

1953

# Securities Credit Corporation v. Marion Willey : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Arthur H. Nielsen; Charles Welch, Jr.; Counsel for Appellant;

---

## Recommended Citation

Brief of Appellant, *Securities Credit Corp. v. Willey*, No. 8041 (Utah Supreme Court, 1953).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/2050](https://digitalcommons.law.byu.edu/uofu_sc1/2050)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

---

---

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

---

SECURITIES CREDIT CORPORATION,  
A CORPORATION,

*Appellant,*

—vs.—

MARION WILLEY, dba MARION  
WILLEY & SONS,

*Respondent.*

Case No.

8041

---

**APPELLANT'S BRIEF**

---

**FILED**

AUG 21 1963

ARTHUR H. NIELSEN  
CHARLES WELCH, JR.

*Counsel for Appellant*

*Salt Lake City, Utah*

Clerk, Supreme Court, Utah

# TABLE OF CONTENTS

	Page
STATEMENT OF FACTS .....	1
STATEMENT OF POINTS .....	5
ARGUMENT .....	6
I. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS .....	6
II. THERE IS NO EVIDENCE OR FACTS IN THE RECORD SUFFICIENT TO SUSTAIN THE FINDINGS, CONCLUSIONS AND JUDGMENT RENDERED BY THE TRIAL COURT .....	20
CONCLUSION .....	28

## AUTHORITIES CITED

### Table of Cases

Art Metal Construction Company v. Lehigh Structural Steel Company (C.C.A. 3rd), 116 Fed. 2d 57 .....	10
Friedman v. Washburn Co., (C.C.A. 7th) 145 Fed. 2d 715 .....	11-13
Jay v. Chicago Bridge & Iron Co., (C.C.A. 10th) 150 Fed. 2d 247 .....	13
Lanasa Fruit Steamship & I Co., v. Universal Ins. Co., 302 U.S. 556, 58 S. Ct. 371, 82 L. ed. 422 .....	18, 19
Lux v. Lockridge, 65 Idaho 639, 150 P. (2d) 127 .....	23, 24
Morgan v. Layton, 60 Utah 280, 208 Pac. 505 .....	25, 26
Nat'l Surety Corp. v. Frist Nat'l Bank, 106 Fed. Supp. 302 .....	16, 17
Swartz v. White, 80 Utah 150, 13 Pac. (2d) 643 .....	24, 25
Wyman v. Wyman, (C.C.A. 9th) 109 Fed. (2d) 473 .....	10, 11

### Utah Rules of Civil Procedure

Rule 7(a) .....	7
Rule 8(d) .....	10
Rule 12(b) .....	17
Rule 12(c) .....	6
Rule 56 .....	9

### Statutes

Idaho Code, Sec. 49-403 .....	26
Sec. 49-404 .....	23
Sec. 49-412 .....	15, 27

### Texts

Moore on Federal Practice, 2nd Edition, Volume 2: Section 12.15 .....	7, 8, 18
--	----------

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

SECURITIES CREDIT CORPORA-  
TION, A CORPORATION,

*Appellant,*

—vs.—

MARION WILLEY, dba MARION  
WILLEY & SONS,

*Respondent.*

Appellant's  
Brief

Case No.  
8041

---

## STATEMENT OF FACTS

This appeal is from a Judgment on the merits rendered by the District Court of Davis County, State of Utah, in favor of the Defendant, Marion Willey, doing business as Marion Willey and Sons (Respondent herein) and against Securities Credit Corporation, a corporation, Plaintiff, (Appellant herein). Plaintiff will hereinafter be referred to as Appellant, and Defendant will hereinafter be referred to as Respondent.

Appellant commenced this action for claim and delivery by filing in the lower court, a Complaint, which followed in substantial detail the form set out in the Utah Rules of Civil Procedure, adopted by this court, (Form 16) wherein it was alleged:

- "1. Plaintiff is the owner and entitled to the possession of the following described personal property located in Bountiful, Utah: A 1952 Mercury four-door sedan, Motor No. 52LA-27, 188-M.
- "2. Said property is now in the possession of the Defendant who is wrongfully withholding the same from the Plaintiff.
- "3. Plaintiff has heretofore made demand upon the Defendant for the return of said property but Defendant has wrongfully refused, and now refuses to return the same.
- "4. That by reason of said wrongful detention, Plaintiff has been damaged in the sum of \$500.00." (R. 1)

Appellant prayed judgment for the return of the 1952 Mercury automobile, and if return of the same could not be had for its reasonable value, for the sum of \$500.00 damage, and for costs of suit. Summons was duly served and returned by the sheriff. (R. 27)

With the Complaint, was filed an Affidavit of Replevin, signed by John Rademacher, Branch Manager of the Plaintiff Corporation, wherein it is stated that the Plaintiff is the owner and entitled to possession of said 1952 Mercury automobile; that "the property is wrongfully detained by the Defendant; that the cause of the detention is unknown to this Affiant, except that Affiant is informed and believes and therefore alleges, that the Defendant claims to have purchased said property from one Edward S. Barrett, but Affiant further alleges that said Edward S. Barrett does not have the title nor right to possession to said automobile." (R. 19)

Based upon the Complaint and Affidavit so filed, a Writ of Replevin was issued out of the court below, upon which the sheriff of Davis County, after attempting to obtain said vehicle, made the following return:

“Demand was made upon the within named defendant for a certain 1952 Mercury, four-door sedan, Motor Number 52LA-27, 188-M; however, defendant refused to give the information as to the location of the automobile, therefore, we were unable to take said property heretofore described into possession. We are returning said Writ of Replevin unsatisfied..” (R. 27)

Thereafter, Respondent filed a re-delivery bond in connection with the Writ of Replevin, making it unnecessary for the sheriff physically to take possession of said vehicle.

Respondent, in his Answer, denied Appellant’s allegation of ownership of the said 1952 Mercury automobile and alleged ownership in himself. (R 2) As a further defense, he alleged that he purchased the automobile from one Ed Barrett of Pocatello, Idaho. Under the provision of Rules 7 (a) and 8 (d) the matters set out in Respondent’s Answer are deemed denied and, therefore, an issue of fact was presented for trial.

A Counterclaim was also filed in which Respondent admitted that no certificate of title was delivered to him by the said Ed Barrett.

Paragraph 3 of the Counterclaim, alleges that the sale of the automobile by Barrett to the Respondent was with the full knowledge and consent of the Respondent.

Paragraph 4, alleged that by the provisions of the laws of the State of Utah and Idaho, that Appellant has

no right, title or interest in said automobile, or claim against Respondent.

Paragraph 5, alleged that Respondent is entitled to a decree quieting title in Respondent. (R. 3)

Other allegations pertaining to the alleged sale of other automobiles by the said Ed Barrett which are not material to the issues involved herein, were also included in paragraph 2 of the Counterclaim. (R. 3)

Appellant filed a Reply to the Counterclaim, denying the foregoing allegations of paragraphs 3, 4, and 5. (R. 5) By so doing, all the affirmative matter set out in Respondent's Answer and Counterclaim was denied, leaving the facts to be determined upon trial of the issues.

Prior to the date fixed for trial of the issues, Respondent prepared and served upon counsel for Appellant, written interrogatories to be answered by the latter, which interrogatories were thereafter answered and filed with the court below. (R. 20-24) (The interrogations and answers were not designated by Appellant in connection with this appeal, for the reason that the same were considered immaterial and irrelevant to the issues involved herein, as will be more fully outlined in Appellant's argument. However, Respondent filed a counter designation requesting said interrogatories and answers to be included in the record, which was done.)

Subsequently, Respondent's Motion for Judgment on the Pleadings was argued by counsel and taken under advisement by the lower court. The court, in connection with the matter, rendered a memorandum decision in which the court, without specifying any reasons, granted said Motion and directed counsel for Respondent to prepare findings, judgment and decree as prayed for in said Motion. (R. 7)



Immediately, counsel for Appellant filed a Motion for Re-hearing setting out that Plaintiff's Complaint had followed the form outlined in the Rules of Civil Procedure (Form 16), and called to the trial court's attention that under Rule 84, such forms are "sufficient under the rules," so that a motion to dismiss or for a judgment on the pleadings could not have been granted on such a Complaint. In the alternative, such Motion for Re-hearing further stated that if the court desired to treat the Motion as one for summary judgment, then counsel should be given an opportunity to file counter-affidavits and submit evidence in contradiction of or in further explanation of the interrogatories which the Defendant, Willey, had filed in the case. (R. 8-11)

This Motion was also taken under advisement by the court and subsequently denied. Thereafter, the court made and entered its Findings of Fact and Conclusions of Law in accordance with the allegations of Defendant's Counterclaim—even though the allegations of such Counterclaim were denied by Appellant in its Reply and even though, as will hereinafter appear, such allegations are not consistent with the facts.

It is from that decision and the judgment of the trial court entered thereon, that this appeal is taken.

## STATEMENT OF POINTS

For the purpose of argument, Appellant has grouped under two points, the claimed error of the trial court in connection with its determination below:

- I. *The Trial Court Erred in Granting Respondent's Motion for Judgment on the Pleadings.*
- II. *There is no Evidence or Facts in the Record Suf-*



*ficient to Sustain the Findings, Conclusions and Judgment Rendered by the Trial Court.*

## ARGUMENT

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS.

### I

The Motion for Judgment on the Pleadings filed by the Respondent in this matter, is very brief. It requests the court to "render judgment in favor of the Defendant on the pleadings under provisions of Rule 12 (c), Utah Rules of Civil Procedure, for the reasons that: a. It appears from the pleadings that the Defendant is entitled to judgment dismissing the Complaint and as prayed for in the Counterclaim. b. The pleadings in this cause are closed. c. The trial of this cause has been set for April 9, 1953, and a hearing on this Motion will not delay trial of the cause if trial becomes necessary."

Since Respondent specifies that his Motion is made pursuant to the provisions of Rule 12 (c), Utah Rules of Civil Procedure, it might be well for us at this time to quote the provisions of this rule. As adopted verbatim from the Federal Rules of Civil Procedure, the rule provides:

"Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and

all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”

Inasmuch as the rule provides that this motion is available *after the pleadings are closed*, we might look to the provisions of Rule 7 (a), to determine what *pleadings* are necessary and what constitutes the pleadings in a case to determine when the same are closed—the Respondent, in this case, having claimed that the pleadings were closed at the time of the filing of his Motion. Rule 7 (a), provides that there shall be a complaint, an answer and a reply to a counterclaim denominated as such. Therefore, in this case, the pleadings were closed when the Appellant filed its Reply to Respondent’s Counterclaim. Confirming this view of the matter is Moore on Federal Practice, 2nd Edition, Vol. 2, Section 12.15, where we find the following statement:

“If a counterclaim (denominated as such) or a cross-claim is pleaded, or if the court orders a reply, the pleadings are not closed until the reply (or answer to a cross-claim) is served.

“After the pleadings are closed a motion for judgment thereon may be made by any party. The only qualification is that it be not made so that its disposition would delay the trial.”

Thus, under the foregoing provisions, the Respondent was entitled to file a motion for a judgment on the pleadings and explain why Respondent alleged in his Motion, that the pleadings were closed and that such Motion would not delay the trial of the cause.

The Supreme Court might well wonder why mention of this matter is made by Appellant in this Brief. The

reason is that Respondent claimed in the lower court, and will undoubtedly claim in the Supreme Court, that the interrogatories and answers to interrogatories, which were on file at the time the Motion for Judgment was made by him, were a part of the pleadings and should be considered with them. However, this is obviously not so under the Rules, particularly since Appellant was entitled to have Respondent answer interrogatories and if the pleadings were not closed until such time as all opportunity had passed for interrogatories to be submitted and answers thereto filed, it would be impossible to make a Motion for Judgment on the Pleadings under this rule.

The basis for determining the merits of a Motion for Judgment on the Pleadings, is well outlined in Moore's Federal Practice, 2nd Edition, Vol. 2, Section 12.15 at page 2269 as follows:

“ . . . a motion for judgment on the pleadings must be sustained by the undisputed facts appearing in all the pleadings, supplemented by any facts of which the court will take judicial notice. For the purposes of the motion, all well-pleaded material allegations of the opposing party's pleading are to be taken as true, and all allegations of the moving party which have been denied are taken as false. Conclusions of law are not deemed admitted. Judgment on the pleadings may be granted only if, on the facts as so admitted, the moving party is clearly entitled to judgment. Hence, a defendant may not obtain a judgment on the pleadings on the basis of the allegations in his answer where no reply is required, since under Rule 8 (d) these allegations are deemed denied; nor may defendant move on the basis of an insufficient denial of the allegations of his answer in plaintiff's reply, where the reply was

not required or ordered by the court. Plaintiff may not move for judgment on the pleadings where the answer raises issues of fact which if proved would defeat recovery.”

Since the adoption of the original rule by the Supreme Court of the United States, an amendment was added (which is now included not only in the Federal Rules, but in our own Rules) to the effect that if additional matter is presented to the court for consideration and not excluded by the court, the “motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.” But under such circumstances, the Rule goes on to state that all parties “shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” Appellant, therefore, contends that the trial court in the instant matter, was not entitled to consider anything but the formal pleadings in the case unless and until it gave Appellant reasonable opportunity to submit additional matter to the court in the form of affidavits or other evidence which, if presented, would affect the ultimate decision in the case. This, in fact, was the essence of Appellant’s Motion for Re-hearing in the trial court, wherein Appellant stated the various facts which it had available to present to the court in support of its Complaint and the position taken therein.

In the absence of any explanation by the court in its memorandum decision as to the basis of its decision granting the motion for Judgment on the Pleadings, it is most difficult for Appellant to find any apparent explanation of the court’s ruling upon which to make its argument that such motion was improperly granted. Under the Rules, the motion in effect admits the allegations of Plain-

tiff's Complaint with respect to ownership of the automobile by Plaintiff and wrongful detention by Defendant. On the other hand, the allegations of Respondent in his Counterclaim or Answer to the effect that he owned the automobile or had purchased it from one Ed Barrett, are denied specifically or deemed denied under the provisions of Rule 8 (d) so that for the purpose of the motion, such matters are deemed to be false.

In the case of Art Metal Construction Company vs. Lehigh Structural Steel Company, (C. C. A. 3rd) 116 Fed. 2d 57, the plaintiff commenced an action against the Lehigh Structural Steel Company to recover an alleged balance owing under a construction contract. The defendant, after the pleadings were in, filed a motion for a judgment on the pleadings which was granted. On appeal, the Circuit Court reversed the lower court and made the following statement concerning the effect of a motion for summary judgment:

"This is an appeal from a judgment entered upon the pleadings on the motion by the defendant, Rule 12c, Rules of Civil Procedure, 28 U. S. C. A., following section 723c. In considering such a motion the facts alleged by the plaintiff must be taken to be true, and the inquire is whether upon those facts, plaintiff has stated a cause of action."

In the case of Wyman vs. Wyman (C. C. A. 9th) 109 Fed. 2d 473, 474, the plaintiff brought an action in the District Court of the United States for the District of Nevada to obtain a judgment for accrued alimony alleged to be payable under a decree rendered in New York. Following the filing of the pleadings, defendant made a motion for judgment on the pleadings which was granted by the



trial court. On appeal, the Circuit Court made the following statement:

“In *Phenix vs. Bijelich*, 30 Nev. 257, 269, 95 P. 351, 353, it is said: ‘When a party moves for judgment on the pleadings, he not only for the purpose of his motion admits the truth of all the allegations of his adversary, but must also be deemed to have admitted the untruth of all his own allegations which have been denied by his adversary.’

“A motion for judgment on the pleadings is permitted by the Federal Rules of Civil Procedure, Rule 12 (c), 28 U. S. C. A. following section 723c. “In his first affirmative defense in his answer to the complaint filed herein, the appellee alleged that on or about October 25, 1932, he became a bona fide resident of the State of Nevada, and ever since said date he had been a resident of and domiciled in said state. The appellant denied this allegation by her ‘Amended Reply to Answer.’ Under the rule of the *Phenix* case, *supra*, we must for the purposes of the motion consider the allegation made by the appellee that he became a resident of and was domiciled in Nevada as untrue. This being so, the court below erred in granting his motion, for, if that allegation were untrue, the Nevada court would not have jurisdiction to entertain the suit for divorce.”

The following analysis of a motion for judgment on the pleadings was made by the Circuit Court of Appeals for the Seventh Circuit in the case of *Friedman vs. Washburn Co.*, 145 Fed. 2d 715:

“After pre-trial conference and the filing of a stipulation of facts, appellee filed its motion for judgment on the pleadings, setting up various grounds therefor, raising both factual and legal issues: Con-

travention of the patent laws; absence of power in the Federal Court to grant the relief prayed; negligence and inexcusable delay showing on the face of the complaint; estoppel; lack of elements of a confidential disclosure action. Appellee also asserted that the action did not fall within the provisions of the Declaratory Judgment Act.

"Rule 12 (c) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c under the authority of which appellee filed its motion, provides: 'After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.' This motion, of course, deals only with questions of law arising on the pleadings, and in considering it, all facts alleged by the plaintiff must be taken to be true, the question being whether upon those facts the plaintiff has stated a cause of action. *Art Metal Construction Co. vs. Lehigh Structural Co.*, 3 Cir., 116 F. 2d 57. In *Ulen Contracting Corp. vs. Tri-County Electric Co-op.*, 1 F. R. D. 284, 285, the court said: 'Judgment is proper on the motion only where no material issue of fact is presented by the pleadings. \* \* \* *'Such a judgment is allowable not for lack of proof, but for lack of an issue; hence, it is proper where the pleadings entitle the party to recover without proof, as where they disclose all the facts or where the pleadings present no issue of fact or an immaterial issue.'*" (Italics added.)

The court in the Friedman Case went on to say, after analyzing the matter, that, "It is obvious from our study of the complaint and answer that many facts were in dispute and that such dispute could not be resolved by a simple study of those pleadings without more."

It is appellant's position in the instant matter that many facts are in dispute and that such dispute can only



be resolved through evidence at the trial, unless respondent is willing to concede the facts claimed by appellant—in which event appellant rather than respondent would be entitled to judgment. Certainly, under the law above cited, the lower court improperly granted Respondent's Motion for Judgment on the Pleadings.

See also *Jay vs. Chicago Bridge and Iron Co.*, (C.C.A. 10th) 150 Fed, 2d 247 (a case arising from the Federal District Court for the District of Utah). There, the Circuit Court of Appeals made the following statement:

“The motion for judgment on the pleadings, or in the alternative for dismissal of the action, admitted all matters well pleaded in the complaint. That rule is too well established to warrant extended discussion.”

On the other hand, Respondent will probably contend, as he did in the lower court, that the entire file, including Appellant's answers to interrogatories, should be considered in determining whether the motion for judgment on the pleadings should be granted.

In the case of *Friedman v. Washburn Co.*, *supra*, where defendant attached affidavits to its motion for judgment on the pleadings on the ground that plaintiff twice previously dismissed the instant action, the court held:

“The rule involved provides that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim. We think the matter was improperly made a part of the record, a motion for judgment on the pleadings being no place to attach exhibits, stipulations or other evidential matters. *Snowwhite v. Tide Water*

Associated Oil Co., D.C., 40 F. Supp. 739; Cf. United States Trust Co. v. Sears, D.C., 29 F. Supp. 643; Palmer v. Palmer, D.C., 31 F. Supp. 861.”

If the lower court wished to consider such evidentiary matter, the Appellant should have been given an opportunity to present such additional matters as it desired which would affect the determination of the case. Some of the additional facts which Appellant had available, are pointed out in Appellant’s Motion for Re-hearing and include:

1. A photostatic copy of the original invoice wherein Lincoln-Mercury, a division of Ford Motor Company, at Los Angeles, California, sold to Motor Center of Pocatello, Inc., a corporation of Pocatello, Idaho, the particular Mercury herein described under date of August 12, 1952.

2. A photostatic copy of the conditional sales contract executed on the 9th day of September, 1952, at Pocatello, Idaho, between Motor Center of Pocatello, Inc., a corporation, as seller and Edward S. Barrett of Pocatello, Idaho, as buyer, covering the 1952 Mercury involved in this action. This contract of sale provides that, “Title to said property shall not pass to purchaser until all sums due under this contract are fully paid in cash.”

3. Assignment of such contract by the Motor Center of Pocatello, Idaho, to Plaintiff herein on September 9, 1952, all of which is shown on the reverse side of said conditional sales contract on file with the Department of Law Enforcement of the State of Idaho. (In fact, such contract of conditional sales provides that the payments provided for therein, shall be payable “at the office of Securities Credit Corporation of Colorado.”)

4. Certificate of the Department of Law Enforcement of the State of Idaho, that a copy of such conditional sales contract was filed in such office on the 15th of September, 1952, under and pursuant to the provisions of Idaho Code 49-412 entitled, "Chattel Mortgages and Conditional Sales—Filing—Notice of Certificate—Constructive Notice."

5. The certificate of title to the motor vehicle involved in this action issued by the Department of Law Enforcement of the State of Idaho, under date of September 16, 1952, wherein Securities Credit Corporation of Pocatello, Idaho, is shown as lien holder, the nature of the lien being described as a conditional sales contract.

Appellant is further ready to establish, by competent evidence, that the payments provided for in said conditional sales contract were not made; that said contract was in default long prior to the commencement of this action; and that demand for the automobile had been made not only upon Mr. Barrett, but also upon Respondent, Willey, when it was found that he had possession of the automobile. Appellant would further prove that at the time Respondent obtained possession of said automobile, it had been registered and titled under the laws of the State of Idaho, had an Idaho license plate affixed to it; that Respondent had actual and constructive notice of Appellant's interest therein; that Respondent obtained possession of said automobile in Idaho, (so that the transaction would be governed under the laws of Idaho); that no certificate of title to the automobile had ever been issued to Respondent herein, either by the State of Idaho or the State of Utah; and that the certificate of title issued by the State

of Idaho has at all times been in the possession of Appellant herein.

With these matters in mind and with the offer on the part of Appellant to produce such facts before the trial court, it was improper for the trial court to consider matters outside the pleadings without considering the effect of the facts which Appellant offered or might offer for consideration, and without giving Appellant opportunity to produce such facts.

However, even considering Respondent's motion to be one for summary judgment and taking into consideration all matters in the file, the lower court improperly granted judgment against Appellant. In the case of *National Surety Corporation vs. First National Bank in Indiana*, 106 Fed. Supp. 302, 304, an action was brought by plaintiff to recover possession of certain bonds held by the defendant. Following the filing of the pleadings, the defendant moved, not only for judgment on the pleadings but also for summary judgment. The court held that a crucial question of fact was posed as to whether the bank, having failed to establish an intervening holder in due course between the theft of the bonds and itself and having none the less proceeded to negotiate them, was a holder in due course, making the following analysis of the function of a motion for summary judgment or for a judgment on the pleadings:

“The office of the motion for judgment on the pleadings or for summary judgment is for practical purposes the same, and often are both applicable, but if it is necessary to consider matters outside pleadings, motion for judgment on the pleadings is to be treated as a motion for summary judgment, and neither can be granted if there is any genuine issue as to any material fact. Barber, District Direc-

tor vs. Tadayasu, 9 Cir., 186 Fed. 2d 775; Munn vs. Robinson, D.C., 92 F. Supp. 60.

“Before such motion can be granted the right thereto must be clear. Hutchings vs. Lando, D. C., 7 F. R. D. 668. And it must appear to be a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim. Michel vs. Maier, D. C., 8 F.R.D. 464. “Under Rule 56 of the Federal Rules of Civil Procedure, 28 U.S.C.A., which provides for summary judgment, it was not intended to deprive litigants of a right to full hearing on the merits if any issue of fact exists. The procedure was not intended to be used as a substitute for regular trial where the outcome of the litigation depends upon disputed questions of fact. Merchants Indemnity Corp. of New York vs. Peterson, 3 Cir., 113 F. 2d 4; Toeblmen vs. Missouri-Kansas Pipe Line Co., 3 Cir., 130 F. 2d 1016.

“In passing upon a motion for summary judgment, it is no part of the court’s function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. Walling vs. Fairmont Creamery Co., 8 Cir., 139 F. 2d 318. All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment. Sarnoff vs. Ciaglia, 3 Cir., 165 F. 2d 167.”

Finally, in connection with this point, we wish to state that a motion for judgment on the pleadings is not a proper means of presenting to the court any irregularity or defect in the pleadings themselves. In other words, Rule 12 (b) relating to the defenses which may be raised by motion, contemplate that technicalities in the pleadings should be raised by a motion to dismiss or failure to state a claim or

some other such motion which will bring to the court's attention the particular defect involved. A motion for judgment on the pleadings lies only when under all the facts and law, as set out in the pleadings, the person is not entitled to recover or is as a matter of law, entitled to recover. As stated in Moore on Federal Practice, Vol. 2, Section 12.15 (page 2273):

“Judgments on pleadings should be given only when the merits can be determined in that manner, and not on some matter that may inhere in the case by virtue of faulty pleadings, but which is not actually involved in the litigation.”

The Supreme Court of the United States has passed upon this particular point and has set forth the criterion to be followed in reviewing a judgment on the pleadings. In the case of *Lanasa Fruit Steamship & I Co. vs. Universal Insurance Company* (1938) 302 U.S. 556, 58 S. Ct. 371, 82 L. ed. 422, the court had before it the interpretation of a policy of Marine Insurance which covered a shipment of bananas that became unmerchantable during a delay. On a motion for judgment on the pleadings filed by the Defendant, the District Court granted such motion, which judgment was affirmed in the Circuit Court of Appeals on the theory that the policy did not cover the loss from stranding. On appeal to the Supreme Court, the Defendant there for the first time contended that the Complaint itself was insufficient, upon which point the Supreme Court held:

“It is suggested that the declaration does not allege that the bananas were shipped in sound condition and that they would have been merchantable at the end of a normal voyage, and that there is no allega-

tion as to the duration of the delay. It does not appear that these questions were raised in the District Court and they were not dealt with by the Court of Appeals, which evidently assumed the sufficiency of the declaration to present the main question as to the interpretation of the general coverage clause. Both courts below have decided the case upon the assumption that the fruit was in sound condition when shipped and would have been merchantable at the end of the voyage had it not been for the stranding and the consequent delay. In view of this course of proceedings we make the same assumption. If any question as to the condition of the cargo or length of the delay and its effect had been presented in the trial court, it might have been met by amendment of the declaration and the issue could have been tried; and if the main question, upon the assumption stated, has been wrongly decided and the case is remanded to the District Court, there will still be opportunity to try any other issues of fact or law which may properly be presented."

It is, therefore, clear that the trial court erred in granting Respondent's Motion for Judgment on the Pleadings for the following reasons:

- a. The Complaint was sufficient to support Appellant's claim.
- b. Questions of fact were raised by the pleadings, which could only be resolved upon trial of the issues.
- c. The Motion for Judgment on the Pleadings admitted the truth of the allegations contained in Appellant's Complaint, which, if so admitted, allows recovery by the Appellant, and
- d. Had the trial court deemed the pleadings faulty,



Appellant should have been given the opportunity to amend.

If the trial court desired to treat the motion for judgment on the pleadings as one for summary judgment, Appellant should have been given an opportunity to produce evidence of the nature set forth hereinabove, which at all events would have compelled a finding that respondent was not entitled to summary judgment.

## II

THERE IS NO EVIDENCE OR FACTS IN THE RECORD SUFFICIENT TO SUSTAIN THE FINDINGS, CONCLUSIONS AND JUDGMENT RENDERED BY THE TRIAL COURT.

While we realize that the trial court relied upon counsel for Respondent to prepare the Findings of Fact and Conclusions of Law and Judgment which were rendered in this case, nevertheless we are amazed that such Findings go so far beyond the pleadings and the facts in determining factual issues wholly without support in the record and in some instances directly contrary to the actual facts appearing in the record.

For example, in Finding Number 3, the court states "that the Plaintiff is not the owner of the automobile in question but is the assignee of the conditional *vendee*." (R. 14) (*Italics added.*) This is both contrary to the matters alleged in the pleadings as well as contrary to the actual facts. In his counterclaim, Respondent in this matter alleges that "on or about the 15th day of September, 1952, *Defendant* purchased a new 1952 model Mercury automobile . . . from one Ed Barrett, doing business as Motor

Center of Pocatello Inc.” (R. 3) In other words, Respondent herein is the person who acquired the interest, if any, of the conditional vendee rather than Appellant. Appellant’s interest arises from an assignment of the conditional sales contract from the *conditional vendor*.

As to that portion of Finding Number 3 which states that Plaintiff is not the owner of the automobile in question, we wish to point out that the title issued by the State of Idaho shows the Appellant to be the lien holder under a conditional sales contract. While the certificate of title is not in evidence, Appellant, in its complaint, alleged it was the owner of the car — which allegation was deemed admitted. Too, Respondent’s claim to title is only through the conditional vendee.

We are at a loss to understand the purpose or meaning of the Court’s Finding Number 4 to the effect that the exact amount of the debt of Edward S. Barrett or the Motor Center of Pocatello, Inc., to the Plaintiff is not known to the Plaintiff. The matter contained in this Finding undoubtedly is taken from the interrogatories and answers thereto on file in the case. Under Interrogatory Number 10, Respondent requested Appellant to identify the debts and obligations which might be owing to Appellant from Edward S. Barrett and/or Motor Center of Pocatello Inc. Obviously, that question did not relate to the instant transaction involving the automobile in this case for the reason that Appellant claimed to be the owner of such automobile. However, by reason of other transactions Appellant in this answer to Interrogatory Number 10 stated that the exact amount of the entire debt was not known but would be conditional upon whether or not contracts which had been assigned to it and the payment of which had been

guaranteed by the Motor Center of Pocatello, Inc., would be paid by the persons primarily liable thereon. In one particular instance Appellant stated in its answer that a debt of \$528.00 had been liquidated, which debt had been incurred July 17, 1953. Any other debts that might exist or be shown to exist have accrued over the past four years during which Appellant has been doing business with the Motor Center of Pocatello.

Likewise, the Court's Finding Number 5 to the effect that no action of any kind has been commenced by plaintiff against Edward S. Barrett or Motor Center of Pocatello, Inc., would have no bearing upon the issues in this case. Obviously an action for claim and delivery lies against the person or persons having possession of the vehicle. When demand was made by Appellant for return of the Mercury automobile and the said Edward S. Barrett failed and refused to deliver the same, Appellant for the first time discovered that the automobile was then in the possession of Defendant in this case. It would have been a useless and needless action to file an action in Idaho for the possession of the Mercury automobile when it was in Utah. Nor could Appellant have joined Edward S. Barrett or the Motor Center of Pocatello in the instant case filed in Utah for the reason that they were not residents of this state so that the court here had no jurisdiction over them.

Concerning the first sentence of Finding Number 5 wherein the Court states that Plaintiff "has never had possession of said automobile" such Finding does not have any basis in the facts or the pleadings. Nor would it have any bearing upon this case as long as Plaintiff had complied with the laws of the State of Idaho in connection with the filing of the instruments showing its lien

upon the automobile in question. Section 49-404 of the Idaho Code provides how a person — either purchaser or lienholder—acquires an interest in the property as follows:

“Except as provided in sections 49-403, 49-412, 49-413, 49-414 and 49-416, no person acquiring a motor vehicle from the owner thereof, whether such owner be a dealer or otherwise, shall hereafter acquire any right, title, claim or interest in or to said motor vehicle until he shall have issued to him a certificate of title to said motor vehicle, *nor shall any waiver or estoppel operate in favor of such person against a person having possession of such certificate of title or an assignment of such certificate of said motor vehicle for a valuable consideration.*”  
(Italics added.)

The Idaho Supreme Court has interpreted this section of the statute in the case of *Lux vs. Lockridge*, 65 Idaho 639, 150 P. (2d) 127. In that case the Plaintiff agreed to sell to the Gray Motor Company a certain truck which he was turning in on a new vehicle. In turn the Gray Motor Company sold the truck (which Plaintiff had delivered to it prior to receiving the new truck) to the Defendant Lockridge. The trial court found that Lockridge was a bona fide purchaser for value and without notice. However, inasmuch as Plaintiff had not delivered the certificate of title to the Gray Motor Company and therefore the Gray Motor Company in turn had not been able to deliver the certificate of title to the Defendant Lockridge, judgment was entered against the Defendant requiring him to deliver the truck over to the Plaintiff on the ground that the above section of the statute had not been complied with and therefore the purported sale to Defendant was void. The court held:

“There was a sharp conflict in the evidence as to whether defendant knew plaintiff retained the right to regain possession of his truck in the event the company could not deliver a new truck. There is, however, no dispute in the record that the certificate of title remained at all times in plaintiff’s possession and was never transferred by him to the company or defendant and that defendant received no certificate of title from the company or plaintiff. All were equally charged with notice of chapter 144, supra, providing that no person could ‘acquire any right, title, claim or interest in or to’ a motor vehicle until the vendee had issued to him the certificate of title. Without, therefore, determining whether or not a sale without the transfer of the certificate is void, though urged by both parties pro and con to do so, we are impressed with the cogency of the reasoning in *Swartz v. White*, 80 Utah 150, 13 P. (2d) 643, to the effect that a purchaser not receiving the certificate of title is not a bona fide purchaser for value and therefore as against defendant the contract existing between plaintiff and the company could not be shown, defeating his rights to retain the truck.”

It is therefore the contention of Appellant in the instant case that whether or not possession of the automobile was ever held by it is immaterial. The real issue is whether Respondent is able to acquire an interest in a motor vehicle through obtaining possession of the same without at the same time obtaining the certificate of title, where the certificate of title has at all times been in the hands of a third person, and the vehicle duly registered showing a third person as the lien holder under a conditional sales contract. Under the reasoning of the Supreme Court of Utah in the case of *Swartz vs. White*, 80 Utah

150, 13 Pac. (2d) 643, it would be impossible for Respondent to acquire any interest in such vehicle adverse to the Plaintiff herein.

In Finding Number 6, the Court determines that Plaintiff knew at the time of the purchase of the automobile by the Defendant that the Defendant paid the full purchase price to Barrett and that Defendant was entitled to the possession of said automobile. We submit that there was nothing in the contract of purchase by Edward S. Barrett from the Motor Center of Pocatello, Inc., which would preclude the buyer from transferring what equity he might have in the vehicle to some third person, and therefore whether or not Appellant knew of the purported sale by Barrett to Defendant herein would be of no consequence. Under any circumstances the Plaintiff would be entitled to retain its lien against the car until the purchase price had been paid, whether such lien were considered to be one under a conditional sales contract or a chattel mortgage. As a matter of fact, our Supreme Court has held that claim and delivery is a proper proceeding to obtain possession of goods mortgaged under a chattel mortgage for the purpose thereafter of foreclosing such chattel mortgage.

In the case of *Morgan v. Layton*, 60 Utah 280, 208 Pac. 505, the court held:

“In this case the mortgagor defaulted. Plaintiff as mortgagee demanded that the debt be paid or that the property covered by the mortgage be delivered into her possession. Defendants failed and refused to comply with the demand. Plaintiff brought this action for the sole purpose of obtaining possession of the property. *We know of no form of action more*

*appropriate, if indeed there is any other appropriate form known to the law.*

“The court found that plaintiff had a special property in the furniture to a certain extent of value; that defendants had defaulted in payment of the debt; that the mortgage in express terms conferred upon plaintiff the right of possession, and hence it found as a conclusion of law that plaintiff was entitled to possession of the property. . . .

“. . . The court is of opinion, under the facts of this case, that claim and delivery was a proper form of action.”

In Finding Number 7 the court specifically refers to interrogatories and determines therefrom that there was a close business relationship between plaintiff (Appellant) and the said Edward S. Barrett, which consisted of “the said Barrett procuring automobiles from the plaintiff and selling said automobiles to various and divers individuals, the defendant being the purchaser of one of said automobiles.” Obviously, Appellant is not engaged in the automobile business. There is nothing in the answers to interrogatories which would so indicate nor is there anything that would justify the court in finding that Barrett procured various automobiles from Appellant. Appellant is engaged in the finance business and as such purchases automobile paper. It is also apparent that Appellant further complies with the laws of Idaho with respect to filing such paper and securing a proper certificate of title from the Department of Law Enforcement. Again, referring to the Idaho Code, Sec. 49-403 provides:

*“No person shall hereafter sell or otherwise dispose of a motor vehicle without delivery to the purchaser or transferee thereof a certificate of title with such*



assignment thereon as may be necessary to show title in the purchaser, nor *purchase or otherwise acquire or bring into this state a motor vehicle . . . unless he shall obtain a certificate of title for the same in his name in accordance with the provisions of this act . . .*” (Italics added.)

While the provisions of this section were complied with when Barrett purchased the automobile from Motor Center of Pocatello, Inc., and Appellant’s lien was established, both Barrett and Respondent failed to comply with the law when attempted transfer was made later to Respondent.

There was certainly no basis for the foregoing Finding No. 7, nor for the next Finding (Number 8) to the effect that because of such dealings the Appellant is estopped “from claiming or asserting any right, title or interest in the said automobile.” As hereinbefore pointed out, the transaction wherein and whereby Appellant obtained its interest in the automobile occurred on September 9, 1952, when the contract of sale was executed between Motor Center of Pocatello, Inc., as seller and Edward S. Barrett as buyer, which said contract was on the same day assigned to Appellant for a valuable consideration. It was not until some time later that Respondent acquired possession of the automobile and claims to have purchased the same. Appellant complied with the provisions of Section 49-412, Idaho Code, relating to filing of the conditional sales contract and has the certificate of title issued by the Department show its lien, thereby complying in all respects with the laws of Idaho relating to the matter. How, under such circumstances, could it be estopped to assert its lien against someone who claims to have acquired an interest in the automobile thereafter?

The same argument applies with equal or greater force with respect to Finding Number 9 to the effect that "the equities in said cause are so completely and so predominantly in favor of the defendant counterclaimant and against the plaintiff, that the Court is constrained to hold in favor of the defendant counterclaimant and against the plaintiff." *What equities?* There has been no evidence of the equities in the case, but certainly the pleadings and interrogatories do not reveal that Respondent has any equity on his side. He apparently purchased—or attempted to purchase—an automobile in Idaho from a private individual, without checking the registration on the car and without ascertaining whether the title to such vehicle was clear and unencumbered. He had constructive—if not actual—notice of Appellant's lien and therefore cannot now be heard to complain if he failed to obtain anything by his action.

## CONCLUSION

We respectfully submit that the trial court was wrong in granting Respondent's Motion for Judgment on the Pleadings; that there is no basis or support for the same either in fact or law and that therefore the Judgment of the lower court should be reversed and the cause remanded, either to proceed with the trial of the matter or to enter judgment in favor of Appellant and against Respondent in accordance with the prayer of the complaint.

Respectfully submitted,

ARTHUR H. NIELSEN  
CHARLES WELCH, JR.  
*Attorneys for Appellant*  
*Salt Lake City, Utah.*