

1963

# Howard B. Ericksen v. Robert L. Poulsen : Brief of Respondent

Utah Supreme Court

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

NOV 4 - 1963

**HOWARD B. ERICKSEN,**  
*Plaintiff-Appellant,*

vs.

**ROBERT L. POULSEN,**  
*Defendant-Respondent.*

Clerk, Supreme Court, Utah

Case No.  
9973

**RESPONDENT'S BRIEF**

**Appeal from the Judgment of the First District Court for  
Box Elder County**

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# IN THE SUPREME COURT of the STATE OF UTAH

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HOWARD B. ERICKSEN, <i>Plaintiff-Appellant,</i>	}	Case No. 9973
vs.		
ROBERT L. POULSEN, <i>Defendant-Respondent.</i>		

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## RESPONDENTS' BRIEF

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### STATEMENT OF KIND OF CASE

This is an action wherein plaintiff has asked for damages due to the sale of a P.O.A. stallion named Applejack, alleging that defendant warranted said stallion to be fit and capable of producing offspring by reason of past performance; alleging that the stallion was sterile; that as a result of sterility certain expenses were incurred. In his prayer he prayed for rescission as well as damages. Defendant answers and alleges that said stallion was young and of tender age;

that two mares had been bred prior to the time of sale and were with foal; that if the stallion became sterile it was due to negligence and mismanagement of the plaintiff, or sickness or disease contracted on the premises of the plaintiff; also that if plaintiff suffered any damages it was the result of the plaintiff's contributory negligence that was a proximate cause of the damage, if any, sustained by him.

## DISPOSITION IN LOWER COURT

Case was tried by the court sitting without a jury, and the court concluded that sufficient evidence had not been presented by the plaintiff, on which the court could predicate a finding concerning the alleged unfitness of Applejack to breed at the time of sale, and as a result thereof dismissed plaintiff's complaint.

## RELIEF SOUGHT ON APPEAL

Defendant, on this appeal, seeks to sustain the judgment in the lower court.

## STATEMENT OF FACTS

The defendant, Robert L. Poulsen, is a doctor of veterinary science and resides in Tremonton, Utah. He met the plaintiff for the first time on the highway south of Pocatello, Idaho (Rec. 10, 188, 210). Prior to said meeting and on the same day, Mr. and Mrs.

Erickson, with a party by the name of Jack Merenes, had been to the premises of Dr. Poulsen in his absence and had seen the stallion Applejack. They had even lead him out of his box-stall and examined him quite carefully (Rec. 9, 186, 197). When they met Dr. Poulsen on the road south of Pocatello, they asked him if the horse was for sale. He advised them that he was and that the asking price was \$1500.00. They were there about 15 to 20 minutes and Erickson said if he could raise the money he would let him know (Rec. 210). Dr. Poulsen (Rec. 210) testified that he did not recall anything said about what Mr. Erickson was going to do with the stallion, but just that he was interested in a P.O.A. stallion and he assumed he was buying him for a stallion, because he didn't say.

The following Monday morning (Rec. 211) Mr. Merenes called Dr. Poulsen and it was agreed that Merenes and Mr. Erickson would leave from Idaho Falls and drive toward Tremonton and Dr. Poulsen would load the stud at Tremonton, and drive toward Idaho Falls and they would exchange the horse where they met. They met at McCammon, Idaho. (Rec. 211). Mr. Erickson had a Chevrolet truck with a horse van on it. Dr. Poulsen had a Miley six pony trailer and the young stallion in the trailer. The record is conflicting as to just what was said at the time the stallion was paid for and placed in the possession of the plaintiff, Mr. Erickson claiming (Rec. 11):

"A. I asked him again about his useability, and he assured me again that if I didn't use him

over two or three times a week, he'd be all  
allright, and that he'd had his shots for dis-  
temper."

Mr. Merenes (Rec. 190) said what happened was as  
follows:

"A. Well, he asked him, he said, "How many  
mares are you going to breed with him?"  
And he said, "about thirty." Well, the doc-  
tor says, "Do you realize the pony won't be  
two until this fall? He's a young pony . . ."

and reported that Erickson said:

"A. Well, he said he'd take good care of him,  
breed what he could and he had a Shetland  
pony to help fill out what he wouldn't  
breed."

He was asked if anything was said about the frequency  
of breeding and Mr. Merenes said: "I didn't hear any-  
thing like that." He said he was there all the time. Dr.  
Poulsen (Rec. 212) gave his version of the conversation  
and said:

" . . . I'm not certain of the exact words, but  
he said about this time, "Well, this little horse  
has sure got his work cut out for him. I've got  
thirty mares to breed to him." And I immedi-  
ately says, "Well, you can't breed thirty mares  
to this horse. He won't be two until in the fall."

MR. GEORGE D. PRESTON: Won't be  
what?

A. Two until fall. And he said, "Oh, I'll be  
careful. I'll space them out and feed him and  
take good care of him." And I says, "Well, you



want to remember he's just a colt, just a young colt. I have bred two mares to him and apparently they've settled." And I says, "I know that the horse has got a lot of breeding ability right now, because he made a good cover on these mares," and I said, "I'd be awful careful breeding him to that many mares."

He was asked if there was any conversation about breeding the horse twice a week and he said there was none. It was cold at the time and all three people were in the Poulsen pony trailer where they held their conversation for the purpose of getting out of the cold. The stallion was then transferred from the six pony trailer to the truck that Merenes and Mr. Erickson were in and driven to Idaho Falls (Rec. 191) and on Wednesday he was taken to Montana (Rec. 12). It is 275 miles from Idaho Falls to the residence ~~of the residence~~ of the Ericksons in Montana (Rec. 22). Mrs. Erickson, however, (Rec. 51) said that they stayed at Archer, near Rexburg, Idaho, and stayed over night and that Archer to Hamilton, where the Ericksons' residence is, is 250 miles and that the total distance from Tremonton was 400 miles (Rec. 40). The stallion, while in the hands of Dr. Poulsen, had been bred to two different mares. One was a buckskin mare (Rec. 214) named Cheyenne. She had, from a previous breeding, foaled on the 29th day of April, 1961. She was thereafter and within nine days bred to Applejack. Mr. Val Dee Leavit was present with Dr. Poulsen at the time of the breeding (Rec. 214, 173, 174). From this breeding the mare had a colt in the following spring

(Rec. 174, 175) and this colt was examined by both Dr. Poulsen and Mr. Leavitt. They caught the colt and threw it down to determine its markings. It was found to be mottled under the tail and around the lips and had definite P.O.A. characteristics. The other mare (Rec. 215) was a little bay mare that Dr. Poulsen had bought at a Prescott sale in Idaho, and she was bred on the 12th day of May near the end of her heat period. The mare was taken to the Pamona Horse sale in California and sold on the 17th day of June. Prior to her sale she was moved into a barn (Rec. 217) and there she was clipped and put on a full grain ration. She was watched carefully to determine whether or not she had settled. She was cross tied in front of other stallions in box stalls and she did not come in heat. There was sufficient time elapsed between the breeding and the day of sale, so that she would have come in heat if she had not been settled. Mares vary from 18 to 21 days (R. 218) between their heat periods. The whereabouts of this mare became unknown so that the defendant could not determine whether or not she had a P.O.A. colt.

Up to the time of delivery in McCammon, Idaho, on the 29th day of May, the horse had proved his breeding ability by breeding two mares. He was exceptionally young, being approximately 21 months of age, and would not reach his second year birthday until September 10, 1959. (Ex. 2). It had had the best of care and was kept in a separate box-stall. where the Ericksons had taken him out to look at him. (Rec. 187).

What the horse was subjected to in the hands of the buyer can only be surmised by the history of what happened to the horse while in their hands. He first became afflicted with ring-worm (Rec. 45), and Erickson also said:

“A. Well, I noticed he wasn’t as lively as other studs. He didn’t run and buck and kick like he should have done.

Q. What were his characteristics?

A. He was a little stiff-legged, and that’s the way he acted.” (Rec. 15).

In the month of October, 1961, (Rec. 16) he developed distemper. On December 12, 1961, Mr. Erickson took him to the veterinary and the veterinary discovered he was blind (Rec. 78); that he would stand with his head down like an animal suggesting some form of brain damage; the horse died that day or the day following and a post-mortem examination was made (Rec. 79) and they found abscesses within the brain which Dr. James K. Jackson from Montana (Rec. 79) called streptococci equi infection, as a result of the distemper.

In regard to the use made of this stallion, there was considerable question of whether abuse had taken place there. The total trip was 400 miles in length from Tremonton (Rec. 40). The stallion was unloaded and reloaded from one vehicle to another and kept overnight. They put him on a breeding program the day after he arrived (Rec. 13). They claimed he completely wilted during an act of breeding (Rec. 13, 14) and had

to be helped down and said they had never seen anything like that. Yet four veterinary doctors, being the plaintiff's veterinary from Montana and two veterinary doctors called in by the defendant as well as the defendant himself, said that this was very normal in a young stallion. This young stallion was bred six times in three weeks (Rec. 14) and none of the mares became with foal. On the 26th day of June (Rec. 68) Dr. James W. Jackson was called in to make an examination and while there bred him to two different mares, one by use of a condom (Rec. 70) and one without within a half hour interval. He claimed that the quantity of ejaculate was small and in response to his counsel's question (Rec. 71):

“Q. Was the stallion Applejack capable of producing offspring the day you made the test?

A. On the basis of the test, no. But the fact that he was producing sperm could neither justify a diagnosis of infertility or fertility.”

He advised his client, the plaintiff, that you could not base a diagnosis or an interpretation on one test (Rec. 73). He prescribed rest and one tablespoon per day of Hi-Amine, an iodize protein (Rec. 74). He admitted it was a touchy drug (Rec. 75). He was given one tablespoon full per day of this drug from the 27th day of June to the 15th day of August (R. 31). The other veterinarians all said the giving of the Hi-Amine drug for this period of time could, in their opinion, be very detrimental to the horse's breeding ability (Rec. 126,

127, 156, 157 and 225) and might injure or destroy it, and that they did not recommend it for a stallion.

To give the stallion rest he was turned into a pasture, but it was found that this pasture contained two horse colts and two filly colts, all being yearlings (Rec. 66). All of the veterinarians, both for plaintiff and defendant, admitted that filly colts of this age could come in heat and that there could be additional breeding that could be detrimental to this young stallion. (Rec. 98, 155, 228, 229).

All of the veterinarians agreed that many factors affect the production of sperm from day to day and two said that after the hauling of a young stallion for a distance of 400 miles under the conditions shown, that he should have had three weeks to a month rest before any breeding program (Rec. 91, 136, 137, 141, 152, 153, 224). All of the veterinarians agreed that all tests and even the pathological report of the autopsy made, after death, showed that the horse was producing sperm and he could not be classed as sterile at any time (Rec. 90, 108, 121, 122, 155, 156, 220). The opinion testimony of some of the veterinarians that the fact that the horse had been bred on the premises of the defendant and had produced a live foal was the best proof of his breeding ability and that he was fertile at the time of sale (Rec. 92, 131, 222).

From this kind of evidence, the court had to find:

“15. That while the court has found that Applejack was able to cover two mares and im-

pregnate one prior to the sale, and that after said animal was transported from Tremonton, Utah, to Hamilton, Montana, he was then unable to impregnate plaintiff's mares, this court is unable, from the evidence, to make any finding as to whether said animal was in fact infertile at the time of the sale."

And had to conclude:

"5. That sufficient evidence has not been presented by the plaintiff on which the court could predicate a finding concerning the alleged unfitness of Applejack to breed as of the time of sale." (Rec. 300).

As a consequence, the court entered a judgment that plaintiff had no cause of action against the defendant.

## ARGUMENT

### POINT I

THE TRIAL COURT DID NOT ERR IN ITS CONCLUSIONS OF LAW NO. 5 AS FOUND IN THE AMENDED CONCLUSIONS OF LAW DATED 16TH DAY OF JULY, 1963, Rec. 300).

The plaintiff had the burden of proof and from that proof the court had to find and conclude, as set out in his conclusion of law No. 5, as follows:

"5. That sufficient evidence has not been presented by the plaintiff on which the court could predicate a finding concerning the alleged unfitness of Applejack to breed as of the time of sale."

The court, at that time, had watched the witnesses, had had an opportunity to observe signalling, (Rec. 14) and had had an opportunity to see the inconsistencies of some of the documents that were handed in as exhibits. For instance, defendant's exhibit No. 26, which is a letter over the signature of plaintiff's expert witness J. W. Jackson, a veterinary of the Veterinary Clinic of Hamilton, Montana, dated January 10th, 1962, and addressed as follows: "To Whom It May Concern." The first paragraph of this exhibit says:

"On June 26, 1961, I was called out to examine a P.O.A. Stud for Howard Erickson. He stated that mares *repeatedly* returned to estrus after breeding." (*Italics added.*)

Now, this statement, when analyzed and when it is considered that it was made up after the stallion's death, leads one to believe that it was an attempt to obtain an advantage under a false premise. For instance, the heat period of estrus, as referred to by the doctor in his letter, is 18 to 21 days (Rec. 218), and they stay in this heat period for several days (Rec. 215). The plaintiff took the stallion to Idaho Falls over Decoration Day (Rec. 12) and left on Wednesday of said week and claims the first attempt to breed was the day after he got home (Rec. 13). This would put the first mare to be bred approximately the first day of June. We have nothing in the record to show whether she was bred at the beginning of her heat period or at the end of it, but she would not come in heat again for 18 to 21 days after the end of the heat period.

The next mare was bred the following Sunday and the same problem arises. The doctor, in his letter, says that the mares *repeatedly* returned to estrus, which would have to be more than once, which is physically impossible to happen. Then again, other exhibits were offered in with inconsistencies. Plaintiff's exhibits 4 to 10 inclusive, being breeding certificates, show \$50.00 paid for the service fee and the plaintiff claimed he paid the \$350.00 for the seven breeding certificates (Rec. 19). Again exhibits 11 to 16 show a \$50.00 breed fee each and plaintiff alleges he paid the said \$50.00 each (Rec. 20). On voir dire examination (Rec. 22) he admitted he gave for the breeding certificates shown as Exhibits 11 to 16, two mares and a bridle. These two mares were sold shortly after, one being sold for \$65.00 and the other for \$72.50 (Rec. 195). The stallion Little Earthquake actually belonged to the defendant Dr. Poulsen, and he was taken there as a courtesy at the request of Dr. Poulsen by Mr. Merenes (Rec. 193) and the consideration given being the two mares and a bridle was for the expense of the trip (Rec. 199) going and the picking of the stallion again at a later date. In regard to the exhibits 4 to 10, it developed on cross-examination that there had been no money passed on that either (Rec. 34) but it was just a trade and that these certificates were obtained and made up when they were getting ready to prepare for trial, and after the stallion's death.

Plaintiff, in his brief on page 4, quotes certain parts from different paragraphs out of the Findings and



leaves other parts out to suit his convenience, which creates a different impression than the actual findings if taken as a whole. For instance, in paragraph 10, he leaves off the last phrase:

“ . . . by reason of past performance.”

which ties back to Finding of Fact No. 2, which has reference to the breeding while in the hands of the defendant, having produced a live colt. Finding No. 11 of the amendments ties again back to paragraph 2. The amended Finding No. 12, which was included at the instance of the plaintiff, speaks of representation, that is, representation of past performance, as spoken of in Findings No. 10 and 2, the knowledge and integrity spoken of would again refer to past performance, that is, that the horse had been bred to two mares and both mares appeared to be settled and it later proved that one gave birth to a live foal and the other was sold and lost track of, and it cannot be determined whether or not she gave birth to a live colt. The record is clear and the court so found that a foal was born from the breeding while in the hands of the defendant. The live foal is living proof of the fitness of the stallion while in the hands of the defendant and there is nothing in the record to show that this condition ever changed until the stallion got in the hands of the plaintiff, when it was so unwisely handled. Again, we find that the plaintiff in his brief, on page 4, leaves out a pertinent part in quoting from paragraph 13 from the findings to-wit:

“ . . . and that after said animal was transported from Tremonton, Utah, to Hamilton, Montana, he was then unable to impregnate plaintiff's mares, this court is unable, from the evidence, or to make any finding as to whether said animal was in fact infertile at the time of sale.”

It must be remembered that each and all of the expert witnesses who testified, and there were four, claimed that all of the evidence showed the young stallion, in each and all of the tests and the post-mortem examination, revealed that he was, in fact, producing sperm in each and every occasion and that he could not be classed as sterile at any time. Each and all of the experts agree that the stress, strain, nervous excitement, over breeding, improper diet, transportation, sickness, infection and many other things either in the mare or the stallion, could affect the ability to have the mare become impregnated even with live sperm present.

The Prestons, in their brief quote from the case of Eden vs. Vloedman, 14 P2d 930. From an examination of this case it appears that bangs disease was reported in the cows. It also appears that the court apparently was satisfied that the bangs disease was present at the time of sale, though not fully developed. This is contrary to any findings in our case. They also quote the case of Petersen vs. Dreher, 194 NW 53, which raised the question of whether an express warranty excluded any implied warranty. In this action, the trial court granted defendant's motion for a directed verdict. When it was heard before the Supreme Court

they held that the plaintiff had offered evidence that the sow was sterile at the time of sale and the court held that the case should have been submitted to a jury for breach of implied warranty, so that the jury might determine whether or not the defect existed at the time of sale. This case could not apply because the court, in our case, found that there was not sufficient evidence to warrant a finding that the defect did exist at the time of sale.

They quote the case of Studebaker Bros vs. Anderson, 50 Utah 319, 67 P. 663, involving an automobile which, to the writer of this brief, should not be applicable for two reasons. One, that anything that is alive and under the custody and control of man, has, its very existence, subject to the treatment that it receives from the hand of man from day to day. The other reason is that the whole reasoning of the court, in this case, indicated that the defect did apparently exist at the time of sale, which is contrary to the findings in our case.

Their quotation from 46 Am. Jur., page 573, refers to an examination immediately after sale, while the first examination that we had in this case was nearly a month later, by third parties.

The Mousel vs. Widker case, 69 NW 2d 783, N.D., was a case where, in the trial in the District Court, the seller sued for the balance due on the purchase price. Judgment was rendered for seller. Thereafter, on motion, a new trial was granted and there was an appeal

from the order granting a new trial. The Supreme Court held that the instruction on express and implied warranties and contracts were incomplete, misleading and amounted to misdirection, and that the court did not abuse its discretion in granting a new trial. This was not a decision on its merits but upon the question of whether or not the jury had been properly instructed and the Supreme Court said it was the court's duty if there had been evidence of either express or implied warranty or both, to properly instruct upon it. The court had instructed on both theories. The court said, page 786, lefthand column:

“In the instant case no request was made by the defendant for more complete instructions on implied warranty. Under the rule stated in the above cases he is barred from raising any objections to the insufficiency of the charge on implied warranty. However, he is not barred on his motion for a new trial from claiming as error that the instructions the court gave on implied warranty amounted to misdirection. That he has a right to do even though he failed to ask for more complete instructions and is barred from objecting on the grounds of non-direction not amounting to misdirection.”

The motion for a new trial was sustained.

In viewing the citations given by appellant in 53 ALR 2d 884, it shows on any of the cases cited that are applicable that the implied warranty covered a defect that was in existence at time of sale. We also have this same doctrine, that the defect must exist at the time of sale, found in 46 Am. Jur., page 571.

## POINT II

### THE TRIAL COURT DID NOT ERR IN MAKING CONCLUSION OF LAW NO. 4, AND THE JUDGMENT.

The Findings of Fact taken collectively show (Rec. 288, 289, 299, and 300) : The purchase; sale for breeding in keeping with age of 21 months; representing breeding to two mares and a live foal being born; in hands of plaintiff, breeding by plaintiff, but no foal; disease on plaintiff's premises; tests showing live and dead sperm; death from abscesses caused by distemper on plaintiff's premises; post-mortem showing at death production of active spermatozoa; no attempt to rescind sale prior to death of stallion; many factors relating to either mare or stallion such as age, physical condition of one or both contribute to failure of mares to get with foal; stallion represented fit and capable by reason of past performance; defendant knew stallion purchased for breeding and plaintiff relied on representations of defendant, but after transportation was incapable of begetting offspring; some expenses incurred by plaintiff in veterinary and feeding; prior to sale bred twice, proof of one impregnation, but after transportation, unable to impregnate; that the court is unable from evidence to find animal infertile at time of sale.

From these findings (Rec. 290) the conclusion No. 4, which is as follows:

“4. That plaintiff has no cause of action against defendant.”

and also conclusion No. 5 (Rec. 300):

“5. That sufficient evidence has not been presented by the plaintiff on which the court could predicate a finding concerning the alleged unfitness of Applejack to breed as of the time of sale.”

The Judgment (Rec. 291) merely carried these Findings and Conclusions into effect. We believe that the Findings and Conclusions as well as the Judgment are proper and are in keeping with the law and adjudicated cases.

Appellant states that he pleads for damages (Rec. 263) but prays for two remedies (Rec. 264)—judgment for damages in one paragraph — rescission and damages in another paragraph and equitable relief in a third paragraph, and complains because defendant did not demand an election of remedies. It must be remembered at the time of the commencement of the action the stallion was dead and could not be returned to the seller so that the rescission as provided for in subparagraph (d) of Section 60-5-7 U.C.A., could not apply. The appellant evidently recognized this for he set out in his proposed findings and conclusions (Rec. 296) paragraph 9:

“ . . . at no time prior to the death of said stallion on the 13th day of December, 1961, or prior to the 14th day of December, 1962, the date when the said complaint was filed, did the plaintiff attempt to rescind said sale or return the stallion in the condition it was at the time of sale.”

And in his proposed conclusions (Rec. 297) he says:

“4. That plaintiff has suffered damages in the amount of \$1,450 by reason of the breach of warranty and has elected to sue for breach of warranty and the difference between the amount paid for the stallion and its actual value.

5. That plaintiff cannot rescind the contract of sale because of his delay in attempting rescission and further that plaintiff cannot return the stallion in substantially the same condition as it was when received.”

The plaintiff has prayed for damages. Under the statute he cannot rescind because he cannot return the subject matter of the sale. The defendant defended and said the animal, when delivered, was as represented, and if any change took place while in plaintiff's hands it was because of plaintiff's abuse and mishandling. Then if the court, after hearing all of the evidence, finds and concludes that sufficient evidence had not been presented by the plaintiff on which the court could predicate a finding concerning the alleged unfitness of Applejack to breed as of the time of sale, he then has no cause of action.

### POINT III

#### THE TRIAL COURT DID NOT ERR IN MAKING CONCLUSION OF LAW NO. 3.

This conclusion of Law No. 3 (Rec. 289) reads as follows:

“3. That the death of Applejack was not caused in any way by reason of the claim of

Applejack's incapability to impregnate plaintiff's mares."

Evidently the plaintiff has reference to conclusions of law No. 2, not 3, at least it appears so from his argument. Let us take the exact testimony of Mrs. Erickson (Rec. 54, line 14) :

"A. Well, I asked if it was Dr. Poulsen and he said yes. So I told him about the tests that were made on the horse and that. Then he asked us if we would wait a while and give the horse a chance to mature, since he was just a young horse, which we agreed to do."

Dr. Poulsen's testimony on this (Rec. 218, line 21) :

"A. She told me that the horse wasn't settling her mares and that they were real disappointed in the horse, that he was not settling the mares. I again told her that he was quite young to be carrying on much of a breeding program, and I asked her, as I remember I asked her how many she'd bred, and I don't recall the number. She told me she'd bred a few. I don't remember exactly how many. But I told her that maybe with time the horse would get a little more maturity, he'd probably breed.

Q. Was there anything said at that time about wanting to bring him back?

A. No, sir."

From the record of the conversation does it meet the requirements of Section 60-5-7 subparagraph (d) U.C.A., which reads as follows:



**"60-5-7. Remedies for breach of warranty—**

**(1) Where there is a breach of warranty by the seller, the buyer may, at his election; (a) Accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price; (b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;**

**(c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty; or,**

**(d) Rescind the contract to sell or the sale, and refuse to receive the goods, or, if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid."**

There certainly was no stallion returned or offered to be returned, as provided in sub-paragraph (d) of paragraph 1 of Section 60-5-7, U.,C.A., so that sub-paragraph 5 of Section 60-5-7, U.C.A., could not apply nor any of the reasoning set out by appellant.

## **POINT IV**

**THE TRIAL COURT WAS THE TRIER OF THE FACTS AND TRIAL COURT'S FINDINGS OF FACT WILL NOT BE DISTURBED AS LONG AS THEY ARE SUPPORTED BY SUBSTANTIAL EVIDENCE OR UNLESS THERE IS NO REASONABLE BASIS IN EVIDENCE.**

The most recent case of *Lowe vs. Rosenlof et al.*, 12 Utah 2d 190, 364 P2d 418, on page 419, right column on Pacific Reporter, says:

“(1) This court has stated on numerous occasions that findings of fact made by the trial court will not be disturbed so long as they are supported by substantial evidence. Therefore, the findings of the lower court must be affirmed unless there was no reasonable basis in the evidence on which the court could fairly and rationally have thought the requisite proof was met.”

The same doctrine is found in *Child vs. Child*, 8 Utah 2d 261, 332 P2d 981, and in *DeVas v. Noble*, 13 Utah 2d 133, 369 P2d 290.

## CONCLUSION

The young stallion, before sale or after, was never sterile. His breeding ability could increase or decrease from time to time, according to favorable or unfavorable handling. His untimely death brought about on account of disease, contracted on the premises of the plaintiff which caused abscesses in the brain, destroyed a very desirable animal. The evidence adduced by the four veterinarians showed how important care and handling can be in any breeding program, particularly of young animals. Also, it showed how the ability of a young, immature animal to breed can change or alter from time to time, according to conditions he might be subjected to.

We believe the horse was abused and improperly bred without consideration of his age. We believe the plaintiff gave no consideration to the effect of the hauling, the weather, the infection contracted on plaintiff's premises, his stiff-leggedness, that developed at plaintiff's place indicating unknown conditions that he might have been subjected to. We do not believe he should have been turned into pastures with fillies that might come in heat and cause excessive breeding and stress, or that he should have been fed a touchy drug for prolonged periods of time. We do not believe that the defendant must guarantee against such treatment. When we consider this kind of treatment with the fact that the stallion in the hands of the defendant bred two mares and evidently settled both, but absolute proof of impregnation of one was made, then we would have to conclude that at the time of delivery he was as represented. We believe that the court was correct in finding and granting a judgment of no cause of action.

Respectfully submitted,

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