

1962

# Hart Brothers Music Co. v. Lile R. Wood : Brief of Appellant

Utah Supreme Court

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Kipp & Charlier; Attorneys for Defendant-Respondent;

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IN THE SUPREME COURT  
of the

STATE OF UTAH FILED

HART BROTHERS MUSIC  
COMPANY, a corporation,

*Plaintiff and Appellant,*

vs.

LILE R. WOOD,

*Defendant and Respondent.*

T 2 5 1962

Supreme Court, Utah

Case No. 9675

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BRIEF OF APPELLANT

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Appeal from the Judgment of the  
3rd District Court for Salt Lake County,  
Hon. Marcellus K. Snow, Judge.

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LILE R. WOOD,  
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BRIEF OF APPELLANT

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DISPOSITION IN LOWER COURT

This is an appeal from a judgment entered by the Honorable Marcellus K. Snow, District Judge, in favor of the Defendant, Lile R. Wood, and against the Plaintiff. No cause of action. The case was tried to the court without a jury. (R. 23).

KIND OF CASE

The Plaintiff's action against the Defendant, Lile R. Wood, is one of rescission of a contract of sale of a piano based on fraud in its purchase, for possession of the piano together with its fair rental value of \$13.00 a month; however, in the event possession cannot be had then a judgment for its

market value. In the alternate, it asks for judgment against the All-American Credit Card Corporation for the sale price of the piano. In denying Plaintiff's judgment against the Defendant, Wood, the court, however, did give it judgment against the All-American Credit Card Corporation. There is no appeal from this part of the judgment.

Appellant was the Plaintiff and the Respondent, Lile R. Wood, was the Defendant in the court below and they will be hereafter referred to as Plaintiff and Defendant.

### RELIEF SOUGHT ON APPEAL

This appeal is from that part of the judgment denying the Plaintiff judgment against the Defendant, Wood, for the possession of the piano together with its fair rental value or for its value in the case the possession could not be had. It seeks reversal of the judgment and judgment in its favor as a matter of law.

### STATEMENT OF FACTS

Plaintiff was and is engaged in the music business in Salt Lake City, Utah and the All-American Credit Card Corporation, is a Utah corporation which received its charter on or about the 6th day of August, 1959 (R. 57). It was engaged in the business of issuing credit cards which authorized the holder to purchase on its credit merchandise with certain

business establishments, one of whom was the Plaintiff, who had agreed with it to honor its credit cards. On the purchase of goods by the credit card holder, the contract of purchase was then to be assigned and delivered to the All-American Credit Card Corporation by the seller, in this instance the Plaintiff, and then pursuant thereto the All-American Credit Card Corporation was to forward to the seller the amount of the purchase price less a discount, which discount was to constitute the All-American Credit Card Corporation's profit on the transaction (R. 22, 35).

The Defendant, Lile R. Wood, at the time of the transaction complained of was the President and Director of the All-American Credit Card Corporation and the holder of one of its credit cards. He also was one of the promoters and organizers of the said corporation, an original stockholder, and had been a director since its organization. He became its Secretary on its incorporation and was such until October, 1959, when he became its President which office he held until March 15, 1960 (R. 38, 44-46).

The Defendant, Wood, purchased the piano in question on December 31, 1959, from the Plaintiff. Purchase was on a credit card of All-American Credit Card Corporation. (R. 37-39.) The circum-

stances pertaining to the purchase are discussed hereafter.

## INSOLVENCY OF THE ALL-AMERICAN CREDIT CARD CORPORATION

The All-American Credit Card Corporation came into existence on about August 6, 1959, with an operating capital of approximately \$31,574.50. The Securities Commission of the State of Uah authorized a public stock offering of \$125,000.00, which was fully subscribed for, however of this amount only approximately \$38,400.82 was collected (R. See financial statement of the All-American Credit Card Corporation of July 22 and September 30, 1959. Exhibit P 9). Immediately upon incorporation the company requested an authorization for the sale of an additional \$175,000.00 worth of stock. The request was granted. However, the Commission, for misconduct and other reasons, withdrew the authorization on September 8, 1959 (R. See letters of the Securities Commission to the All-American Credit Card Corporation dated September 8, 1959, and September 21, 1959, which appear as part of Exhibit P 9).

The corporation within six weeks of its existence found itself in financial difficulties. Its operating capital had been reduced to \$1,515.43 (R. See All-American Credit Card Corporation balance sheet of September 30, 1959, of Exhibit P 9).

On September 20, 1959, the All-American Credit Card Corporation again requested the Commission to revoke its suspension of the \$175,000.00 issue, and in its request, among other things, it stated:

“Because our stock subscription balances have not been paid as agreed on and because of the company’s expenses in commencing operations and making the change over referred to above, it becomes imperative for the company to be allowed to resume the sale of the 175,000 shares previously approved for a public offer. Since time is of the essence your early consideration and approval of this request will be greatly appreciated.” (R. See letter dated September 20, 1959 of Robert B. Hansen, attorney, of Exhibit P 9, and also see letter of Mr. Hansen of Exhibit P 9, dated October 28, 1959).

The Securities Commission denied the request because the corporation had violated the terms and conditions of the registration and advised the corporation that it should not thereafter collect any of the money owing by the subscribers of the first public subscription of \$125,000.00. This letter the All-American Credit Card Corporation construed as a stop order and thereafter made no efforts to collect from the subscribers of the first public issue of \$125,000.00 (R. See letter of the Director of the Securities Commission to the All-American Credit Card Corporation dated November 3, 1959, as appears in Exhibit P 9, Exhibit P 5, and R. 150).



As of November 30, 1959, the cash in the bank and available to the All-American Credit Card Corporation had diminished to \$145.58. (R. See Exhibit P, balance sheet of the All-American Credit Card Corporation as of November 30, 1959, which appears in the file marked "Exhibit P 9").

On December 30, 1959, the corporation had cash available of \$58.93 (R. 52, Exhibit P 2), and on January 29, 1960, it had cash in the bank of \$36.53 (R. 55, Exhibit P 3).

On December 30, 1959, the All-American Credit Card Corporation had current obligations of approximately \$47,813.61 (R. 72-82, 144). Of this amount approximately \$7,000.00 was owed to its dealers, that is those business organizations who had agreed to honor its contracts (R. 103-104). In addition to this, the All-American Credit Card Corporation had a contingent liability of \$6,250.00 having guaranteed the promissory note of one James Donaldson, who was brought into the corporation by the Defendant, Wood, in October of 1959 when Donaldson became a Director, its Vice President and Manager. He resigned as Manager on March 15, 1960 (R. 117-135), Minutes of September 4, 1959, Plaintiff's Exhibit P 11, Minute Book of the All-American Credit Card Corporation).

Part of the indebtedness or \$30,688.16 above mentioned was the result of a default judgment put in motion by the Defendant, Wood. He secured the assignment of claims to himself from various creditors, including one from James A. Donaldson in the sum of \$7,500.00, which defendant, Wood, then assigned to one John Malmberg, who filed an action in the District Court of Salt Lake County, Utah, upon which he secured a judgment against the All-American Credit Card Corp. in the sum of \$30,688.18 plus court costs. The summons in the action was served on Donaldson, Wood's friend, and he permitted the judgment to be taken by default. The assignment also included a claim of Wood in the sum of \$8,994.00, (R. 72-82, District Court Case Number 125410). However, in addition to the claim of \$8,994.00, Wood also asserted an additional claim of \$9,000.00 represented by a promissory note executed by Donaldson on behalf of the corporation without any authorization of the Board of Directors (R. 80-81).

A Director's Meeting of the All-American Credit Card Corporation was held on December 30, 1959, pursuant to call of the Defendant, Wood. Wood, as its President presided. The purpose of the meeting was to provide ways to pay the company's dealers to whom they owed in excess of \$7,000.00. Wood stated this was the purpose of the meeting.

The dealers had to be paid by December 31, 1959. The Directors turned down various financing programs; however, they pledged \$5,500.00 for this purpose. One method proposed was the discounting of their paper or selling it to other institutions. No decision was made as to whether this program should be pursued or not. They had no commitments that any financial institution would accept their paper (R. 68, 71, Exhibit P. 11, Minute Book, see minutes of December 30, 1959.)

#### WOOD'S TRANSACTION WITH PLAINTIFF

Although the Securities Commission had advised the corporation not to collect on its unpaid stock subscriptions, which the corporation treated as a stop order, (R. Exhibit P 5), it continued to solicit and enter contracts with various business firms for the honoring of its credit cards (R. 36). On November 6, 1959, it solicited the Plaintiff and on that day the Plaintiff agreed to honor its credit cards (R. 35-36). The purchases under the credit cards were to be honored 30 days after the purchase (R. 35).

The contracts with its dealers and its credit cards, including Wood's, expired as of December 31, 1959, (R. 143).

Three purchases were made from Plaintiff by credit card holders of the All-American Credit Card Corporation, one on November 6, 1959, one on Nov-

ember 16, 1959, and one on November 17, 1959 (R. 36). However, the Plaintiff was not reimbursed for these purchases by the All-American Credit Card Corporation (R. 36-37). The corporation owed to the Plaintiff the amount of the purchases or \$13.68 on December 30, 1959. (Ex. P. 1, R. 37).

The day following the Directors' Meeting of December 30, 1959, the Defendant, Wood, went to the Plaintiff's place of business and negotiated for the purchase of the piano in question. He requested that the purchase be made on the strength of his credit card with the All-American Credit Card Corporation. Mr. Reed Hart, the Secretary and Treasurer of the Plaintiff, handled the transaction, and he testified that he questioned the Defendant, Wood, about the ability of the All-American Credit Card Corporation to pay it as they had not received the payments for the purchases theretofore made. Wood assured him that the payments would be made immediately not only on the delinquents payments but for the piano and stated that Hart could verify it with Mr. Donaldson, is Manager. He then got Mr. Donaldson on the telephone and turned the phone over to Mr. Hart. Mr. Donaldson verified Defendant's, Wood, statements and said that the money for the purchase of the piano and the delinquent contracts would be forwarded the next day, (R. 29, 37-39, 46, 49).

Although the Defendant, Wood, did not admit that he and Mr. Hart discussed the delinquent accounts, he did not deny that such a conversation took place (R. 57), and although he denied he said that payment would be made immediately by the All-American Credit Card Corporation he said payment would be made in a few days. (R. 51-52)

As before mentioned on December 30, 1959, the corporation had \$58.93 in the bank (R. 52).

The Defendant in answer to the charge of fraud claimed that he believed that the Harts would be taken care of from money to be supplied to the company from a secondary source. That is, that it could either sell his contract or discount other contracts to financial institutions. However, he admitted that as of December 31, 1959, that the company did not have a commitment for such a source of income (R. 90).

In attempting to prove solvency of the All-American Credit Card Corporation, the Defendant pointed out the uncollected subscription of the first issue and the fact that the company held promissory notes for unpaid stock subscriptions. However, the company, as heretofore mentioned, treated the letter of the Securities Commission advising them to no longer collect on the stock subscriptions as a stop order (R. 149, 150), and Donaldson testified that he was instructed by Wood and the Board of Direc-

tors not to take any action to collect the promissory notes and unpaid stock subscriptions. (R. 168-169, 153-154).

The stockholders did not honor their pledge to put up the \$5,500.00 for the payment of the obligations of the corporation except Mr. English, one of the Directors, paid one of the creditors of the company in the sum of \$1,169.73 for which he received an assignment from the company of certain obligations due it. (See minute book Exhibit P 11, also see letter of Bridwell and Yano dated February 19, 1960, to the Securities Commission together with its enclosures as they appear in Exhibit P 9).

The Plaintiff notified the Defendant, Wood, and All-American Credit Card Corporation by letter dated February 17, 1960, that it was rescinding the contract of sale and again a few days later in a telephone conversation Wood was again told by Mr. Daines, Plaintiff's attorney, that the transaction between it, the Defendant and the All-American Credit Card Corporation was rescinded and he made a demand for the return of the piano. (R. Exhibit 10, 86-88).

In the letter of February 17, 1960 (Exhibit P 10) the Defendant, Wood, was also advised not to pay the All-American Credit Card Corporation the amount of the purchase price of the piano, and

the Defendant, Wood, admitted that as of said date he had not paid the All-American Credit Card Corporation for the piano as required by his credit card agreement (R. 86-88). However, the Defendant, Wood, testified and also Donaldson to the effect that on the 27th day of February, 1960, he paid the All-American Credit Card Corporation for the amount of the purchase price of the piano. This was accomplished apparently by Donaldson giving him checks in the amount of \$1000.00 of the All-American Credit Card Corporation and then Wood giving the company his checks for \$919.15. These checks were never presented for payment. This manipulation appears in the general ledger of the All-American Credit Card Corporation (R. Exhibit D 12); for under the cash disbursements CD 16 there appears disbursements to Lile R. Wood in the sum of \$1000.00 and under the journal entry, cash receipts and sale C 11 there appears a credit to Lile R. Wood in the sum of \$919.15, the amount of the Hart purchase.

The piano had a fair market value of \$908.00 and a fair rental value of \$10.00 a month. (R. 39-40)

### POINTS URGED FOR REVERSAL

The Court erred in failing to find that the Defendant, Wood, fraudulently induced the Plaintiff to sell him the piano in question and in failing to enter judgment against the Defendant, Wood, for

the possession of the piano plus a fair rental value for its use or if possession could not be had, then a judgment for its fair market value.

## ARGUMENT

### POINT I.

THE PLAINTIFF ESTABLISHED AS A MATTER OF LAW, BY CLEAR AND DECISIVE PRESENTATIONS, THAT THE PURCHASE OF THE PIANO IN QUESTION WAS INDUCED BY FRAUD, AND AS TO THIS THE MINDS OF REASONABLE MEN CANNOT DIFFER.

The Appellant recognizes that the burden rests on him to establish his case by clear and convincing proof, and that to warrant a reversal of the trial court findings this is a matter on which the minds of reasonable men cannot differ.

The All-American Credit Card Corporation on whose credit the Defendant, Wood, purchased the piano in question was insolvent, could not pay for it, at the time of the purchase and so known to him. He was one of the corporations' promoters and original director, its first secretary and in October, 1959, became its President and was such on December 31, 1959, the day the piano was purchased. (R. 37-39, 44-46). He knew that on the day the corporation's charter was issued, August 6, 1959, it commenced business with an operating capital of \$31,584.50 (Financial Statement of July 22 and September 30, 1959, of the All-American Credit Card Corporation Exhibit P 9); that within six



weeks after existence its operating capital or cash had been reduced to \$1,515.43. (Balance sheet of All-American Credit Card Corporation of September 30, 1959, Exhibit P 9.) He knew that on November 30, 1959, it had only \$145.58 cash in the bank and that December 30, 1959, its cash had been reduced to \$58.93. (R. 55, Exhibit P 3). He also knew that it had obligations of approximately \$47,813.16, and of this amount it owed its dealers approximately \$7,000.00 for he called a directors' meeting for December 30, 1959 over which he presided, for the purpose of raising funds with which to pay the corporation's dealers. The purpose of the meeting was not accomplished. (R. 72-82, 66, 71, Exhibit P 11, Minute Book and Minutes of December 30, 1959). He knew that the Securities Commission had revoked an authorized issue of \$175,000.00 and that it had directed the corporation not to collect any of the unpaid subscriptions of the first authorized issue of \$125,000.00, (R. 149-150) and further he and the officers of the corporation had instructed its manager not to collect any of the unpaid subscriptions on promissory notes given by the original incorporators. (R. 168-169) A copy of the minutes of December 30, 1959, of the All-American Credit Card Corporation is affixed hereto as Appendix A.

The Defendant, Wood, knowing all the fore-

going, of which there can be no dispute, went to the Plaintiff's place of business on December 31, 1959 to negotiate the purchase of the piano on a credit card of the All-American Credit Card Corporation which he knew expired as of midnight of that date.

From the foregoing there can be no question that he intended to defraud the Plaintiff and if possible shift part of the loss he had sustained with his dealings with his corporation, as the corporation owed him \$17,000.00 for past services. (R. 80-81) In making the purchase there is no question but that Mr. Wood represented to Mr. Hart that the corporation was solvent and would pay them immediately. Wood himself testified that not only did Mr. Hart question him about the corporation's ability to pay, he represented that it would be paid in cash and immediately. Mr. Hart's testimony is as follows:

“MR. DAINES:

Q. Tell us what the conversation was between you and Mr. Wood, will you?

A. He came in, said he wanted to buy the piano on the All-American Credit Card, and he said he would call — I questioned him a little about it, and he said —

Q. What did you say to him?

A. I asked him when we would get our money, and if the credit was good for that much. I think there was a limit of about a

thousand dollars, or less, on these credit cards. In other words, if went over their limit, we were to call office and get clearance, so he said we can call the office, and he called the office and got Mr. Donaldson on the phone. Then, he handed the phone to me. I asked him if the credit was good for the amount of \$900. He said, "Yes, good for ten thousand dollars. Let him have what he wants; sign on the card" — and I questioned about these general bills. He said, "Include all in one bill, send down there, and we will send your check by return mail," and that is how we signed him up. That was the last —

Q. Anything said by Mr. Wood about these other accounts?

A. Yes; I told him about these other accounts, for they hadn't been honored.

Q. What did he say about that?

A. I don't recall any comment on that part.

Q. What did he say; did you ask him when you would get the money for this piano?

A. Yes; I asked him; he said, "Just as soon as you send the bill into the company".

Q. He would get it for you. Is that the only conversation you had?

A. That was all we had." (R. 38-39).  
and Mr. Wood testified as follows:

"MR. DAINES:

Q. At the time you made this purchase did you represent to him that this credit card

would be honored by the immediate payment of cash?

A. Well, I don't know as I would say be "immediate payment"; I think we said the payment would probably be consummated in a few days. I don't recall how soon". (R. 48)

The Defendant, Wood, also admitted that he told Hart that All-American Credit Card had the money to pay for the piano. He stated as follows:

"MR. DAINES:

Q. Did you represent — now — next question; did you represent to him that they had the money to honor it?

A. Yes.

Q. Now was that question asked and that answer given?

A. Yes." (R. 51-52)

and Wood also admitted that he knew that the company did not have the money with which to pay for the piano. (R. 49, 50, 51)

The Defendant, Wood, to justify his conduct and show lack of fraud attempted to show that he believed that the All-American Credit Card Corporation had the assets and ability to pay for the piano at the time of purchase asserting that the corporation could discount its paper with a loaning institution including his contract of purchase, that is, that they had what he called a secondary source of money.

However, this is unworthy of belief for the corporation had no source, that is, no financing institution had agreed to accept its paper or provide it with funds and in fact the paper was never discounted. At the directors' meeting of December 30, 1959, the advisability of discounting paper was discussed. However, the Manager told them that he did not have a source and that he was merely given authority by the directors to thereafter negotiate for one. Further, the securing of such a source of secondary financing was dependent, so Donaldson, the corporation's manager said, on the officers and Board of Directors co-signing the notes of the All-American Credit Card Corporation. This the officers and directors refused to do and so advised him at the Directors' meeting of December 30, 1959, at which Wood, the Defendant was present. This was also the testimony of Mr. English and Mr. Wilcox who were directors of the All-American Credit Card Corporation. (R. 105, 113-114, Minutes of the All-American Credit Card Corporation directors meeting of December 30, 1959, Appendix A).

Mr. Donaldson testified as follows:

“MR. DAINES:

Q. Can you tell us what you told the Board of Directors in that meeting?

A. Just to the best of my memory I had contacted about five different sources for what we call secondary money.

Q. Could you tell us, before you go further, what you mean by "secondary money"?

A. Secondary money was to take the accounts that had not paid in their 30 days, or when their due date came by, the customer was given the privilege of extending his account by paying this one or one and one-half per cent per month service charge we had on there, but in order for us to pay the dealer back, that meant we had to have more cash in the company in order to pay our dealers.

I had talked to the Continental Bank, Time Finance, Mr. Jex, the Jeoples Finance. In the files were two letters from the Firestone Company interested in making a large loan to the company. None of them had been consummated.

"My authorization by the company was just to negotiate these, and at the meeting I wanted instructions from the Board of Directors as to which way to proceed from here, and what to do.

In the meantime I informed the directors that we were current at the time, and that we had disbursed to the dealers, and we had been able to pay our bills to this point. We had another four or five days possible before the next dealer due date was due. I had talked to the people at the Continental Bank and they informed me, because of the newness of the company and the time element we were faced with, they would like additional security other than just pledging our accounts. We were not going to discount the accounts. We were merely going to borrow against them, and they said they had to have additional

security, they would like the directors of the company to sign the note personally for the amount we had asked for, and that was one of the main reasons we called the meeting on December 30, to get these people to sign the note, or tell me, as the manager, which direction to proceed from here.

Q. Did they give you any instructions on that as to which way you should proceed?

A. No. This was left in kind of a loose end, or some of the Directors, Mr. English, felt he did not want to borrow money while he had cash of his own. He objected to paying interest when he had the money to put in.

Now one of the directors suggested that we each contribute money." (R. 129, 130)

Further, the Defendant, Wood, attempted to show solvency of the All-American Credit Card Corporation and his good faith by claiming that the corporation was actually solvent by virtue of the unpaid stock subscription of the original incorporators and the uncollected pledges of the subscribers under the first authorized stock issues of \$125,000.00. However, This is untenable as the corporation had never taken any action to collect these so-called obligations. In fact, it had treated a letter of the Securities Commission of the State of Utah as a prohibition against the collection of unpaid subscriptions of the authorized issue. (Plaintiff's exhibit P R. 150). Further, the officers and directors of the corporation had instructed its manager not

to collect either of them and the Defendant Wood was one of them. Mr. Donaldson testified:

“MR. DAINES:

Q. And, now, did you take any action —

A. No, sir; but I certainly wanted to a dozen times, and the directors always said no, don't push them.

Q. Mr. Wood said, “Don't push me”.

A. He was there; I don't know who voted which way; I can not, as manager —

Q. Mr. Wood told you not to take any action?

A. Not to take action against any of the subscribers, but I wanted to.

THE COURT: Are you talking about the first issue?

MR. DAINES: No, I am talking about the original subscribers — the incorporators; what I am talking about.

A. That, your Honor, I thought it was part of the original issue; that is what I am talking about.

Q. You took no action against the original incorporators?

A. No.

Q. I see.” (R. 168, 169). Also R. 153, 154)



And again Donaldson said:

“MR. DAINES:

Q. (By Mr. Daines) You never brought any action on behalf of this corporation to collect on these so-called notes that it had, did you?

A. No, sir; I wasn't —

Q. You knew that the corporation owed these dealers around \$8,000.00?

A. That is correct. (R. 168-169).

It should also be kept in mind that according to the testimony of the Defendant, Wood, that the All-American Credit Card Corporation on December 31, 1959, had current obligations of approximately \$47,813.16 and of this amount so he said, the corporation owed him approximately \$17,000.00.

We also call to the Court's attention that in a further attempt to make the transaction appear valid the Defendant, Wood, and his friend Donaldson testified that the Defendant Wood on February 27, 1960, subsequent to notice of recession, paid the All-American Credit Card Corporation the sum of \$919.15 in satisfaction of his obligation to it for the purchase of the piano in question. This they said was effected by the corporation on this day giving Wood checks totalling \$1,000.00 and Wood then in return giving the corporation a check for the sum of \$919.15. None of the checks were ever presented to the bank for payment. This was merely

a bookkeeping entry on the part of Wood and Donaldson for the corporation had no funds in the bank with which to pay its checks. (R. 160-167; exhibit P 15)

We recognize that to reverse a finding of the trial court presents a problem; however, this court has held that where no fact trier acting fairly and reasonably could find as the trial court found that the Court will grant a reversal, and it is our position that no reasonable mind could fail to find on the evidence but that the Defendant, Wood, was guilty of fraud. In the case of *Continental Bank & Trust Company vs. Stewart*, 291 Pac. (2d) 890, 4 Utah (2d) 228, Justice Crockett said:

“While it is true that the testimony of a witness such as Mr. Cheney would ordinarily be regarded as sufficient to compel the affirmance of the trial court’s finding, that is not necessarily so under all circumstances. Defendant is correct in arguing that even though the testimony standing alone might be sufficient to support a finding, it must always be appraised in the light of all the attendant circumstances and countervailing testimony. If when so viewed, it appears so clearly and palpably unreasonable that no fact trier acting fairly and reasonably could accept it, then it must be rejected as a matter of law, and the fact determined otherwise. This is particularly so here where Mr. Cheney had such a vital personal interest in the controversy, since it obviously would be greatly to his advantage if he could fix upon Mr. Stewart the

responsibility of paying this large unsecured personal debt.”

And as to representation as to financial status of third parties the rule is:

“It is well settled that where the other requisite elements of actionable fraud are present, false and fraudulent representations made to one contemplating business transactions or negotiations with a third person, concerning the financial status, solvency, or credit of such third person, constitute misrepresentations which may form the basis for actionable fraud. While one of whom inquiries as to financial standing or reputation of a third person are made has his option to answer or not and may refuse to give any information according to the truth as far as he knows. Benefit to the representor is entirely immaterial as far as his responsibility is concerned. In order to constitute the basis of a charge of fraud in any case, the statements must be certain and definite, more than mere expressions of opinion or statements as to something to eventuate in the future, and, according to the language of many of the authorities, false and fraudulent in that they were made with intent to deceive or so recklessly as to constitute the equivalent of wrongful knowledge. \* \* \*” (23 Am. Jur., Page 844 Section 71.)

32 ALR (2d) 184-234

As to the elements of actionable fraud see the following Utah cases:

Pace v. Parrish, 122 Utah, 141, 247 P. 2d 273  
Kinnear et al v. Prows et al  
81 Utah, 135,  
16 P. 2d 1094

Stuck v. Delta Land and Water Co.  
63 Utah, 495,  
227 P. 791

Nielson v. Leamington Mines and Exploration  
Corporation  
87 Utah, 69,  
48 P. 2d 439

### CONCLUSION

We urge that the Plaintiff in this case has established by clear and convincing proof; and to this the minds of reasonable men cannot differ:

(1) That the Defendant, Wood, either alone or with the aid and assistance of his friend, Donaldson, the manager of the All-American Credit Card Corporation misrepresented the condition as to its solvency and its ability to pay for the piano. A material misrepresentation as to material existing fact.

(2) That Wood knew that such representations were false, as he knew the company was in dire financial circumstances, insolvent and unable to pay its obligations, and having been questioned regarding the solvency of the All-American Credit Card Corporation it was his duty to disclose its financial condition.

(3) That the Defendant, Wood, actually did not believe nor did any one else connected with the company at the time the representation was made that the All-American Credit Card Company was

solvent and able to honor its credit card obligations. They could not reasonably believe such to be true in view of its financial condition.

(4) That the Defendant, Wood, intended in making the representation of solvency that such should be acted upon by the Plaintiff.

(5) That the Plaintiff was induced to and acted reasonably in relying on the representations as to solvency and in so doing was ignorant of their untruthfulness and falsity.

(6) The contract of sale having been timely rescinded the plaintiff has a cause of action for the return of the piano together with damages for its use.

(7) In the light of the foregoing we respectfully submit that this court should reverse the lower Court's finding directing it to find that the Defendant, Wood, was guilty of fraud in the purchase of the piano and render judgment in the Plaintiff's favor awarding him possession thereof together with a reasonable rental of \$10.00 per month since date of purchase or that if possession cannot be had then judgment for its value in the sum of \$919.15 together with interest thereon at the legal rate of 6 per cent per annum.

Respectfully submitted,

L. DELOS DAINES  
822 Kearns Building  
Salt Lake City 1, Utah  
*Attorney for Appellant*

APPENDIX A  
ALL-AMERICAN CREDIT CARD  
CORPORATION

SPECIAL BOARD MEETING, December 30, 1959,  
214 E. 5th So., S. L. C., Utah

Meeting called to order at 7:45 P.M. President  
Wood presiding.

DIRECTORS PRESENT:

LILE WOOD	RAY PRUETT
BONNIE ANDERSON	ISAMU AOKI
RUSSEL LARSON	JAMES ENGLISH
JAMES DONALDSON	Mr. Jensen excused.
MELVIN WILCOX	

Minutes of the last meeting approved as read with  
one correction:

Motion #2, "ENTITIES" — Clarification — The  
15 - 25 entities means Individual sales of stock  
can be sold to 15, 20, or 25 persons in large de-  
nominations. No more than 25 sales or it becomes  
a public offering.

President Wood stated that the purpose of this meet-  
ing was to decide how we are going to pay our deal-  
ers. He then turned the meeting over to Mr. Donald-  
son.

Mr. Donaldson read the rescinding letter to the  
stock subscribers. There was a discussion on the  
Securities Commission telling us to get our house  
in order and then come back for re-consideration,  
however our problem is that we owe money to our  
Dealers and they must be paid December 31, 1959.  
Mr. Donaldson, then suggested that the Board Co-  
sign a note to borrow the monies needed to pay off  
our dealers. He pointed out that Notes are payable  
within one year.

Mr. Aoki presented the following motion, seconded by Mr. English and passed:

That the Board of Directors be polled as to their actual intent to payment of the balance of their subscription as of December 30, 1959, and if negative indicate ability to resell their stock to friends within a limited time.

Mr. English discussed the damage to personal reputation and stated that he will give \$1000.00 to protect dealers. — For that purpose only!

Mr. Pruett stated that he preferred Mr. Donaldson's suggestion of Co-signing together but would pledge \$1000.00.

Mr. Wilcox said he could pay \$1,500.00.

Mr. Wood said he would pay \$1,100.00.

Mrs. Anderson said she could borrow \$500.00.

Mr. Donaldson, would to be reimbursed for his time spent and the rest of his stock can be sold in a limited time.

Mr. Aoki, feels that he has already put in too much time, money and effort, and at this time he is unable to go any further.

Mr. Larson will sell part of his stock to help pay off the dealers.

There being no further business before the meeting, the same was, on motion duly made, seconded and carried, adjourned at Midnight.

/s/ Bonnie Anderson

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Secretary

Mr. English suggested we organize a little syndicate, instead of paying the bank or finance company interest, we could realize a profit on the monies we have loaned the All-American Credit Card Corporation.

APPROVED:

OMMISSIONS OR CORRECTIONS: