

1953

Securities Credit Corporation v. Marion Willey : Brief of Appellant

Utah Supreme Court

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George K. Fadel; Counsel for Respondent;

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IN THE SUPREME COURT

of the

STATE OF UTAH

SECURITIES CREDIT CORPORA-
TION, A CORPORATION,

Appellant,

— vs. —

MARION WILLEY, dba MARION
WILLEY & SONS,

Respondent.

Case No.

8041

FILED

OCT 24 1953

RESPONDENT'S BRIEF

Clerk, Supreme Court

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IN THE SUPREME COURT
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STATE OF UTAH

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Appellant,

— vs. —

MARION WILLEY, dba MARION
WILLEY & SONS,

Respondent.

Case No.

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

Respondent agrees with the statement of facts of the appellant as set forth in appellant's brief so far as the facts are stated.

However, respondent denies the conclusions inserted by the appellant in its Statement of Facts. On page three of Appellant's brief, the appellant in the next to the last paragraph sets forth:

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

There appears to be a mistake in the last word of the paragraph which should have read "Appellant", not "Respondent"

The additional facts to be stated are in the main contained in the Respondent's Interrogatories served upon the Appellant, (R. 20) and the Answers To Interrogatories To Plaintiff (R. 22) made by the appellant:

INTERROGATORY NO. 1

1. In paragraph 1 of the complaint the plaintiff alleges it is the owner of the subject automobile and entitled to possession of same. (a) From whom was the automobile purchased.

ANSWER: The Plaintiff received an assignment of the contract of sale from the Motor Center of Pocatello, Inc., of Pocatello, Bannock County, Idaho.

(b) When and where was it purchased.

ANSWER: The contract for the sale of said car was purchased on the 9th day of September, 1952 at Pocatello, Idaho.

(c) Was title issued in name of plaintiff.

ANSWER: Title was issued showing plaintiff as lienholder by virtue of conditional sales contract, which had been assigned to plaintiff.

(d) When did plaintiff get possession of same.

ANSWER: Plaintiff did not take possession of said car.

(e) When did plaintiff part with possession of same

ANSWER: (No answer given)

(f) To whom was possession relinquished by plaintiff.

ANSWER: (No answer given)

(g) How much did plaintiff pay for said automobile, to whom, and when.

ANSWER: The plaintiff paid \$2439.51 to Motor Center of Pocatello Inc. upon the 9th day of September, 1952.

(h) Describe the document by which plaintiff claims title

ANSWER: Certificate of title of motor vehicle issued by the Department of Law Enforcement, No. 818165, and conditional sales contract assigned to plaintiff.

INTERROGATORY NO. 2

Does the plaintiff have a certificate of title to said vehicle. If so, when and where was the same issued and by whom.

ANSWER: Yes, the same was issued September 16, 1952, at Boise, Idaho, by the Department of Law Enforcement.

INTERROGATORY NO. 3

Is plaintiff acquainted with Edwin S. Barrett or Edw. S. Barrett of Pocatello, Idaho. If so, has plaintiff had any business transactions with him during the past two years

ANSWER: Yes, plaintiff has had business transactions with Edward S. Barrett of Pocatello, Idaho, during the past two years.

INTERROGATORY NO. 4

State the nature of business done with Edw. S. Barrett during the past two years.

ANSWER: The nature of the business done with Edward S. Barrett was financing motor vehicles.

INTERROGATORY NO. 5

Has plaintiff done any business with Motor Center of Pocatello, Inc., during the past two years. If so, state the nature of the business.

ANSWER: Yes, the plaintiff has done business with Motor Center of Pocatello, Inc., during the past two years. The nature of the business has been the financing the sale of automobiles, flooring automobiles and various types of financing.

INTERROGATORY NO. 6

Has plaintiff financed any automobiles for Edw. S. Barrett and/or Motor Center of Pocatello, Inc., during the past two years.

ANSWER: Yes.

INTERROGATORY NO. 7

List the date, amounts advanced, and the description of any automobiles financed by plaintiff for Edw. S. Barrett and/or Motor Center of Pocatello, Inc., during the past two years.

ANSWER: A full and complete answer to this interrogatory would require a complete audit of the Edward S. Barrett and Motor Center of Pocatello, Inc. accounts extending over the full period of two years and would be burdensome upon the plaintiff. Innumerable transactions have occurred during the last two years and the ferreting out of each one would amount to a Herculean task.

INTERROGATORY NO. 8

What if any documents were executed at the time of the alleged purchase of the subject automobile. Were any of these documents recorded; if so, when and where.

ANSWER: Assignment of conditional sales contract; execution of certificate of title by the Department of Law Enforcement; application for transfer of title made by Motor Center of Pocatello, Inc., to cause title to be issued in name of the plaintiff. The assignment of contract was recorded in the office of the Department of Law Enforcement, Boise, Idaho. Application for certificate of title in name of plaintiff was filed with the department of Law Enforcement. Copy of the conditional sales contract was filed with the Department of Law Enforcement.

INTERROGATORY NO. 9

State the name and address of any persons who purchased any automobiles from Edw. S. Barrett and/or Motor Center of Pocatello, Inc., which had been financed by you during the past two years.

ANSWER: (Same as No. 7)

INTERROGATORY NO. 10

Does Edw. S. Barrett and/or Motor Center of Pocatello, Inc., owe you any money. If so, state how much, the dates the obligations were incurred, and the amounts which have been paid on the obligations since September 15, 1952.

ANSWER: The exact amount of debt is not now known to the plaintiff. The nature of said indebtedness is conditioned and conditional upon plaintiff's fully collecting contracts which have been assigned to plaintiff. One debt of \$528.00 is liquidated. This debt was incurred July 17, 1955. No payments have been made upon the liquidated debt and no definite amount has been estimated on the conditional debts.

INTERROGATORY NO. 11

Has any action been commenced by plaintiff against Edw. S. Barrett and/or Motor Center of Pocatello, Inc., within the past four months. If so, describe the action taken, the purpose thereof, and the present status thereof.

ANSWER: No.

INTERROGATORY NO. 12

State the names and address of any witnesses to matters alleged in the complaint.

ANSWER: Edward S. Barrett, John Rademacher, Charles E. Crowshaw, Evan F. Olson, all residents of Pocatello, Bannock County, State of Idaho.

The Respondent alleged by way of counterclaim (R. 3):

“1. On or about the 15th day of September, 1952, defendant purchased a new 1952 model Mercury automobile, four-door sedan, Motor No. 52 LA 27, 188M, from one Ed Barrett doing business as Motor Center of Pocatello, Inc., at 628 North Main Street, Pocatello, Idaho, as an authorized dealer in new Mercury Automobiles, for a total sum of \$2650.00 fully paid by Defendant to said seller.

2. No certificate of title was delivered to defendant upon delivery of said automobile by the said seller for the reason advanced by the seller that none had been issued. Defendant has since January, 1951, purchased some fifteen new Mercury automobiles from said Ed Barrett and Motor Center of Pocatello, Inc., and each of said vehicles was delivered to defendant without certificates of title but the defendant obtained certificates of title upon said new automobiles in the State of Utah. Defendant had no notice of any claim of the Plaintiff whatsoever until more than one month after said purchase was completed.

3. The sale of the said automobile by said seller to defendant was with the full knowledge and consent of the plaintiff.

4. By provisions of the laws of the State of Idaho, and the State of Utah, the Plaintiff has no right, title or interest in or to said automobile or any claim against the defendant.

5. The defendant is entitled to a decree of this court quieting title to said automobile in defendant and declaring that plaintiff has no right, title, interest or claim therein.

WHEREFORE defendant prays that the complaint be held for naught and that judgment be rendered quieting title to said automobile in the defendant, and for the defendants costs."

STATEMENT OF POINTS

There are two principal questions for decision :

POINT I

WHETHER FROM THE PLEADINGS THE RESPONDENT WAS ENTITLED TO A JUDGMENT DISMISSING THE APPELLANT'S COMPLAINT.

POINT II

WHETHER FROM THE PLEADINGS THE RESPONDENT WAS ENTITLED TO A JUDGMENT UPON THE THE COUNTERCLAIM OF THE RESPONDENT.

ARGUMENT

POINT I

WHETHER FROM THE PLEADINGS THE RESPONDENT WAS ENTITLED TO A JUDGMENT DISMISSING THE APPELLANT'S COMPLAINT.

A determination should be made at the outset as to what are pleadings for the purpose of a Motion For Judgment On the Pleadings, and particularly whether answers to Interrogatories are pleadings. Rule 7 (a) of Utah Rules of Civil Procedure provides :

“7(a). PLEADINGS. There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer.”

There is no mention that Interrogatories To Parties or the answers thereto are pleadings. It is the contention of the Respondent that Answers To Interrogatories are pleadings whenever the Answer to Interrogatories relates to an issue raised by the allegations of a complaint, answer or counterclaim. In support of the contention that answers to Interrogatories are pleadings, Respondent refers by analogy to the use, function and designation of a Bill of Particulars under the former Code of Civil Procedure. The Utah Code Annotated, 1943, 104-6-3, provides:

104-6-3. ENUMERATED. “The only pleadings allowed on the part of the plaintiff are:

- (1) The complaint.
- (2) The demurrer to the answer.
- (3) The reply.

And on the part of the defendant:

- (1) The demurrer to the complaint.
- (2) The answer.
- (3) The demurrer to the reply.”

No mention is made of a Bill of Particulars as being a pleading.

Utah Code Annotated, 1943, 104-13-3 provides:

104-13-3. "AN ACCOUNT, HOW PLEADED —BILL OF PARTICULARS. It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within ten days after a demand therefor in writing, a copy of the account, or be precluded from giving evidence thereof. The court, or a judge thereof, may order a further account when the one delivered is too general or is defective in any particular."

A Bill of Particulars was so held to be a pleading by the Supreme Court of Utah in the case of *Inland Engineering & Construction Company vs. Maryland Casualty Comapny, et al.*, 76 U 435, 290 P 367, decided July 21, 1930, wherein the Inland Engineering brought suit against a subcontractor and the surety for the subcontractor for an alleged failure to complete construction of a road as per contract. The Defendants demanded a bill of particulars, and the trial court ordered the Plaintiff to supply a bill of particulars, but none was in fact filed by the Plaintiff. Judgment in the lower court was for Plaintiff, but reversed and remanded by the Supreme Court because Plaintiff failed to file the bill of particulars.

The Supreme Court made these pertinent statements at page 447:

“The Statute relating to a Bill of Particulars is largely a rule of pleading relieving a pleader from the necessity of pleading each item unless required by the adverse party upon demand for a more particular and complete statement.”

At page 447 quoting from *Morrisette, Executor vs Wood*, 128 Ala. 505, 30 So. 630, 631:

“The word ‘account’ has no clearly-defined meaning.

“A bill of particulars has been held proper in actions based upon common counts . . . libel and slander; ejectment; trover, trespass . . .”

At page 451:

“Whenever a demand for bill of particulars relates to an issue raised by allegations of a complaint, an answer or a counterclaim, its proper classification must be a pleading, which should be filed as ordered by the court in this case, and the issues cannot be said to be made up or the case be at issue until such has been done.”

“How can a court rule upon the admissibility of evidence relating to matters set out in a bill of particulars unless a bill is filed and is before the court as a part of the pleadings limiting and defining the issues. The authorities seem to be well nigh unanimous that in a proper case, where bill of particulars is permitted, the bill limits or enlarges the issues of proof.”

Under our present Utah Rules of Civil Procedure in absence of the use of a bill of particulars, provision is

made for other types of discovery among them being, Interrogatories to Parties as provided by rule 33 Utah Rules of Civil Procedure. The last paragraph of rule 33 provides in part as follows:

“Interrogatories may relate to any matters which can be inquired into under Rule 26 (b), and the answers may be used to the same extent as provided in Rule 26 (d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require.”

Rule 26 (d) paragraphs 1 and 2 provide as follows:

“(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.”

It clearly appears from the wording of rule 26 (d) that the Interrogatories to Parties may be used upon the hearing of a motion, and that the deposition of a party may be used by an adverse party for any purpose.

Since a bill of Particulars was not denominated by the Code of Civil Procedure as being a pleading but was by decision of this court declared to be a pleading when

relating to an issue raised by a complaint, answer or counterclaim, and since the use of interrogatories performs a function under the Utah Rules of Civil Procedure comparable to the functions of a bill of particulars under the code of Civil Procedure, then even though the Utah Rules of Civil Procedure do not specifically denominate Interrogatories to Parties and ~~to~~^{the} answers thereto as being pleadings, yet the same should be so considered whenever the answers to interrogatories relate to an issue raised by a complaint, answer or counterclaim.

At the bottom of Page 7 of Appellant's brief, appellant contends that if answers to interrogatories are considered pleadings, then it would be impossible to make a Motion for Judgment on the Pleadings because the pleadings would never be closed. Of course, technically, pleadings are not closed until the time of trial since it is possible to amend the various pleadings, but there being no motions to amend, pending, for all practical purposes and for purposes of Motion for Judgment On The Pleadings, the pleadings are closed. Likewise, though the Appellant might have interposed interrogatories to be answered by the Respondent, yet there having been no interrogatories pending, unanswered, at the time of Motion For Judgment On The Pleadings, the pleadings were closed.

The complaint of the Appellant substantially followed Form 16 of forms set out in the Utah Rules of Civil Procedure and alleged in paragraph 1 of the complaint (R. 1):

“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. 52 LA-27, 188-M.”

Paragraph 2 of the complaint alleges possession in the respondent, paragraph 3 alleges a demand for possession and refusal, and paragraph 4 alleges damages.

The action commenced by the Appellant was solely one of replevin. Replevin is defined in Corpus Juris Secundum, Volume 77, Page 10 as being an action at law for the recovery of specific personal chattels, wrongfully taken and detained or wrongfully detained. At page 13 of said Volume 77, it is stated that replevin is a possessory action in which the gist of the action is the plaintiffs right to immediate possession of the property and the defendant's wrongful taking or wrongful detention of the property. Again at page 29 of Volume 77, Corpus Juris Secundum, it is stated that since replevin is strictly a possessory action, it lies only in behalf of one entitled to immediate, exclusive and unqualified possession as against the defendant at the time of commencing the action, and if there is any preliminary act or condition precedent to be performed before the unqualified right of possession attaches, the action cannot be maintained.

The complaint alleges as a conclusion that the plaintiff is the owner and entitled to immediate possession of the automobile. In answer to interrogatory 1, appellant answers that it is a lien holder by virtue of a conditional sales contract which had been assigned to appellant by

Motor Center of Pocatello, Inc., and that appellant had never taken possession of the car, thus contradicting, or at least qualifying, the allegations of the complaint. As a conditional seller, the appellant had no right of possession except upon default under the contract, but the appellant did not allege a contract or the default thereof, or any other allegations supporting the appellant's right to immediate possession. In answer to Interrogatory No. 10, the appellant states that Edw. S. Barrett and/or Motor Center of Pocatello, Inc., owed appellant some conditional obligations but that only one debt of \$528.00 was liquidated. In answer to Interrogatory No. 11, appellant admits that no action was taken against Edw. S. Barrett and/or Motor Center of Pocatello, Inc., within four months prior to December 13, 1952, which indicates that no action was taken after September 9, 1952, the date which appellant claims to have acquired an interest in the car. In its affidavit of Replevin (R. 19), appellant deposes upon information and belief that Respondent claimed to have purchased the car from Edward S. Barrett. The appellant could not have maintained replevin against Edward S. Barrett and/or Motor Center of Pocatello, Inc., without alleging and proving a default under the contract. In the case of *Calhoun v. Universal Credit Co., et al.*, 106 Utah 166, 146 P2d 284, in which Calhoun purchased a car from a dealer; the dealer assigned the contract to Universal Credit Co., who repossessed the car without knowledge or consent of Calhoun after Calhoun was in default of payments

under the contract. There was evidence that Calhoun had been given extensions on previous instalments. Calhoun brought action for conversion, recovered judgment in the trial court. which was affirmed by the Supreme Court holding at Page 174:

“Thus until notice of intention to enforce the forfeiture provisions of a contract was given, and a reasonable time to comply with the demand for payment allowed, an indefinite extension of time would not expire, and defendants could not repossess the automobile.”

The Appellant contends (App. Br. 25) that it was entitled to bring replevin and cited *Morgan vs. Layton*, 60 Utah 280, 208 Pac. 505; however that case was one in which the complaint alleged the mortgage, the default thereof and the provisions which entitled the Plaintiff to possession, and the Supreme Court held further in that case:

“The possession acquired by the Plaintiff under judgment of the court, however, is not an absolute, unqualified possession. It is limited by the purposes for which it was obtained, viz., in order to foreclose the mortgage by advertisement and sale as provided by law. For that purpose, and that purpose only, the Plaintiff is entitled to possession of the property.”

The Appellant in answer to the interrogatories admitted that it had never had possession of the car, that no action has been commenced against Motor Center of Pocatello, Inc., and/or Edward S. Barrett, that no

payments had been made upon the liquidated debt and no definite amount had been estimated on the conditional debts, and that there were no liquidated debts owing from Motor Center of Pocatello, Inc., and/or Edward S. Barrett except a debt of \$528.00 arising on July 17, 1953, all of which clearly indicates that no procedure declaring forfeiture under the conditional sales contract had been taken; and that Appellant could not have been the "owner and entitled to possession" of the car.

The Idaho Code 49-401 (e) entitled "Definitions" provides:

49 Idaho Code 401 "Definitions"

"(e) Owner—A person who holds the legal title to vehicle or in the event vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the condition stated in agreement with an immediate right of possession vested in the conditional vendee or lessee or in the event a mortgagor of vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for purposes of this chapter."

Idaho Code 49-416 further provides:

"In the event of the transfer of ownership of a motor vehicle by operation of law as upon inheritance or repossession is had upon default in performance of the terms of a conditional sales contract the department of law enforcement may upon the surrender of the prior certificate of title, or when that is not possible,

upon presentation of satisfactory proof to the department of ownership and right to possession of such motor vehicle and presentation of an application for a certificate of title, issue to the applicant a certificate of title thereto. Only an affidavit by the person or agent of the person to whom possession of the motor vehicle so passed, setting forth facts entitling him to such possession and ownership, together with a copy of the journal entry, court order or instrument upon which such claim of possession and ownership is founded, shall be considered satisfactory proof of ownership and right of possession. If the applicant cannot produce such proof of ownership he may apply directly to the department of law enforcement and submit such evidence as he may have and the department of law enforcement may thereupon, if it finds the evidence sufficient, issue a certificate of title to the applicant."

The Appellant contends that it was entitled to produce facts as set forth on Page 14 of its brief, assuming that the court was proceeding under the Summary Judgment procedure. However, the court did not consider matters outside of the pleadings and the Summary Judgment procedure was not applicable. Nevertheless, even though the facts which appellant sets forth on page 14 of its brief were admitted, these facts taken with the answers to interrogatories would show nothing more than a lienholder's interest in the appellant and would not avail the appellant under its allegations in replevin which appears to be a mistaken remedy in absence of allegations in the complaint in addition to the conclusion

that plaintiff is "owner and entitled to possession" of the car. The appellant made no attempt to amend the complaint.

POINT II

WHETHER FROM THE PLEADINGS THE RESPONDENT WAS ENTITLED TO A JUDGMENT UPON THE THE COUNTERCLAIM OF THE RESPONDENT.

The Respondent's counterclaim, (supra page 7) seeks equitable relief by way of quieting title to the car in the Respondent as against the appellant. The success of the counterclaim depends upon the proof of a purchase or acquisition by the Respondent under circumstance which would constitute the claim of the Respondent superior to and prior in right to that of the appellant. The trial court could properly find such proof in the pleadings from the following pleadings:

(a) The Affidavit of Replevin (R. 19) of the appellant alleges under oath, that "affiant is informed and believes and therefore alleges, that the defendant claims to have purchased the property from one Edward S. Barrett but Affiant further alleges that said Edward S. Barrett does not have title nor right to possession to said automobile."

From this affidavit Appellant admits the existence of the claim of Respondent to have purchased the car from Edward S. Barrett; the allegation that Edward S. Barrett "does not have title nor right to possession to

said automobile" is not an allegation that Edward S. Barrett did not have title and right to possession at the time of sale and transfer of possession to Respondent.

(b) By the answer to Interrogatory No. 1, Appellant answers that it is a lienholder under a conditional Sales contract and that Appellant had never taken possession of the automobile.

(c) Answering interrogatories Numbers 3, 4, 5, and 6, the appellant answers that during the past two years Appellant had been financing motor vehicles, flooring automobiles and supplying other types of financing for Edward S. Barrett and Motor Center of Pocatello, Inc.

(d) Respondent by interrogatory No. 7 requested the Appellant to list the date, amounts advanced, and the description of any automobiles financed by the Appellant for Edward S. Barrett and/or Motor Center of Pocatello, Inc., during the past two years. The Appellant answered:

"A full and complete answer to this interrogatory would require a complete audit of the Edward S. Barrett and Motor Center of Pocatello, Inc. accounts extending over the full period of two years and would be burdensome upon the Plaintiff. Innumerable transactions have occurred during the last two years and the ferreting out of each one would amount to a Herculean task.

Again by interrogatory No. 9 the Respondent re-

requested Appellant to state the names and addresses of any persons who purchased any automobiles from Edward S. Barrett and/or Motor Center of Pocatello, Inc., which had been financed by the Appellant during the past two years. In response the Appellant gave answer the same as its answer to Interrogatory No. 7.

(e) Answering Interrogatory No. 10 Appellant stated that the exact amount of the debt was unknown; that only one debt of \$528.00 was liquidated and was incurred July 17, 1955 (1953).

(f) Answering Interrogatory No. 11 Appellant admitted that no action whatsoever had been taken against Edward S. Barrett or Motor Center of Pocatello, Inc.

From the foregoing it would appear that the most the Appellant could offer by way of proof is that it held a lien by reason of a conditional sales contract; that a certificate of title showed Appellant as lienholder; that Appellant had for more than two years been financing automobiles under various plans for Edward S. Barrett and Motor Center of Pocatello, Inc., to the extent that to enumerate the transactions would constitute a "Herculean task".

This would resolve the issue as to whether one who finances a dealer in new automobiles, flooring plans, demonstrators and various other types of financing, can claim priority by reason of a recorded lien as against

one who purchases the automobile from the dealer but fails to obtain a certificate of title at the time of purchase.

The Appellant urges that the Respondent could not acquire any interest in the automobile without first having issued to him a certificate of title, and cites both the Idaho Code and the Case of *Lux vs. Lockridge*, 65 Idaho 639, 150 p. (2d) 127 (App. Br. 23), in support of this argument. *Lux vs. Lockridge* did not hold that there could be no sale without a transfer of title, but held that one could not be a bona fide purchaser under circumstances of that case without first receiving a certificate of title.

The case of *Swartz vs. White*, 80 U 150, 13 p (2d) 643, cited by the Idaho Court was one wherein a Mrs. White owned a car and endorsed certificate of title there-to in blank and left it at her home. Stewart made a false representation to Mrs. White's husband and obtained the certificate and possession of the car. The car was worth about \$400.00. Stewart filled in his name in the blank in the presence of Swartz and received \$125.00 from Swartz and delivered the certificate to Swartz. Swartz brings replevin claiming to be an innocent purchaser. On appeal the Supreme Court held that in view of the notice to Swartz of the delivery of the title in blank, and the requirements of the statute regarding receipt of a certificate of title before title passes, and the fact that Swartz was only going to pay \$125.00 for an auto worth at least

twice that figure, Swartz could not have been a bona fide purchaser. At page 158, the Court held:

“Without attempting to decide the complete meaning or full operation of this provision of the statute (registration), it is sufficient to say that the circumstances in this case, in view of that statute, amount to a flag of warning to any intending purchaser that there has been no completed sale or transfer of title by the registered owner. Swartz was thereby put on inquiry as to the responsibility of Stewart and his right to dispose of or pledge the car. By the possession which he had Stewart could have been a buyer, or bailee, or an agent with limited power to sell, or he could have been as he was, in possession by larceny without any right whatsoever to transfer title.”

The reference of the Utah Court to the registration statute was not essential to support the decision of the court, since the decision is supported by considerable other evidence that Swartz was not a bona fide purchaser.

The dissent opinion in *Lux vs. Lockridge* wherein two of the five justices dissented contended that the statute under consideration was never intended to have application to the immediate parties, i.e., vendor and vendee, but that the statute is clearly an Anti-Theft Act.

The Supreme Court of Utah in cases subsequent to *Swartz vs. White*, (supra) hold that equitable title to a motor vehicle can be transferred without transfer and issuance of a certificate of title.

In the Case of *Dahl vs. Prince*, 230 p (2d) 328, U (1951), the plaintiff, auto dealer, took a Buick automobile in trade from one, Garn, but did not have the certificate of title transferred to him at the Tax commission. A creditor of Garn attached the Buick while Garn had it one day using it while Plaintiff repaired Garn's truck. Plaintiff brings replevin against the Sheriff, Prince. Judgment for the plaintiff was affirmed by the Supreme Court which held that the plaintiff could acquire equitable title without getting a new certificate as required by 57-3a-72, Utah Code Annotated, 1943. The court quoted from its previous holding in *Jackson vs. James*, 97 U. 41, 89 P. (2d) 235, to the effect that a gift of ownership to an automobile would be complete as between the donor and donee without change in registration, and that the statute makes the registration evidence of title and ownership for the protection of innocent fide purchaser.

The Supreme Court affirmed judgment in favor of the purchaser from a dealer as against a finance company in *Jones vs. Commercial Investment Trust*, 65 U 151, 228 Pac. 896, wherein the Plaintiff purchased an automobile from a dealer who was being financed by the Defendant. Judgment for the Plaintiff was affirmed by the court holding that the Defendant finance company retaining legal title to the automobile but allowing a dealer to exhibit the same and hold itself out as legal

owner, with right to sell the same, is estopped to deny the authority of the dealer to sell the vehicle to a bona purchasers.

Again in the Case of *Harrison vs. Auto Securities Co. et al.*, 70 U 11, 257 P 677, the Plaintiff purchased a car in Price, Utah, from a dealer who had received it from a Salt Lake dealer. The Salt Lake dealer was being financed by the Defendant and the latter repossessed the car by trick. Plaintiff sued for conversion and judgment for the Plaintiff is affirmed on appeal, the Court holding that the Defendant was estopped and that where one of two innocent parties must suffer from the wrongful act of a third person, the loss shall fall upon the one who by his conduct created the circumstances which enabled the third party to perpetrate the wrong and cause the loss.

Appellant cites Idaho Code 49-404 (App. Br. 23) contending that no interest to a motor vehicle can be acquired without the issuance of a certificate of title. However, this provision was not intended to apply to a dealer in Motor vehicles in transactions with another dealer. The following provisions of the Idaho Code should be considered

Idaho Code 49-130 (c) "Provided further a registered dealer in motor vehicles shall not be permitted to license his individual cars which are being held for the purpose of being sold to the public."

Idaho Code 49-402 APPLICATION TO CERTAIN VEHICLES—EXEMPTIONS. “The provisions of this chapter shall apply exclusively to every motor vehicle required to be registered with the department under the laws of this state except any said vehicles owned by the federal government excepting also vehicles exempt under provision of section 49-108.” (Farm equipment, etc.).

49-403 Idaho Code DELIVERY OF CERTIFICATE OF TITLE UPON SALE OR DISPOSITION — RE-ASSIGNMENT BY DEALERS. “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 provided that any dealer holding current dealer license plates issued by this state, in lieu of having a certificate of title issued in the name of such dealer, reassign any existing certificate of title issued in this state.

49-405 Idaho Code If a certificate of title has not previously been issued for such motor vehicle in this state, said application, unless otherwise provided for in this chapter, shall be accompanied by a proper bill of sale or a duly certified copy thereof, or by a certificate of title, bill of sale or other evidence of ownership required by law of any other state from which such motor vehicle was brought into this state.

In the case of a new motor vehicle being

registered for the first time, no certificate of title or registration shall be issued unless such application is endorsed by an enfranchised new car dealer authorized to sell such new motor vehicle. The department of law enforcement shall retain the evidence of title presented by the applicant and on which the certificate of title is issued. . . .

49-421 Whoever shall operate in this state a motor vehicle for which a certificate of title is required, without such certificate having been obtained in accordance with the provisions of this chapter or whoever, not being an enfranchised dealer, or acting upon behalf of such dealer, shall acquire, purchase hold or display for sale a new motor vehicle without having obtained a certificate or title therefor is guilty of a misdemeanor.

It will be noted that 49-130 (c) prohibits a dealer from licensing his individual cars which are being held for sale and that 49-402 indicates that the provisions of the code cited by the Appellant do not apply to vehicles not required to be registered.

By 49-403 it appears that a dealer acquires title and can transfer title without having a certificate issued in his name. Also 49-405 provides that a dealer acquires title to a new vehicle by a proper bill of sale. The provisions of 49-421 indicate that a dealer or one acting upon behalf of such dealer can display for sale a new motor

vehicle without obtaining certificate of title thereto. To support the contention that the vehicle was deemed new, we cite Idaho Code 49-401 (c) :

“ ‘Used Vehicle’ every motor vehicle, which has been sold, bargained, exchanged, given away or title transferred from the person who first acquired it from the manufacturing or importer, dealer or agent of the manufacturer or importer, and so used as to have become what is commonly known as ‘second-hand’ within the ordinary meaning thereof.”

From an analysis of the Idaho Code it appears that the provisions relied upon by the Appellant are not applicable to dealers acquiring automobiles from dealers or others.

CONCLUSIONS

It is respectfully submitted that the pleadings clearly establish that Appellant had no standing upon its complaint in replevin, and that the Decree quieting title to the vehicle in the Respondent was fully supported and justified.

Respectfully submitted,

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