, it being an error of his own making.

Respectfully submitted,

JACKSON B. HOWARD,
Attorney for Respondent