

1980

James B. Johnston v. Maureen H. Simpson and Wayne Simpson, Dba the Flight School : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES B. JOHNSTON,

Plaintiff-Respondent,

vs.

Case No. 16859

MAUREEN H. SIMPSON and WAYNE
SIMPSON, dba The Flight School,

Defendants-Appellants.

BRIEF OF RESPONDENT

Appeal from a Judgment of the
District Court of Weber County

Honorable John F. Wahlquist, Judge

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Plaintiff-Respondent,

vs.

Case No. 16859

MAUREEN H. SIMPSON and WAYNE
SIMPSON, dba The Flight School,

Defendants-Appellants.

BRIEF OF RESPONDENT

NATURE OF THE CASE

This was an action for rescission of a written contract for the purchase and sale of an airplane and for restitution by defendants to plaintiff of the purchase price paid under the contract.

DISPOSITION IN LOWER COURT

Following a trial, without a jury, the court granted plaintiff's claim for rescission of the contract and directed defendants to make restitution to plaintiff in the sum of \$41,125, together with interest thereon at the rate of 6 percent per annum from January 25, 1979--the date of rescission--to October 26, 1979--the date of trial.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment of the trial court.

STATEMENT OF FACTS

The respondent, James B. Johnston, is the general manager of a retail store in Ogden, Utah. He became acquainted with the appellants, Maureen H. and Wayne Simpson, through his next-door neighbor, who was a flight instructor for the Simpsons. Upon the completion of his basic flight training program, respondent had several discussions with Maureen Simpson concerning the purchase of an airplane (Tr. 2). These discussions resulted in the execution of a retail purchase order on July 29, 1977, which provided that respondent would purchase a 1978 Cessna airplane from appellants for \$41,125. A down payment in the amount of \$3,000 was made and a second retail purchase order was executed by the parties on October 17, 1977 (Tr. 25). The second agreement was essentially identical to the first. Paragraph 5 of each retail purchase order provides that:

Title to aircraft products herein sold and purchased shall pass to Purchaser when full purchase price shall have been paid to Dealer or upon Dealer's accepting other financial arrangements satisfactory to Dealer in lieu of full purchase price. All risk of loss shall be on Purchaser from and after receipt of possession of the aircraft products.

On or about October 17, 1977, respondent tendered the unpaid balance of the purchase price to appellants and personally took delivery of the airplane at the Cessna factory (Tr. 16-17). On that date, two separate security interests were in effect against the subject airplane (Ex. 6P). The first was granted by Skyways, Inc. (the regional distributor), to Cessna, Inc. (the manufacturer), through a security agreement dated October 14, 1977. The

release of this security interest was not filed of record until November 16, 1977. The second was granted by Transwest, Inc. (the local distributor), to Skyways, Inc., through a security agreement dated October 17, 1977. The release of this security agreement was not filed of record until April 20, 1978 (Ex. 6P; R 95). At the time of execution of the agreement, respondent had no knowledge of the existence of these outstanding security interests (Tr. 19-20). At about this time, respondent asked Maureen Simpson when he could expect to receive his certificate of registration of title from the Federal Aviation Administration (Tr. 5). She advised him that he would receive the certificate within 90 days from late October 1977 (Tr. 6). This was the customary length of time for a purchaser to receive a certificate (Tr. 32). Mrs. Simpson further advised respondent that she would undertake to submit the documents necessary to obtain the certificate to the FAA on respondent's behalf, since that was the established custom in the aircraft industry (Tr. 28). Respondent relied on her assurance (Tr. 9).

The documents required by the FAA for the issuance of the certificate were a bill of sale between the appellants and respondent, a bill of sale between the appellants and their supplier, Trans-West Aircraft Sales, and an application for the issuance of a certificate of registration to the airplane in the name of the respondent (Tr. 29). Appellants' customary policy was to send the necessary documents to the FAA contemporaneously with receipt of the purchase price for the aircraft (Tr. 29, 30). However, in this instance, the necessary documents were never received by the FAA and appellants were unable to offer any corroborating evidence that the documents were, in fact, sent or any explanation as to why they were never received (Tr. 33-34).

Respondent contacted Mrs. Simpson on December 14, 1977, to determine the status of his application for issuance of the certificate. Mrs. Simpson told him that the "paperwork had been filed and that it was in the process" (Tr. 6). Two more months passed, and respondent had not yet received the certificate, so he again contacted Mrs. Simpson--this time on February 9, 1978. She again gave him the same answer (Tr. 6). As the appellants characterize it, it was at this point that they realized that there must be a "problem" in the issuance of the certificate, as opposed to a mere "delay" (Appellants' brief, p. 5).

On April 13, 1978, respondent advised the owner and general manager of appellants' distributor of his difficulty in obtaining the certificate (Tr. 7). Soon thereafter, on April 20, 1978, Mrs. Simpson was again made aware of the problem (Tr. 7). Further entreaties were made upon her on July 9, 1978, September 24, 1978, and October 26, 1978 (Tr. 7-8), and appellants continued to insist that the documents were being "straightened out" and resubmitted (Tr. 8). The net effect of appellant's inability to prepare the documents in a form acceptable to the FAA was that for two separate periods of time there were no valid pending applications on file. The first period was January 1, 1978, to March 28, 1978; the second, September 20, 1978, to February 21, 1979 (R. 94). A valid application for registration, or a certificate of registration, is required to use an airplane (deposition of Maureen Simpson, pp. 7-8; deposition of James B. Johnston, pp. 26-27).

Appellants were not able to prepare the documents in a form acceptable to the FAA until February 21, 1979--almost one month after respondent gave his notice of rescission (Tr. 22). Mrs. Simpson testified that because the documents were improperly filled out, they would not be a part of the compu-

ter record at the FAA (Tr. 37), and that it is this computer record that the FAA personnel customarily consult in responding to requests for information respecting the record owner of a particular aircraft (Tr. 48). The paper files containing any applications for registration are not normally consulted (Tr. 48).

Nearly 17 months after payment of the purchase price, respondent had still not received the certificate of registration promised to him by the appellants (Tr. 22). There was no registration in force on the airplane after September 20, 1978, which precluded fleet insurance coverage thereon (Tr. 11) and which precluded pledging the airplane as collateral to secure repayment of a loan (Tr. 12). Respondent's patience with the matter was exhausted, and on January 25, 1979, he gave notice of rescission (Tr. 9).

After January 25, 1979, respondent flew the airplane "from time to time as a matter of keeping the oil lubricated and the mechanical parts of it from drying out and becoming damaged by nonuse" (Tr. 13). A flight to California best accomplished that purpose (Tr. 15), and appellants' own expert testified that the flying of an airplane is not at all incompatible with preservation of an airplane (Tr. 68).

ARGUMENT

I

THE COURT PROPERLY FOUND THAT APPELLANTS' FAILURE TO CONVEY FREE AND CLEAR TITLE TO THE AIRCRAFT ON OCTOBER 17, 1977, AND TO PERFORM THEIR PROMISE TO PROMPTLY AND PROPERLY REGISTER AND RECORD RESPONDENT'S PURPORTED TITLE WITH THE FAA CONSTITUTES A BREACH OF WARRANTY OF TITLE.

Appellant sellers' warranty of title is mandated by § 70A-2-312 Utah Code Annotated (1953), which provides in material part:

(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

- (a) the title conveyed shall be good, and its transfer rightful; and
- (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right as he or a third person may have. (Emphasis added.)

Under paragraph 5 of the retail purchase order contract, title was to pass to respondent when the full purchase price was paid on October 17, 1977. As noted above, on that date, two separate security interests were in effect against the subject airplane (Ex. 6P). The first was granted by Skyways, Inc. (the regional distributor), to Cessna, Inc. (the manufacturer), through a security agreement dated October 14, 1977. The release of this security interest was not filed of record until November 16, 1977. The second was granted by Transwest, Inc. (the local distributor), to Skyways, Inc., through a security agreement dated October 17, 1977. The release of this security agreement was not filed of record until April 20, 1978 (Ex. 6P; R 95). At the time of execution of the agreement, respondent had no knowledge of the existence of these outstanding security interests (Tr. 19-20).

It is not disputed that these security interests were not foreclosed and respondent's possession and use were undisturbed. However, this factor is irrelevant, according to the Uniform Commercial Code, for the warranty is breached even absent adverse claim or dispossession. Such is noted in Comments 1 and 4 to § 2-312 of the Code:

1. Subsection (1) makes provision for a buyer's basic needs in respect to a title which he in good faith expects to acquire by his purchase, namely, that he receive a good, clean title transferred to him also in a rightful manner so that he will not be exposed to a lawsuit in order to protect it.

The warranty extends to a buyer whether or not the seller was in possession of the goods at the time the sale or contract to sell was made.

The warranty of quiet possession is abolished. Disturbance of quiet possession, although not mentioned specifically, is one way, among many, in which the breach of the warranty of title may be established.

The "knowledge: referred to in subsection 1(b) is actual knowledge as distinct from notice.

. . . .

4. This section rejects the cases which recognize the principle that infringements violate the warranty of title but deny the buyer a remedy unless he has been expressly prevented from using the goods. Under this Article "eviction" is not a necessary condition to the buyer's remedy since the buyer's remedy arises immediately upon receipt of notice of infringement; it is merely one way of establishing the fact of breach. [Emphasis added.]

As is stated in 67 Am.Jur.2d, Sales, § 482:

[T]he language of the Uniform Commercial Code supports the conclusion that the warranty is not merely a warranty against dis-possession, nor against assertion of an adverse claim, but is an unqualified commitment by the seller of good title, rightful transfer, and freedom of the goods from any security interest, lien, or encumbrance. [Emphasis added.]

This warranty of title, as the trial court found, was breached in two respects: (1) appellants' failure to perform their promise to promptly and properly register and record respondent's purported title with the office of the Federal Aviation Administration Registry prior to January 25, 1979; and (2) appellants' failure to convey title to respondent free and clear of two security interests granted in favor of certain third parties.

That the existence of these outstanding security interests is at odds with the notion of an unqualified commitment of good title can be seen from certain cases detailing the rights of prior unrecorded purchasers vis-à-vis the rights of subsequent secured parties. The contest between prior unrecorded purchasers (like respondent) and subsequent secured parties (like Cessna, Inc., and Skyways, Inc.) presents a situation where the policy favoring the purchaser is weak, since the subsequent secured party has or may have dealt on the faith of the record.

This was recognized in Marsden v. Southern Flight Service, Inc., 277 F.Supp. 411 (M.D.N.Car. 1964). In that case, before the plaintiff buyer of an aircraft took possession and paid the full purchase price, defendant seller had granted two security interests in the airplane which were recorded with the FAA. At delivery, for full payment plaintiff buyer received a bill of sale and an application for FAA registration. These documents were turned back to the dealer on the dealer's assurance that he would see they were filed with the FAA. The dealer failed to do so. Other documents showing the plaintiff buyer as owner were filed with the FAA and were placed in the file, but in a relatively inaccessible portion of the file folder. The dealer then refinanced the plane, paying off the two prior mortgages and giving a new security interest to the refinancing lender and its assignee. A professional title search organization performed a title and lien search for the benefit of this refinancing lender and its assignee which showed only the two prior mortgages and title registered in the dealer's name. The refinancing security interest was filed with the FAA and the two prior security interests were released. Several months later, buyer's bill of sale was filed for recordation.

On these facts, the court held that the unrecorded buyer's title and his rights were subject to the refinancer's security interest, for the refinancer and its assignee had no actual notice from the non-title documents. Thus, because of the federal recording system which was determined to have superseded state law, an unrecorded buyer was dispossessed by subsequent parties who had dealt on the faith of the record title.

In Dowell v. Beech Acceptance Corp., 3 Cal.3d 544, 91 Cal. Rptr. 1, 476 P.2d 401 (1970), plaintiff purchased an airplane for cash in full from an authorized dealer through a distributor. That distributor had assigned its security interest to Beech Acceptance Corporation; this assignment and security interest was recorded with the FAA. The vendor dealer promised to file the bill of sale with the FAA, but did not do so. The dealer also failed to pay Beech. Afterward, Beech and the distributor removed the plane from Dowell's possession. On these facts, the California Supreme Court held that Dowell did not take free of the prior federally recorded security interest created by the distributor. The court concluded:

[Section 1403 of the Federal Aviation Act] provides a comprehensive system of recordation the purpose of which is to bring order to the field of aircraft titles and to protect the holders of substantial property interests in aircraft. Neither of those purposes is served if we apply state law in a manner virtually ignoring the existence of the federal system. If prior recorded interests are not protected against subsequent buyers who fail to search title, the federal policy in favor of the recordation of aircraft titles will be frustrated and subsequent purchasers in California will cavalierly decline to investigate title so as to avoid "actual notice" under Commercial Code section 9307. 476 P.2d 405.

It is worth noting here that appellants contend that respondent's interest is protected under § 70A-9-307(2) of the Utah Commercial Code. That section provides:

(2) In the case of consumer goods, a buyer [in the ordinary course of business] takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes . . . unless prior to the purchase the secured party has filed a financing statement covering such goods.

Scholarly authority and case law are unanimous in declaring that this section simply does not, and cannot, apply here. As one authority notes:

Viewed from afar, 9-307(2) is like a mirage; it appears to apply in many circumstances to permit buyers to take free of prior perfected security interests. In fact it is a provision of narrow scope that deals almost exclusively with a relatively insignificant transaction, one in which one consumer sells used goods to another consumer. J. White and R. Summers, Uniform Commercial Code, p. 943 (West, 1972).

There is no dispute that appellants are dealers selling from inventory, not consumers selling from isolated private stock (appellants' brief, p. 2). And, there is no dispute that the aircraft at issue was, at the time of purchase, new, not used.

A typical case interpreting § 9-307(2) is Everett National Bank v. Deschuiteneer, 109 N.H. 112, 244 A.2d 196, 5 U.C.C. Rep. Serv. 561 (1968). There, the defendant purchased an automobile from a dealer. The dealer had allegedly purchased it from the debtor who had in turn given a security interest to the plaintiff. The plaintiff, who was the original financier, was attempting to enforce his security interest against the defendant purchaser who claimed the protection of § 9-307(2). The court held that § 9-307(2) would not protect the buyer in such circumstance since his seller was a dealer. Accord, New England Merchants National Bank v. Auto Owners Finance Co., Inc., 355 Mass. 487, 245 N.E.2d 437, 6 U.C.C. Rep. Serv. 58 (1969); Muir v. Jefferson Credit Corporation, 108 N.J. Super. 586, 262 A.2d

33, 7 U.C.C. Rep. Serv. 273 (1970). As Professor Gilmore states, § 9-307(2) applies only to sales "by amateurs to amateurs." G. Gilmore, 2 Security Interests in Personal Property, § 26.12 at 716.

Since § 9-307(2) does not apply to the instant case, appellants are relegated to § 9-307(1), if at all, which provides:

A buyer in ordinary course of business (subsection [a] of section 70A-1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence." (Emphasis added.)

This section, by its very terms, provides that a buyer in ordinary course takes free only of security interests created by his seller. In the present case, the security interests were created not by appellants, but by other parties in the chain of distribution. Therefore, the negative implication is clear that the buyer in ordinary course takes subject to any security interest created by a party not his seller. The case law confirms this. National Shawmut Bank v. James, 108 N.H. 386, 236 A.2d 484, 4 U.C.C. Rep. Serv. 1021 (1967); General Motors Acceptance Corporation v. Trovills, 43 Mass. App. Dec. 96, 6 U.C.C. Rep. Serv. 409 (1969), 69 Am.Jur.2d, Secured Transactions, § 469. Therefore, appellants' assertion that respondent is afforded the protections of § 9-307 is unfounded and the fact remains that respondent's interest in the aircraft was subject to the security interests held by Cessna, Inc. (which was not released of record until November 16, 1977), and Skyways, Inc. (which was not released of record until April 20, 1978).

The jeopardy to which respondent's interest was exposed is further made clear in Pope v. National Aero Finance Co., 236 Cal.App.2d 722, 46 Cal.Rptr.

233 (1965). That case involved an action for conversion and unlawful detainer, thereby making it necessary for the plaintiff buyers to prove an ownership or possessory interest in the airplane. The court held against plaintiffs on the facts and went on to observe that as a result of the federal recording system for aircraft, even had the plaintiffs acquired an interest in the airplane on January 31, 1960, as alleged, their interest would not have been superior to that of the finance company under its chattel mortgage, which was exeucted and delivered by the dealer on January 20, but not filed for recordation until February 2. The court held that federal registration is necessary in order to have a valid claim and that the federal statutes preempt the field with respect to the effect to be given to instruments not recorded pursuant thereto. The court reasoned that, since the plaintiffs never recorded, even if they did have an interest in the airplane, they would not be entitled to priority over the finance company which did record.

The crucial importance of recordation under the federal statute for validating an interest is made clear in James Talcott, Inc. v. Bank of Miami Beach, 143 So.2d 657 (1962) (Fla. Dist. Ct. App.). Talcott involved a contest between two chattel mortgagees. The court gave priority to the bank on the following facts: bank took its mortgage on the airplane on December 5; Talcott took its mortgage on March 18; bank recorded its interest with the FAA on March 19; and Talcott recorded six months later. The court held as follows:

By the plain language of the federal statute, neither the bank's mortgage nor Talcott's mortgage were valid with respect to the aircraft, as against the other, until recordation with the Federal Aviation Agency, as neither party was grantee or privy to the grantee of the other or had notice of the other's mortgage lien. Thus, while Talcott holding the mortgage issued second was unaffected by the existence of the earlier unrecorded mortgage--until

the latter was recorded--by force of the same statute, Talcott's later mortgage was ineffective with reference to the aircraft against the holder of the earlier mortgage until Talcott should record its mortgage. [Citation omitted.] Therefore, the priorities were established when the bank recorded its mortgage prior to the time that the Talcott mortgage was placed of record. At 659.

Thus, recordation was essential to validate the underlying interest. Without it, the interest failed. See also Continental Radio Co. v. Continental Bank & Trust Co., 369 S.W.2d 359 (Tex. Cir. App. 1963).

In Dawson v. General Discount Corporation, 82 Ga.App. 29, 60 S.E.2d 653 (1950), it was held that an assignee of a vendor of an airplane; who had recorded his retention of title contract with the FAA shortly after the purchase, had title superior to that of defendant, who had purchased from the original vendee, but whose interest was not recorded. And, in Marshall v. Bardin, 169 Kan. 534, 220 P.2d 187 (1950), the court stated that if an attachment creditor dealt on the faith of the recorded title of the airplane showing title in his debtor, then he would prevail against a prior unrecorded purchaser's claim. These cases again demonstrate that validation of the title holder's interest requires recordation of that interest. An unrecorded interest will be inferior to a later recorded interest.

Finally, the very case on which appellants place substantial reliance, State Security Co. v. Aviation Enterprises, Inc., 355 F.2d 225 (10 Cir. 1966), supports respondent's position that the state of the record at the FAA Registry is the decisive factor in assessing the respective rights of competing interest holders. In that case, the court, in fact, held that a chattel mortgage on an airplane was invalid as against a good-faith purchaser from the mortgagor. But, the reason it was found invalid--which appellants overlook in their brief--was because it was not recorded with the FAA. The

inference is strong that had that chattel mortgage been duly recorded with the FAA, the Tenth Circuit would have applied the teachings of Marsden, Dowell, Pope, Talcott, Dawson and Marshall, supra, to hold that the recorded interest prevailed over the purchaser's unrecorded interest, or, as applied to the instant case, that Cessna, Inc.'s or Skyways, Inc.'s recorded security interests were superior to respondent's unrecorded ownership interest.

It cannot be too often stressed that up until April 20, 1978, or more than six months after execution of the agreement, Skyways, Inc.'s security interest was not released of record. Respondent's interest was not recorded until February 21, 1979, or seventeen months after execution of the agreement and almost one month after the date of rescission; and, for most of the period after the date of execution of the agreement until February 21, 1979, the FAA records showed that the record owner of the airplane was the appellant Flight School, not the respondent (deposition of Maureen H. Simpson, p. 33; deposition of James B. Johnston, p. 30). Until April 20, 1978, respondent's unrecorded ownership interest was inferior to that of Skyways, Inc.'s recorded interest. From that date until February 21, 1979, his unrecorded interest was inferior to that of the appellant Flight School's. Even appellants' witness, Gene Baltachio, president of Sky West, Inc., acknowledged at trial that until November 20, 1977, his company was the record owner of the airplane and could have exercised all incidents of ownership with respect to the plane, such as pledging the plane as security for a loan (Tr. 64-67). The very real ability of Cessna, Inc., Skyways, Inc., and Transwest, Inc., at various times subsequent to execution of the agreement, to exercise rights of ownership inconsistent with those of respondent is absolutely incompatible with the requirement of the seller's

warranty of title, under the Utah Commercial Code, that the seller must provide an unqualified commitment of good title free from any security interest, lien or encumbrance. The existence of these various security interests in third parties and the absence of record proof of respondent's title, as promised by appellants, constitute a breach of the warranty of title.

As a leading authority notes, "If the plaintiff buyer proves the defective title or the presence of a lien or encumbrance of which he had no knowledge at the time of sale, he will win." J. White and R. Summers, supra, at p. 300. The trial court recognized this in holding for respondent.

II

THE COURT PROPERLY FOUND THAT APPELLANTS' BREACHES OF WARRANTY OF TITLE CONSTITUTED A MATERIAL AND SUBSTANTIAL BREACH OF CONTRACT SUPPORTING RESCISSION OF THE AGREEMENT.

It is well settled that in order to justify the rescission of a contract, a breach thereof must touch the fundamental purposes of the contract. According to Williston, "[Rescission] is not permitted for a slight, casual, or technical breach, but, as a general rule, only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract." 12 Williston on Contracts 188 (3d Ed. 1970). As this court recently noted in Polyglycoat Corp. v. Holcomb, 591 P.2d 449 (Utah 1979), and quoting the authorities there cited:

As a general proposition, a party to a contract has a right of rescission and an action for restitution as an alternative to an action for damages where there has been a material breach of the contract by the other party. What constitutes so serious a breach as to justify rescission is not easily reduced to precise statement, but certainly a failure of performance which 'defeats the very object

of the contract' or '[is] of such prime importance that the contract would not have been made if default in that particular had been contemplated' is a material failure. At 451.

That a failure of, or defect in, the title of the seller to the property sold constitutes a ground for rescission by the buyer is well established. 77 C.J.S. Sales, § 100(c), p. 794; Tuft v. Brotherson, 106 Utah 499, 150 P.2d 384 (1944); Koscove v. Brunger, 143 Colo. 354, 352 P.2d 961 (1960); Maloney v. Houston, 51 Cal.App. 585, 197 P. 661 (1921). As the court noted in Tuft:

That one may lawfully agree to sell either personal or real property to which at the time he has no title cannot be questioned, and the want of title furnishes no ground for rescission unless, upon tender, defendant is unable to comply with the agreement. At 386.

The trial court properly recognized that appellants' breach of its warranty of title constituted a material and substantial breach of the parties' agreement which justifies the remedy of rescission.

III

RESPONDENT'S USE OF THE AIRPLANE AFTER HIS NOTICE OF RESCISSION WAS FOR MAINTENANCE AND PRESERVATION OF THE AIRPLANE AND DOES NOT BAR THE REMEDY OF RESCISSION.

After giving notice of rescission on January 25, 1979, respondent flew the airplane to ensure that it did not become damaged through nonuse (Tr. 13). By doing so, he complied with the duty imposed upon him by § 70A-2-602(2)(b) of the Utah Commercial Code. That section provides:

(b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this chapter (subsection [3] of section 70A-2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them.

Reasonable care here required more than simply walking away from the airplane and subjecting it to a condition of disuse. As appellants' own expert testified, three to four months of disuse should not hurt the airplane (Tr. 58). The clear negative implication is that disuse beyond that point can result in harm to the airplane. That is what respondent sought to avoid.

The law is clear that in an action for rescission, "the goods returned or tendered must be in substantially the same condition as when the buyer received them" 78 C.J.S., Sales, § 503, p. 172. The record is utterly devoid of any evidence respecting actual condition of the airplane subsequent to the notice of rescission. Respondent's prime purpose was to preserve the plane, and there is not a shred of evidence which indicates he fell short of attaining that purpose.

Finally, it should be noted that the cases cited by appellants in support of their argument, Porter v. Porter, 577 P.2d 111 (Utah 1978), and Buehner Block Co. v. Glezos, 6 Utah2d 226, 310 P.2d 517 (1957), in no way stand for the proposition that use contrary to a purported rescission bars the remedy of rescission. Porter is a divorce case addressing issues of jurisdiction and visitation. Buehner is an implied partnership and mechanics' liens case addressing issues not remotely pertinent to the instant case.

CONCLUSION

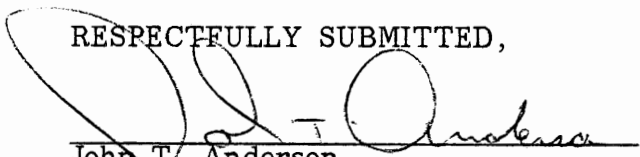
Appellants breached their warranty of title owed to respondent in two respects: first, they failed to convey title to respondent free and clear of two security interests granted in favor of certain third parties, as agreed; and, second, they failed to perform their promise to promptly and properly register and record his purported title with the Federal Aviation Administration Registry, as agreed.

The existence of the outstanding security interests against the airplane on the date of execution of the agreement violated the clear terms of paragraph 5 thereof. The failure to register the purported title resulted in placing the record title to the airplane in the names of third parties and not in the name of respondent. These two sets of facts are absolutely incompatible with appellants' warranty of title which required them to provide an unqualified commitment of good title free from any security interest, lien or encumbrance.

The court properly found that appellants' commitment to respondent was something less than unqualified. The judgment should be affirmed.

DATED this 5th day of May, 1980.

RESPECTFULLY SUBMITTED,


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CERTIFICATE OF SERVICE

I, John T. Anderson, attorney for respondent in the above-entitled action, hereby certify that on the 5th day of May, 1980, I served the attached brief of respondent upon the following by depositing two copies thereof in the United States mails, postage prepaid, addressed as follows:

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