

1980

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

Utah Supreme Court

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John T. Anderson; Attorneys for Respondent Frank S. Warner; Attorneys for Appellants

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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.

REPLY BRIEF OF  
DEFENDANTS, APPELLANTS

Frank S. Warner  
WARNER, MARQUARDT & HASENYAGER  
543 - 25th Street  
Ogden, Utah 84401.

Attorney for Defendants,  
Appellants.

John T. Anderson  
ROE AND FOWLER  
340 East Fourth South  
Salt Lake City, Utah 84111

Attorney for Plaintiff,  
Respondent.

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Clk. Supreme Court, Utah

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Frank S. Warner  
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543 - 25th Street  
Ogden, Utah 84401

Attorney for Defendants,  
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John T. Anderson  
ROE AND FOWLER  
340 East Fourth South  
Salt Lake City, Utah 84111

Attorney for Plaintiff,  
Respondent.

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APPELLANTS' REPLY BRIEF

ARGUMENT

POINT I

THE WEIGHT OF AUTHORITY SUPPORTS THE VIEW THAT THE FEDERAL AVIATION ACT DOES NOT PREEMPT STATE LAW IN DETERMINING PRIORITY OF INTERESTS IN AIRCRAFT.

The Respondent (Plaintiff below) primarily relies upon Dowell v. Beach Acceptance Corp., 3 Cal.3d 544, 91 Cal. Rptr. 1, 476 P.2d 401 (1970) for the proposition that the Federal Aviation Act in providing for the registration of documents affecting the title to or any interest in civil aircraft in the United States preempts state law and is the sole determining factor in determining priority of interests

in aircraft. Dowell specifically so holds. Dowell was the first case to squarely face the preemption question and hold in favor of the development of federal priorities. 19 St. Louis Univ. L.J. 122 at 134. Dowell has been soundly criticized. 19 St. Louis Univ. L. J. 122; Bitzer Croft Motors v. Pioneer Bank & Trust, 401 N.E. 2d 1340 (Ill. App. Ct. 1980); Cessna Finance Corp. v. Skyways Enterprises, 580 S.W. 2d 491 (Ken. 1979); Bank of Hendersonville v. Red Baron Flying Club, 571 S.W. 2d 152 (Ct. App. Tenn 1977). Only one case has been found which follows Dowell and that was an intermediate appellate court decision in Florida. O'Neill v. Barnett Bank 360 So.2d 150 (Dist. Ct. App. Fla. 1978). A sister division of the same court subsequently refused to follow that case. Michigan National Bank v. Maierhoffer, 382 So.2d 318 (Dist. Ct. App. Fla. 1979). All other cases subsequent to Dowell dealing with this issue appear to have held that the Federal Aviation Act does not preempt state law dealing with the issue of priorities among competing interests in aircraft. Bitzer Croft Motors v. Pioneer Bank & Trust, *supra*; Cessna Finance Corp. v. Skyways Enterprises, *supra*; Bank of Hendersonville v. Red Baron Flying Club, *supra*; Michigan National Bank v. Maierhoffer, *supra*. Thus the Kentucky Supreme Court in Cessna Finance Corp., holds:

Cessna Finance contends that the Federal Aviation Act, 49 U.S.C. Sec. 1403, preempts all state laws governing priorities among perfected security interests. We do not agree. The purpose of Congress in enacting the Federal Aviation Act was to establish a single national filing system for the recording of documents evidencing title and security interests in civil aircraft and not to legislate priorities among holders of various interests in aircraft. H.R. Rep. No. 2360, 85th Cong., 2d Sess., Reprinted in (1958) U. S. Code & Admin. News, pp. 3741, 3750, 3755; H.R. Rep. No. 9738, 75th Cong., 3d Sess., 405-407 (1938). E. g., Henson, Secured Transactions 22 (1979). Congress did not intend to supercede state laws that would otherwise govern the priorities between perfected security interests. Haynes v. General Elec. Credit Corp., W.D.Va., 432 F.Supp. 763, 765-767 (1977), Affirmed C.A.4th, 582 F.2d 869 (1978) (per curiam); Sanders v. M. D. Aircraft Sales, Inc., C.A.3d, 575 F.2d 1086 (1978); see also Malone v. White Motor Corp., 435 U.S. 497, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978). (FN5)

FN5. Cessna Finance relies on Dowell v. Beech Acceptance Corp., Inc., 3 Cal.3d 544, 91 Cal.Rptr. 1, 476 P.2d 401 (1970), cert. denied, 404 U.S. 823, 92 S.Ct. 45, 30 L.Ed.2d 50 (1971) for the proposition that, because of the federal preemption of the priority issue, a buyer in the ordinary course of business from a retail dealer does not take free of a prior federally recorded security interest created by that dealer. This is the Only case to so hold. Sigman, The Wild Blue Yonder: Interests in Aircraft Under Our Federal System, 46 So.Cal.L.Rev. 316, 339-348 (1973). Because it misapprehends the Act's legislative history and misapplies the standards for application of the preemption doctrine, we choose to allow it to remain one of a kind.



And the Tennessee Court of Appeals in Bank of Hendersonville analyzes the issue as follows:

California appears to stand alone in its insistence that a customer who buys an airplane out of the stock of a dealer must carry out a ''title search'' for recorded ''floor plan'' liens.

This Court prefers to follow the rule announced in all other jurisdictions that the rights of a purchaser from a dealer in ordinary course of business are superior to the holder of a lien upon a moving stock of planes in the hands of a dealer. There are a number of reasons why this decision is preferable.

1. The Uniform Commercial Code has brought uniformity and order to the field of commercial law. To graft a new class of exceptions upon the existing uniform law would reverse the wholesome intent and result of the law.
2. It is not reasonable to assume that Congress intended any such result where not clearly stated.
3. The proliferation of aircraft dealerships and aircraft purchases would be seriously hampered if the public were not allowed to trust dealers selling in ordinary course of business.
4. It is inequitable and unjust to allow a mortgagee to hold ''secret liens'' on chattels while authorizing the chattels to be exhibited for sale by a dealer to the deception and loss of the purchasing public.
5. Lienholders may protect themselves (if they desire) by impounding the mortgaged planes in locked surroundings inconsistent with the free-sale situation of a stock of merchandise.

These cases are well reasoned and should be followed by the court in the instant case.

## POINT II

RESPONDENT RECEIVED GOOD TITLE ON THE DATE OF PURCHASE AND THE SELLERS' WARRANTY OF TITLE WAS NOT BREACHED.

Respondent fails to note in his brief that on October 17, 1977, the date of purchase, (Trial Court's Finding No. 1) the date on which title was to pass, (Trial Court's Finding No. 2) there were no title documents on file with the FAA whatsoever (Trial Court's Finding No. 3). The Federal Aviation Act specifically provides that "no conveyance or instrument, the recording of which is provided for by subsection (a) of this section shall be valid. . . against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation." 49 U.S.C. Section 1403 (c). The Uniform Commercial Code provides that title to goods passes when agreed upon by the parties or upon delivery. In this case the result is the same whether you rely upon paragraph 5 of the Purchase Agreement or whether you rely upon Section 2-401(2) of the Uniform Commercial Code. In either event title to the aircraft passed to the Respondent not later than the date of

delivery, October 20, 1977, (TR. 16-17). No documents affecting that title were on file with the F.A.A. prior to October 25, 1977. (Trial Courts Finding No. 3). Therefore, by the very language of the Federal Aviation Act quoted above, even assuming it preempts state law on the issue of priorities, the Trial Court was in error.

The only claimed defect in the respondent buyer's title is two Security Agreements executed by Skyways to Cessna Finance Corporation and subsequently by Transwest to Cessna Finance Corporation for the sole specific purpose of facilitating the transfer of title to the buyer respondent. (TR.51-54). The last of these two security interests was released on November 21, 1977 (Trial Court's Finding No. 3), only 31 days after respondent took delivery of the aircraft. It was not until some fourteen months later that respondent notified appellant of his wish to rescind the contract. On the date that respondent took delivery of the aircraft, October 20, 1977, the appellant Flight School had perfect unencumbered title to the same. This conclusion is inescapable when analyzed in light of Section 9-307(1) of the Uniform Commercial Code (70a-9-307(1) U.C.A.) which provides as follows:

A buyer in ordinary course of business  
(subsection (9) of Section 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.

When Skyways purchased the aircraft from Cessna, Skyways executed a security agreement to Cessna Finance Corporation and at that point in time Skyways clearly did not have unencumbered title. However, when Skyways sold the aircraft to Transwest, Transwest being a buyer in ordinary course of business took free of the security interest created by Skyways. In turn Transwest financed the aircraft by executing a security agreement to Cessna Finance Corporation. Transwest then did not have unencumbered title. However, when Transwest sold the aircraft to the appellant Flight School in the ordinary course of business the Flight School took free of the security interest created by its seller Transwest. Pursuant to Section 9-307 U.C.C. this result would obtain even though the security interest had been (and it was not) filed with the FAA and even though the Flight School might have known (although there is no evidence in the record to so indicate) of the existence of either of the prior security agreements. Thus, appellant Flight School had good unencumbered title to the aircraft which it subsequently transferred to the respondent. That this transfer was "rightful" within the meaning of Section 2-312 of the Uniform Commercial Code is self evident because it was

Cessna itself who made delivery to the Flight School's buyer, the respondent herein.

This result seems imminently clear and perpetuates the intent of the Uniform Commercial Code that a buyer in the ordinary course of business buying inventory from a dealer take free and clear of any security interest or encumbrance unknown to him. Such a result facilitates the intent of the Uniform Commercial Code to encourage the free flow of goods and to protect the unsuspecting consumer against encumbrances held by commercial interests who are better able to protect themselves in such a setting.

This result is further mandated by Section 2-403 of the Uniform Commercial Code (Section 9-2-403 Utah Code Annotated) which provides as follows:

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

- (a) the transferor was deceived as to the identity of the purchaser, or
- (b) the delivery was in exchange for a check which is later dishonored, or
- (c) it was agreed that the transaction was to be a "cash sale," or



(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the chapters on Secured Transactions (chapter 9), Bulk Transfers (chapter 6) and Documents of Title (chapter 7). (Emphasis Added.)

In this case Cessna entrusted the aircraft through its chain of dealers to The Flight School and indeed made delivery directly to the Flight School's buyer, respondent Johnston. To hold that there was defect in Johnston's title as a result of the two security interests put in place solely for the purpose of facilitating the transfer of that title to Johnston is a ludicrous and inequitable result.

Respondent Johnston's real and only concern throughout this entire transaction was the delay experienced in obtaining a certificate of registration from the FAA. There are three problems, however, in Johnston's reliance upon these delays in attempting to rescind the contract.

First, the delays were completely beyond the control of the appellant and any finding to the contrary is totally without support in the record. The respondent's own witness, Mr. Gene Battachio, owner of Transwest Aircraft Sales testified as to the difficulty experienced in this particular case. He related other experiences he was personally familiar with and testified it was not unusual to experience substantial delays in obtaining certificates of registration from the FAA. (TR. 54-57).

Secondly, the certificate of registration is not a title document and does not evidence ownership. See 49 U.S.C Section 1401(f) which provides:

Registration shall not be evidence of ownership of aircraft in any proceeding in which such ownership by a particular person is, or may be, in issue.

Finally, plaintiff Johnston has failed to plead any breach of the contract of sale based upon the delay in receiving the certificate of registration and has plead only that appellant Flight School breached its warranty by failing to convey good unencumbered title to respondent Johnston. The issue of the delays in obtaining a certificate of registration were never properly before the court and counsel for appellant Flight School continually objected throughout the trial to any evidence concerning

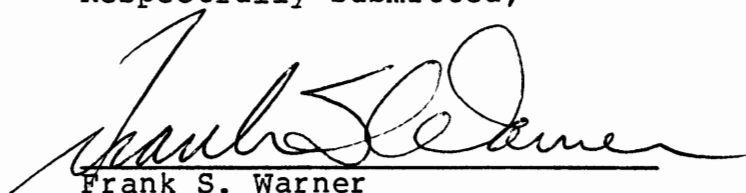
such delays. See counsel's opening statement and numerous objections throughout the transcript.

CONCLUSION

This is an equitable action seeking rescission of a contract for the sale of an aircraft commenced 15 months after plaintiff took delivery of that aircraft. To permit such a rescission on the ill-founded theories of respondent and the court below not only results in a grossly inequitable result in this particular case but also reeks havoc in the real commercial world of the aircraft industry. This court is urged to reverse the lower court and hold as a matter of law that the warranty of title was not breached.

DATED this 9th day of October, 1980.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Frank S. Warner", is written over a horizontal line.

Frank S. Warner  
WARNER, MARQUARDT & HASENYAGER  
Attorney for Defendants,  
Appellants.



CERTIFICATE OF MAILING

I hereby certify that on this 9th day of October, 1980, I mailed two copies of the foregoing Reply Brief to John T. Anderson, Roe and Fowler, Attorneys for Respondent, 340 East Fourth South, Salt Lake City, Utah, postage prepaid.

  
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Suzann Fries