

1968

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

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.  
11133

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## BRIEF OF RESPONDENT

Appeal from Summary Judgment of the Third Judicial  
District Court in and for Salt Lake County,  
Honorable Stewart M. Hanson, Judge.

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**FILED**  
APR 4 - 1968

*Clerk, Supreme Court, Utah*

## TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF NATURE OF CASE .....	1
DISPOSITION OF LOWER COURT .....	2
RELIEF SOUGHT ON APPEAL .....	2
STATEMENT OF FACTS .....	2
ARGUMENT .....	12
 POINT I. THE RELATIONSHIP BETWEEN PLAINTIFF AND DEFENDANTS WAS ONE OF LENDER AND BORROWERS, RATHER THAN VENDOR AND VENDEES, AND ANY ALLEGED FAILURE OF CONSIDERATION OR FRAUD IN THE INDUCEMENT AS BETWEEN STANLEY AND HIS "CUSTOMERS" WOULD SERVE AS NO DEFENSE TO PLAINTIFF'S ACTION ON THE NOTE AND MORTGAGE .....	 12
 POINT II. DEFENDANTS BY THEIR CONDUCT ARE ESTOPPED TO ASSERT ANY FAILURE OF CONSIDERATION OR FRAUD .....	 17
 CROSS-APPEAL .....	 20
 POINT III. THE CONDUCT OF DEFENDANTS CONSTITUTES, AS A MATTER OF LAW, THE OBTAINING OF MONEY BY FALSE PRETENSES AND THE LIABILITY CREATED IS NOT DIS-	

## TABLE OF CONTENTS (Continued)

	Page
CHARGEABLE IN BANKRUPTCY PURSUANT TO THE EXCEPTION FOUND IN SECTION 17a(2) OF THE BANKRUPTCY ACT .....	20
POINT IV. PLAINTIFF IS ENTITLED, PURSUANT TO THE TERMS OF THE PROMISSORY NOTE AND CHATTEL MORTGAGE, TO AN ATTOR- NEY'S FEE FOR THIS APPEAL .....	24
CONCLUSION .....	25
INDEX TO CASES AND AUTHORITIES	
STATUTES	
FEDERAL BANKRUPTCY ACT SECTION 17a(2), 11 U.S.C. Sec. 35 .....	21
TEXTS	
28 Am. Jur. 2., Estoppel and Waiver, Sec. 27 .....	18
28 Am. Jur. 2d, Estoppel and Waiver, Sec. 35 .....	18
28 Am. Jur. 2d, Estoppel and Waiver, Sec. 43 .....	20
Collier on Bankruptcy 14th Edition, Sec. 17.16 .....	21
PERIODICALS	
UTAH LAW REVIEW, Vol. 1967, No. 2, "Fraudulent Financial Statements and Section 17 of the Bankruptcy Act — The Creditor's Dilemma" .....	21

# TABLE OF CONTENTS—Continued

	Page
CASES CITED	
Commercial Credit Corp. v. Orange County Machine Works, 34 Cal. 2d 766, 214 P.2d 819 .....	13
Commercial Credit Corp. v. Smith, 143 Misc. 478, 278 NYS 759 .....	15
Cox v. Helms, 36 N.M. 31, 7 P.2d 617 .....	17
Davidson-Paxon Co. v. Caldwell (C.C.A. 5th) 44 Am. B.R. (NS) 19, 115 F.2d 189, 133 ALR 432 .....	23
Gear v. Davis, 435 P.2d 923, ..... Utah 2d .....	21
Hartford Accident and Indemnity Company v. Flanagan (S. D. Ohio) 41 Am. B.R. (NS) 351, 28 F. Supp. 415 .....	24
Mutual Finance Company v. Martin, 63 So. 2d 649, 44 ALR 2d 1 .....	13
Mutual Finance Corporation v. Dickerson, 123 N.J.L. 62, 7 A.2d 859 (1939) .....	15
Petterson v. Ogden City, 111 Utah 125, 176 P.2d 643 .....	18
Scow v. Guardtone, 18 Utah 2d 135, 417 P.2d 643 (1966) .....	15
Thorp Finance Corp. v. LeMire, 264 Wis. 220, 58 N.W. 2d 641, 44 ALR 2d 189 .....	19
Universal Credit Company v. Enyart, 231 Mo. App. 299, 98 S.W. 2d 120 .....	19
Wells v. Blitch, 182 Ga. 826, 187 S.E. 86 .....	22

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BONNIE RAE POWELL, his wife,

*Defendants-Appellants.*

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Case No.  
11133

## BRIEF OF RESPONDENT

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### STATEMENT OF KIND OF CASE

Plaintiff sued defendants on a promissory note and chattel mortgage covering certain household furniture for \$1,679.00, for a deficiency judgment if a deficiency should arise on foreclosure sale, and in the alternative, for the same relief together with a determination that defendants had obtained money from plaintiff by false pretenses making plaintiff's claim nondischargeable under Section 17a(2) of the Federal Bankruptcy Act.

## DISPOSITION IN LOWER COURT

Plaintiff moved for a summary judgment which the court granted with respect to the cause of action on the note and chattel mortgage, including attorney's fees, the court determining that the personal property described on the chattel mortgage had never been in the possession of defendants, and that the mortgage lien was, therefore, without value. On the alternative cause of action for a determination that the money was obtained by false pretenses, the summary judgment was denied.

## RELIEF SOUGHT ON APPEAL

Defendants seek to reverse the summary judgment. Plaintiff, on cross appeal, seeks a determination by this court that the admitted facts, as a matter of law, require a finding that defendants obtained money from plaintiff by false pretenses and that the liability of the defendants to plaintiff is, therefore, not dischargeable under Section 17a(2) of the Federal Bankruptcy Act.

## STATEMENT OF FACTS

Plaintiff takes exception to the statement of facts in defendants' brief since the same contains statement upon statement outside the record of this case, the accuracy of which plaintiff denies. These departures from

the record will be noted hereafter. Plaintiff believes that a complete statement of the facts based upon the record is necessary.

On September 6, 1966, the defendants went to the office of plaintiff in Midvale, Utah with a list of household furniture (Exhibit 1) and there executed a promissory note and chattel mortgage (Exhibits 5 and 6) for a sum sufficient to pay for the described furniture. A check (Exhibit 4) for \$1,305.55 was made payable to the defendant, Dahl Ray Powell and to the dealer, Stanley Furniture, which check was later endorsed by Powell, delivered by Powell to Stanley, deposited and paid. Prior to the execution of the note an application and financial statement (Exhibit 2) was completed and signed by defendants whereon detailed information was entered indicating the obligations and monthly installments of the borrowers. Detailed information was also requested and obtained regarding employment, bank account, monthly earnings, and assets (T. 15).

The representative of the plaintiff company upon receiving the financial statement and other information made a credit check and determined that the defendants were good credit risks for a total loan of 1,752.00 (R. 16). A settlement sheet (Exhibit 3) executed by defendants provided for repayment over 24 months of the total loan which included interest, a service charge, recording charges, and premium charges for credit life and health and accident insurance.



The defendants made only one payment of \$73.00 on the note. Unknown to plaintiff, (T. 11, 32) the money for this payment was received by defendants in cash from Mr. Stanley, proprietor of Stanley Furniture, and the same money was taken to plaintiff company (T. 24) the defendants being given a receipt for this amount.

At some later date defendants were riding around one day and stopped by Stanley's Furniture to talk to him to see if the furniture had come in yet and a sign on the place of business indicated that Stanley had filed bankruptcy. (T. 25) The furniture had never been delivered (T. 7) and defendants refused to pay further on the note.

The affidavit of plaintiff's manager states that the plaintiff, through its agents and employees, had no notice of any fact or circumstance which would put it on inquiry that the transaction as herein described was other than a bona fide loan to be secured by household furniture belonging to the defendants, and which loan was to be repaid by the defendants (R. 17). Defendant, Dahl Ray Powell, on deposition, testified, however, that a friend of his, one David Hunt, sometime prior to the above-described transaction with Pioneer, had told the Powells that they could go to Stanley Furniture and there receive furniture without paying for it because when a payment was due, that Stanley would make it (T. 4). Defendants went to Stanley's place of business, met Mr. Stanley and

picked out a bed. Stanley told defendants that they "could order the furniture and that he would make the payment" (T. 6) and that there was no limit on what additional furniture defendants might pick out. Defendants selected other furniture as listed on Exhibit 1 prepared in Mr. Stanley's own handwriting (T. 7). On the first visit Stanley told defendants it would be necessary that they go to some finance company. Pioneer Finance and Thrift was not mentioned at first (T. 7). Stanley had a list of finance companies which he showed defendants and asked them to select one. When defendants told Stanley that it didn't matter, Stanley selected Pioneer (T. 8, 31). The defendants had had no prior dealings with that company.

With respect to delivery of the furniture, Stanley said that he was waiting for the items to be shipped (T. 8). He did not give the defendants any set time when delivery would be made, but when inquiry was later made by defendants he kept "giving us time" stating that "the train wasn't in yet." (T. 9)

Stanley told defendants that each month when the payment was due to the finance company defendants were supposed to come up to his store and he would hand them the money and defendants would make the payment (T. 10). Stanley cautioned defendants "not to tell the finance company" that Stanley was going to make the payments (T. 11), and defendants never did tell Pioneer (T. 23, 24).

Mrs. Powell recalled that Stanley told them "that he was making the payments and we could tell them (the finance company) that we was getting money for the furniture but not to tell them who was supposed to make the payments." (T. 32)

Defendants did not inform the finance company that the merchandise which they were to receive was to be delivered at some indefinite future date (T. 22), but, rather, executed a chattel mortgage which stated that the described household goods "were located at the address of the mortgagors." (Exhibit 6) Both Mr. and Mrs. Powell testified that they understood that they were borrowing money for Stanley and were lending him their credit (T. 23, 25, 26, 38, and 39) in consideration for a promise by Stanley that he would give them free furniture. Mr. Powell stated that "I kind of worried about it" (T. 23) but that he did not tell the finance company the whole story about Stanley, what he had promised to do for them, nor that Stanley was the party who was to make the payments on the note (T. 23).

On cross-examination, Mr. Powell was asked by his counsel (T. 25) :

Q. "Mr. Powell, you mentioned a moment ago that you considered that you were lending Stanley your credit. Do I take this to mean that you didn't consider you were buying furniture?"

- A. "Well, the way he told us that he was borrowing money on our credit and in return he was giving us furniture for him lending us his credit or him using our credit."

Mrs. Powell was asked concerning her understanding (T. 38):

- Q. "Now you knew that you weren't paying for any furniture if Stanley's deal went through as promised?"

- A. "Yes."

- Q. "So when your husband made the statement on his deposition that what he was doing was lending his credit to Stanley, that more accurately reflects what was happening, doesn't it?"

- A. "Yes."

- Q. "And didn't you understand that at that time, didn't you understand before you went to Pioneer, that you were actually making a loan for Stanley?"

- A. "Yes."

- Q. "So that he could have the use of some \$1,-700.00?"

- A. "Yes."

On re-cross-examination, counsel for defendants then asked Mrs. Powell, (T. 39) "And you didn't think that you were using that money to pay for furniture?"

A. "We was just loaning it to Stanley."

Q. "You weren't using it to pay for the furniture?"

A. "No."

Mrs. Powell was asked (T. 32):

Q. "At the one time he said to you 'Don't tell the finance company that I am making the payments,' wasn't that a red flag to you that the finance company didn't have the whole story?"

A. "Well, yes, but on the other hand, our friend said that some finance companies did know what was going on. He didn't name any finance companies specifically but he said that there was some of them that did know."

Q. "So, with respect to Pioneer you really weren't informed whether or not they were informed?"

A. "No."

Q. "But you did comply with Mr. Stanley's request and not tell them?"

A. "Yes."

Mrs. Powell further testified as to going through the mechanics of giving credit references and other financial information and was asked, "Is it your understanding that the reason they do these things is so that they can rely on your credit?"

A. "Yes."

Q. "Did you feel that they were relying on your credit when you were in there?"

A. "Yes."

A. "We was just loaning it to Stanley."

Q. "You weren't using it to pay for the furniture?"

A. "No."

Plaintiff's manager, Clark Gleave stated by affidavit that the plaintiff "relied upon the representations of defendants that they were in possession of certain goods described on said chattel mortgage, that they were the parties who would make the payments thereon to Pioneer

Finance and Thrift Company,” and further stated, “that plaintiff would not have made the described loan had they known that Melvin A. Stanley dba Stanley Furniture and Appliance was actually the party who was to make the payments on the note and mortgage and if they had known that the household goods described on the chattel mortgage were not in the possession of the defendants” (R. 17).

The defendants’ statement of facts commencing on page 3 of their brief recites a history of the business known as Stanley Furniture and Appliance and declares (outside the record of this case) that five judgments had been obtained against Stanley, one of which was in excess of \$30,000.00.

The statement of facts then recites the startling conclusion, “Stanley’s insolvency was known to the finance company through routine inquiry to the Salt Lake Credit Bureau, Dun & Bradstreet, or their own ‘lender’s exchange’. Such information was not available to his customers (such as the Powells).” As citation for this conclusion as to what was in the minds of plaintiff’s agents, plaintiff cites page 22 of the record. Going to page 22 of the record we find that what counsel has cited is actually a paragraph from his “statement of facts” submitted in the form of a memorandum at the time of the hearing of plaintiff’s motion for summary judgment. Such statement was not part of the testimony then, and

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is not part of the testimony now. From this point in ~~defendants'~~ ~~plaintiffs'~~ statement of facts each paragraph contains verbatim quotes from the "record" which turns out to be a statement of ~~defendants'~~ ~~plaintiffs'~~ counsel, extracted from his prior statement of facts filed in the trial court memorandum. The statements are not found in the affidavit or depositions constituting the facts in the instant matter.

Such citations frequently appear to be an attempt by counsel to gain the sympathy of this Court. For instance, on page 5 of defendants' brief it is said, "At first Stanley made the proposition that he would deliver furniture and make the 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." This quotation should be compared to the testimony elicited on the depositions of Mr. and Mrs. Powell. Mr. Powell was a high school graduate of Union High School in Roosevelt, and reads and writes English (T. 3). His wife, Bonnie Rae Powell, was a graduate of Delta High School (T. 30). There is absolutely nothing in their testimony which indicates a lack of ability to comprehend what was transpiring in this matter.

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## ARGUMENT

## POINT I

THE RELATIONSHIP BETWEEN PLAINTIFF AND DEFENDANTS WAS ONE OF LENDER AND BORROWERS, RATHER THAN VENDOR AND VENDEES, AND ANY ALLEGED FAILURE OF CONSIDERATION OR FRAUD IN THE INDUCEMENT AS BETWEEN STANLEY AND HIS "CUSTOMERS" WOULD SERVE AS NO DEFENSE TO PLAINTIFF'S ACTION ON THE NOTE AND MORTGAGE.

Defendants occupy much space in their brief attempting to establish that the plaintiff was not a holder in due course of the promissory note, and that, therefore, the defenses of failure of consideration and fraud were available to defendants as against plaintiff. All of the cases cited in defendants' brief are cases involving the purchase of conditional sales contracts or the assignment of promissory notes after the same have been executed to a vendor. Plaintiff submits that the defendants have misconstrued the relationship of the parties.

It is common knowledge that financing institutions are commonly called upon to finance the purchase of chattels. Such financing may be handled by the buyers executing a conditional sales contract to the vendor which is later sold to a financing institution. Another alternative would be the execution of a promissory note and

chattel mortgage to the vendor by the vendees, and the assignment of these documents for consideration to a financing institution. A third and entirely different mode of financing the purchase of chattels is that demonstrated in the instant case where the defendants borrowed money from the finance company evidencing an intention that that money was to be used for the purchase of household goods. The household goods were given as security for the loan, and the check was made payable to the dealer and the borrower in order to insure that the funds were actually used for the purpose intended. There is nothing unusual about this mode of business. Powell had it within his power to refuse to deliver the check to Stanley until the furniture was in his possession. He chose to make a loan of the money to Stanley, receiving therefor a promise of free furniture. It is plain that Stanley was capitalizing on the all-too-common desire of the public to "get something for nothing." In this case Stanley appears to have obtained the complete trust and confidence of Mr. and Mrs. Powell with respect to the carrying out of his scheme. But Mr. and Mrs. Powell played a knowledgeable part in that scheme, while Pioneer Finance was uninformed as demonstrated by all of the facts in the record.

Defendants' cases cited in their brief such as *Commercial Credit Corp. vs. Orange County Machine Works*, 34 Cal.2d 766, 214 P.2d 819, and *Mutual Finance Company vs. Martin*, 63 So.2d 649, 44 ALR 2d 1, are not pertinent to the instant matter. In those cases the finan-

cing institution was found to have participated in the transaction (the sale) to the extent that the court held they were not a holder in due course of the paper which they purchased. The Martin case goes so far as to argue that "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." While this language may have fit the facts in that case, it is a stretch of the imagination to fit that language to the present fact situation where the borrowers (Mr. and Mrs. Powell) were in complete control of the situation and able to protect their interests against the unscrupulous and insolvent dealer (Stanley). Rather than divulge the information which they had relative to the scheme of Stanley to use their credit to borrow money, with the hope of obtaining gain in the form of free furniture, these defendants refused to divulge any information to the finance company which would have put the finance company on notice as to what was happening. Defendants even went so far as to manually pick up \$73.00 from Stanley, carry it to Midvale, and deliver it to Pioneer, all for the very obvious reason that Stanley did not want the finance company to know the source of the money from which the payment was made.

In cases where contracts or notes have been sold or assigned, the courts have held that the financing institution must have acted in bad faith in order that the defense of failure of consideration or of fraud in the inducement

prevail against them. In *Mutual Finance Corporation vs. Dickerson*, 123 N.J.L. 62, 7 A.2d 859 (1939), the facts show a fictitious sale transaction by an automobile dealer and are similar to the "fictitious sale" in the instant case. It is held that since the finance company had no actual knowledge of the fictitious character of the transaction it did not act in bad faith, even though the dealer testified that there were a great number of transactions similar to the one under consideration with the plaintiff which were purely for the purpose of borrowing money.

In *Commercial Credit Corporation vs. Smith*, 143 Misc. 478, 258 NYS 759 (1932) it was noted that the circumstances that a finance company and the seller of chattels had carried out similar financing transactions and that the finance company purchased paper only after investigating the maker's financial standing may well be indicative of good faith on the part of the financing institution. It is to be noted that in the instant case the financial information requested of the Powells and the representative's absence from the area where the Powells were sitting (T. 15) for a time sufficient to make a check with the Credit Bureau indicates that plaintiff did make an independent investigation of the financial condition of the borrowers as set forth in Mr. Gleave's affidavit (R. 16).

Defendants quote the case of *Scow vs. Guardtone*, 18 Utah 2d 135, 417 P.2d 643 (1966) as authority for the proposition that the financing institution should not be

relieved from the impact of a fraudulent contract entered into between dealer and vendor. In that case a local bank purchased conditional sales contracts covering hearing aids. The court found that fraud had been established to avoid the contract between the purchasers and Guardtone and observed that the financing institution had the burden of showing that it was an innocent purchaser for value. The court pointed out that the "home modernization contracts" were on a printed form which in the usual "fine print" included the name of the financing institution as the assignee. It further recited that the assignee accepted the contract "with recourse." The Court then stated that "these circumstances might reasonably lead one to believe that the assignee had something to do with the planning of this transaction and knew the facts concerning the collateral contracts (certain bonus appointment guarantees and advertising agreements) and that it was advisedly attempting to avoid any involvement of itself therein, but without regard to what effect those contracts may have upon the purchasers." The Court went on to state "Finally, and most important, is the fact that there was a substantial alteration on the face of the assigned contract in the name of payee, from Guardtone of Utah to Guardtone, Inc., a circumstance which should put a prudent purchaser on inquiry. No such inquiry was made."

The instant case can be distinguished on its facts. There is no assigned contract situation in the instant

case, no involvement of the finance company in the sales transaction, nor any facts which would put it on notice of any irregularity in the sale. There was no failure of consideration for defendants' promise to pay the promissory note, since it is conceded that defendants received a check from plaintiff company containing the name of Dahl Ray Powell as payee, ostensibly for the purchase of furniture. There is no attempt on the part of defendants to show that they were fraudulently induced by Pioneer in connection with their borrowing the money. The fraud practiced upon them was the fraud of Stanley and not of Pioneer and their recourse is against Stanley, hopeless as that prospect may be.

## POINT II

DEFENDANTS BY THEIR CONDUCT ARE ESTOPPED TO ASSERT ANY FAILURE OF CONSIDERATION OR FRAUD.

In *Cox v. Helms*, 36 NM 31, 7 P.2d 617 (1932), it was held that where the defendants participated in a false and misleading transaction whereby an automobile dealer presented to the plaintiff financing institution a conditional sales contract and note which did not represent the true state of affairs and thereby induced the plaintiff to part with its money, the defendants were estopped to deny the rights of the plaintiff under such conditional sales contracts. Clearly, the defendants participated in a false and misleading transaction in making application



for a loan and did not represent the true state of affairs either as to the security described on the chattel mortgage, or as to the party who was to make repayment. Such conduct constitutes equitable estoppel as defined in 28 Am Jur 2d, Estoppel and Waiver, Sec. 27, page 627: "Equitable estoppel, or estoppel in pais, is a term applied usually to a situation where, because of something which he has done or omitted to do, a party is denied the right to plead or prove an otherwise important fact." This definition was approved by this Court in *Petterson vs. Ogden City*, 111 Utah 125, 176 P.2d 599, 604.

At 28 Am Jur 2d, Estoppel and Waiver, Sec. 35, the elements of an equitable estoppel (as related to the party to be estopped) are stated as "(1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and

(3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice."

In the case of *Thorp Finance Corp. vs. LeMire* 264 Wis. 220, 58 NW 2d 641, 44 ALR 2d 189, (1953) there was a recital by the defendant purchaser that he "acknowledges delivery and acceptance of" the furniture being purchased, which was therein described in detail, although in fact the furniture had not been delivered at that time, but there was a verbal understanding between seller and purchaser that the furniture would be delivered in approximately 14 days thereafter. The court held in an action to recover by plaintiff on a conditional sales contract which plaintiff had purchased without knowledge of the non-delivery of the furniture, not having been advised of that fact until after the conditional purchaser had paid to it the first monthly installment payment on the contract, that the conditional purchaser would be estopped by the recital in the contract acknowledging delivery and acceptance of the furniture from defending on the grounds that the conditional seller had failed to make delivery and the furniture had never been received by defendant. A similar holding is found in *Universal Credit Company vs. Enyart*, 231 Mo. App 299, 98 SW 2d 120, (1936) where the buyers had acknowledged "delivery and acceptance" of an automobile. A written representation was made in the instant case on the face of the chattel mortgage (Exhibit 6) that "the personal property described is located at the address of mortgagors."

While it is unlikely that plaintiff relied upon the literal language of this statement it did rely upon the representation made both orally and in writing that the Powells were borrowing the money for the purpose of purchasing the furniture listed on the chattel mortgage which would be in Powells' possession upon the delivery of the check to Stanley.

It has been held that one may also be estopped by subsequent conduct. See 28 Am. Jur. 2d, Estoppel and Waiver, Sec. 43, p. 651. The subsequent conduct of defendants in the instant case consisted of the manual delivery of one payment to the plaintiff which funds were provided by Stanley in cash, obviously to prevent the finance company's obtaining any information which would make it suspicious that the funds were coming from Stanley rather than the borrowers. This was an active concealment of the true facts.

## CROSS - APPEAL

### POINT III

THE CONDUCT OF DEFENDANTS CONSTITUTES, AS A MATTER OF LAW, THE OBTAINING OF MONEY BY FALSE PRETENSES AND THE LIABILITY CREATED IS NOT DISCHARGEABLE IN BANKRUPTCY PURSUANT TO THE EXCEPTION FOUND IN SECTION 17a(2) OF THE BANKRUPTCY ACT.

Section 17a(2) of the Federal Bankruptcy Act provides that "the discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as are liabilities for obtaining money or property by false pretenses or false representations . . ." Although neither defendant has filed a petition in bankruptcy, it has been indicated that the better procedure on the part of the creditor who anticipates that its debtors will seek the relief of the Bankruptcy Act, is to allege facts in its suit on the original obligation which would survive a discharge in bankruptcy, obtaining an express finding in such action as to the facts which overcome the effect of a discharge. See note in *Utah Law Review*, Vol. 1967, Number 2, p. 281, entitled "Fraudulent Financial Statements and Section 17 of the Bankruptcy Act — The Creditor's Dilemma."

This court has held recently in the case of *Gear vs. Davis*, 435 P. 2d 923, ..... Utah 2d ....., that the misrepresentations of the bankrupt need not be in writing in order to come within the exception, but may be made orally. In the instant case there was an oral misrepresentation that the defendants were borrowing money for the purpose of purchasing the furniture listed on the chattel mortgage. There is in addition, a set of facts evidencing a scheme wherein Stanley and the defendants were knowledgeable participants. It is stated in *Collier on Bankruptcy*, 14th Edition, Sec. 17.16 p. 1619, "A purchase of goods on credit by a bankrupt who does not

intend to pay therefor, constitutes a false representation (Citing *Wells v. Blich*, 182 Ga.826, 187 SE 86, and other cases). In *Wells v. Blich* money was obtained by an individual from his sister in consideration of a purported sale of property, the sister being informed that the money would be used to pay off an encumbrance presently against the property. The funds were never used for the purpose asserted, and the sister was out not only the money but the property as a result of a foreclosure proceeding against it. The Georgia Court said "A false representation may consist in obtaining the money of another upon the faith that it will be used for the purpose for which the trust was extended, when the person so intrusted with the money had no present purpose of using it for the purpose which he declared would be subserved, and in future contemplation of a fraudulent bankruptcy."

In the instant case we have the obtaining of money from the plaintiff on the pretense that it was borrowed by defendants for the purpose of purchasing the very household goods which were security for the loan. The money was in fact delivered by defendants to Stanley, the defendants understanding that they had lent their credit to Stanley and made available to him the proceeds of a loan in consideration for a promise by Stanley that they would receive free furniture. Powells had no present intent of using the money for the purpose which they declared would be subserved by the loan since they understood they were to receive their furniture "free."

The Bankruptcy Act refers to false pretenses or false representations. In deliberately choosing these words the Congress indicated a difference between "false pretenses" and "false representations." The latter may appropriately mean express misrepresentation. "False pretenses" more appropriately refers to implied representations or conduct intended to create and foster a false impression. As stated in the dissenting opinion of Judge Sibley in *Davidson - Paxon Co. vs. Caldwell* (C.C.A. 5th 1945) 44 Am. B.R. (NS) 19, 115 F.2d 189, 133 ALR 432, "In both cases, of course, an intended deceit is essential. In either, a discharge is made ineffectual."

Plaintiff concedes that in order to overcome the discharge in bankruptcy the facts must indicate that the defendants participated in a scheme intended to and which actually did deceive the plaintiff. Plaintiff submits that the essentials are found in the admissions of defendants as set forth in the plaintiff's Statement of Facts herein.

Such active participation with the knowledge that they were not disclosing the whole story to the finance company is not merely the failure to mention a fact, but an outright concealment of the very facts which would have put the finance company on notice with respect to Stanley's scheme.

As stated in *Hartford Accident and Indemnity Company vs. Flanagan* (S. D. Ohio 1939) 41 Am. B.R. (NS) 351, 28 F. Supp. 415, public policy demands that "the act should be liberally construed so as to prevent the discharge in bankruptcy of a liability which would not exist but for the fraudulent conduct of the bankrupt." Can it be honestly supposed that Pioneer Finance would have made the loan involved here but for the fraudulent conduct of the Powells?

#### POINT IV

PLAINTIFF IS ENTITLED, PURSUANT TO THE TERMS OF THE PROMISSORY NOTE AND CHATTEL MORTGAGE, TO AN ATTORNEY'S FEE FOR THIS APPEAL.

Plaintiff has been required to respond to an appeal of the defendants to this Court before it could proceed on the judgment obtained by it against defendants. A reasonable attorney's fee should be awarded plaintiff against defendants upon remand of this case to the District Court, and the Supreme Court should indicate that such allowance of an attorney's fee for this appeal is proper in order that the trial judge can be governed thereby and another appeal averted.

## CONCLUSION

This Court should affirm the summary judgment of liability against the defendants and, further, instruct the trial court to make a finding that the defendants obtained plaintiff's money by false pretenses and that their conduct falls within the exception to the Federal Bankruptcy Act, Section 17a(2), and further instruct the trial court as to the allowance of an attorney's fee for this appeal.

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Respondent



Finance and Thrift Company," and further stated, "that plaintiff would not have made the described loan had they known that Melvin A. Stanley dba Stanley Furniture and Appliance was actually the party who was to make the payments on the note and mortgage and if they had known that the household goods described on the chattel mortgage were not in the possession of the defendants" (R. 17).

The defendants' statement of facts commencing on page 3 of their brief recites a history of the business known as Stanley Furniture and Appliance and declares (outside the record of this case) that five judgments had been obtained against Stanley, one of which was in excess of \$30,000.00.

The statement of facts then recites the startling conclusion, "Stanley's insolvency was known to the finance company through routine inquiry to the Salt Lake Credit Bureau, Dun & Bradstreet, or their own 'lender's exchange'. Such information was not available to his customers (such as the Powells)." As citation for this conclusion as to what was in the minds of plaintiff's agents, ~~plaintiff~~ **defendants cite** page 22 of the record. Going to page 22 of the record we find that what counsel has cited is actually a paragraph from his "statement of facts" submitted in the form of a memorandum at the time of the hearing of plaintiff's motion for summary judgment. Such statement was not part of the testimony then, and

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is not part of the testimony now. From this point in ~~plaintiff's~~ <sup>defendants'</sup> statement of facts each paragraph contains verbatim quotes from the "record" which turns out to be a statement of ~~plaintiff's~~ <sup>defendants'</sup> counsel, extracted from his prior statement of facts filed in the trial court memorandum. The statements are not found in the affidavit or depositions constituting the facts in the instant matter.

Such citations frequently appear to be an attempt by counsel to gain the sympathy of this Court. For instance, on page 5 of defendants' brief it is said, "At first Stanley made the proposition that he would deliver furniture and make the 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." This quotation should be compared to the testimony elicited on the depositions of Mr. and Mrs. Powell. Mr. Powell was a high school graduate of Union High School in Roosevelt, and reads and writes English (T. 3). His wife, Bonnie Rae Powell, was a graduate of Delta High School (T. 30). There is absolutely nothing in their testimony which indicates a lack of ability to comprehend what was transpiring in this matter.

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