Recent Decisions

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A commercial airliner en route to Brussels from New York crashed while making its final approach to the Brussels airport, resulting in the death of the plaintiffs' decedents. Suit was filed in the United States District Court for the Southern District of Mississippi against Boeing Company on the basis of diversity of citizenship.¹ The petition, instituted thirteen days before the Mississippi statute of limitations would have prescribed the action,² was predicated on Belgian law³ and alleged negligent manufacture of the aircraft. Boeing moved to dismiss, contending the suit was barred by the five-year Belgian statute of limitation. The district court denied the motion and submitted the case to the jury, which returned a general verdict for the defendants. The plaintiffs' motion for a new trial was denied. On appeal, Boeing, by cross points of error, contended that the trial court erred by not directing a verdict for the defendants because the right and the remedy were barred under Belgian law. Held, affirmed on different grounds: When a foreign statute of limitations has attributes that the forum would characterize as substantive, the entire suit is barred at the forum if barred by the otherwise applicable law of the foreign jurisdiction. Ramsay v. Boeing Co., 432 F.2d 592 (5th Cir. 1970).

Statutes of limitation have long been considered to be matters of procedure by the great majority of American courts.⁴ The reason given

¹ 28 U.S.C. § 1332 (1964). Plaintiffs Alexander and Jean Ramsay were citizens of Michigan; Genevieve Swallender was a citizen of Minnesota; Martha Offergelt was a citizen of West Germany; and Helene Balteay was a citizen of Belgium. Defendant Boeing Company was a Delaware Corporation with its principal place of business in the state of Washington. Thus a situation of complete diversity of citizenship was presented to the federal court; Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).


³ Belgium Civil Code art. 1382 (1970) provides: "Any human act which causes injury to another, obliges the person whose fault caused the damage to redress it."

Belgium Civil Code art. 1383 (1970) provides: "Everyone is liable for the injury caused not only by his action but also by his negligence or imprudence."

Belgium Civil Code art. 1384(1) (1970) provides: "One is responsible not only for the injury caused by one's own acts, but also for that which is caused by the act of persons for whom one is responsible, or of things which are in one's control or custody."

⁴ See, e.g., H. Goodrich, Conflict of Laws § 85 (4th ed. 1964). See also cases
is that forum procedure is familiar to both the lawyers and the courts; requiring a judicial system to apply the procedure of other states and foreign nations imposes an intolerable burden upon them. Such a system actively encourages forum shopping, but the convenience of administration clearly outweighs the policy against forum shopping.\(^8\)

Forum procedure has also been justified on the ground that statutes of limitation, being only statutes of repose and not of cancellation, affect the "remedy and not the right."\(^9\) This rule has a dubious historical basis and has been criticized. One commentator has suggested that the rule was first delineated by the common law courts, then a justification or rationalization was contrived for it.\(^7\) The Second Circuit has stated that characterization of statutes of limitation as procedural is merely an "accident of history."\(^8\) The English common law had been relatively free from foreign influences, and it was only natural that English judges would be more inclined to apply "common law" than attempt to discover the "civil law" of a foreign jurisdiction, written in a foreign language.\(^9\) Perhaps some justification existed for this characterization during the developmental period of the common law, but today it has been questioned by many conflict of laws scholars and has been rejected by some courts.\(^10\)

Another justification for the "right-remedy" distinction is that statutes of limitation have no extraterritorial effect—law is not binding beyond the borders of the sovereign who promulgated that law and whose force stands behind it.\(^11\) Thus, if a state or nation enforces a right created under

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\(^8\) See Lorenzen, Statutes of Limitation and the Conflict of Laws, 28 YALE L. J. 492 (1919); Ailes, Substance and Procedure in the Conflict of Laws, 39 Mich. L. Rev. 392 (1941).


\(^7\) See note 10, infra.

\(^8\) 220 F. 2d 152, 154 (2d Cir. 1955).


\(^10\) See generally A. De Cervera, The Statute of Limitations in American Conflicts of Laws (1966). Most notable among the courts which refuse to follow this rule are all federal courts sitting in diversity of citizenship jurisdiction. Federal courts are required to apply the law of the state in which they sit as to matters of substance, Erie R.R. v. Tompkins, 304 U.S. 64 (1938) as well as the forum's conflict of laws rule, Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

Under the theory of Guaranty Trust Co. v. York, 326 U.S. 99 (1945) and Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949), such statutes are considered to be "outcome-determinative" and as such are characterized as substantive provisions of the state law.

a foreign law, it is because that right has "vested" and all nations have
the obligation, through a theory of comity, to protect vested rights." But
the primary goal in conflict of laws is to establish a system in which the
choice of a forum will not affect the result." If this is truly the purpose
of conflict of laws, the "right-remedy" distinction is not conducive to it.
The distinction between right and remedy appears to be based largely on
historical grounds and very little else. As Mr. Justice Holmes stated, "It
is revolting to have no better reason for a rule of law than it was laid
down in the time of Henry IV. It is still more revolting if the grounds
upon which it was laid down have vanished long since, and the rule
simply persists from blind imitation of the past." Moreover, no greater
difficulty exists in the application of a readily discernable statute of limi-
tations than in the application of any of the substantive laws of a foreign
nation. A statute of limitation is not a rule of procedure; it does not
affect the method of the presentation of the suit, but rather determines
whether the injured party shall be allowed the opportunity to offer any
proof whatsoever. Traditional rules of procedure are interrelated and
operate as a cohesive system. Thus, there is a necessity for the court to
be familiar with all rules of procedure in order to apply any one of them
properly. A statute of limitation is not a part of normal rules of pro-
cedure and could be individually translated without losing any of the
basic substance of the enactment. Although the substance-procedure
rationale may be justified on the basis of convenience of application in
many areas of the law, it is an artificial and misleading concept regarding
statutes of limitation. Simply stated, "A 'right' is not something which
has an objective existence independent of a 'remedy' [but rather] . . . it
exists in a particular country only if . . . the courts . . . of that country
will enforce it and give a remedy for its breach." 14

The most far reaching exception to the general rule that the forum
statute of limitation controls, thereby being characterized as procedural,
is the borrowing statutes enacted in most of the fifty states. Generally,
the purpose of such statutes is to bar the action if it is barred by the
place of the otherwise applicable law. 15 Despite application of these

See also A. DE CERVERA, THE STATUTE OF LIMITATIONS IN AMERICAN CONFLICTS OF
LAWS 3 (1966); Hogget v. Emerson, 8 Kan. 262 (1871).
13 J. BEALE, TREATISE ON THE CONFLICT OF LAWS (1935).
12 See Vernon, Statute of Limitations in the Conflict of Laws, 32 Rocky Mt. L. Rev.
287, 293 (1960).
11 O. HOLMES, COLLECTED LEGAL PAPERS 167 (1920).
10 J. FALCONBRIDGE, CONFLICT OF LAWS § 241.43 (1947).
14 See, e.g., Tex. Rev. Civ. Stat. Ann. art 4678 (1952) which allows the mainte-
nance of a wrongful death suit in Texas so long as it is not barred by the law of the
place of the injury; Texas still follows the traditional place of the injury rule, Marmon
v. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex. 1968). See generally Thomas,
statutes, there will, of necessity, be widely varying results. Moreover, a state may apply its own statute of limitation, consistent with the full faith and credit clause of the Constitution, and deny enforcement to a cause of action barred at the forum but not barred at the place of the otherwise applicable law. Thus, the goal of conflict of laws—substantial identity of result—is thwarted by allowing the forum to apply its own limitation period to a foreign cause of action.

The harshness of the lex fori rule has also been relaxed by judicial exceptions to the usual procedural characterization of statutes of limitation. Such statutes are characterized as substantive on the basis of four possible tests, which are by no means clearly defined. The "built-in test" was first announced in The Harrisburg. The case involved a suit in rem, brought in admiralty to recover damages from the steamer Harrisburg for the death of a seaman. The Supreme Court held that a wrongful death action was unknown to the common law and thus no recovery was possible unless predicted on state wrongful death acts. Each of the acts involved provided a one-year statute of limitation. The Court construed the limitation as one upon the right and not merely the remedy. As Mr. Justice Holmes conceived it:

The statute creates a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within the twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all . . . . Time has been made the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right.


18 Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953). An action was brought for the wrongful death of an Alabama citizen against a Pennsylvania Corporation. Pennsylvania had a one-year statute of limitations on wrongful death actions and Alabama had a two-year limitation period. Trial was to a Pennsylvania court and the United States Supreme Court affirmed a summary judgment for the defendant on the ground that the cause of action was barred by the forum statute of limitations. The court found no compulsion under the Full Faith and Credit Clause to apply the foreign statute of limitations.

The court had difficulty distinguishing the earlier case of Hughes v. Fetter, 341 U.S. 609 (1951) which had required Wisconsin to open her doors to the enforcement of a wrongful death claim based on Illinois' law. Mr. Chief Justice Vinson found the differentiating factor to be the "uneven hand" Wisconsin had laid on causes of action arising in sister states. A close reading of Hughes will disclose that that was not the basis of Mr. Justice Black's opinion, and in fact it seems to be clearly contra to it.

19 119 U.S. 199 (1886).

Therefore, if under the "built-in test" the foreign statute of limitation can be construed as barring the right as well as the remedy, the foreign statute will control. Generally, an equitable result is reached, but such is due to happenstance rather than careful judicial reasoning.

The second test, variously called the "directed test" or the "specificity test," was first enunciated in Davis v. Mills. A suit was filed in Connecticut against corporate directors pursuant to a Montana statute. Mr. Justice Holmes, speaking for the Court once again, stated:

[The fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right.]

This is by far the most widely accepted test for determining whether a statute of limitation is substantive. The courts in some instances have gone so far as to allow an action, barred at the forum, to be commenced on the theory that a statute creating a new liability must be applied in toto by the forum state. In such a case, an action at the forum will be barred only if barred by the law of the place having the otherwise applicable law.

The third test is the "foreign courts' characterization test." Under this test the forum will determine whether the particular statute of limitation is substantive or procedural by characterizing it as the courts of the foreign jurisdiction have characterized it. In Goodwin v. Townsend recovery was sought in a federal district court in Pennsylvania under the Ontario Highway Traffic Act. The plaintiffs' injuries resulted from

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22 194 U.S. 451 (1904).

23 Id. at 454. (emphasis added).


Contra, Platt v. Wilmot, 193 U.S. 602 (1904); Dainan v. A. J. Lindemann & Hover- son Co., 238 F. 2d 72 (7th Cir. 1956); Tiffenbrun v. Flannery, 198 N.C. 397, 161 S.E. 857 (1930). The "specificity" test is the test the plaintiffs in Ramsay contended should have been applied by the Fifth Circuit. Plaintiff-Appellants' Petition for Rehearing or Rehearing En Banc, Docket No. 28266, pp. 4-5, Ramsay v. Boeing Co., 432 F. 2d 592 (5th Cir. 1970).


27 197 F. 2d 970 (3d Cir. 1952).
an automobile accident in Ontario, Canada, more than twelve months prior to the filing of the suit. Under the Ontario Act, suit must be brought within twelve months of the date of the accident or the action is barred. The Third Circuit, in determining whether the limitation was procedural or substantive, looked to the characterization given the statute by the Ontario courts. This particular test has not been widely accepted, but the courts of New York and Maryland, in addition to the Third Circuit, appear to have adopted this view.

The final standard for determining whether a statute should be characterized as substantive or procedural has been denominated the "attributes test." The court must determine whether the statute possesses attributes under the law of the foreign state which the forum would characterize as substantive. The only case applying this test is Wood & Selick, Inc. v. Compagnie Generale Transatlantique. In that case suit was instituted under the admiralty jurisdiction of the federal court in New York on bills of lading issued in France. The district court characterized the French statute as procedural and held that the longer New York statute would permit the action. Speaking for the Second Circuit, Judge Learned Hand stated:

Our own statutes of limitation do in fact extinguish the right so far as they extinguish all remedies, for a right without a remedy is a meaningless scholasticism, and the distinction we make is more than formal only in that the applicable period varies with the law of the forum where the suit chances to be laid. At any rate it is permissible for us to say that if the assumed extinguishment which the French law imposes, is itself subject to conditions which assimilate it to our ordinary statutes of limitation, it makes no difference that it speaks of 'extinguishment.' We are to decide whether the defense falls within one class or the other recognized by us, and in that inquiry we are not necessarily concluded by the terms used; we may assimilate it rather to matter of remedy, just because it has those conditions which would so determine it in our law.

Under this test, a forum court looks to the law of the foreign jurisdiction and attempts to determine the characteristics of the statute under the foreign law which the forum characterizes as either substantive or procedural. Until Ramsay no other court attempted to apply the attributes test; the Second Circuit later reversed itself on the point. These tests, although consciously designed to relieve against the harshness of the

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8 Id. at 973.
11 43 F.2d 941 (2d Cir. 1930).
12 Id. at 943 (emphasis added).
lex fori rule, unfortunately provide little in the way of certainty or predictability in the area of conflicts of law.

The above tests apply to all types of statutes of limitation but are particularly significant where wrongful death statutes are involved. Wrongful death statutes of limitation are most often considered substantive because passed in derogation of the common law. Such statutes either allow a cause of action where none previously existed or prevent a cause of action from abating on the death of the injured party. Whether the fact that the statute alters the common law is a valid ground for treating its limitation period differently is questionable, such is the rule in a vast majority of American jurisdictions.

It is apparent that when a foreign statute of limitation is involved, the adjudication of the controversy doubles in complexity. When the foreign law is not that of another state, but that of a civil law nation with no historical common law background, the problems are almost insurmountable.

The Fifth Circuit in Ramsay relied heavily on three prior Mississippi cases and two recent Fifth Circuit cases in concluding that the Belgian statute of limitation was substantive and thus would bar an action in Mississippi. These cases are clearly distinguishable since they involved

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87 R. Leflar, American Conflicts Law § 139 (1968). In addition Professor Ehrenzweig contends that such statutes have been so generally adopted that they can be legitimately considered to be a type of "statutory common law." A. Ehrenzweig, Conflict of Laws § 552 (1962).


89 Gaston v. B.F. Walker, Inc., 400 F.2d 671 (5th Cir. 1968); Ford, Bacon & Davis v. Valentine, 64 F.2d 800 (5th Cir. 1933); Bethlehem Steel Co. v. Payne, 183 So. 2d 912 (Miss. 1966); Davis v. Meridian & B. R.R., 248 Miss. 707, 161 So. 2d 171 (1964); Hamilton v. Cooper, 1 Miss. 542 (1832).
the application of common law statutes of sister states. Further, none of the cases applied the attributes test.

The most recent Mississippi case, Bethlehem Steel Company v. Payne, is typical of the factual settings and legal analysis of the other cases. In that case suit was instituted in Mississippi under the Louisiana Compensation Act for personal injuries while in the course and scope of employment. The Mississippi court held:

[W]here a statute which creates the right, in the same enactment provides for the time within which suit is to be brought . . . a majority of the courts have taken the position that the limitation qualifies the right so that unless suit is brought within the time allowed under the foreign statute, no suit may be brought at the forum, even though the time may be longer.

Each of the cases cited by Judge Morgan involved statutes with built-in prescription periods. It is difficult to believe that even the Fifth Circuit could construe any one of these cases to support the position taken in Ramsay.

The Fifth Circuit in Ramsay made a clear break with the totality of the courts in the American system. No other jurisdiction has adopted the attributes test. The only court which ever applied that test has long since overruled the holding. Judge Morgan cited only one reason for failing to apply the test of Davis v. Mills: it “lacks the clarity necessary for facile application.” Instead, he concluded that “a more satisfactory approach in this situation is to determine whether the Belgian prescrip-

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8 Bethlehem Steel Co. v. Payne, 183 So. 2d 912, 916 (Miss. 1966).
9 This statement is not categorically true as to Davis v. Meridian & B. R.R., 248 Miss. 707, 161 So. 2d 171 (1964). In Davis the Mississippi court was faced with the problem of construing the Alabama wrongful death statute. A foreign administrator brought suit in Mississippi without qualifying under the Mississippi law. After notice of this, he subsequently qualified in Mississippi but the time for bringing the wrongful action had run under the Alabama statute. The Mississippi court held: “Our courts adopt the construction of a statute given by the courts of the state whose legislature enacted it.” Id. at 172. This particular statement would seem to be based on the “foreign courts’ characterization test” rather than on the built-in test present in the other four cases.
41 Gaston v. B.F. Walker, Inc., 400 F.2d 671 (5th Cir. 1968) and Ford, Bacon & Davis v. Valentine, 64 F.2d 800 (5th Cir. 1933), involve the application of the Louisiana Compensation Act, as did the Bethlehem Steel Company case. The prescription period in each of these cases was built-in to the statutory enactment by the Louisiana Legislature. In the ancient Hamilton case the Kentucky statute regulating detinue actions on runaway slaves contained a built-in prescription period also. It is impossible to conclude from the above cases that any similarity exists between them and Ramsay except to the extent that the ultimate result was that all of the statutes were characterized as substantive.
43 Ramsay v. Boeing Co., 432 F.2d 592 (5th Cir. 1970).
tion statute has attributes under Belgian law which Mississippi would characterize as substantive." The casual logic of the court compels belief in its stated criteria, but under careful analysis it appears the court is stepping from "muddy ground" into a hopeless quagmire of foreign law.

It is apparent that under the "built-in test" the Belgian limitation statute would not bar the suit. The limitation is not in the same statute, and it is not even in the same code or type of code. A more compelling showing should be necessary to allow a criminal statute of limitation to bar a civil remedy where the difference in the limitation periods is twenty-five years. Under the "specificity test" it would again be difficult to argue that a criminal statute was directed at the right created in the civil code so specifically as to say that it qualified it. Here, however, despite the fact that Judge Morgan purports to apply the "attributes test," he seems intent on showing how specifically the penal limitation is directed at the civil cause of action. Such discussion is hardly relevant to the test purportedly applied by the court. The "foreign courts' construction test" also presents formidable difficulties in its application to the present case. A civil law country rarely finds it necessary to construe its laws in such a way as to make that construction useful to a common law court in determining whether a statute is substantive or procedural. It is virtually impossible to tell from the record whether the Belgian courts had construed this statute in any way, notwithstanding any consideration regarding a procedural-substantive classification. In such a situation the court is at best guessing, and where foreign nation law is involved, adversary experts replace the court as the final "guessers."

Under the court's own test, however, there does not appear to be any significant showing that any "attributes" were found. The opinion seems intent on showing how the Belgian courts had construed the statute or on showing that the penal prescription period was specifically directed at the civil cause of action. Apparently, the court is not interested in applying its own test, but would rather use the more established means of reaching a final conclusion. The case is an anachronism in the Fifth Circuit, the courts of Mississippi and, even more objectionably, within itself.

Some justifications may be offered for the court's unique decision. As Judge Morgan points out, this suit was filed approximately thirteen days before Mississippi's statute of limitation would have prescribed the action. The action had already been prescribed under the limitations periods of all other states having any contact with the accident or the

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44 Id.
45 Id. at 600, nn.12-14.
46 Id. at 599-603.
47 Id. at 594.
Further, the only contact Mississippi had with the suit was that Boeing Company did business there and was amenable to service of process. Mississippi is also the only state with a six-year limitation period on wrongful death actions. On these facts, the Fifth Circuit was faced with one of the most blatant cases of forum shopping since the abolition of the "general federal common law." The court could not dismiss the action on the grounds of forum non conveniens, for there was no other available forum. Applying the built-in or specificity tests, it is unlikely that Belgian law could be construed as barring the claim. Therefore, the court was left with the "attributes" or foreign courts' characterization test. It seems apparent that the court selected the least defensible of the two. However, in light of the difference of interpretation given a statute by a civil law country as opposed to that of a common law country, neither test would definitely control the disposition of the case. The court chose to follow a unique and questionable test and stretched it to its logical breaking point. The gross nature of the forum shopping apparently was the deciding factor. In a less blatant case the court would have followed traditional reasoning and applied one of the two major tests in construing the statute.

The test applied by the Fifth Circuit is by no means a picture of clarity and logic in comparison to the built-in or specificity tests. As one court, speaking of the specificity test, stated:

"It is true that the test we prefer leaves much to be desired. It permits the existence of a substantial gray area between the black and white. But it at least furnishes a practical means of mitigating what is at best an artificial rule in the conflict of laws, without exposing us to the pitfalls inherent in prolonged excursions into foreign law. . . ."

The Ramsay court's test requires too great a reliance on foreign experts who are required to testify in a foreign language through interpreters; in doing so they must attempt to mesh two systems which are inherently

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44 Id. at 594, n.4.

49 The most blatant case of forum shopping remains Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928). In that case a Kentucky corporation had an exclusive taxi service contract in Kentucky and sought to enjoin another Kentucky corporation from violating this monopoly type agreement. Under Kentucky law such a contract was unenforceable, but under the "general federal common law" of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), such an agreement was enforceable. The plaintiffs dissolved the Kentucky corporation, reincorporated it in Tennessee, and then sued in federal court. They were thus able to have the favorable federal law applied on the basis of diversity of citizenship and careful forum selection. See also Erie R.R. v. Tompkins, 304 U.S. 64 (1938) and Guaranty Trust Co. v. York, 326 U.S. 99 (1945). For a general discussion of the problem see C. Wright, LAW OF FEDERAL COURTS 54-55 (2d ed. 1970); 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §§ 8, 138 (Wright ed. 1963).


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different under conditions which lead to mistakes and misstatements. If the real basis of the traditional procedural characterization is ease of administration, the excerpts printed from the testimony of the experts in the present case make it obvious that such determination takes much longer than a simple translation of the applicable statute.\(^5\)

It would be much less confusing and time-consuming to treat all statutes of limitation as substantive. It is much more convenient to translate a two or three line statute than to attempt to characterize it after translation. Such an approach would eliminate the necessity for prolonged “excursions into foreign law” and would provide the much needed certainty that is presently lacking in conflict of laws. It would also alleviate some of the problems noted above regarding borrowing statutes and a longer forum statute of limitation. Here the limitation period of the state having the otherwise applicable law would apply. There would still be differences in result due to the various methods used in determining the applicable law, but any increase in consistency would be welcomed. This is not, however, the approach taken by the overwhelming majority of common law courts, although there is authority for such a view in many civil law countries.\(^6\) This simplified approach may at least serve to bring some semblance of order out of utter chaos. The present system is cumbersome and highly unworkable. It is time to heed Mr. Justice Holmes’ admonition. Only justice and convenience of administration can result from such a course of action. As to Ramsay, Judge Morgan has probably unconsciously offered the most relevant evaluation of the case; the attributes test “lacks the clarity necessary for facile application.”

William Frank Carroll


United Airlines leased a forklift hoist from W. E. Johnson Equipment Company for the purpose of loading and unloading wheelchair passengers to and from its planes at the Miami airport. The hoist malfunctioned, causing a passenger to fall to the ground and sustain serious personal injuries. After settling the passenger’s claim, United sought indemnification from Johnson in a Florida state court on the ground

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\(^5\) Ramsay v. Boeing Co., 432 F.2d 592, 601-03 (5th Cir. 1970).
of breach of implied warranty of fitness. The trial court granted Johnson's motion for a directed verdict on the ground that the suit was improper. The appellate court reversed.¹ Held, affirmed: In the absence of an agreement to the contrary, where the lessor has reason to know any particular purpose for which the leased chattel is required and that the lessee is relying on the skill and judgment of the lessor to select or furnish a suitable chattel, there is an implied warranty that the chattel is fit for that purpose. W. E. Johnson Equipment Co. v. United Airlines, Inc., 238 So. 2d 98 (Fla. 1970).

In deciding that the duty of a bailor for hire was not limited to the exercise of due care to furnish an article in a reasonably safe condition,² the court extended the implied warranty of fitness under section 2-315 of the Uniform Commercial Code to the bailment for hire or lease situation.³ A source of difficulty in the developing area of products liability has been the conflict between strict liability in tort, as stated in section 402A of the Restatement,⁴ and the warranty theory, as provided in sections 2-313 through 2-318 of the Uniform Commercial Code.⁵ It is uncertain whether section 402A, based on the common law, is consistent with or complementary to the statutory rules of the UCC. Some authorities contend that the conflict is merely semantic, since the same persons are provided the same remedy based on essentially the same criteria; others, supporting the Restatement position, contend that the UCC is more limited in the relief granted as well as the persons protected and, therefore, is inadequate to afford the needed protection.⁶ Although Johnson deals specifically with the extension of the implied warranty of fitness to lease situations, the method of interpretation and application of the Code used by the court has significance in resolving the conflict between the Code and Section 402A.

² The appellate court noted that its decision was in apparent conflict with Brookshire v. Florida Bendix Co., 153 So.2d 55 (Fla. App. 1963) in which the court had previously stated that the duty of the lessor was limited to the exercise of due care.
⁴ Restatement (Second) of Torts § 402A (1965).
⁵ Uniform Commercial Code §§ 2-313 to 2-318.
Three basic approaches have been used by the courts in applying the implied warranty provisions of the UCC to non-sale transactions. The first is the sale-no sale distinction. Under this approach, the court merely determines whether the transaction is a sale as defined by the Code. The Code afforded protection only in pure sale situations. This approach has been criticized as an opaque screen for the more relevant issues of products liability and, consequently, there is some tendency to no longer use it.

The second approach bypasses the sale-no sale problem by examining the facts of the transaction and determining whether the transaction amounts to a sale in the form of a lease, such as a form of security arrangement. This concept was enunciated in Sawyer v. Pioneer Leasing Corp. when the Supreme Court of Arkansas held that section 2-316 of the UCC would be applied when the "provisions of the lease are analogous to a sale." However, as the dissent pointed out, the majority gave no guidelines to aid in the determination of when this situation exists. Thus, rather than clarifying the issue, the decision confused the question and substituted terminology. The decision in Sawyer would have been more significant had it unequivocally asserted that implied warranties should be extended to lease arrangements whenever circumstances justify their imposition. The specific details of the contract would no longer be relevant factors considered. Rather, the court would look to the underlying reasons for applying the warranty to leases.

The court in Johnson, setting forth the third approach, examined the circumstances surrounding the transaction to determine whether they

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1 Uniform Commercial Code § 2-106(1) defines a sale as a "passing of title from the seller to the buyer."


5 244 Ark. 943, 428 S.W.2d 46 (1968).

6 Id. at 54 (emphasis added).

7 Id. at 56 (dissenting opinion).

are appropriate to imply a warranty of fitness and gave guidelines to aid in that determination. This method is preferrable because it deals with the real issue of products liability—consumer protection.

The opinion begins by noting that Official Comment 2 of section 2-313 expressly states that the warranty provisions of the UCC are not limited exclusively to sales, but may be applied in other “appropriate circumstances such as bailments for hire.”16 This conclusion is proper not only for reasons of policy, but is also supported by section 2-102 which defines the scope of article 2 of the Code in terms of “transactions in goods” which clearly is not limited to sales.17 In addition, section 1-102 encourages the evolutionary expansion of the Code by calling for a liberal construction to promote its underlying purposes and policies.18 Thus, support for the extension of the implied warranty provision to lease transactions is found within the UCC itself.

The court not only defined the scope of the statute, but also outlined the reasons for imposing a warranty of fitness and described the “appropriate circumstances” when the imposition was proper. The court confronted the essential purposes and the public policy involved in implying warranties to protect the consumer in sales transactions and found by analogy that the same elements were present in a lease situation. This is the same method used in Cintrone v. Hertz Truck Leasing and Rental Service19 and Price v. Shell Oil Co.20 to extend strict liability in tort under section 402A to lease situations.

The court in Cintrone discussed both strict liability in tort and implied warranty, but it is unclear which was used as the basis for the decision. The court held that the trial judge should have submitted the issue of breach of warranty to the jury, but notes parenthetically that an action in strict liability, although not plead by the plaintiff, would be considered more apt.21 However, the complaint was not based on the UCC and the apparent consensous of the commentators is that Cintrone was decided on common law principles of strict liability and breach of warranty and, therefore, cannot be cited as a Code case although the rationale of the court is consistent with Code principles.22 As the original warranties in sales transactions were created by the common law, it is not surprising that the common law could extend those warranties to

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16 Uniform Commercial Code § 2-313, comment 2.
18 Uniform Commercial Code § 1-102.
lease transactions using the policies of the Code, as expressed in the comments, for guidance.\textsuperscript{22}

The courts following \textit{Cintrone} view it as deciding with reference to the doctrine of strict liability in tort. In \textit{Price}, the court stated that \textit{Cintrone} held "that a lessor of a truck is liable upon the basis of strict liability in tort."\textsuperscript{23} Thus, \textit{Cintrone} must be distinguished from \textit{Johnson} which was based on the statutory provisions of the UCC and not on common law principles of implied warranty.

The basic elements cited in \textit{Cintrone} and \textit{Price} to justify the extension to leases are essentially the same elements cited in \textit{Johnson}. The leasing industry has greatly expanded in recent years and the same business goals may be obtained through leases as well as sales.\textsuperscript{24} The risk of harm from a defective product exists in lease situations just as in sales. The person leasing a product is in equal need, and has an equal right to, protection from an unreasonable risk of harm.\textsuperscript{25} The lessee, like the buyer, is relying on the skill and judgment of the lessor to provide a safe product. In fact, the reliance in a lease situation is greater in that there is less opportunity to examine and inspect the product for defects.\textsuperscript{26} Finding these elements present in a lease situation, the court in \textit{Johnson} held that the implied warranty of fitness of purpose should be applied.

The ability of the lessor to bear and distribute the loss as the person putting the product in the stream of commerce is the essential consideration in determining whether the warranty should be applied.\textsuperscript{27} This

\begin{itemize}
\item \textsuperscript{22} Miller, \textit{A "Sale of Goods" as a Prerequisite for Warranty Protection}, 24 Bus. LAWYER 847, 853 (1969).
\item \textsuperscript{26} W.E. Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98, 100 (Fla. 1970); \textit{Cintrone} v. Hertz Truck Leasing and Rental Serv., 45 N.J. 434, 212 A.2d 769, 778 (1965). "It is generally true that the bailee for hire spends less time shopping for the article than he would in selecting like goods to be purchased, and since the item is not one which he expects to own, he will usually be less competent in judging its quality." Farnsworth, \textit{Implied Warranties of Quality in Non-Sales Cases}, 57 COLUM. L. REV. 653, 673-74 (1957).
\item \textsuperscript{27} The court in \textit{Johnson} expressed the standard it would apply:

\begin{itemize}
\item The warranty of fitness does not arise in all lease transactions, but it should be recognized under appropriate circumstances. Just as in sales cases, whether the warranty should be applied may depend upon whether
\end{itemize}
approach allows a balancing of the interest of the consumer and the interests of the lessor. On the one hand, the lessor engaged in the business of renting goods is in the position to spread the loss resulting from a defective product as an expense of doing business. He is also in the position to know and control the condition of the chattel as well as protect against loss through insurance. On the other hand, if the transaction is a single occurrence by a private individual who is not primarily or substantially involved in leasing goods, the relative positions of the parties would greatly change the court's considerations.

The similarity between the factors considered in Cintrone, Price and Johnson justifying the extension of tort and warranty to leases is no accident. The underlying policy supporting the implied warranty of the UCC is the same principle supporting section 402A. Both arise from a public policy protecting the consumer from defective products placed on the market. The warranty theory used in Johnson was expressed in Jacob E. Decker & Sons, Inc. v. Capps, a pre-Code decision in which the court stated:

We think the manufacturer is liable in this case under an implied warranty imposed by operation of law as a matter of public policy. Liability in such a case is not based on negligence, not on a breach of the usual implied contract warranty, but on the broad principle of the public policy to protect human health and life.

While a right of action in such a case is said to spring from a 'warranty,'

the lessor possessed or should have possessed expertise in the characteristics of the leased chattel, whether the lessee's reliance upon selection of a suitable chattel was commercially reasonable, and whether the lessor was a mass dealer in the chattel leased or whether the transaction was an isolated occurrence.

238 So. 2d at 100.

In Conroy v. 10 Brewster Ave. Corp., 97 N.J. Super. 75, 212 A.2d 415, 418-19 (Super. Ct. 1967), it was held that the reasoning of Cintrone applied only to the "mass lessor." The importance of the "commercial setting" is also emphasized in Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 728, 85 Cal. Rptr. 178 (1970).

UNIFORM COMMERCIAL CODE § 2-104(1) provides:

'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill particular to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or other intermediary who by his occupation holds himself out as having such knowledge of skill.

The court's emphasis on the nature of the lessor's enterprise and ability to bear the loss appears to be consistent with his definition.


See cases note 29 supra.

See note 28 supra.

139 Tex. 609, 612, 616-17, 164 S.W.2d 828, 829, 831-32 (1942).
it should be noted that the warranty referred to is not the more modern contractual warranty, but is an obligation imposed by law to protect public health . . . and is not dependant on any provision of the contract, either express or implied.

The above rationale and the reasoning of the court in Johnson should be compared with the language found in comment c of section 402A:

On whatever theory, the justification for strict tort liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has a right to and does expect in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for the consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum protection at the hands of someone, and the proper persons to afford it are those who market the product. 36

Johnson approves of Prosser's conclusion that there is "no good reason to withhold extension of the fitness warranty to the lease situation, subject to all limitations now found in sales cases." 34 Cintrone reaches the same conclusion: "In this developing area of the law we perceive no sound reason why a distinction in principle should be made between the sale of a truck by a manufacturer, and a lease for hire of the character established by the evidence." 36 The similarity of these three decisions continues in Price where the court, after citing the landmark decisions of Greenman v. Yuba Power Products, Inc. 38 and Vandermark v. Ford Motor Co., 37 which established the basis of strict liability in tort, as well as the extension to leases in Cintrone, concludes: "We can find no significant difference between a manufacturer or retailer who places an article on the market by means of a sale and a bailor or lessor who accomplishes the same result by means of a lease." 38

The present trend of judicial application of the Code implied warranties is apparently moving toward the position taken in section 402A. Privity has been abolished in a number of states as a requirement of recovery. 39 Disclaimer of liability has been held unenforceable if uncon-

33 RESTATEMENT (SECOND) OF TORTS, § 402A, comment c. See also RESTATEMENT (SECOND) OF TORTS, § 402A, comment m.
34 238 So. 2d at 100, citing W. Prosser, Torts, § 95, at 655 (3d ed. 1964).
35 212 A.2d at 769.
38 466 P.2d at 727.
39 For collection of cases see Anderson, THE UNIFORM COMMERCIAL CODE §§ 2-314
scionable based on the bargaining positions of the parties and the interests involved. Notice of injury has been less strictly applied in some jurisdictions as a bar to recovery. The statute of limitations for torts, running from the time of discovery of injury in most jurisdictions, could be held to apply based on the recognition that implied warranty obligations rest in principles of public policy and not in a contract and as such are not controlled by contractual limitations running from the time of purchase.

As the first case to extend the UCC to lease transactions, Johnson should be of great significance as precedent for those jurisdictions which apply the implied warranties of the UCC to products liability cases. Johnson is indicative of the liberal approach taken by a growing number of courts in affording protection to the consumer in such cases arising under the Code. If the reasoning and the principles enunciated in Johnson are followed by other courts, regardless of the basis in tort or warranty, the needed protection would be afforded to the consumer and public policy fulfilled, while the theoretical and semantic differences would be left to the academicians.

R. Alan Haywood


In October 1965 Nevadair, Inc., a Beechcraft distributor, delivered a Beechcraft aircraft to Tanger, an authorized Beechcraft dealer, pursuant to a conditional sales contract. Under the contract, Nevadair retained a security interest in the amount of the unpaid balance in the aircraft; further, Tanger could not sell the plane without Nevadair's consent. Nevadair then assigned its security interest to Beech Acceptance Corporation which filed the conditional sales contract and the

to 2-316 (2d Ed. 1970); Titus, supra note 6; Prosser, supra note 6; Annot., 74 A.L.R. 1111 (1960); Annot., 75 A.L.R.2d 39 (1961); Annot., 17 A.L.R.3d 1010 (1968).

40 Cases cited note 39 supra.

41 Cases cited note 39 supra.


43 Other courts have held other sections of the UCC applicable to leases. See Sawyer v. Pioneer Leasing Corp., 428 S.W.2d 46 (Ark. 1968); Hertz Commercial Leasing Corp. v. Transportation Credit, 59 Misc. 2d 226, 298 N.Y.S.2d 392 (N.Y. County Ct. 1969).
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assignment with the Federal Aviation Agency. These instruments were recorded in November 1965. In July 1966 Dowell purchased the plane from Tanger's dealership in the ordinary course of business, making no inquiry into the state of the title since the plane was ostensibly new, and Tanger was an authorized dealer. Neither Tanger nor Dowell filed the bill of sale with the Federal Aviation Administration registry as required by federal statute. When Beech and Nevadair learned that the plane had been sold in violation of the conditional sales contract, they removed the plane from Dowell's possession without his knowledge. Upon discovering the loss, Dowell sued to establish title to the plane and to recover damages from Beech, Nevadair, and Larson (Nevadair's parent corporation). A judgment for Dowell was affirmed by a California appellate court. Held, reversed: The holder of a prior recorded security interest in a new aircraft prevails over a subsequent buyer in the ordinary course of business who did not record his title or search the FAA registry to discover the existence of a prior security holder. The federal policy requiring recordation of aircraft would be undermined if state law regarding security interests controlled the rights of the parties. Dowell v. Beech Acceptance Corp., 3 Cal. 3d 544, 476 P.2d 401 (1970), cert. denied, 40 U.S.L.W. 3162 (U.S. Oct. 12, 1971).

The court concluded that it was faced with a direct conflict between the Federal Aviation Act and the California Commercial Code. The Federal Aviation Act establishes a registry of all conveyances affecting title to, or interest in, any civil aircraft in the United States; any conveyance not recorded is invalid, but a conveyance properly recorded "shall from the time of its filing for recordation be valid as to all persons without further . . . recordation." The court held that this sec-

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2 Id.; Tanger, however, did indicate to Dowell that he would file pursuant to the federal statute.
5 49 U.S.C. § 1403(d) (1964). The entire section reads:
§ 1403. Recordation of aircraft ownership.
(a) Establishment of recording system.
The administrator shall establish and maintain a system for the recording of each and all of the following:
(1) Any conveyance which affects the title to, or any interest in, any civil aircraft of the United States;
(2) Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any specifically identified aircraft engine or engines of seven hundred and fifty or more rated takeoff horsepower for each engine or the equivalent of such horsepower, or any specifically identified aircraft propeller capable of absorbing seven hundred and fifty or more rated takeoff shaft horsepower, and also any assignment or amendment thereof or supplement thereto;
tion provided that the recordation with the FAA of a valid security interest in an aircraft would give the holder a valid property interest in the plane until the interest is divested by a subsequent valid recordation that takes priority. The California Commercial Code provides that a third party buyer of goods in the ordinary course of business

(3) Any lease, and any mortgage, equipment trust contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any aircraft engines, propellers, or appliances maintained by or on behalf of an air carrier certificated under § 1424(b) of this title for installation or use in aircraft, aircraft engines, or propellers, or any spare parts maintained by or on behalf of such an air carrier, which instrument need only describe generally by types the engines, propellers, appliances, and spare parts covered thereby and designate the location or locations thereof; and also any assignment or amendment thereof or supplement thereto.

(b) Recording of releases, cancellations, discharges, or satisfactions. The Administrator shall also record under the system provided for in subsection (a) of this section any release, cancellation, discharge, or satisfaction relating to any conveyance or other instrument recorded under said system.

(c) Validity of conveyances or other instruments; filing. No conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid in respect of such aircraft, aircraft engine or engines, propellers, appliances, or spare parts 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 Administrator: Provided, That previous recording of any conveyance or instrument with the Administrator of the Civil Aeronautics Administration under the provisions of the Civil Aeronautics Act of 1938 shall have the same force and effect as though recorded as provided herein; and conveyances, the recording of which is provided for by subsection (a) (1) of this section made on or before August 21, 1938, and instruments, the recording of which is provided for by subsections (a) (2) and (a) (3) of this section made on or before June 19, 1948, shall not be subject to the provisions of this subsection.

(d) Effect of Recording. Each conveyance or other instrument recorded by means of or under the system provided for in subsection (a) or (b) of this section shall from the time of its filing for recordation be valid as to all persons without further or other recordation, except that an instrument recorded pursuant to subsection (a) (3) of this section shall be effective only with respect to those of such items which may from time to time be situated at the designated locations and only while so situated: Provided, that an instrument recorded under subsection (a) (2) of this section shall not be affected as to the engine or engines, or propeller or propellers, specifically identified therein, by any instrument theretofore or thereafter recorded pursuant to subsection (a) (3) of this section, Sections E, F, G, omitted.

(h) Previously unrecorded ownership of aircraft. The person applying for the issuance or renewal of an airworthiness certificate for an aircraft with respect to which there has been no recordation of ownership as provided in this section shall present with his application such information with respect to the ownership of the aircraft as the Administrator shall deem necessary to show the persons who are holders of property interests in such aircraft and the nature and extent of such interests.


takes the goods "free of a security interest created by the seller even though the buyer knows of its existence." A "buyer in the ordinary course of business" is defined as one who purchases goods without notice of a third party interest from a seller in the business of selling goods of that kind. Moreover, a buyer can acquire no better title than his seller held, unless the goods have been entrusted by a third party to a seller of the type of goods in question, in which case the seller can transfer all rights of the entrustor to a buyer in the ordinary course of business.

Two approaches may be taken in determining whether state or federal priorities should control. The first involves a narrow construction of

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7 The section reads as follows:
(1) A buyer in ordinary course of business (subdivision (9) of section 1201) 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.

CAL. COMM. CODE § 9307 (West 1965).

8 The section reads as follows:
§ 1201(9). 'Buyer in ordinary course of business' means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawn broker. 'Buying' may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a preexisting contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

CAL. COMM. CODE § 1201 (West 1965).

9 The section reads as follows:
§ 2403. Power to Transfer; Good Faith Purchase of Goods; 'Entrusting.'
(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 for the purpose of sale, obtaining offers to purchase, locating a buyer, or the like, 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.

CAL. COMM. CODE § 2403 (West 1965).

10 For discussion of conflicting authority, see 22 A.L.R. 3d 1270 (1968).
the scope of the federal provision. Under this view, section 1307 would affect only the recordation of those conveyances\(^{11}\) of aircraft specifically included in the act. State law would control the validity of the recorded title and subsequent rights of third parties not required to record under state law to overcome a recorded interest. The initial recordation of a conveyance of an aircraft is required by federal statute; however, the priority of later transactions which do not depend on recordation for validity are determined by state law. These transactions can divest title. Federal registration would have no effect on other methods of perfecting a security interest under state law.\(^{12}\) Indeed, Congress intended the federal statute to establish a uniform system of recordation, not a system of federal priorities for property interests. This approach would not deny that Congress has the power to establish priorities under the Commerce Clause, rather it recognizes that Congress has not done so within the confines of section 1403.\(^{13}\) Significant support can be found for a narrow view of section 1403. The legislative history of the Federal Aviation Act of 1958 is vague; however, the history of its predecessor, the 1939 Act, indicates that Congress did not intend section 1403 to nullify state law affecting priority of secured interests; rather the Act was intended to establish a federal system of recordation to replace the varied and confusing state statutes then in existence.\(^{14}\) Additional support for a narrow reading of section 1403 may be found in the legislative history and subsequent enactment of section 1406 in 1964.\(^{15}\)

Section 1406 states:

The validity of any instrument of which is provided for by section [1403] of this title shall be governed by the laws of the state . . . in

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\(^{11}\) Conveyance is defined as follows:

§ 1301. Definitions. As used in this chapter, unless the context otherwise requires—

\[(17) \text{ 'Conveyance' means a bill of sale, mortgage, assignment of a mortgage, or other instrument affecting title to, or interest in, property.}\]


\(^{12}\) "Perfection" of a security interest is generally accomplished by taking such steps as are necessary to give the holder of the interest priority. See generally Perfected Instrument, \textit{Black's Law Dictionary} 1296 (4th ed. 1951); \textit{Uniform Commercial Code} §§ 9-302, 9-303 (official text 1962). The Code, however, establishes certain circumstances where even a perfected interest may be defeated. See note 7 supra.


\(^{14}\) For an excellent analysis of the legislative history of the provision see Dowell v. Beech Acceptance Corp., 84 Cal. Rept. 654, rev'd, 3 Cal. 3d 544, 476 P. 2d 401 (1970); see also \textit{Hearings on H.R. 9738, Before the Committee on Interstate and Foreign Commerce}, 75th Cong., 3d Sess., at 405-07 (1938); \textit{S. Rept. No. 1661, 75th Cong., 3d Sess.} (1938); 83 \textit{Cong. Rec.} 7104 (1938).

which such instrument is delivered, irrespective of the location or the place of delivery of the property which is the subject of such instrument.\textsuperscript{16}

The commentators have consistently taken the view that section 1403 is not a comprehensive statute establishing federal priorities in property interests; instead, they view the section as establishing a single system of notice through a national recordation system.\textsuperscript{17} In situations similar to Dowell, several courts have held that the federal statute controlled only those transactions which established their priority by means of recordation and, except for recordation, state law establishing priorities was controlling.\textsuperscript{18}

The California Supreme Court refused to adopt the reasoning of the trial court and the appellate court. Under the California Commercial Code, Beech's secured interest would have become effective upon recordation with the federal registry, but the subsequent purchase of the aircraft by Dowell from Tanger in the ordinary course of business would have given Dowell title to the plane under the state-established priorities, regardless of whether he recorded. In holding that the state law could not prevail, the court adopted a more expansive interpretation of section 1403. Under this broader interpretation of section 1403 the court concluded that the statute was intended to establish a federal registry and, in addition, established federal priorities, making recordation the exclusive means of perfecting any property interest in an aircraft. Under the court's approach, the initial validity of the transaction would be controlled by state law; however, the transaction would be invalid until recorded in the federal registry, regardless of whether recordation under state law was required to give it priority over a recorded interest. Thus, although a person could obtain a semi-valid interest in property, for example a purchaser in the ordinary course of business of an airplane subject to a prior recorded interest, he could perfect his interest only by filing his title in the federal registry,\textsuperscript{19} thereby establishing the priority.

The approach taken by the California Supreme Court finds considerable support in various cases interpreting section 1403.\textsuperscript{20} Most of these

\textsuperscript{17} GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY, § 13.5 at 426, 427 (1965); Scott, Liens in Aircraft: Priorities, 25 J. AIR LAW & COMM. 193 (1958).
\textsuperscript{19} In re Verterans' Air Express Co., 76 F. Supp. 684 (D.C.N.J. 1948).
cases are based on the supposition that the federal policy embodied in section 1403 would be undermined if this section were not regarded as establishing a comprehensive system for determining priorities of property interests in aircraft. These decisions take the position that the federal government has completely occupied the field of aircraft recordation, preempting state law and establishing the controlling law in the area. Under this analysis, no property interest in an aircraft can have any validity over a prior recorded interest until properly recorded. State law determines the validity of the documents recorded; however, federal law establishes ipso facto that prior to recordation, no interest is valid.

_Dowell_ represents an application of federally established priorities supplanting state priorities. The court noted that in the absence of the federal statute, California law would have dictated that Dowell, as a buyer in the ordinary course of business, would be accorded priority. However, in enacting section 1403, Congress had manifested a federal policy establishing priorities regarding aircraft. In holding that Beech, which had recorded its interest under the federal statute, had the superior interest, the court stated explicitly:

> The federal policy to foster recordation and to protect recorded interests is eviscerated by a rule which relies on state laws to protect the buyer in the ordinary course of business even though he fails to undertake a simple title search which would have readily revealed all encumbrances.

The conflict existing between various courts results from their conflicting interpretations of the policy encompassed by the section and the lengths Congress intended to go in effectuating the policy. All authorities agree that the section was intended to establish a national

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82 See note 21 _supra_.

83 The court stated:

> Our task is to determine whether the foregoing federal system of recording interests in aircraft affects priorities recognized by applicable state law. The issue is squarely before us because, absent the federal recording system and its possible impact on state law, there can be no doubt that Tanger had the power to defeat Beech's security interest by a sale to a buyer in the ordinary course of business and that plaintiff was such a buyer.


84 _Id._ at 406.
recordation system; however, whether Congress intended to supplant state established priorities has not been uniformly answered.

Courts adopting the view that state priorities are superceded have indicated that the federal interest is all pervasive. The federal interest demands that all equitable considerations giving rise to concepts such as the "bonafide purchaser for value without notice," the "buyer in the ordinary course of business," and the "artisan mechanic lien" must give way to a federal recordation policy. Such a demanding federal interest is enunciated neither in the statute nor in its legislative history; indeed, a contrary intent is indicated.55

The argument often advanced for federal preemption of state interests—uniform law involving interests of national importance—is untenable, since state law throughout the nation is already uniform under the Uniform Commercial Code.56 Indeed, if section 1403 is interpreted as preemting state law, the law regarding security interests in goods is made less consistent by establishing special priorities applying only to aircraft.

Priority of secured interest in property has historically been an area of state interest. If Congress had intended to emasculate state law in this area as Dowell indicates, Congress surely would have done so with a more definite statement of that intent. Merely to whisk aside the policy consideration motivating the drafters of the Uniform Commercial Code to include protection for a buyer in the ordinary course of business appears to be advocation of returning to a rule in which the maintenance of records is more significant than the equities underlying the transaction which the records represent. As noted by the California Appellate Court, "it would indeed be anomalous if by saying nothing whatever about priorities, Congress had intended to wipe out all state laws which on consideration of equity and public policy have created exceptions to the 'first in time, first in right' rule."57

Guy W. Anderson, Jr.

55 See note 17 supra.