

ORIGINAL

**OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE**

IN THE UNITED STATES SUPREME COURT

DKT/CASE NO. 82-342

TITLE PHILKO AVIATION, INC., Petitioner
v.

PLACE MAURICE SHACKET, ET UX.
Washington, D. C.

DATE April 20, 1983

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ALDERSON REPORTING

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440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PHILKO AVIATION, INC., :

4 Petitioner :

5 v. : No. 82-342

6 MAURICE SHACKET, ET UX. :

7 - - - - -x

8 Washington, D.C.

9 Wednesday, April 20, 1983

10 The above-entitled matter came on for oral argument
11 before the Supreme Court of the United States at
12 10:13 a.m.

13 APPEARANCES:

14 LESLIE R. BISHOP, ESQ., Oak Bridge, Ill.; on behalf of
the Petitioner.

15 JAMES C. MURRAY, JR., ESQ., Chicago, Ill.; on behalf of
16 the Respondents.

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C O N T E N T S

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LESLIE R. BISHOP, ESQ., on behalf of the Petitioner	3
JAMES C. MURRAY, JR., ESQ., on behalf of the Respondents	23

1 answer or plead and judgment, default judgment, was
2 taken against that Defendant, together with \$29,000
3 attorney's fees in favor of Plaintiff Shacket.

4 Philko appealed to the Seventh Circuit Court
5 of Appeals and the Seventh Circuit Court of Appeals
6 affirmed the judgment of the U.S. district court.
7 Philko subsequently petitioned to this honorable Court
8 by writ of certiorari and that certiorari was granted,
9 but limited to the first issue presented by the
10 Petitioner Philko as to the question presented: Does
11 state law permit a conveyance of title to aircraft by
12 transfer of possession alone, without the necessity of
13 FAA recording.

14 Both the Plaintiff Shacket and Philko through
15 Mr. Edward J. McArdle, its president, had had prior
16 dealings, not directly related to this lawsuit, with
17 Roger Smith or Smith Aviation, Inc., the dealer
18 involved. Mr. Shacket's first contact with Smith was in
19 1972, wherein he traded one aircraft for another, and
20 that was in Smith's context as a dealer of used
21 aircraft.

22 Mr. McArdle or Philko or corporations related
23 to McArdle Limited, which was Mr. McArdle's holding
24 company for several business corporations engaged in the
25 leisure time business, became acquainted on a chance

1 meeting with Roger Smith at DuPage County Airport,
2 became apprised of the availability for purchase of a
3 fixed base operation at Aurora Municipal Airport in
4 Aurora, Illinois, and subsequently formed a new Delaware
5 corporation called Philko to buy the assets of Philko
6 Aviation in Aurora.

7 He then leased that facility to Roger Smith
8 Aircraft Sales, Inc., and Roger Smith Aircraft Sales,
9 Inc., sold fuel, oil and service under the trade name
10 Philko, whereas he maintained his sale of used aircraft
11 under the name Roger Smith Aircraft Sales, Inc.

12 Sometime on or about November of '77 Roger
13 Smith persuaded or sold a new 1978 Piper Navajo airplane
14 to Shacket by means of a purchase order. The plane had
15 not at that time been manufactured. The purchase order
16 was signed and \$20,000 was deposited by Shacket at that
17 time. The delivery was to be in early 1978.

18 In April 19th of 1978, Shacket, after being
19 advised the plane was then ready for delivery, appeared
20 at Aurora Airport from his home in Detroit preparatory
21 to closing and taking possession of the aircraft. At
22 that time Mr. Shacket paid an additional \$106,000 in
23 cash and he had at a prior time given up possession to a
24 1972 Piper Navajo airplane which was to be used as the
25 tradein. So that the total consideration paid by

1 Shacket was the \$20,000 at the time of execution of the
2 agreement, \$106,000 at the time he took possesssion, and
3 the delivery into Roger Smith Aircraft, Inc.'s hands of
4 a '72 Piper Navajo some time in March of '78.

5 Mr. Shacket took possession of the aircraft

6 --

7 QUESTION: Mr. Bishop.

8 MR. BISHOP: Sir?

9 QUESTION: Do you think all of these facts are
10 really essential to resolve the legal issue presented in
11 the petition for certiorari?

12 MR. BISHOP: Yes, sir.

13 Mr. Shacket took possession of the airplane
14 after being shown copies of the title documents
15 conveying title from Piper in a complete chain up to and
16 including Smith Aviation, Inc. Smith Aviation, Inc.,
17 through Roger Smith, provided him with a buyer's copy of
18 the bill of sale conveying from Smith Aviation to
19 Maurice Shacket.

20 Maurice Shacket had asked for the original
21 documents. He was told that they weren't ready. He
22 returned to Detroit, but left his friend Mr. Hamburg,
23 who was staying a day later, to bring the copy. The
24 same story was told to Mr. Hamburg, who did not get the
25 original documents necessary for filing with the FAA.

1 Next day, on or about April 20th, Mr. Smith
2 takes all of the original documents necessary to file
3 with the FAA and presents them to Mr. McArdle, with the
4 story that he was going to try to borrow \$151,000 on the
5 aircraft, but it was exceeding his line of credit. Mr.
6 McArdle declined through his corporation to extend any
7 further credit to Roger Smith Aircraft, but did agree
8 ultimately to buy the aircraft.

9 He bought the aircraft by paying \$152,000 in
10 cash and cancelling an antecedent debt of \$60,000, which
11 had not yet become due but which was shortly to become
12 due. Mr. McArdle did so, however, only after his bank,
13 who was the provider of the \$152,000 cash and was going
14 to make the loan on the aircraft, inspected the
15 documents, determined them to be valid documents, had
16 checked with the FAA recording facility in Oklahoma
17 City, determined that the Piper aircraft had been
18 manufactured and that there were no intervening title
19 interests.

20 At that point Mr. McArdle authorized the
21 disbursement of funds for the loan to be delivered to or
22 for the account of Roger Smith Aircraft Sales.

23 QUESTION: Are you repeating all these facts
24 to demonstrate or persuade us that we're confronted with
25 two bona fide purchasers here?

1 MR. BISHOP: Well, we have a slight
2 difference, Your Honor, Mr. Chief Justice. Shacket was
3 perhaps a buyer in the ordinary course under the UCC.
4 Philko was a purchaser, a good faith purchaser for
5 value. The difference being under our UCC, Mr. Chief
6 Justice, is one uses an antecedent debt as part of the
7 consideration.

8 At any rate, the documents were duly filed
9 with the FAA on or about May 31st. They were noted as
10 filed for record.

11 About June, mid-June, Shacket had found out of
12 McArdle's interest, and that was the first contact Mr.
13 McArdle had or was aware of Shacket's involvement in the
14 transaction.

15 QUESTION: Shacket had the airplane, didn't
16 he?

17 MR. BISHOP: Yes, sir. He took possession of
18 the airplane at the time he paid his money. Mr. McArdle
19 was told that the aircraft was in Michigan with a Piper
20 dealer being fitted with avionics.

21 We have here, then, a conflict between the
22 Illinois Uniform Commercial Code and the federal
23 recording statute. Section 49 U.S.C --

24 QUESTION: You agree that, except for the
25 federal law, the right result was reached below?

1 MR. BISHOP: I'm sorry? I didn't hear your
2 question.

3 QUESTION: If there were no federal recording
4 statute, the result reached below would be correct in
5 your view?

6 MR. BISHOP: Not entirely, Your Honor.

7 QUESTION: At least it wouldn't concern us,
8 because it would be a matter of state law.

9 MR. BISHOP: That is correct, that is
10 correct.

11 QUESTION: So your focus is on the impact of
12 the federal statute.

13 MR. BISHOP: That is correct, yes, sir. The
14 federal statute says under 1403 that no document will be
15 accorded validity as to third parties without notice
16 unless and until it is filed for record. Shacket never
17 filed his interest for record. McArdle or Philko,
18 looking at the FAA records through its bank, finds no
19 intervening interest, has all of the original documents
20 in its hands, duly files them with the FAA.

21 Plaintiff -- Shacket makes the allegation,
22 well, even if we had sent them down for recording you
23 would not have known in time. But that really begs the
24 question, because if they'd been sent down for proper
25 recording at Oklahoma City you wouldn't have had the

1 documents in Smith's hands to perpetrate the fraud in
2 Philko.

3 So we have an interplay here of two statutes,
4 one under the Illinois Uniform Commercial Code that
5 would purport to pass title by possession of the
6 document, and the enactment of 1401 and 1403 which
7 require the registration of an owner of aircraft, and
8 upon that registration under 1401 either having the
9 document recorded under 1403 or having recordable
10 documents under 1403.

11 Shacket takes the position that if you look at
12 1406 you are directed to the state law in which the
13 document is delivered. 1406 was enacted in 1964 to
14 solve a problem that dealt with the choice of law to
15 determine the respective rights or validities of the
16 parties of the contract.

17 That is to say that you had a choice of where
18 the aircraft was located, you had a choice of the place
19 of execution or place of delivery. 1406, appropriately,
20 we think, chose the place of delivery of the document as
21 the most logical choice for highly mobile, highly
22 valuable pieces of machinery, where often consortiums of
23 lenders, 60 or more, get together.

24 One reads the Congressional Record and you
25 come away with the inescapable conclusion that, in their

1 analysis of enacting 1406, they are viewing 1406 as a
2 choice of law, a federal choice of law as to the parties
3 to that agreement to determine validity.

4 QUESTION: Well, Mr. Bishop, I think you've
5 got some problems in your argument with the language of
6 Section 1406. It says "the validity of any instrument
7 the recording of which is provided for by section 503 .
8 . . shall be governed by the laws of the state." Now,
9 why shouldn't the UCC govern as to priorities under that
10 section?

11 MR. BISHOP: Well, it's a question I think
12 where we have our problem, Mr. Justice, is that if you
13 have resort to state law for substantive ownership
14 rights, you've gone beyond the scope of 1406. The
15 determination of validity is, quite properly I think,
16 limited to the execution: Is it proper, does it
17 properly describe the asset, does it meet the test of
18 that jurisdiction in which it's delivered, and, analyzed
19 from the two parties that are involved in that
20 particular instrument, does it meet the test as a valid
21 instrument?

22 Obviously, you must have some machinery to
23 eliminate fraudulent acts. But the minute you logically
24 extend 1406 into the substantive law of the state, now
25 you're giving credence to a transfer of ownership, if

1 you will, without having recorded it under 1403. And
2 1403 says no interest in any aircraft will be valid
3 unless recorded in 1403.

4 So 1406 can't be used to bypass the effect of
5 recording under 1403 without making 1403 almost a
6 useless tool. The object of recording was to provide
7 for the Government and for the aviation industry a
8 rather neat set of rules whereby lenders could take some
9 comfort in the status of title; whereby investment
10 capital would flow in in such a way that lenders or
11 investors would be reasonably certain to have an
12 interest in the specific chattel that they're looking
13 at; and so that the Government would be empowered to
14 send out notices to owners of defects discovered by the
15 Federal Aviation Administration. And how could it do it
16 if --

17 QUESTION: Mr. Bishop, you would agree, would
18 you not, that because of 1406 that the validity of the
19 instruments describing the second transaction, which
20 were in fact recorded, are governed by Illinois law
21 because of 1406?

22 MR. BISHOP: Yes, sir, and there is no dispute
23 that those documents are properly executed under
24 Illinois law and that they are the original documents to
25 the transactions that they purport to represent. That's

1 in the record, Your Honor.

2 But the validity of those documents does not
3 mean that you allow the substantive state law to operate
4 beyond the parties to those instruments or beyond the
5 scope of them to divest what would appear to be the
6 titleholder.

7 QUESTION: Were 1403 and 1406 passed at the
8 same time?

9 MR. BISHOP: No, sir. 1403 was in a sense
10 part of the 1926 Act --

11 QUESTION: And so when did --

12 MR. BISHOP: It was voluntary. It became
13 really in its present form as you now know it in 1948.

14 QUESTION: When did 1406 come along?

15 MR. BISHOP: 1964, 1964.

16 QUESTION: So -- and both sections use the
17 word, either "validity" or "valid," didn't they?

18 MR. BISHOP: Do both sections?

19 QUESTION: No transfer --

20 MR. BISHOP: Validity or valid, yes. The
21 determination of validity.

22 QUESTION: Don't you have to say that the
23 validity means different things in those two sections?

24 MR. BISHOP: Oh, yes, I think so. But in
25 looking at them, Mr. Justice, you're looking -- when

1 you're talking about 1406 you're talking about the
2 validity of a document. There are parties to the
3 document, and the analysis of the validity of that
4 document, --

5 QUESTION: What are you talking about in
6 1403?

7 MR. BISHOP: 1403, you're talking about any
8 document, and you are talking about the substantive
9 rights of the whole world apart from the document. That
10 is to say, any right affecting aircraft must be, if it
11 is going to enjoy validity, it must be recorded under
12 1403.

13 There is no interplay --

14 QUESTION: Well, that's a slight
15 overstatement, isn't it, Mr. Bishop? Isn't it valid as
16 to the parties to the transaction and all persons who
17 have actual notice of the transaction?

18 MR. BISHOP: Yes, sir.

19 QUESTION: Even if it's not recorded.

20 MR. BISHOP: In this context, I mean third
21 parties without notice.

22 QUESTION: So that if it should develop that
23 the relationship between your client and the fraudulent
24 dealer was such that your client should be deemed to
25 have been on actual notice, then you would be bound?

1 MR. BISHOP: The result would be otherwise,
2 that is quite correct, sir.

3 The notice -- returning to 1406, 1406 can only
4 operate if you have a recorded document under 1403,
5 because if you don't have a document under 1403 it isn't
6 valid by operation of 1403. So you must have something
7 of record. Otherwise you have what would essentially be
8 a useless recording statute, because some items would be
9 a matter of record and some need not be a matter of
10 record.

11 QUESTION: Well, it wouldn't be only useless,
12 would it? Suppose it had been filed.

13 MR. BISHOP: I'm sorry?

14 QUESTION: Suppose the Shacket papers had been
15 filed with the FAA. I suppose that filing would have
16 had some operative consequences.

17 MR. BISHOP: We are saying that this 1403 is
18 not framed in language --

19 QUESTION: Your client wouldn't be in the fix
20 he is if Shacket had filed his papers.

21 MR. BISHOP: That's quite so. It may even go
22 further than that. If Shacket had just taken the
23 photocopies that he had and made them part of the
24 record, he might have muddied the waters sufficient to
25 have alerted a wary person.

1 But the requirements of 1403, Mr. Justice, are
2 that you must file the original documents. The original
3 documents are what Roger Smith delivered to Mr. McArdle
4 and Mr. McArdle on behalf of Philko delivered to the
5 Sandwich State Bank. And there is no dispute in the
6 record as to those documents.

7 If you look at 1403, it is to advise the wide
8 world of the recorded status or title or security
9 interest in an aircraft. 1406 was an attempt by
10 Congress, and I think a very excellent attempt, to
11 develop a choice of forum so that -- not a choice of
12 forum, but a choice, a federal choice of law so that you
13 could determine the validity of a document.

14 They examined in the Congressional
15 deliberations at great length what the alternatives were
16 and gave some almost scary examples of the problems
17 engendered with, say, a small airline fleet flying over
18 the country, trying to make a mortgage with a consortium
19 of banks out of New York.

20 They discussed the problems with analyzing the
21 transaction from the location of the aircraft, some of
22 which were in the air and operational at the time, and
23 the choice of law keyed into the point of execution, but
24 often you have multiple signers of a document in
25 different locations, and finally came to the resolution

1 that the one thing that generally happened to any
2 document about one time was its delivery, and it wasn't
3 an effective instrument in most every jurisdiction until
4 delivery.

5 So 1406 very correctly selected the place of
6 delivery as the federal choice of law to determine the
7 validity of the document.

8 QUESTION: Mr. Bishop, I am concerned by the
9 legislative history, which you have not really
10 mentioned. The original Senate bill contained a clear
11 provision saying that every instrument so recorded will
12 have priority over all other claims arising afterwards.
13 The Congress knew how to draft language that would have
14 clearly required priority effect here and that language
15 was dropped from the legislation.

16 And in the maritime bill Congress clearly
17 provided for priorities. In the motor vehicle
18 registration it did not. It had the language to do it
19 here and took it out. Now you're asking us to write it
20 back in.

21 MR. BISHOP: Not really, Justice O'Connor. I
22 think if you look at it it may be as simple an
23 explanation as a term of art. There is no requirement
24 under 1403 as such that you must file. That's under
25 1401 and it involves then the registration of the

1 aircraft which is necessary to operate it.

2 But it also says under 1401 that this shall
3 not be determinative of any title if that title is in
4 dispute. Then you drop down to 1403 and, while there is
5 no affirmative compelling statutory language to record
6 under 1403, it very clearly says that if you don't
7 record the instrument isn't valid as to third parties
8 without notice -- clearly, as much a penalty clause as
9 one could hope for.

10 And if you have no validity for an unrecorded
11 instrument, whether that transaction is represented by a
12 document or not, if 1403 says you have no validity you
13 have nothing to consider under the statute. And yet you
14 look at the various state statutes that deal with
15 personal property and that transfers personal property
16 all over the place by delivery of possession.

17 I think it's clearly apparent from the
18 Congressional record that they did not want to have
19 aircraft or aircraft financing the subject matter of
20 non-recorded transactions.

21 QUESTION: Well, they may have been concerned
22 more with having a central registry than with requiring
23 the priorities.

24 While I have you interrupted, may I ask you if
25 you think the Mortgage Convention affects the case?

1 MR. BISHOP: The Mortgage Convention? I am
2 sorry, Your Honor?

3 QUESTION: The treaty dealing with --

4 MR. BISHOP: The treaty. No, Your Honor, I do
5 not. The treaty does not affect the operation of this
6 case.

7 QUESTION: May I follow up, Mr. Bishop, on
8 what Justice O'Connor was asking you about. Would you
9 not agree that if there had been two recorded documents,
10 one by each purchaser, that state law then would govern
11 the priority as between the two? Isn't that the --

12 MR. BISHOP: No, I would not agree with that,
13 Mr. Justice. If you --

14 QUESTION: At least if they were both security
15 interest documents?

16 MR. BISHOP: I would not agree with that. In
17 looking at the Congressional record, what Congress is
18 trying to do here, Mr. Justice, is create a satisfactory
19 forum for the flow of investment money or capital. I
20 cannot conceive under the current state of the case law
21 where any lender would make a loan on anything other
22 than the borrower's, the individual's credit. He isn't
23 looking -- he always takes, of course, a security
24 interest in the aircraft.

25 But it is such a frail thing, if you can pass

1 it around and defeat it under Uniform Commercial Codes
2 or pass title around by other than non-recorded
3 documents --

4 QUESTION: Well, but I'm suggesting that if
5 there had been two recorded documents. 1403 really just
6 deals with the kind of document that has never been
7 recorded, and I'm just asking you about, had there been
8 two recorded documents. Then it seems to me you would
9 be in a state law situation.

10 MR. BISHOP: Well, I think you have, as we
11 suggested in our brief, Mr. Justice, a race-notice
12 statute. From the original enactment of 1403, which
13 originally provided for validity upon recordation, that
14 was subsequently changed in 1940 -- 1976, to be keyed
15 into the filing for record, rather than recording, and
16 mandated the FAA to keep a register of all documents
17 filed for record.

18 Now, it would seem not really important unless
19 it was in Congress' mind to establish a priority of the
20 filing of documents. And they don't come out and say
21 that, we're going to establish a priority, but the
22 structure of the whole thing, if you look at it, can't
23 really effectively operate from its Congressional intent
24 standpoint unless you have a race-notice statute.

25 QUESTION: When your client made the purchase,

1 did he -- where was the airplane?

2 MR. BISHOP: It was actually, we found out
3 later, in Mr. Shacket's hands back in Detroit. We don't
4 know exactly where it was, but it had been delivered to
5 him or given to him either one or three days before the
6 actual transaction with our client.

7 Our client had been told that the aircraft was
8 with a Piper dealer in Michigan being fitted with
9 avionics. For a new airplane, Your Honor, that's a
10 rather normal thing to have happen.

11 QUESTION: Suppose, instead of a conflict
12 between two purchasers in good faith, at the time your
13 client made the purchase, consummated the transaction,
14 the airplane was in the custody of some repair
15 organization and had a claim for \$50,000 for repair and
16 maintenance. Now, is there a provision for recording
17 mechanic's liens under this Act?

18 MR. BISHOP: Mechanic's liens? Any and all,
19 the statute says, any and all interests to or affecting
20 aircraft shall be recorded.

21 QUESTION: Well, if it was in the possession
22 of the company making alterations and the alterations
23 had not been completed, there wouldn't be any occasion
24 to record. They might not know the total amount.

25 MR. BISHOP: Of the claim.

1 QUESTION: Of the claim. Now, wouldn't your
2 client take subject to whatever that claim was?

3 MR. BISHOP: If that claim is not a matter of
4 record, I would say to you --

5 QUESTION: Under the federal Act?

6 MR. BISHOP: Under the federal Act, yes, sir,
7 that I would say that anybody who is not on notice
8 should not have to deal with that claim.

9 QUESTION: Well then, what does the repairman
10 have to do, file his lien before he starts his work?

11 MR. BISHOP: Yes, sir. And if the Court
12 adopts the rule as we think it should be or Congress
13 intended, rather, you will find the procedure, I think,
14 in transactions where all aircraft are financed through
15 escrows, the document is recorded first and the money
16 disbursed later.

17 QUESTION: Well, don't most state laws require
18 that a mechanic, to preserve a lien on a moving vehicle,
19 has to retain possession of it? He doesn't file a
20 lien.

21 MR. BISHOP: Yes, he must retain possession to
22 assert his lien. But here you come again into a
23 conflict between 1403 and state lien law. 1403 says the
24 interest must be recorded, any and all interests.

25 QUESTION: Well, did your client have no

1 obligation to find out where this aircraft was and
2 whether someone in possession might have a mechanic's
3 lien claim, as yet unrecorded because as yet unknown?

4 MR. BISHOP: Well, Mr. Chief Justice, how --
5 where would you search? It's a practical problem.
6 Where would you begin?

7 But I draw the Court's attention to the fact
8 that the statutory language expressly says that you look
9 to the validity of the document without regard to the
10 location or presence of the aircraft. The whole idea of
11 1406 was to get away from physical delivery of
12 possession. It becomes eminently impractical when
13 you're thinking of a Boeing 747 on a route between Miami
14 and Lisbon. How is the airline going to finance it in a
15 New York bank unless you have the rule and the rule is
16 the law that Congress enacted?

17 CHIEF JUSTICE BURGER: Mr. Murray.

18 ORAL ARGUMENT OF JAMES C. MURRAY, JR.,

19 ON BEHALF OF RESPONDENTS

20 MR. MURRAY: Mr. Chief Justice, may it please
21 the Court:

22 In essence, this case only requires this Court
23 to consider basically four factors, four factors that
24 are determined, already determined, either by the U.S.
25 district court or the Court of Appeals, and are

1 reflected in the depositions that were taken in this
2 case.

3 It is undisputed that Philko Aviation recorded
4 bills of sale, the original bills of sale. Whether Mr.
5 McArdle saw the original bills of sale at the time he
6 consummated his transaction is a question, but it's
7 unimportant for this Court to determine the issue before
8 it.

9 The second fact is that my client on April
10 19th, 1978, took possession of his \$235,000 custom-made
11 vanity number aircraft, flew it off from Aurora Airport
12 and flew it to Detroit, and he has been in possession of
13 that aircraft since that time.

14 The third fact that this Court has to look at
15 is that the district court and the Court of Appeals,
16 based upon this record, determined that my clients had
17 title interest in this aircraft under state law under
18 two separate theories: one, it was a buyer in the
19 ordinary course of business; and second, it was a bona
20 fide purchaser for value.

21 The fourth factor is that both the district
22 court and the Court of Appeals determined that Philko
23 Aviation was not a buyer in the ordinary course of
24 business, and the Court of Appeals determined that it
25 was not a bona fide purchaser for value.

1 And let me address the question, Mr. Chief
2 Justice, that you asked Mr. Bishop regarding whether or
3 not Philko Aviation was a bona fide purchaser for
4 value. It is clear under Illinois law that it would not
5 be, and the reason under 2-401, subparagraph (2) of the
6 Uniform Commercial Code, there is one element. Although
7 Mr. Bishop is correct, he did give value under the
8 Uniform Commercial Code, an antecedent debt, if he
9 cancelled it -- and that's a question -- if he had
10 cancelled the antecedent debt, that would give value.

11 But what he didn't tell you is the fact that
12 under Illinois law you have to physically take
13 possession of the goods, the delivery of the goods. And
14 the Code speaks, that section of the Code speaks, about
15 physical delivery of the goods. It doesn't talk about
16 delivery.

17 Those are the essential --

18 QUESTION: Mr. Murray, is it not possible
19 that, even though the second purchaser wasn't a
20 purchaser under Illinois law, that either he or the bank
21 had a security interest in the claim? There's been no
22 ruling on that question?

23 MR. MURRAY: There has been no ruling. And to
24 answer your question, Justice Stevens, I do not believe
25 so. Under Article 9 of the Uniform Commercial Code --

1 and that issue was not raised --

2 QUESTION: No, but if it hasn't yet been
3 decided don't we have to, for purposes of analyzing the
4 federal statute, at least consider that one possibility
5 is that the second purchaser did acquire a security
6 interest in the plane?

7 MR. MURRAY: Yes, I'm not disagreeing with
8 you.

9 QUESTION: And then you'd have to decide
10 whether such a security interest would be valid as
11 against a prior unrecorded transaction, assuming that
12 the security interest person did not have notice.

13 MR. MURRAY: That's correct. And I would ask
14 -- and I would suggest to you, Justice Stevens, that you
15 would have to focus your attention on whether or not
16 this secured party who took an interest in an aircraft,
17 whether or not -- as you know, under the Code you have
18 certain elements in order for a security interest to
19 attach.

20 One of those interests is that your borrower
21 has a proprietary interest in the aircraft. Their
22 interest is predicated on the bill of sale between
23 Philko Aviation and Roger Smith Aircraft Sales. Under
24 Illinois law it is clear under the Uniform Commercial
25 Code that that conveyance -- that Roger Smith had

1 nothing to convey under that instrument, and there was
2 nothing to convey.

3 QUESTION: Well, you may be entirely right,
4 but all I'm suggesting is that it has not yet been
5 decided whether the second purchaser got a security
6 interest, because the district court didn't really
7 address that.

8 MR. MURRAY: That's absolutely correct.

9 QUESTION: And it seems to me that we have to
10 assume that possibility in order to resolve the proper
11 construction of the federal statute, that it is at least
12 possible that on remand, because we have a summary
13 judgment situation --

14 MR. MURRAY: That's correct.

15 QUESTION: -- that a trial would show there
16 was a security interest. And then the question is,
17 would the federal statute protect that security interest
18 against a prior unrecorded sale of the aircraft?

19 MR. MURRAY: And I don't -- first of all, if
20 you're suggesting that this case, in order for that
21 issue to be determined, should be remanded for further
22 consideration, I would suggest to you, Justice Stevens,
23 that that is unnecessary, because all the facts in this
24 case are in the record. And my analysis --

25 QUESTION: Normally we don't decide questions

1 of state law, is all I'm suggesting.

2 MR. MURRAY: I agree with you, and I'm not
3 suggesting that you should decide it. But if that --
4 but you had suggested, Justice Stevens, that that issue
5 might be critical to your determination as far as,
6 although this looks like an absolute title situation,
7 under old common law mortgages under the absolute deed
8 types of cases, which were taken solely for security
9 purposes, were given some effect.

10 And all I'm suggesting to you, Justice
11 Stevens, is that when you look at Article 9 and what is
12 required for purposes of creating a security interest,
13 and based on the facts in this case, it is clear that
14 Philko Aviation would not take a security interest.
15 That's all I'm saying.

16 QUESTION: Well, even if that's true, what
17 that means is that even if you lose the battle here you
18 may win the war.

19 MR. MURRAY: That's correct.

20 Those are the four factors that this Court
21 should consider with respect to its interpretation of a
22 federal statute, 1403. This Court is called upon to
23 interpret this statute as not only preempting state law
24 with respect to recording statutes, but also the
25 substantive legal rights.

1 This Court is being called upon to interpret
2 this statute in such a way as to strip my client of his
3 rights in his new aircraft, those rights which would be
4 recognized and upheld in virtually every single state of
5 the Union.

6 QUESTION: Well, I suppose Philko claims that
7 it's being stripped of its rights to its new aircraft.
8 I mean, both of the parties probably have equities.

9 MR. MURRAY: I'm not suggesting, Justice
10 Rehnquist, that both parties do not have equities. I am
11 not suggesting that at all. I am suggesting the fact
12 is, is that under this particular factual situation the
13 equities lie with my client, because I do not believe
14 Congress intended 1403 to preempt state law substantive
15 title questions.

16 I will agree that Congress intended to preempt
17 state recording laws, and that I would agree. But with
18 respect to state substantive title questions, I would
19 disagree.

20 QUESTION: Well, isn't the real issue that
21 contained in the remark you just made, I think, isn't
22 it? What did Congress intend --

23 MR. MURRAY: That's correct.

24 QUESTION: -- with respect to two people, each
25 with presumably very substantial equities.

1 MR. MURRAY: That's correct, Justice
2 Rehnquist. And it is our position that Section 503
3 preempts only state recording laws and does not affect
4 the substantive ownership of title interests. The mere
5 fact of recording does not legitimize an invalid
6 conveyance or a purported ownership interest, and there
7 is no question that under state law Philko did not have
8 a legitimate interest.

9 Philko claims to have a superior right in this
10 aircraft by virtue of recording of a bill of sale. Yet,
11 under state law it has no interest to record because
12 Smith, Roger Smith, had no interest to convey and having
13 already sold the aircraft to a bona fide purchaser for
14 value and a buyer in the ordinary course. The language
15 of the statute clearly preempts state recording
16 statutes, but it does not, as Petitioner suggests, go
17 further and preempt state law as to the ownership
18 interest and priorities.

19 QUESTION: But isn't your argument that there
20 was no interest to convey at the time it was conveyed,
21 isn't that essentially based on a recording statute
22 rather than a substantive law?

23 MR. MURRAY: No, it's not, Justice Rehnquist.
24 I do not believe that my -- my client's rights are not
25 based upon this recording statute. The recording

1 statute that state law has recognizes, at least under
2 the Uniform Commercial Code, recognizes that interests,
3 especially in the secured party situation, that a buyer
4 in the ordinary course will take priority over a secured
5 creditor if he takes from a merchant.

6 Even if the buyer in the ordinary course
7 checks with the secretary, in our state, the secretary
8 of state's office and determines that there's a
9 financing instrument and has knowledge of that financing
10 instrument, that buyer in the ordinary course takes
11 priority, at least under our state law and under our
12 recording statutes, the statute with respect to --

13 QUESTION: So you really say the federal
14 statute essentially just tells you where to record?

15 MR. MURRAY: That's right. The FAA is nothing
16 more than a national county recorder.

17 QUESTION: Yes. Everything that follows from
18 recording, beyond the mere act of recording, still
19 depends on state law under 1406.

20 MR. MURRAY: That is our position, Your Honor,
21 and the first -- in order for us to determine that
22 intent, the first thing we look at is the statute
23 itself, and --

24 QUESTION: Well, what does 1403 mean, then?
25 It says no instrument shall be valid. That's just --

1 doesn't that have some substantive bite?

2 MR. MURRAY: Well, I can only refer this,
3 Justice White, I can only refer this Court to the
4 decision --

5 QUESTION: You say that that word "valid" just
6 has no force at all.

7 MR. MURRAY: No, I'm just saying --

8 QUESTION: That you have to look to state law
9 for every substantive consequence of the filing?

10 MR. MURRAY: As it relates to title, that's
11 correct. In fact, Justice Wisdom in the Gary Aircraft
12 versus General Dynamics case says that the literal
13 interpretation would lead to a ridiculous result and
14 could create unenforceable interests without giving
15 value, simply by recording.

16 For example, if, rather than giving fair
17 consideration, there was no consideration and that the
18 bill of sale between Philko, Philko Aviation and Roger
19 Smith was properly executed under an Illinois law, but
20 there was no consideration, and if it was filed with the
21 county recorder, under the Petitioner's interpretation
22 that would have validity.

23 If for example -- and I'm not saying this is
24 the case, but it does demonstrate a ridiculous result
25 under the Petitioner's interpretation -- if you had a

1 three year old child that executed a bill of sale for an
2 aircraft and that bill of sale was recorded, he under
3 state law could disaffirm that contract, even assuming
4 it was properly recorded.

5 QUESTION: Well, Mr. Murray, I really don't
6 think that's correct, because you're arguing about the
7 fact that state law controls the meaning and validity of
8 recorded instruments. But 1403(c) doesn't deal with
9 recorded instruments; it deals with the failure to
10 record. It says if you fail to record then that shall
11 not be a valid transaction. And here we're dealing with
12 a situation, unlike the Gary case, in which there was a
13 failure to record.

14 And why doesn't the plain language apply?

15 MR. MURRAY: Let me tell you that that also
16 could deal with a ridiculous result. In the record in
17 this case, my client took possession, Justice Stevens,
18 on April 19th. Mr. McArdle and Mr. Smith had their deal
19 on April -- the following day. It's unclear as to when
20 the bank checked it, but it certainly checked, the bank,
21 checked title with the FAA prior to the disbursement of
22 the funds, which occurred on April 22nd.

23 The testimony of Kenneth Rittenhouse, who is
24 the president of Clark Aviation, points out the problems
25 in dealing with this recording statute on a new

1 aircraft. He states in his testimony that he would not
2 check the recording statute because there would not be
3 any interest in conveyance, because of the fact that
4 when a new aircraft is manufactured and ready to be
5 delivered it is picked up from the manufacturer, which
6 in this case it would be, and physically delivered to
7 the ultimate customer. It's not like an automobile,
8 that sits on the lot of an automobile dealer.

9 In this particular case, if my client took the
10 photocopies, as Mr. Bishop suggests, took the aircraft
11 registration application, attached all those documents,
12 and the day after he took delivery put them in an
13 envelope and mailed them to the FAA at Oklahoma City,
14 and assuming, rather than waiting 30 days later, that on
15 the time they disbursed, the Sandwich State Bank
16 disbursed the funds in this matter, they also did the
17 same thing, the problem you have here is, whichever set
18 of documents gets recorded first is pure happenstance.

19 And why? Well, Mr. Andrews, when asked why he
20 waited 30 days to record the bill of sale, it is because
21 of the fact that it takes time in which to record. With
22 respect to Mr. Rittenhouse, the reason why he doesn't
23 check the bills of sale is because it takes time. And
24 he estimates five or six days before -- from the time
25 you deposit it in an envelope until it gets filed, not

1 recorded but filed, with the FAA.

2 So what we are faced with is a situation that,
3 if it hits the proper desk --

4 QUESTION: You might have the second set of
5 papers filed first, is what you're saying.

6 MR. MURRAY: That's right, Your Honor.

7 QUESTION: But that would not be within
8 1403(c) because then there would not be a failure to
9 record.

10 MR. MURRAY: No, that's --

11 QUESTION: Then you'd have both transactions
12 recorded --

13 MR. MURRAY: My client under the --

14 QUESTION: -- and your question arguably would
15 be resolved under state law.

16 MR. MURRAY: No.

17 QUESTION: But here you have one set of papers
18 that were simply not recorded.

19 MR. MURRAY: No, that's wrong, Justice
20 Stevens. If you look at the deposition of my client
21 Maurice Shacket, he attempted --

22 QUESTION: Well, I understand, but he did not
23 record.

24 MR. MURRAY: The reason why he didn't record
25 is the FAA refused to record it. So you're never going

1 to get to the situation Your Honor suggests, where we
2 have two sets of bills of sale in which Roger Smith has
3 given a bill of sale to Philko Aviation and Roger Smith
4 has given a bill of sale to my client, because whichever
5 set of bill of sale hits the clerk's desk and gets
6 stamped first, they're going to take the second set and
7 turn it back and say, get us a bill of sale in this
8 situation from Philko Aviation.

9 And that's exactly what happened in this
10 case. So you're never going to get the situation Your
11 Honor suggests of having two bills of sale from the same
12 seller recorded with the FAA at the same time.

13 QUESTION: That's because of the FAA's
14 practice of only accepting the original. Then the
15 statute provides a mechanism that will work.

16 MR. MURRAY: No. Just there is under the
17 regulations that would permit you to file with the FAA
18 some of the photocopies. They do have a system or a
19 mechanism where title is in dispute to determine. Like
20 for court decisions or anything like that, you just have
21 to file some sort of notice, and that would be contained
22 in the Section 14 CFR 14.17, which is that section that
23 deals not only with recording but with aircraft
24 registration.

25 I would direct the Court to the well-reasoned

1 -- welll, I think well-reasoned since it's in my favor
2 -- Justice Wisdom's opinion in Gary Aircraft, in which
3 he deals with the language "shall be valid" would lead
4 to ridiculous results. Wisdom suggests, as do the
5 Respondents, that the statute gives validity if the
6 instrument that's recorded is otherwise valid.

7 Philko's interest was not valid. Mere
8 recordation could not transform it into a valid
9 instrument. Shacket's nonrecording against Philko is
10 not fatal to Shacket's superior rights under controlling
11 state law.

12 There is nothing in the legislative history
13 which suggests that Congress intended to supplant state
14 substantive law relating to titles to aircraft. It
15 merely intended to be a simple -- simply a central
16 repository. And in order to determine a legislative
17 intent, because there really is -- and Petitioner and I
18 both agree -- there is a total absence of legislative
19 history. And I have attempted to try to locate the
20 hearings, and it's been very difficult, in order to find
21 out what this is.

22 I can tell you that Senator Patrick McCarran,
23 Senator from Nevada, from 1935 had submitted various
24 bills. Then Senator Truman, who was -- this bill, which
25 ended up the Civil Aeronautics Act of 1938, was the

1 floor manager for this bill. And if you look at the
2 drafts of the various Senate and House bills dating back
3 to 1936, you will not find any language of 1403 or
4 comparable language of 1403. It was only in the last
5 bill, that was eventually passed by Congress.

6 So because there seems to be an absence of
7 legislative history, we must look at comparable statutes
8 that were in existence at the time this statute was
9 enacted, and that statute is the Ship Mortgage Act of
10 1930. That statute has a very similar recording
11 provision as 1403.

12 Yet Congress in the Ship Mortgage Act defines
13 various types of interests. For example, it defines
14 what is to be construed under the statute as a preferred
15 mortgage. It then sets forth in very specific detail as
16 to what needs to be contained in a preferred mortgage,
17 and then it sets out priority rules with respect to such
18 preferred mortgage. This statute was in existence at
19 the time Congress enacted the Civil Aeronautics Act.

20 As an aid for interpretation you look at the
21 whole statute. You do not look and focus your attention
22 on just one provision. One provision that was in
23 existence at the time the statute was enacted was
24 Section 501(f).

25 Now, Section 501(f) deals with registration.

1 But in order to register an aircraft under the FAA, you
2 must attach ownership interests, basically the bills of
3 sale. And yet, under 501 they say, if you register an
4 aircraft it is not presumed or is not a decision as to
5 who has title.

6 And then we look, in 1964 we look at Section
7 1406. And they talk about the validity of any
8 instrument the recording of which shall be governed by
9 the laws of the state in which such instrument is
10 delivered. It is clear, Justice Stevens, that this is
11 merely a choice of law forum, as to what law to apply.

12 Petitioner would have this Court and suggests
13 to this Court that all that provision did is we look to
14 the mechanics of execution of the documents. But the
15 legislative history, which is not clear -- I'm not
16 suggesting it is -- but it seems to indicate, because I
17 have quoted a portion of it in my brief from the
18 hearings and they quoted another section of it, but it
19 seems to me when you read the Senate reports, where they
20 look to the Senate report to determine the validity of
21 such instrument, one would need only look to the
22 substantive law of the particular place in which the
23 relevant instrument is delivered.

24 Now, it doesn't define substantive law there,
25 but my understanding of it and I think any reasonable

1 person's understand is substantive law is the
2 substantive law as far as, if that instrument would
3 convey an interest in property you look to that state's
4 law. If it would not, then that instrument, the fact
5 that it's recorded has no validity.

6 And vis a vis my client, that's correct. They
7 don't have title, and the fact of their recording does
8 not vest title in Philko Aviation.

9 Then we look at the interpretation -- and in
10 addition, with respect -- with respect to this
11 particular interpretation, the -- it is of particular
12 note that the letter from the then current Administrator
13 of the FAA to Senator Warren Magnusen relating to
14 Section 1406, and that letter is part of the Senate
15 report, which states in pertinent part:

16 "As in the case with the recording system,
17 substantive validity of recorded instruments remains a
18 question of local law."

19 Then we look at the current regulations of the
20 FAA. Now, obviously -- and I am not attempting to
21 suggest that this Court is bound to take into
22 consideration the regulations of the FAA when in this
23 Court's opinion that it believes directly contravenes
24 the statute. However, I do suggest to you, and this
25 Court has held, as we've pointed out in our brief, that

1 you give great weight to the interpretations of agencies
2 that have been vested by Congress for the implementation
3 of a statute. And under 14 CFR Section 4917 of that
4 statute, it states: "The recording of a conveyance is
5 not a decision of the FAA that the instrument does in
6 fact affect title to or an interest in the aircraft or
7 other property it covers."

8 QUESTION: Of course, that's fairly ambiguous,
9 isn't it, for these purposes?

10 MR. MURRAY: I'm not suggesting that it
11 isn't. All I'm saying is that the recording, at least
12 as far as the FAA's position, is that it's not going to
13 make a title question, render a decision as to who has
14 title to an aircraft, if the instrument is just merely
15 recorded with it.

16 QUESTION: You mention in your brief, Mr.
17 Murray, Section 1403(d). But I don't believe either you
18 or your opponent have argued it at any length. Do you
19 derive some comfort from that section?

20 MR. MURRAY: No, Your Honor, other than the
21 fact of -- you mean talking about the notarization
22 provision?

23 QUESTION: No, where it talks about something
24 being valid. The catch title is "Effective Recording."
25 I would have thought that perhaps you would have derived

1 some comfort from it.

2 It's on page 14 of your brief.

3 MR. MURRAY: Thank you.

4 Well, no, I do not.

5 QUESTION: Mr. Murray, one of the amicus
6 briefs did refer to the Mortgage Convention, the treaty,
7 and indicated that it may have had some application or
8 affect here. And while you and your opponent didn't
9 really deal with it, it did seem to have some potential
10 application and conceivably could be read to require not
11 a single recording system, but a recognition of priority
12 for recorded interests.

13 Would you like to comment on that?

14 MR. MURRAY: Yes, I would, Justice O'Connor.
15 My analysis of that statute is that all that -- or that
16 treaty, the Mortgage Convention Act -- and all I can
17 give you, Justice O'Connor, is my reading of the
18 Mortgage Convention Act -- under Article 1, paragraph 2,
19 makes clear that each contracting state's substantive
20 law will control rights in an aircraft.

21 There is no need to adopt a uniform national
22 law. Article 17 of the Mortgage Convention permits
23 contract states to reference the law of territories.
24 And I must admit, my interpretation of the law of
25 territories would be analogous to the law of the

1 states.

2 Third party rights in the aircraft are
3 determined according to the law of the contracting
4 state. In addition, under Section -- when Section 506
5 or 1406 was enacted by Congress in 1964, the State
6 Department sent a letter to the Senate, and they had the
7 reports and they read it, and they said that they had no
8 objection to 1406. And I have to submit and I think we
9 have to agree that in my opinion it does affect
10 substantive title law.

11 I would just like to make mention of the
12 following facts. The state's law concept of possession
13 as a factor in determining substantive ownership
14 interest does not violate any federal interest. The
15 question that somehow lenders are going to be disabused
16 for investing in an airplane if you don't have a central
17 recording is just simply nonsense.

18 We do not have a central recording system for
19 heavy equipment, heavy construction equipment. There is
20 no central recording, and yet lenders on a day-in and
21 day-out basis lend on that kind of equipment and file
22 their interests with the state law. And that type of
23 heavy construction equipment is as expensive, if not
24 moreso, than this particular aircraft which we are
25 dealing with.

1 QUESTION: But here, Mr. Murray, we do have a
2 central --

3 MR. MURRAY: I'm not arguing that, Your
4 Honor.

5 QUESTION: -- recording provided by the
6 Congress.

7 MR. MURRAY: I am not suggesting, Mr. Chief
8 Justice, that this is not a central recording statute.
9 All I'm suggesting is, to respond to Mr. Bishop's
10 argument that somehow lenders will be wary about lending
11 on aircraft if you do not interpret this statute as
12 affecting substantive priorities. That's all my
13 comments went to.

14 The registration provision of Section 501
15 effectively controls aircraft in this country. Title 14
16 CFR 1431 talks about aircraft, application for aircraft
17 registration. You get an N number. The N number is
18 like a license number. It's the registration number of
19 the aircraft and they control everything through that N
20 number.

21 With respect to the mobility, if there's any
22 federal law or agency that controls transportation more
23 than the FAA I don't know what agency there is. They
24 basically control from the time it leaves the airport
25 gate to the time it arrives at its destination. It

1 controls the manufacturing, the specification. It
2 oversees continual repair of all this equipment. And
3 it's all keyed to the registration number, not the
4 recording statute.

5 There is no reason that has been advanced by
6 these Petitioners to reject well-established and
7 non-discriminatory state law, and that this Court should
8 end up with a situation and adopt this statute, which is
9 not clear and Congressional intent is not clear, and
10 that there is an ambiguity in it, and to in effect
11 interpret it in such a way that in effect in this
12 situation if, rather than taking the bills of sale, my
13 client left the aircraft and Roger Smith forged the bill
14 of sale.

15 Thank you very much.

16 QUESTION: Mr. Murray, let me ask you just one
17 question of fact, if I may. Under your view, from whom
18 did Shacket get title, from Smith or from Clark?

19 MR. MURRAY: Smith.

20 QUESTION: From Smith. Was Smith in title,
21 then, for at least a moment? Is that the theory, it
22 went from Clark to Smith?

23 MR. MURRAY: That's correct. I mean, and my
24 client did have a bill of sale.

25 Thank you, Justice Stevens. Thank you, Your

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