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Pioneer Finance & Thrift Company, a Corporation v. Dahl Ray Powell and Bonnie Rae Powell, His Wife : Brief of Appellants

Utah Supreme Court

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

**PIONEER FINANCE & THRIFT
COMPANY, a corporation,**

Plaintiff-Respondent,

VS.

**DAHL RAY POWELL and
BONNIE RAE POWELL, his wife,**

Defendants-Appellants.

Case No.

11123

BRIEF OF APPELLANTS

**Appeal from Summary Judgment for debt in favor
of Plaintiff Pioneer Finance & Thrift Company
the Third Judicial District Court in and for
Lake County. Hon. Stewart M. Hays.**

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APR 11 - 1968

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IN THE SUPREME COURT OF THE STATE OF UTAH

PIONEER FINANCE & THRIFT
COMPANY, a corporation,
Plaintiff-Respondent,

vs.

DAHL RAY POWELL and
BONNIE RAE POWELL, his wife,
Defendants-Appellants

Case No.
11133

BRIEF OF APPELLANTS

Appeal from Summary Judgment for debt in favor of Plaintiff Pioneer Finance & Thrift Company in the Third Judicial District Court in and for Salt Lake County. Hon. Stewart M. Hanson, Judge.

STATEMENT OF THE CASE

On March 18, 1967, Pioneer Finance and Thrift Company brought an action against Dahl Ray Powell and Bonnie Rae Powell, his wife, to recover on a note and chattel mortgage signed by the Defendants (Appellants here) during an appointment at the Plaintiff's office (Respondent here) on Septem-

ber 6, 1966, which appointment had been made between the Plaintiff and Defendants by one Melvin A. Stanley, dba Stanley Furniture and Appliance. In addition to the claim for debt, the Plaintiff also alleged that the Defendants had obtained money from the Plaintiff by false pretenses.

DISPOSITION OF THE LOWER COURT

On Motion for Summary Judgment by the Plaintiff, a hearing was held in the Third Judicial District Court before the Honorable Stewart M. Hanson, Judge, which hearing resulted in a judgment for the Plaintiff for the debt claimed against the Defendants but denied judgment on Plaintiff's allegation that the Defendants had obtained money by false pretenses. It is from the Summary Judgment for debt which the Defendants appeal.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of judgment against them for debt on the grounds of fraud in the inducement; failure of the Respondent to act in good faith to avoid an unconscionable contract; failure of a condition precedent; want or failure of consideration; and remand for trial of the case on the ground that the Appellants' allegations of fraud and failure of consideration were such as to require factual determination by trial before judgments for debt could properly be rendered against them.

STATEMENT OF FACTS

On September 6, 1966, Melvin A. Stanley, hereinafter referred to as "Stanley" made an appointment with the Respondent, Pioneer Finance and Thrift Co., hereinafter designated as "Pioneer", for the Appellants, Mr. and Mrs. Dahl Ray Powell, hereinafter designated as "The Powells" to go to Pioneer's office and sign a note and chattel mortgage. Pursuant to the appointment made by Stanley, the Powells went to Pioneer's office and executed commercial paper contemplated by Stanley's making the appointment.

Since an important part of the defense against collection of that note by Pioneer involves an alleged wide-spread fraudulent plan engaged in by Stanley, some history of Stanley and description of his *modus operendi* which describe the "commercial setting" in which the Powells contracted to pay money to Pioneer will be of more than passing interest to this Court.

Melvin A. Stanley established a business of which he was the proprietor known as Stanley Furniture and Appliance, located at 779 East Third South, Salt Lake City, Utah, sometime in 1955 or 1956. (R 22)

Though Stanley's business with his *customers* appears to have been legitimate until about 1962, his payment record with his *creditors* from the time he began his appliance business until 1964 grew steadily worse. Between 1957 and 1964, fourteen

suits for non-payment of debt were filed against Stanley which resulted in eleven unsatisfied judgments against him. Five of the judgments were obtained by finance companies, one such judgment was in excess of \$30,000.00. (R 22)

The fact of *Stanley's insolvency* was known to the finance companies through routine inquiry to the Salt Lake Credit Bureau, Dun & Bradstreet, or their own "Lenders Exchange." Such information was not available to his customers [such as the Powells]. (R 22)

It is apparent that beginning in about 1962, when Stanley closed his bank account and began transacting all his business with cash, Stanley's creditors were about to close his doors unless he could come up with some cash. Consequently, at that time, he conceived the idea that he could generate working capital to meet the pressing claims which, if not paid, would close his doors, by inducing some of his old customers to sign conditional sale contracts at his place of business, which Stanley could sell to finance companies and generate immediate cash for him, if he delayed purchasing and delivering the furniture. As is customary with conditional sale contracts, the finance company furnished Stanley with forms which Stanley handled directly for them. (R 22)

Beginning in about 1965, most of the finance companies [including the Respondent Pioneer] to whom Stanley had been selling conditional sale con-

tracts became sufficiently suspicious of the possibility that there might be something wrong with Stanley's *conditional sale contracts* and in order to try to insulate themselves from Stanley's plan, began refusing to accept *contracts* signed in Stanley's store and insisted that he "produce the bodies" by having his customers come to the finance company offices where customers signed *notes and chattel mortgages* in the presence of loan company personnel. (R 22)

In order to induce his customers to sign without first receiving their furniture, Stanley promised to make the payments to the finance companies called for by the defendants' note and chattel mortgage. All these payments for finance companies, Stanley made faithfully until Stanley's bankruptcy in November, 1966. (R 23)

At first, Stanley made the proposition that he would deliver furniture *and* make finance company payments to a few former customers such as 65-year-old Ladislao Cruz who neither read nor wrote either Spanish or English and whose command of spoken English was very limited. During the period 1962 to 1966, Stanley induced Mr. Cruz to sign ten contracts. Mr. Cruz did not know which finance company's paper he was signing since he could not read and Stanley made the payments directly to several of the finance companies involved. Mr. Stanley delivered all or part of the furniture on about half of the contracts Mr. Cruz signed and since Cruz was not making the payments, he felt he was in no position to press Stanley for delivery of the furniture. (R 23)

Following 1962, Stanley gradually enlarged his scheme by contacting a number of other Spanish speaking former customers who were employed at such installations as Kennecott and Ajax Press and induced them to sign conditional sale contracts. He delivered enough of the furniture, in cases other than those at bar, to give credence to his claim that he would deliver furniture *and* pay the finance companies. (R 23)

As the snowballing cost of finance charges and high interest and delivering at least part of the furniture began to overcome him, Stanley persuaded some of his earlier customers to whom he *had* delivered furniture and for whom he *was* making payments, to become "shills" and induce their fellow workers, at first only Spanish speaking but later English speaking, to go to finance company offices and sign notes and chattel mortgages to pay for furniture Stanley promised to deliver. (R 23) (Also see Defs.' Deposition, p. 4, 26)

In each case the new recruit was induced by Stanley to remain silent about the arrangements by persuading him the scheme was available to only a limited few "working men" who Stanley wanted to "help." [see Defs.' Deposition p. 27] The arrangement was not available to just anybody. There are several cases where two brothers did not know the other was involved because the injunction not to tell anyone else about his scheme except on Stanley's specific instruction was so skillfully and powerfully planted by Stanley in his victims' minds. (R 24)

It was established in Stanley's bankruptcy hearing that by 1965 and through November, 1966, when he filed for bankruptcy, even though Stanley was receiving as much as \$28,000.00 per month from finance companies generated by his ever-enlarging scheme, he was able only to make the finance company payments without delivering any or only a small part of the promised furniture.

Thus the finance companies themselves became the principal beneficiaries of Stanley's scheme. (R 24)

In each case, when one of Stanley's shills would contact a prospective customer, he would honestly tell the prospect that Stanley had been in business for many years; that he and other people he personally knew *had* received their furniture and that Stanley *was* making the payments. This personal testimony was powerful enough to bring even more sophisticated prospects into the scheme. Some did not take Mr. Stanley's explanations about kick-backs and profitable investments at face value and realizing his prices were high, purchased the furniture in the *confidence that it would be delivered. They had personal testimony of fellow employees that Stanley delivered* and even though the prices were high and if later Stanley was unable to pay off the finance company, since they were buying furniture they needed anyway, they would be able and willing to pay the finance company obligations. [see Defs.' Deposition p. 26, 39]

Stanley *did not deliver* promised furniture to the Powells in the case at bar and since they had received nothing for the note and chattel mortgage they had signed, refused to continue payments to Pioneer after Stanley quit supplying the money for the payments and filed bankruptcy in November, 1966. (R 25)

Stanley's bankruptcy petition lists some *FIVE HUNDRED (500) FAMILIES* which he had brought into his confidence game and sought to discharge his obligations to them in the amount of approximately *FIVE HUNDRED THOUSAND (\$500,000.00) DOLLARS*. (R 25)

It is apparent that Stanley, using the fact that he had been in business for many years and by employing shills who could honestly say they had received their furniture and that Stanley was making finance company payments, engaged in a highly successful confidence scheme against the Powells and hundreds of others. (R 25)

ARGUMENT ONE

THE PLAINTIFF PIONEER FINANCE COMPANY IS NOT A PURCHASER FOR VALUE, AND NOT A HOLDER OF AN INSTRUMENT IN DUE COURSE, CONSEQUENTLY, THE ARRANGEMENTS BETWEEN THE POWELLS, MELVIN A. STANLEY, AND PIONEER MUST BE CONSIDERED AS A WHOLE AND ARE GOVERNED BY ORDINARY SALES OR CONTRACT LAW WHEREUNDER THE NOTE

UN
 BECAME ENFORCEABLE AGAINST DEFENDANTS BY VIRTUE OF FRAUD IN THE INDUCEMENT [ARGUMENT TWO AND THREE] FOR FAILURE OF A CONDITION PRECEDENT [ARGUMENT FOUR] AND FOR FAILURE OF CONSIDERATION [ARGUMENT FIVE].

The transaction between Pioneer and the Powells wherein the Powells signed a note and chattel mortgage with Pioneer as payee took place in Pioneer's office on September 6, 1966, more than nine months after the effective date of the Utah Uniform Commercial Code, which Code enunciates the law governing this case.

By definition, to be a negotiable instrument, a writing must conform to the requirements of a "Draft" (Bill of Exchange) — "Check", "Certificate of Deposit" or "Note." [See Sec. 70A-3-104, (2) U.C.A.] The chattel mortgage signed by Appellants does not meet these requirements for negotiable instruments. While the note is a negotiable instrument, in this case the *note was never negotiated*.

The note was *never acquired by an innocent purchaser for value*; it is still in the hands of Pioneer, the original party to the contract, which is here bringing suit for its collection. Consequently, the Respondent has none of the special protection provided for holders in due course provided in the Uniform Commercial Code and Section 70A-3-306 U.C.A. bears directly on this case.

“70A-3-306. RIGHTS OF ONE NOT HOLDER IN DUE COURSE. — Unless he has the rights of a holder in due course any person takes the instrument subject to

(a) all valid claims to it on the part of any person; and

(b) all defenses of any party which would be available in an *action on a simple contract*; and

(c) the defenses of *want or failure of consideration, nonperformance of any condition precedent, nondelivery, or delivery for a special purpose . . .*” [emphasis added]

Lest there be a lingering doubt whether the note, because it is by definition a negotiable instrument should be given by special protection beyond that provided by contract law alone, attention is called to 44 ALR 2d 31:

“It is a well-known rule that in the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable. 8 Am Jur, Bills and Notes § 355.

“Under this rule, even if the instrument executed by the purchaser to the seller in a secured chattel sale transaction is negotiable, *where the transferee [finance company] suing thereon is not a holder in due course he ordinarily is not protected against defenses which the chattel purchaser-obligor could assert against the seller of the chattel.* This point is supported and illustrated by the numerous cases listed in §20 [g], *infra*, in which a par-

ticular transferrer was found not to be a holder in due course, and by the following cases, which demonstrate its expression and application”

A case directly in point wherein the seller of the goods failed to make delivery of the goods which were promised and the finance company tried to collect on its note despite failure of the dealers warranties, is *Mutual Finance Co. v Martin*, 63 So 2d 649, 44 ALR 2d 1, (1953) wherein after finding that the finance company plaintiff was *not a holder in due course*, the Supreme Court of Florida states at 44 ALR 2d 7:

“The argument has been advanced by appellant that this case should be reversed and that this Court should hold the finance company to be a holder in due course of the note and that personal defenses are unavailable against it. Appellant says that unless this is done it ‘will destroy the long established precedent of the State of Florida and thereby seriously affect a certain mode of transacting business adopted throughout the State in reliance thereon.’ It may be that our holding here will require some changes in business methods and will impose a greater burden on the finance companies. *We think the buyer — Mr. & Mrs. General Public — should have some protection somewhere along the line. We believe the finance company is better able to bear the risk of the dealer’s insolvency than the buyer and in a far better position to protect his interests against unscrupulous and insolvent dealers*

“If this opinion imposes great burdens on finance companies it is a potent argument in favor of a rule which will afford protection to the general buying public *against unscrupulous dealers in personal property.*” [emphasis added]

In the case at bar, the dealer Stanley was likewise insolvent and unable to respond in damages. In the *Mutual Finance Co.* case, *supra*, the dealer did deliver some goods, though not as warranted. In the case at bar, the dealer Stanley delivered nothing.

ARGUMENT TWO

THE POWELLS WERE INDUCED TO SIGN THE NOTE AND MORTGAGE FOR PIONEER AS PART OF STANLEY'S WIDESPREAD FRAUDULENT SCHEME OR CONFIDENCE GAME PERPETRATED ON THEM AND 500 OTHER UTAH FAMILIES BY M. A. STANLEY, DBA STANLEY FURNITURE COMPANY.

Melvin A. Stanley fraudulently induced the Powells to go to Pioneer's office and sign a note and chattel mortgage for Pioneer. The fraud perpetrated by Stanley on the Powells complies with all of the requirements of an allegation of fraud as enunciated by the Utah Supreme Court in *State v Fisher*, 79 U 115, 120, 8 P2, 589 (1932); *Pace v Parrish* 122 U 141, 247 P 2d 373 (1952) and other cases and is set forth with particularity as follows:

(a) Stanley falsely represented to the Appellants that he could and would deliver to them fur-

niture of their selection and that he could and would repay monthly to the finance company the money necessary to satisfy their note;

(b) Stanley made these fraudulent representations to the Powells *barely two months before filing his bankruptcy petition*, [which petition showed a ratio of debt to assets of 600 to 1] knowing his representations were false, since though he had been able to induce enough new participants in his scheme to make the promised cash payments to finance companies until November 10, 1966, *he had not been able to buy and deliver to his customers all of the promised furniture for more than two years prior to his bankruptcy petition*. In September, 1966, when Stanley made his promise to deliver furniture to the Powells *and* make finance company payments, he knew his promise to deliver furniture was false because he had been unable to deliver any furniture in the several months prior to September, 1966. His bankruptcy petition of November, 1966, showed approximately \$600,000 of debt to \$1,000 of assets.

(c) That Stanley, knowing for more than two years that he could not perform all his promises to deliver furniture and make finance company payments, made these false and fraudulent representations with intention to cheat and defraud the gullible Appellants;

(d) That an actual fraud was perpetrated on the Powells in that they signed Notes in reliance on Stanley's false representations; Stanley did not fulfill his promise to deliver the furniture and since

November 10, 1966, did not repay the money required to satisfy the Pioneer note and left the defrauded Powells with an obligation under that note;

(e) That Stanley, using his position as the person with the most actual knowledge of his business, falsely and fraudulently represented to his customers that his business operations were profitable and that he could perform his promises by virtue of, among others, the following reasons: (i) That he received special discounts and rebates from furniture and appliance suppliers which they paid preferentially to Stanley because of his large volume of business with them, (ii) that he received money each month as fees or kickbacks from the finance companies for bringing customers to them, (iii) that the profits thus generated were sufficient to pay for furniture he promised to deliver and also to repay monthly cash sufficient to satisfy their notes, thus inducing his customers to sign the notes and turn the proceeds over to him in reliance on Stanley's representations. (R 33-34)

While it may be argued that Stanley's promise to deliver furniture at a future date did not necessarily constitute a fraud since Stanley might argue he intended to fulfill his promises when made, the same cannot be aid of his statements that he was presently receiving special discounts from manufacturers, investing his money in profitable ventures and receiving kickbacks from finance companies, all clearly *mis-statements of existing fact, and which*

were used by him to induce his customers to enter into his scheme. (R 34)

The South Carolina Supreme Court in *Page v Pilot L. Ins. Co.* 193 SC 59, 5 SE 2d 454, 125 ALR 872 (1939) holds that even a promise of *future performance* which, as here, was made as *part of a general plan* may constitute actionable fraud as follows:

“A future promise is not fraudulent, unless such a future promise was *part of a general design or plan* existing at the time, made as part of a general scheme to induce the signing of a paper or to make one act, as he otherwise would not have acted, to his injury.”
[emphasis added]

Certainly Stanley engaged in a *general plan* to have been able to induce 500 families and 20 finance companies to engage in his scheme.

The disparity between the business experience of the Powells and of Pioneer is such as to meet the requirement of the Utah Supreme Court to the effect that the Appellants must show that they had a right to rely on Stanley and Pioneer as set forth in *Johnson v Allen*, 108 Utah 148, 158 Pac 2d 134, 159 ALR 256 (1945), and more recently in *Reese v Harper*, 8 Utah 2d 119, 329 Pac 2d 410, (1958). Stanley and Pioneer were in business for many years. Stanley sold merchandise to many individuals on a legitimate basis before he began his fraudulent undertakings. On the other hand, it must be kept in mind that the Powells are young (24 years old) and

inexperienced in business (reared on rural Utah farms) [Def. Deposition p. 3] and that Stanley induced them to join his scheme through the employment of a shill, namely, David Hunt, [Def. Deposition p. 4, 26, 28] who had been a life-long friend of Mr. Powell and who himself had been induced to join Stanley's scheme by an innocent friend. Mr. Hunt honestly told the Powells that Stanley had been in business for many years and was, therefore, not a fly-by-night operator. He also told the Powells honestly that *Stanley had delivered furniture to him* and *was fulfilling his promise to make the finance company payments on his obligations.*

Lest there be an inclination to impute fraud to the Powells reference should be made to 23 Am Jur, Fraud and Deceit, Sec 182 where the following will be found:

“Relief will often be granted to a party who was ignorant of the fact that a scheme was fraudulent and entered into it in reliance on the representations of the other party as to its honesty.

“Equity often interferes for the relief of the less guilty of parties, where his transgression has been brought about by the imposition or undue influence of the party on whom the burden of the original wrong principally rests.”

ARGUMENT THREE

THE NOTE AND CHATTEL MORTGAGE SIGNED BY THE POWELLS WERE INDUCED

BY, WERE COLLATERAL TO, AND WERE TAINTED WITH THE FRAUD OF STANLEY'S PROMISES AND ARE UNENFORCEABLE BY PIONEER SINCE PIONEER BREACHED ITS STATUTORY DUTY TO ACT IN GOOD FAITH AND AVOID UNCONSCIONABLE CONTRACTS.

In *Scow v Guardtone*, 18 Utah 2d 135, 417 Pac 2d 643 (1966) the Utah Supreme Court found the finance company was not relieved from the impact of Guardtone's fraudulent contracts merely because of the finance company's self serving disclaimer that the obligations to them were not affected by Guardtone's fraudulent contracts. (see 417 P2 at 644.)

As in *Guardtone*, the case at bar is an "integrated whole" (417 P2 at 644) with Stanley arranging for loans and sending his agent to accompany the Powells and others to finance company offices with a list of furniture and dollar amount in Stanley's own handwriting [Def. Deposition p. 6] and supplying Pioneer with credit information. His own handwritten list of furniture upon which both the Powells and Pioneer relied may well be an integral part of the contract between the Powells and Pioneer.

The reasons the Powells believe Pioneer had knowledge of Stanley's fraudulent activities are summarized as follows:

Pioneer had done business with Stanley for several years, at first by buying his conditional sale contracts and later, when Pioneer learned something to make it fear Stanley's conditional sale contracts,

changed to executing notes and chattel mortgages directly with customers, such as the Powells, that Stanley made appointments for. Pioneer knew Stanley was insolvent and had no inventory or credit, since between 1957 and 1964, fourteen suits for non-payment of debt were instituted against Stanley which resulted in eleven unsatisfied judgments, *five of said judgments, all unsatisfied, having been obtained by finance companies, one of which was in the amount of \$30,000.00*; they chose to disregard information regarding Stanley's business history and methods which was supplied to them by the Salt Lake Credit Bureau, Dun & Bradstreet, and by the "Lenders Exchange," a non-profit clearing house in Salt Lake County maintained by finance companies for the very purpose of supplying the finance companies with information about borrowers and about sellers whose paper Pioneer purchases; Pioneer knew from its considerable experience with Stanley customers that many items sold under his contracts were grossly overpriced; that the contracts covered color television sets, expensive stereo sets and some exotic items beyond the usual level of living of many of Stanley's customers; they knew Stanley was insolvent, and consequently had no credit, and *owned no inventory*; sold from catalogues and floor samples and Pioneer knew that *Stanley could not have made delivery of the furniture* covered by the chattel mortgage at the time it was executed; Pioneer knew, even though Stanley was insolvent, that his business was large and "hopped" from one to another finance company

rather than being placed with one or a few of them which is the usual for furniture stores.

Pioneer knew that *all* Stanley customers had *perfect payment records* with them. *There was no delinquency* either while Pioneer was taking assignments of Stanley's conditional sale contracts nor during the last year or so before Stanley's bankruptcy when Pioneer, along with all other finance companies, with legal power to do so, shifted from purchasing conditional sale contracts to making so-called "direct loans" with customers Stanley made appointments for.

Pioneer hoped to insulate itself from whatever fraud Stanley might be perpetrating by changing from assignments to direct loans. Instead, Pioneer implicated itself even deeper in Stanley's fraud by becoming an immediate party rather than an assignee; they acted with reckless disregard for the effect of Stanley's dealings on his unsophisticated customers.

Pioneer breached the positive duty imposed upon it to conduct its affairs in *good faith* as set forth in Section 70A-1-203 U.C.A. and to heed notice as defined in Section 70A-1-201 (25) :

“(25) A person has ‘notice’ of a fact when

- (a) he has actual knowledge of it; or
- (b) he has received a notice or notification of it; or

- (c) *from all the facts and circumstances known to him at the time in question he has reason to know that it exists.*"
[emphasis added]

As stated in 28 Am Jur 2d, Estoppel and Waiver, Sec. 80,

"Good faith is generally regarded as exercising *reasonable diligence to learn the truth*
...."

Pioneer also breached its duty to *avoid the execution of unconscionable contracts* as set forth in Section 70A-2-302 U.C.A. The breach of which duty has been held in several recent cases as grounds for denying recovery by finance companies as shown in 17 ALR 3d 1010 Sec. 57 as follows:

"Uniform Commercial Code §2-302 (1) provides that if the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

"Applying this provision, the courts have held in a number of cases that an unconscionable clause in a sales contract was unenforceable . . .

"In *Frostifresh Corp v. Reynoso* (1966) 52 Misc 2d 26, 274 NYS 2d 757, a Spanish-

speaking salesman sold a refrigerator-freezer to a husband and wife for a cash sales price of \$900, plus a charge of \$245.88. The cost of the refrigerator-freezer to the seller was \$348. When the husband told the salesman that he had only 1 week left on his job and could not afford to buy the appliance, the salesman told them that *the appliance would cost them nothing* because they would be paid bonuses or commissions of \$25 each on the numerous sales that would be made to their friends and neighbors. The retail contract was entirely in English, and was neither translated nor explained to the buyers. In granting judgment against the buyers for only \$348 with interest, less the \$32 paid on account, the court said that the contract was unconscionable under Code § 2-302 because the price and terms were shocking to the conscience. It pointed out that the service charge alone almost equaled the cost of the appliance and that the buyers were handicapped by a lack of knowledge both as to the commercial situation and as to the nature and terms of the contract, which was submitted in a language foreign to them. [emphasis added]

“Home Improvement, Inc. v. MacIver (1964) 105 NH 435, 201 A2d 886, 14 ALR 2d 324, was relied on in *State by Lefkowitz v ITM, Inc.* (1966) 52 Misc 2d 39, 275 NYS2d 303, in which the court enjoined the operation of a “referral-sales program” as unconscionable, finding specifically that the contracts entered into with buyers under the program were unconscionable under Code § 2-302 (1). Under the plan, the consumer received a commission for each prospect who was referred

by the consumer and who also made a purchase. The promoters charged over \$900 for a simple broiler, over \$1,500 for a color television set, and almost \$1,000 for a vacuum cleaner. They made numerous misrepresentations as to the products involved, and, the court said, their plan had the vice and quicksand nature of all endless-chain transactions. In finding that the contracts were unconscionable under Code § 2-302 (1), the court said that they were unconscionable because not only was the price unfair but *also the contracts were procured by deceptive practices.*" [emphasis added]

The immediate profits including prepaid interest, investigation fees, profit on insurance premiums, often amounting to from \$200 to \$500 on a single Stanley contract, plus the prompt payment records of Stanley customers (prompt because payments were made by Stanley himself) may well have induced Pioneer's management to cast aside caution, "ride the balloon", and "take a chance" despite their knowledge of Stanley's insolvency and unsavory business record.

Pioneer took its chance with Stanley's unsavory business and enjoyed the high profits generated by Stanley's business for several years. In view of Pioneer's failure to abide by its statutory duty of care and failure to heed the most obvious signs of insolvency and fraud, surely Pioneer cannot now be allowed to shift its burden to innocent young people who had neither the business experience nor ac-

cess to the Lenders Exchange, the Salt Lake Credit Bureau or Dun & Bradstreet, all of which resources Pioneer had, to avoid an unconscionable contract.

Pioneer may claim it did not know of Stanley's operations but under the Uniform Commercial Code, Pioneer had a *positive duty to act in good faith and avoid an unconscionable contract*. One of the most elementary principles of jurisprudence teaches that one does not fulfill a positive duty merely by closing his eyes thus avoiding to see the obvious.

ARGUMENT FOUR

THE PLAINTIFF IS NOT A HOLDER IN DUE COURSE AND STANLEY'S FAILURE TO DELIVER THE PROMISED GOODS CONSTITUTES A FAILURE OF A CONDITION PRECEDENT TO THE CONTRACT BETWEEN THE POWELLS AND PIONEER.

As stated in Sec. 70A-3-306, U.C.A. quoted in argument ONE above, since Pioneer is an "immediate party" and not a holder in due course, the "nonperformance of any condition precedent" is available to the Powells as a defense against enforcement of their contract with Pioneer.

When taken as a whole, in the transaction between the Powells, M. A. Stanley, and Pioneer, there can be no doubt that the Powells fully expected Stanley to deliver the furniture he promised to sell to them. Also in the absence of absolute fraud, on its part, Pioneer also expected Stanley to deliver.

Stanley's handwritten list of furniture (see Def. Deposition p. 6) with a dollar amount which was acted upon by Pioneer is part of Pioneer's file and may actually be a written part of the contract itself between the Powells and Pioneer. At the very least, the handwritten list is written evidence of what the condition precedent consisted of. Delivery of the furniture was certainly a *condition precedent* to payment of money by the Powells under the contracts *contemplated by both the Powells and Pioneer at the time the note and mortgage were executed.*

At Section 668, WILLISTON, CONTRACTS 3d ed Page 152 has the following to say with respect to conditions:

“... Conditions may be created by the manifested assent of the parties thereto, *or they may be created by the law from the terms or nature of the contract* without any manifestation of assent to their creation. From this viewpoint, conditions fall into two broad classes:

- (1) The express condition; and
- (2) The constructive condition, also frequently called a condition implied in law.

In *Ross v Harding*, 391 P2 526 (1964) the Washington Supreme Court quoted WILLISTON favorably as follows:

“[6] Whether a provision in a contract is a condition, the nonfulfillment of which excuses performance, *depends upon the intent*

of the parties, to be ascertained from a fair and reasonable construction of the language used *in the light of all the surrounding circumstances*. 5 WILLISTON CONTRACTS (3rd ed) § 663 p. 127” [emphasis added]

Lest it be thought that the law of condition precedent applies only to a failure by a *party* to perform, see RESTATEMENT, CONTRACTS, where in Chapter 10, Sec. 257, Comment “a” at page 367 the following will be found:

“A condition may be a performance *by a party* to a contract or *some other event*. The condition may be the present existence of a fact or its *future occurrence*. The party may warrant or promise that the fact exists or shall occur or he may not so promise. Such a promise as in other cases, may be *inferred from conduct as well as stated in words*.”

In the case at bar, the “other event” contemplated by the parties was the delivery of the furniture by Stanley.

See also Chapter 13, Section 395 of the RESTATEMENT, Comment “a”:

“Sections 250-325 (Chapters 10, 11) state the rules governing the requirements for a duty of immediate performance. A conditional right to performance arises as soon as the contract is made, but the duty does not mature or become one of immediate performance until later. *The condition must first occur*, and the terms of the contract may require it to occur at a particular time or within a limited period” [emphasis added]

Stanley never delivered the furniture so the "condition" never occurred, and so the duty of the Powells to pay under their note is "not mature."

11 Am Jur 2d BILLS AND NOTES § 664 states:

"664. Breach for conditional delivery or delivery for special purpose.

"As between *immediate parties*, and as regards a *remote party other than a holder in due course*, delivery of an instrument may be shown to have been conditional, or for a special purpose only, and *thus it is a defense as to such parties that an instrument was delivered on a condition precedent* which has not been performed . . ." [emphasis added]

In *Cockrell v Taylor*, 122 Fla 798, 165 So 887, 105 ALR 1338 (1936) the Supreme Court of Florida cites at length the Utah Supreme Court in this Court's decision in *Martineau v Hanson*, 47 Utah 549, 166 P 432, 433, (1916), as authority for the proposition that parole evidence may be used to establish that a note was manually delivered to another on a *condition precedent* which failed and constituted a valid defense against collection of said note, as follows:

" "It is familiar law, notwithstanding some conflict in the authorities, that a person may manually deliver an instrument, though it be in the form of commercial paper, to another, on its face containing a binding obligation in praesenti of such person to such other, with a contemporaneous verbal agreement

that it shall not take effect until the happening of some specified event; and that the paper as between the parties will have no validity as a binding contract till the conditions shall have been satisfied; and that proof of such condition does not violate the rule that a written instrument cannot be varied by a contemporaneous parol agreement; that such evidence only goes to show that the instrument never had vitality as contract."

" 'While the fact that the note in question was delivered only upon the condition that it should not become a completed or enforceable contract unless the purchaser of the lands in question paid the sum stated is not as directly pleaded as it might have been, yet it seems clear to us that the condition is sufficiently set forth, and that, as pleaded, it constituted a condition precedent to the right of recovery on the note, and one which the parties could legally agree upon . . . ' "

To the same general effect, see *Glendo State Bank v Abbott* Wyo. 216 Pac 700, 34 ALR 296 (1923) where the Wyoming Supreme Court said:

"The plaintiff [bank] is named as payee in the note. At the trial it introduced the note, and rested. The defendant then introduced evidence tending to prove that he signed the note and delivered it to one Dix, who was soliciting subscriptions for shares of stock in a corporation called the Western Life & Casualty Company; that Dix took the note *for the purpose of delivering it to that company, with the understanding that the company would issue and send to defendant 500 shares*

of its capital stock, or return the note; that the defendant did not receive the shares of stock. . . ." [emphasis added]

Also see *Franklin Discount Co. v Ford* 27 NJ 473, 143 A 2d 161, 73 ALR 2d 1316 (1958) where the Supreme Court of New Jersey said:

"The effect of the eight lines reciting the consideration was to prohibit the defendants from showing a contrary parol agreement, a right which they would otherwise have under the Negotiable Instruments Law. The *plaintiff was not a holder in due course*. Thus, the endorsers under R. S. 7:2-16 NJSA *might show a parol agreement that the delivery was conditional upon the extension of a new line of credit*, or, what amounts to the same thing, under R. S. 7:2-58, NJSA, that there was a failure of an agreed-upon consideration." [emphasis added]

The list of furniture and dollar amount in Stanley's own handwriting which was given to Pioneer at the time of execution of the note here sued upon and which is still in Pioneer's possession must clearly show that the note was executed by the Powells and delivered to Pioneer on the condition that the Powells would receive the listed furniture.

ARGUMENT FIVE

PIONEER, NOT BEING A HOLDER OF AN INSTRUMENT IN DUE COURSE, THE NOTE AND CHATTEL MORTGAGE SIGNED BY THE POWELLS ON BEHALF OF PIONEER ARE VOID AND UNENFORCEABLE AGAINST THE

POWELLS BECAUSE THE POWELLS RECEIVED NO CONSIDERATION FOR SIGNING THEM.

The Respondent, Pioneer, is not a holder in due course nor an innocent purchaser for value of the note upon which it now sues the Powells. In fact, Pioneer is an immediate party to the contract on which it sues. Accordingly, the provision of the Utah Uniform Commercial Code, Section 70A-3-306 cited in Argument ONE above is applicable here and "the defense of want or failure of consideration" is available to the Powells.

Black's Law Dictionary (Second Edition), West Publishing Company, 1910, defines consideration as follows: "CONSIDERATION. The inducement to a contract. The cause, motive, price, or impelling influence which induces a contracting party to enter into a contract. The reason or material cause of a contract." (Citations omitted.)

M. A. Stanley made the appointment with Pioneer for the Powells to go to its office to borrow money to pay for furniture which Stanley promised to deliver to the Powells. The Powells delivered to Pioneer a list of furniture in Stanley's own handwriting showing a dollar amount to be charged for the furniture, which amount was the net amount (exclusive of interest and other charges) the Powells promised to pay Pioneer. That handwritten list is in the possession of Pioneer; it is part of the over-all contract and is written evidence that the Powells expected to receive furniture as consideration for

promising to pay money to Pioneer. [see Def. Deposition p. 25, 26, 37, 38] The Powells were handed a check, prepared prior to their arrival on Stanley's telephone instructions. The check was payable to Mr. Powell *and* to M. A. Stanley.

Since Pioneer is not a innocent purchaser for value, and is in fact an immediate contracting party, as stated in Section 70A-3-306 (b) U. C. A., the Powells may defend against collection of their note as "*in an action on simple contract . . .*"

The furniture contained in Stanley's list was never delivered. Hence, the Powells did not receive the "cause, motive, or impelling influence which induced them to enter into the contract," to pay money to Pioneer as required by Black's definition of consideration.

While it is true that Pioneer gave a check to the Powells, the check was consciously designed by Pioneer to be worthless to the Powells. The check could *not* be converted into money or anything else of value by the Powells themselves.

If it be contended that delivery of the check which the Powells could not cash was consideration for their entering into a contract to pay money to Pioneer, then that check was delivered for a "special purpose" viz., to be re-delivered to Stanley with no value in itself to the Powells.

Since the Powells received nothing of value to them for contracting to pay money to Pioneer, the Powells' promise to pay said money is unenforceable

against them for want or failure of consideration.

This principle is illustrated by WILLISTON, CONTRACTS, illustration No. 3, Sec. 167, Sub 1:

“A [Stanley] has a bilateral contract with B [the Powells] in which the promises are dependent. A [Stanley] assigns his rights thereunder to C [Pioneer], who informs B [the Powells] of the assignment. Thereafter, A [Stanley] wholly fails to perform his own duties under the bilateral contract. C [Pioneer] has no right against B. [the Powells] ...”

The foregoing rule is cited in *Thorp Finance Corporation v LeMire* 264 Wis 220, 58 NW 2d 641, 44 ALR 2d 189 (1953) and is shown by ALR to have considerable authority since its Editors cite cases in support of that same legal proposition from Alabama, Arkansas, District of Columbia, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Nebraska, New Jersey, New York, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin. Following the above citations, ALR 44 2d summarizes the law at page 32 as follows:

“Thus a dealer’s fraudulent misrepresentations as to the condition and value of an automobile in selling it to the defendant *constituted a defense available to the defendant purchaser as against a transferee of the note and conditional sale contract*, where the latter was not an innocent purchaser for value. *Com-*

mercial Credit Co. v. Childs (1940) 199 Ark 1073, 137 SW 2d 260, 128 ALR 726.”

If a misrepresentation by the seller as to the *condition* of the product sold is a defense against the finance company which was not a holder in due course, surely failure of the seller to deliver *anything* must be a defense available to the Powells here.

To hold that the Powells must pay the amount called for in the note when they did not receive the furniture which induced them to enter the contract, would be to clothe Pioneer with the special attributes of a holder in due course or an innocent *purchaser* for value while in fact, Pioneer is merely an immediate contracting party.

That defense of failure of consideration is a defense against collection of the Powells' note by Pioneer is also clearly illustrated in *Mutual Finance Company v Martin*, 63 So 2d 649, 44 ALR 2d 1, 7 (1953) wherein the Supreme Court of Florida cites the Supreme Court of California:

“See also *Commercial Credit Corp. v. Orange County Machine Works*, 34 Cal 2d 766, 214 P 2d 819, 822 (1950), where the Supreme Court of California said:

“ ‘When a finance company actively participates in a transaction of this type from its inception, counseling and aiding the future vendor-payee, it cannot be regarded as a holder in due course of the note given in the transaction and *the defense of failure of consideration may properly be maintained. Machine*

Works never obtained the press for which it bargained and, as against Commercial, there is no more obligation upon it to pay the note than there is to pay the installments specified in the contract.' " [emphasis added]

The Florida Court continued:

"To paraphrase the last sentence of the above quotation to fit the instant case, 'Martin never obtained the deep freezer he bargained for, and as against the finance company there is no more obligation upon him to pay the note than there is to pay the installments specified in the conditional bill of sale.' "

Similarly, in *A. A. Murphy, Inc. v Banfield*, Oklahoma, 363 P 2d 942, (1961) Murphy, the finance company, endeavored to collect on a note executed by Mr. and Mrs. Bogard to join in a "food freezer plan." After finding that the finance company was not a holder in due course, the false promises by the "Plan" salesman and the "Plan's" failure to deliver the freezer promised, were defenses against collection of the note by the finance company. Speaking for the Supreme Court of Oklahoma, Berry, Justice, states:

"Since plaintiff is not a holder in due course, the provisions of 48 O.S. 1951 § 127, are applicable, and defendant buyers could interpose as against it all defenses available between themselves and the payee (Banfield).

"[10] *Apart from failure of consideration, defendants' principal reliance for rescis-*

sion was placed upon fraud in the procurement of the notes and mortgages. The evidence in support of this issue is likewise undisputed. Banfield's agents (whose authority was not denied) represented that a new Markett refrigerator-freezer combination unit would be delivered; . . . Later a secondhand freezer box of a different make was delivered . . . Defendants did not know the terms of the note until they checked the chattel mortgage on file and received a statement of payments from plaintiff finance company . . . This conduct, as we view it, was not incompatible with, nor did it preclude equitable rescission. *Frickenschmidt v Garner*, 174 Okl 559, 51 P 2d 537; *Davis v Gwaltney*, Okl 291 P 2d 820.

"In an action on a promissory note by one *who is not a holder in due course*, both fraud in the procurement of the note and absence or *failure of consideration* are valid defenses." [emphasis added]

It seems clear from the foregoing that failure of consideration is a defense available to the Powells against Pioneer since Pioneer is not a holder in due course, and the Powells did not receive the furniture.

ARGUMENT SIX

THOUGH THE CHATTEL MORTGAGE EXECUTED BY THE POWELLS RECITED THAT THEY HAD RECEIVED DELIVERY OF THE FURNITURE FROM STANLEY, THE POWELLS ARE NOT NOW ESTOPPED TO SET UP STANLEY'S FAILURE TO PERFORM AS A DEFENSE AGAINST PAYMENT OF THE NOTE NOR

DOES THE PAROL EVIDENCE RULE PREVENT THE USE OF EXTRINSIC EVIDENCE TO ESTABLISH WANT OR FAILURE OF CONSIDERATION.

Though it is true that the chattel mortgage signed by the Powells included "small print" stating that the Powells had possession of the goods being purchased from Stanley and pledged to Pioneer, the evidence will also show that when the Appellants went to the finance company offices in company with Stanley's agent, Hazel Stulsky, "everything was ready"; finance company personnel had all or most of the papers made out in advance; Stanley had already supplied credit information. [Def. Deposition p. 13, 35, 36]

The procedures were "rushed" taking only 15 to 20 minutes for completion. The Appellants did not have time to read and comprehend the chattel mortgage they signed. No effort was made to explain the nature of the papers signed by the Powells at the finance company office. [Def. Deposition p. 36, 37]

Citing again the Supreme Court of Wisconsin in *Thorp Finance Corporation v LeMire*, 264 Wis 220, 58 NW 2d 641 (1953) where that court points out at 44 ALR 2d 189 in a footnote citing Am Jur Estoppel § 39:

"The proper function of equitable estoppel is the prevention of fraud, actual or constructive, and the doctrine should always be so applied as to promote the end of justice and

accomplish that which ought to be done between man and man. Such an estoppel cannot arise against a party except when justice to the rights of others demands it and when to refuse it would be inequitable."

Though in *LeMire*, the Wisconsin Supreme Court was dealing with an assigned contract rather than a note and chattel mortgage, since it found the finance company not to be holder in due course, and since Pioneer is not such a holder in this case, the principles enunciated in *LeMire* are applicable here. In *LeMire*, the court went on to say at 44 ALR 2d 189:

"The finance company would be prevented from invoking estoppel against *LeMire*, based upon the recital of delivery of the merchandise, if the finance company, at the time it purchased *LeMire*'s contract, was not acting in good faith and exercising due diligence. The law with respect to this is well stated in 19 Am Jur, Estoppel 739, 741, sec 86:

"'. . . Good faith is generally regarded, however, as requiring the exercise of reasonable diligence to learn the truth, and accordingly estoppel is denied where the party claiming it was put on inquiry as to the truth and had available means for ascertaining it'

". . . The trial court made a statement in the record after counsel for the plaintiff had moved for a directed verdict explaining the court's reasons for granting such motion. In such statement the trial court declared that it would be a violation of the parol evidence rule

to permit LeMire to prove that the *furniture being purchased by him from Stoltz had never been delivered* when the contract itself recited such delivery." [emphasis added]

The Court in *LeMire* then cites Jones, EVIDENCE, COMMENTARIES, (2d Ed) p 2859, Sec 1563, with respect to the *parol evidence rule* as follows:

"We point out in preceding sections that evidence extrinsic to a writing which goes in legal avoidance of the entire writing or agreement is admissible. When entire want of consideration is pleaded, or offered to be shown under such form of pleading as may warrant such showing, the offer of proof goes to an avoidance of the entire agreement and to show that the writing is without legal force. *The same is true where failure of consideration is set up. It is immaterial whether the attempt be regarded as one to establish fraud or merely as going to the matter of performance and enforceability.* Viewed in either aspect, the substantive law recognizes a remedy, and that remedy goes to the very existence of the writing as a legally effective and enforceable thing. It goes, *not in contradiction of any term, but to the entirety. Thus in actions on bills and notes or other contracts the defense is frequently interposed, and proved by means of extrinsic evidence that the agreement was without consideration, or that the consideration has failed.* The same applies to bills of sale, releases and other writings. And the recital in an adoption not under seal of the receipt of consideration may be contradicted

for the purpose of showing the invalidity of the instrument for want of consideration." [emphasis added]

Volume 44 ALR 2d 205 shows additional instances in which obligor was not estopped to prove failure of consideration by parole *despite the obligor's prior acknowledgement of receipt of the property* and cites *Parker v Funk*, 185 Cal 347, 197 P 83, 44 ALR 2d 205 (1921) as follows:

"... where the defendant had executed a conditional sale contract covering the purchase of property described as 'one Ameston truck unit and Ford automobile, Motor No. 17577717,' and had acknowledged therein receipt of 'said property,' and that it was in good condition and repair, but the fact was that the contract covered the purchase of a truck *which was to be constructed by the vendor* out of a Ford automobile then in his possession and a certain truck unit which was to be attached thereto, and the vendor had not completed and delivered the truck when the contract was signed and *in fact never did deliver it*, the defendant purchaser was *held not estopped by contract or in pais*, by such acknowledgement of receipt of the property, to defend an assignee's action upon the conditional sales contract on the ground that the vendor had never delivered the completed truck to him and that *his liability was conditional upon such delivery* rather than absolute as indicated by the contract. The court viewed the conditional purchaser's recital or receipt of the property as being, in this instance, merely a recital of receipt of the consideration, not

intended to be acted upon by a transferee of the contract, and not barring the defendant chattel purchaser from showing *as against the assignee that the consideration has failed*. The holding that there was no estoppel by contract was placed upon the ground that the acknowledgement of receipt of the described property was in effect but an acknowledgement of receipt of the consideration for the contract, and that *it is always open to a party to dispute the recital of a consideration.*" [emphasis added]

To a similar effect, the Annotation cites *American Nat. Bank v A. G. Somerville, Inc.* (1923) 191 Cal 364, 216 P 376; *General Motors Acceptance Corp. v Whitehead* (1931) 1963 SC 236, 161 SE 494, *Southwest Contract Purchase Corp. v McGee* (1947 Tex Civ App) 296 SW 912, Judgment affd 120 Tex 240, 36 SW 2d 978; *Malas v Lounsbury* (1927) 193 Wis 531, 214 NW 332 and *Geocariss v Carellas* (1912) 174 Ill app 232.

Despite the "small print" in the chattel mortgage acknowledging possession of the furniture promised by Stanley, under the circumstances, the Powells are not now estopped to deny that they ever received that furniture.

ARGUMENT SEVEN

THE CASE AT BAR IS NOT PROPERLY A SUBJECT FOR SUMMARY JUDGMENT SINCE THE PLEADINGS OF THE DEFENDANTS ALLEGE FRAUD IN THE INDUCEMENT AND FAILURE OF CONSIDERATION, BOTH OF

WHICH ARE FACTUAL ISSUES TO BE DETERMINED BY THE TRIER OF THE FACTS.

Rule 56 (c) Utah Rules of Civil Procedure, Summary Judgment, states in part:

“ . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that *there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law*. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.”

The Complaint alleges that the Powells owe Pioneer \$1,679.00 based on a note and chattel mortgage executed by the Powells for Pioneer. *Pioneer is not and does not claim to be a holder of the note in due course*. Consequently, fraud in the inducement and failure of consideration are available to the Powells against Pioneer's attempt to collect thereon and both are questions of fact.

The Powells' Affidavit states that they received no consideration for their note, (R 13) and their Answer states that Stanley defrauded them by inducing them to sign the note in furtherance of his fraudulent scheme. (R 10) It seems clear that Stanley's fraudulent scheme was *collateral* to the very commercial paper he induced the Appellants to sign for Pioneer Finance Company.

The facts as alleged therefore clearly place this case within the scope of *Scow v Guardtone* 18 Utah 2d 135, 417 Pac 2d 643 (1966) where at 417 Pac 2d 645 the Utah Supreme Court stated:

“We turn to a consideration of the rights of the Assignee, the Defendant, Prudential Federal Savings. It is pertinent to observe that the fraud, having been established to avoid the contract with Guardtone, the burden of showing it was an innocent purchaser for value, was upon Prudential . . .”

and at 646:

“From the facts recited herein, it is our opinion that there was a basis in the evidence upon which the jury could fairly and reasonably refuse to believe that the Defendant, Prudential Federal, was an innocent purchaser and which forced the conclusion that it was bound by the judgment rescinding the contract for fraud.”

Though Stanley has not actually been sued by the Powells because he cannot respond in damages, and the law does not require the doing of futile acts, there can be small doubt that the Powells could prevail against him on the basis of his failure to deliver the furniture he promised and on his fraudulent promises to them. If so, Pioneer's collateral note would be unenforceable against the Powells under the *Guardtone* rule.

Under Rule 56 (c) *all the allegations in the Complaint must be uncontroverted by the defendant* before it would be appropriate to issue a summary judgment against the defendants. It seems clear that under the law enunciated in *Scow v Guardtone*, supra, the Answer alleges facts, which if true, state a valid defense to the Complaint.

If there be doubt that Stanley's promises were collateral to the Powell's contract to pay money to Pioneer, it should be remembered that the list of furniture and dollar amount in Stanley's handwriting is now and from the beginning has been in Pioneer's files.

The furniture listed by Stanley was copied onto the Chattel Mortgage and the dollar amount shown in Stanley's handwriting was the amount of the net proceeds of the note and the amount of the check issued by Pioneer showing Stanley as a payee.

CONCLUSION

This case should be remanded, with instructions as to the governing law, for trial of the facts by a jury to determine whether the Appellants were in fact fraudulently induced to enter into their contract with the Respondent; whether their contract contemplated delivery of furniture to the Appellants as a condition precedent to the ripening of their obligation under their note; whether the Respondent had

sufficient notice, but failed to fulfill its statutory duty to act in good faith and avoid an unconscionable contract.

Respectfully submitted,

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