1964

# Richard E. Lundstrom et al v. Radio Corporation of America et al : Appellants' Petition for Rehearing with Brief in Support Thereof

Utah Supreme Court


Dwight L. King; David B. Dee; Attorneys for Plaintiffs and Appellants;
Kipp and Charlier; Attorneys for Defendant and Respondent;

In the

SUPREME COURT OF THE STATE OF UTAH

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MR. and MRS. RICHARD E. LUNDSTROM, et al.,

Plaintiffs and Appellants,

vs.

RADIO CORPORATION OF AMERICA and UTAH ELECTRONICS, INC.,

Defendants and

CONTINENTAL THRIFT & LOAN COMPANY,

Defendant and Respondent.

Case No. 10174

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# APPELLANTS' PETITION FOR RE-HEARING WITH BRIEF IN SUPPORT THEREOF

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## Cases Cited



## Statutes Cited

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## APPELLANTS' PETITION FOR RE-HEARING WITH BRIEF IN SUPPORT THEREOF

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Appellants petition this Honorable Court for a re-hearing upon the following grounds:

I

That the decision of this Court indicates a misapprehension as to the manner in which the issue of fraud was presented in the lower court proceedings and the decision of the Court therefore dep[illegible]s of their constitutional right of

a trial by jury.

II

The Court has failed to consider the proposition that an assignee takes subject to the defenses against his assignor.

DATED this 22nd day of September, 1965.

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BRIEF IN SUPPORT OF PETITION FOR RE-HEARING

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ARGUMENT

POINT I.

THE DECISION OF THIS COURT INDICATES A MISAPPREHENSION AS TO THE MANNER IN WHICH THE ISSUE OF FRAUD WAS PRESENTED IN THE LOWER COURT PROCEEDINGS AND THE DECISION OF THE COURT DEPRIVES THE APPELLANTS OF THEIR CONSTITUTIONAL RIGHT OF A TRIAL BY JURY.

This Court, in its opinion, has indicated that there was [illegible] plaintiffs' proof on the fraud

count and that the trial court rejected the proof on the grounds that it was not clear and convincing. This is not so.

Plaintiffs' Complaint as originally filed, alleged two causes of action. The first cause of action sought credit on the contracts for the persons who were actual and bona fide purchasers. It sounded in contract. The second cause of action was an allegation founded on a fraudulent scheme. At the time of pre-trial, the second cause of action was dismissed by the pre-trial court and as was stated in the Statement of Facts in the original Brief of Appellants, page 7, the case went to trial on the first cause of action. No proof was permitted on the second cause of action which set up fraud as the basis of plaintiffs' claim.

This Court has made a determination on factual matter. It finds that Continental Thrift has been "cautious, if not indeed over cautious" and has made the first determination as to what the proof the appellants presented to the trial court indicated. No ruling, prior to the Supreme Court, had been made on the evidence submitted by appellants. The trial court restricted appellants to the Pre-Trial Order. It did not permit the proof of fraud nor did it submit the question of Continental Thrift's

participation in the fraudulent scheme perpetrated to the Jury.

It is respectfully submitted that this is a factual matter and that the Jury might find that Continental Thrift was participating in a fraudulent scheme on the same evidence that this Court finds it to have been "cautious, if not indeed over cautious".

## POINT II.

## THE COURT HAS FAILED TO CONSIDER THE PROPOSITION THAT AN ASSIGNEE TAKES SUBJECT TO THE DEFENSES AGAINST HIS ASSIGNOR.

Under the Utah law, any claim which could have been asserted against an assignor at the time of assignment may be assertec against the assignee. The Jury verdict found that the assignor had not entered into a good faith or bona fide transaction and had no intentions of performing its agreements. Rule13 (j) of the Utah Rules of Civil Procedure has been completely ignored by the decision of this Court.

It appears that this "reference sales" type of sales gimmick has had wide-spread use and has been, by at least one state, roundly condemned for the inherent fraud on which the program is based. In a case discovered only since the symposium on the new Commercia Code, the State of Pennsylvania refused to honor the holder of a neg[illegible] in due course where it had notice

that the note arose out of a "reference sales" program.

In Norman v. World Wide Distributors, Inc., 202 Pa. Super. 53, 195 A.2d 115, the plaintiff, in a suit in equity, obtained judgment that a negotiable note in the hands of a holder should be declared void because the holder had knowledge of the "reference sales" circumstances out of which the note arose.

The described "reference sales" was nearly identical to the Utah Electronics - Continental Thrift transaction before this Court.

The Court held that the holder of the negotiable note, because it had knowledge of the "reference sales" transaction, had not taken it in good faith.

The case now before the Court is much more compelling in its circumstances in that the note was not negotiable and the finance company participated in the formulation of the "reference sales" program and set up the devices through which it seeks protection in this Court.

The cited case states (p. 117),

"The referral plan was a fraudulent scheme

> based on an operation similar to the recurrent chain letter racket. It is one of many sales rackets being carried on throughout the nation which are giving public officials serious concern. (See article of Wall Street Journal, page 1, October 10, 1963.) The plaintiffs introduced evidence to show that at the end of 20 months of operation, it would require 17 trillion salesmen to carry on a referral program like World Wide described to the plaintiffs.
>
> Peoples contend that even though World Wide may have been guilty of fraud, it can collect on the note because it was a holder in due course."

If this Court's decision is permitted to stand, the effect would be, it is submitted, to permit a participating party in a concededly fraudulent transaction to be insulated from the natural, logical consequences of its own acts, and the end result would be the lowering of the moral standard of the business community.

## POINT III.

## THE OPINION UNDERMINES THE MORAL PURPOSE OF THE USURY STATUTE AND THE CONDITIONAL SALES LAW OF THE STATE OF UTAH.

The decision of the Court holds that the increase in selling price above the recommended retail price of $695.00 to in excess of $900.00, did not indicate that the "cash price" was

exceeded. As a necessary consequence, Section 15-1-2a (c 5), U.C.A., 1953, is destroyed as a practical matter. From this time forward, it will be impossible to control the interest item that a conditional seller may add on to the real or "cash price" of the item which he sells.

The decision renders ineffectual Section (B) of the Conditional Sales Law Section 15-1-2a, U.C.A., 1953, which requires that all of the agreements between the buyer and the seller must be contained in the conditional sales contract. It passes over this requirement by simply referring to the fact that there happened to be two documents, apparently not feeling that the fact that they were both executed at the same time and as a part of one transaction, is of any significance.

It is respectfully submitted that the effect of this decision, if permitted to stand, will be to destroy the enforcibility of the Conditional Sales Law as far as it is intended to control the interest rates that a seller may charge. The ultimate end will again be the lowering of the moral

standard in the business community.

RESPECTFULLY SUBMITTED this 22nd day of September, 1965.

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Mailed a copy of the foregoing Appellants' Petition for Re-Hearing with Brief in Support Thereof to KIPP AND CHARLIER, Attorneys for Defendant and Respondent, Boston Building, Salt Lake City, Utah, this 22nd day of September, 1965.