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1 P R O C E E D I N G S

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 00-1831, United States v. Sandra Craft.

5 Mr. Jones.

6 ORAL ARGUMENT OF KENT L. JONES

7 ON BEHALF OF THE PETITIONER

8 MR. JONES: Mr. Chief Justice, and may it please
9 the Court:

10 The question in this case is whether the Federal
11 tax lien that applies by operation of law to all property
12 and rights to property of a delinquent taxpayer attaches
13 to the interest of that taxpayer in a tenancy by the
14 entirety. The taxpayer in this case was an attorney who,
15 for 10 years, failed to file a Federal income tax return
16 and accumulated a Federal tax obligation of approximately
17 half a million dollars.

18 At the time the taxes were assessed and the
19 notice of tax lien was filed, the taxpayer owned a real
20 property in a joint tenancy by the entirety with his wife.
21 He then conveyed his interest in that property to his wife
22 for \$1, and when his wife then sought to sell the property
23 the tax lien appeared in the title record.

24 QUESTION: Now, tell us about the fraudulent
25 conveyance proceeding. Does the fraudulent conveyance

1 holding, or finding, make no difference one way or the
2 other? If it was a fraudulent conveyance the husband has
3 the property -- you can -- well, if it was a fraudulent
4 conveyance, you can pursue the property, and if it wasn't,
5 the lien is still there anyway under your theory. Is that
6 the way it works?

7 MR. JONES: I think that we would say that the
8 lien, the question of the validity of the lien is the
9 first question. If the lien is valid you don't need to
10 address the fraudulent conveyance question. Indeed, we
11 haven't presented the fraudulent --

12 QUESTION: Right.

13 MR. JONES: -- conveyance question in this case.

14 If the lien were not valid, it would still be
15 possible to go after property in certain circumstances if
16 there had been a fraudulent conveyance, but on this record
17 we're not challenging the determination that as a matter
18 of State law there was not a fraudulent conveyance, except
19 for this fraudulent enhancement portion that the court
20 awarded.

21 QUESTION: Mr. Jones, as part of the background,
22 how did it come about that it's only the taxpayer who has
23 the liability? Did she file separate returns, or was she
24 an innocent spouse?

25 MR. JONES: In this case, the taxpayer is the

1 husband. The husband was an attorney, and he filed no
2 return, and when -- there's two ways for this issue to
3 come up. Either spouse may file either no return, or file
4 only a separate return. It's only when they file a joint
5 return that they are jointly and severally liable for the
6 tax obligation, so if, as in this case, the taxpayer
7 simply files no return at all, then the obligation is
8 exclusively that -- the tax obligation is that of the
9 nonfiler, in this case the husband.

10 Indeed, Judge Ryan pointed out in his separate
11 opinion that the decision of this Court, of the court of
12 appeals is very amenable to abuse, because on this theory
13 both spouses can earn income, neither of them can file a
14 return, or they can both file a separate return, and then
15 they can put all of their real and personal property in a
16 tenancy by the entirety, including stocks and bonds in
17 States like Michigan and Maryland, and claim a complete
18 exemption of all of their property from Federal tax
19 obligations.

20 Now, in --

21 QUESTION: -- some penalties for failing to file
22 a return?

23 MR. JONES: There are some penalties, but the
24 penalties, like taxes, have to be enforced against the
25 property of the taxpayer, and if the taxpayer is allowed

1 to exempt all of its property in this fashion, then
2 there's literally no way that the taxes can be enforced
3 through civil procedures.

4 QUESTION: What about criminal procedures? Are
5 there any criminal procedures for --

6 MR. JONES: I --

7 QUESTION: -- failure, continued failure to
8 file --

9 MR. JONES: Of course, if you file a return,
10 then you're not exposing yourself to any criminal
11 obligations, and if you don't file a return, it would
12 be -- I'm not familiar with a statute that makes that a
13 crime by itself. Now, it may be that it's a crime in
14 connection with some intent to conceal, but just the fact
15 that you didn't file -- I'm not -- frankly, I'm not --
16 even though I come before the Court on tax cases, I'm not
17 an expert on criminal tax matters, but it's my impression
18 that that would not by itself be a crime.

19 Now, the Federal tax --

20 QUESTION: We'd better not let the word get out.
21 I thought that it was a crime, but I'll check.

22 (Laughter.)

23 MR. JONES: All right, well, I stand --

24 QUESTION: We'll keep it just among ourselves.

25 MR. JONES: I will defer all questions on title

1 18 to Justice Kennedy. I'm simply not --

2 QUESTION: Do we know as a matter of fact what
3 her situation was? Did she not file also? Did she file a
4 separate return?

5 MR. JONES: I don't know whether she had any
6 income of her own. I don't know whether she was required
7 to, whether she did file a return -- this case does not
8 involve this -- the wife's taxes. It involves the half-
9 million dollars of taxes of the husband.

10 QUESTION: Yes, I know. I was just curious how
11 that came about.

12 MR. JONES: I don't believe the record reflects.

13 Now, the comprehensive text of the Federal tax
14 lien reaches not only all property of the taxpayer but all
15 rights to property of the taxpayer, and this Court has
16 consistently held that this broad text shows a plain
17 intent to reach every type of interest that a taxpayer
18 might have in property, and two terms ago in the Drye case
19 the Court summarized these holdings and said that the
20 Federal tax lien reaches every species of valuable,
21 legally protected right or interest of the taxpayer, and
22 the simple question that we have before us today is
23 whether a taxpayer who has an interest in a tenancy by the
24 entirety has any valuable legally protected interest in
25 the property.

1 QUESTION: Well, of course, isn't the issue
2 whether the taxpayer has a legal interest in the property?
3 Isn't that the issue?

4 MR. JONES: That is the underlying issue in this
5 case.

6 QUESTION: And the other side says no, there's
7 this mythical entity called the marriage, or something
8 like that, is the owner.

9 MR. JONES: Well, it's a real entity. There is
10 really a marriage. It's just that the property interests
11 are, in fact, owned by the individual spouses, as I can
12 explain by going through what rights a tenant by the
13 entirety has under the applicable law in this case, which
14 is Michigan law. A --

15 QUESTION: But are any of those rights legal
16 rights owned by the taxpayer.

17 MR. JONES: Yes.

18 QUESTION: That's the basic question.

19 MR. JONES: Yes, and indeed, in fact, the
20 supreme court in Michigan has so held.

21 Let me just describe these rights that the
22 taxpayer has. The individual owner of the -- each spouse
23 in a tenancy by the entirety has the right to occupy and
24 use the premises, has the right, with the consent of the
25 other spouse, to mortgage or sell it, and under section --

1 QUESTION: Wait, wait. Strike that one. I
2 mean, that's -- the marriage can sell it. I mean, with
3 the consent of the other one is just to say --

4 MR. JONES: This is --

5 QUESTION: -- tenancy by the entirety. It's the
6 marriage that sells it.

7 MR. JONES: That is exactly the interest that
8 the taxpayer had in the Rodgers case in a homestead
9 estate. He could not sell his properties separately from
10 that of his spouse. He could only mortgage or sell it
11 with the right, with the concurrence of the spouse, and
12 what the Court held in Rodgers --

13 QUESTION: But he had a legal interest in the
14 property.

15 MR. JONES: Yes, he did.

16 QUESTION: He did.

17 MR. JONES: Yes, and if I might go on, there are
18 more interests involved. I mean, even if you wanted to
19 stop there, we can't stop there, because the taxpayer in
20 fact has greater interests than the ones we've already
21 described.

22 Under section 557.71 of the Michigan Code, which
23 is quoted at page 41 of the joint appendix and page 3 of
24 our reply brief, each spouse in -- since 1975 each spouse
25 in Michigan has had the right to equal portion of the

1 income from the property, that is, the interest, the
2 dividends, the rents, to the profits, and is entitled to
3 half of the proceeds on the sale of the property. Each
4 spouse under Michigan law is entitled to half of the
5 property on divorce, and has a right of survivorship that
6 gives him the fee simple, absolute --

7 QUESTION: Presumably the Government could get a
8 lien on any of those things if they ever came into being.

9 MR. JONES: They are in being, and that's what
10 the supreme court of Michigan pointed out in Dow v. State.
11 The court held that these significant interests in
12 property possessed by each spouse are property for
13 purposes of the constitutional Due Process Clause, and
14 that each spouse must separately be given notice of any
15 action affecting their significant property interests.

16 QUESTION: Given notice by whom?

17 MR. JONES: Of any action that might be brought
18 with respect to the property. In other words, under the
19 Due Process Clause you have to have notice and an
20 opportunity to be heard if there's property affected, and
21 what the court said is that these significant -- I'm
22 quoting. These significant interests in property of each
23 spouse entitle each of them to separate notice, because
24 they have separate rights.

25 Now --

1 QUESTION: How did that case come up? I mean,
2 was somebody suing the tenants by the entirety, or --

3 MR. JONES: My recollection is that it was a
4 foreclosure-type case.

5 Now, the pecuniary right of each spouse to half
6 the income and half of the proceeds on the sale is an
7 ordinary kind of right to money. It is a
8 quintessential --

9 QUESTION: May I just interrupt you once more?
10 You, in describing the case, said that each of them was
11 entitled to notice because each of them had a separate
12 right in the property. Is that what the State court
13 said --

14 MR. JONES: Yes.

15 QUESTION: -- or is that your sort of
16 interpretation?

17 MR. JONES: It said that -- the words -- well, I
18 don't have the text in front of me. It said the
19 separate --

20 QUESTION: It makes a big difference. They're
21 each entitled to notice --

22 MR. JONES: Each spouse --

23 QUESTION: -- which is -- because each had a
24 separate right --

25 MR. JONES: It says each spouse is entitled to

1 separate notice --

2 QUESTION: Right.

3 MR. JONES: -- because they have a significant
4 interest in the property, and --

5 QUESTION: Mr. Jones, you're not asserting that
6 the Government's lien gives it any greater right than he
7 has, so the recitation that you had, you're not saying
8 that the Government lien means that they could preempt her
9 right, are you?

10 MR. JONES: No. We're saying that we have those
11 rights. In fact, in this case that is the issue. There
12 was the sale. There was a consensual sale of the
13 property. Half of the proceeds were placed in escrow.
14 Half were given to the wife as her undisputed 50-percent
15 share, half were placed in escrow pending determination of
16 the validity of the lien. That's what this case is. It's
17 that --

18 QUESTION: Would the case be any different if
19 that transaction you just referred to hadn't taken place?
20 Would the Government's case be weaker?

21 MR. JONES: The Government's case would be
22 significantly different if the sale had not occurred.
23 Then we would presumably be waiting to see what happened,
24 or we would under Rodgers be attempting to bring a
25 foreclosure case. We haven't attempted to do that here

1 because we didn't need to do it and, in fact, we rarely
2 do, and while I'm on the foreclosure issue, let me point
3 out that Rodgers held that a joint interest can be
4 foreclosed notwithstanding that neither spouse by
5 themselves force the sale of it.

6 What the Court explained was that Congress
7 specifically provided in 7403 of the code that the
8 foreclosure applies to the entire property, and that in
9 that sale the rights of the innocent spouse are protected
10 and, indeed, the court, the district court has discretion
11 not even to order a foreclosure if it so chooses.

12 QUESTION: But --

13 QUESTION: Well, let's assume you do foreclose
14 because we find that, indeed, the husband has a property
15 interest in the tenancy by the entirety, so you foreclose.

16 Now, I guess some of his interest you've just
17 pointed out is a right to half of the income from the
18 property, but surely his most significant interest is that
19 he is entitled to half of the whole property if the
20 marriage dissolves, right?

21 MR. JONES: Or if it's sold, and he's entitled
22 to all of it if he's the survivor.

23 QUESTION: Right. These are all contingencies,
24 okay. How do you -- you foreclose -- how do we value
25 these contingencies?

1 MR. JONES: This --

2 QUESTION: What do we -- we have people come in
3 and say how stable the marriage is, or what?

4 MR. JONES: This Court discussed that exact,
5 what the Court called the practical reality in the Rodgers
6 case, and gave a detailed example that I think took three
7 or four pages of the Court's opinion in Rodgers,
8 explaining how you would value the respective interests of
9 the parties.

10 Let me also suggest to the Court that there is a
11 very thorough and thoughtful decision of the district
12 court in New Jersey in United States v. Jones in 1995 that
13 discusses the circumstances when discretion would not be
14 exercised to allow foreclosure of tenancy-by-the-entirety
15 property, and the Court concluded that there were
16 circumstances which that case was one, where instead of
17 foreclosing on the property, the property rights of -- the
18 United States would simply be put in the position of
19 holding the right of survivorship of the delinquent
20 spouse, and in addition, the right of that spouse to half
21 of the rents would be recognized immediately on behalf of
22 the United States.

23 The foreclosure remedy, I've heard cases
24 describe it as a drastic remedy. Well, I don't know if
25 it's drastic, but it's a remedy that doesn't have to be

1 exercised, and that there are cases that explain
2 circumstances when it's appropriate in the court's view
3 not to do so.

4 QUESTION: But in your view, you always value
5 the taxpayer's interest at 50 percent?

6 MR. JONES: No. I think in the Rodgers -- well,
7 if the property's been sold, yes. If the property hasn't
8 been sold, and we're talking about in a foreclosure
9 context, I believe the Rodgers court goes through the
10 example of the varying life expectancies of the two
11 tenants, and which one -- and I believe what the Court in
12 Rodgers said was that each of them should be treated as if
13 they have a life estate plus a right of survivorship, and
14 the Court explains how that could well -- I think in the
15 facts of Rodgers resulted in only 10 percent of the
16 proceeds being applied to the husband's interest and 90
17 percent being retained on behalf of the spouse, but --

18 QUESTION: But there must be a foreclosure to
19 that extent?

20 MR. JONES: There -- that was a -- I believe
21 those were hypothetical facts that the Court discussed in
22 Rodgers.

23 QUESTION: Mr. Jones, during the continuance of
24 the marriage can either spouse force a sale?

25 MR. JONES: No, and that was the point made in

1 Rodgers also, that in any kind of joint tenancy -- by the
2 way, I should emphasize --

3 QUESTION: But I thought joint -- I may be wrong
4 in this. I thought a joint tenancy could be converted
5 into a common tenancy by the action of one --

6 MR. JONES: I misspoke. It's not in every joint
7 tenancy. It is a common feature of joint tenancies that
8 they can't be forcibly sold by one and, indeed --

9 QUESTION: During the continuance of the joint
10 tenancy.

11 MR. JONES: Correct, and that that was the case
12 in Rodgers --

13 QUESTION: Okay.

14 MR. JONES: -- where the homestead right could
15 not be --

16 QUESTION: But I take it from your earlier
17 answer that there is, in tenancies by the entirety there
18 is no such legal means of converting that tenancy into a
19 tenancy in common which then can either be the subject of
20 a forced sale or petition, is that correct?

21 MR. JONES: I believe that's correct, and I
22 believe it was also true in Rodgers of the homestead
23 estate, which is a common -- which is also a common
24 estate.

25 In fact, in this Court's opinion in Jacobs in

1 1939, where the Court said that we were not -- the Federal
2 tax laws were not bound by the ancient fictions of
3 tenancies by the entirety, the Court pointed out that a
4 joint tenancy and a tenancy by the entirety create the
5 same rights. The only difference is the fiction of the
6 marital unit, and the Court held in the Jacobs case, as it
7 had held 9 years earlier in the Tyler case, that that
8 feudal fiction or ancient fiction did not bind the tax
9 provisions, that the tax provisions were to be implied in
10 light of the actual rights of the tenants and not based
11 upon the artificial rules of State law, and then in Irvine
12 and in Drye just two terms ago this Court, in interpreting
13 the term, property, and rights to property and Federal tax
14 legislation and in the lien statute said that we look to
15 the realities of the taxpayer's right, and we're not
16 struck blind by legal fictions of artificial --

17 QUESTION: But the realities of taxpayer rights
18 depend on State law, don't they?

19 MR. JONES: The realities of the taxpayer's
20 right are drawn from State law, but we're not supposed
21 to -- I mean, in the words of the Court, let the
22 artificial rules of State law blind us to the realities of
23 those rights, and let me give you --

24 QUESTION: Well now, what's the difference, do
25 you think, between the artificial rules and the realities?

1 MR. JONES: Well, this Court has said that
2 difference can be seen in tenancies by the entirety, that
3 the realities are that the tenants -- I mean, it is a
4 fiction. The respondent admits it's a fiction. Every --

5 QUESTION: Well --

6 MR. JONES: The word fiction is what is implied
7 here.

8 QUESTION: You say it's a fiction. What do you
9 mean by it?

10 MR. JONES: What is a fiction is the idea that
11 neither spouse actually owns an interest in this property.
12 That's the fiction.

13 QUESTION: So is a corporation a fiction, but we
14 don't tax the shareholders for income of the corporation.
15 It's a fiction acknowledged at law and --

16 MR. JONES: It's a legal entity. It has an
17 existence. The marital unit is the fiction.

18 QUESTION: So is the marriage --

19 MR. JONES: The marriage --

20 QUESTION: -- for purposes of the tenancy by the
21 entirety.

22 MR. JONES: The marriage is the fact. What's
23 the fiction is that these spouses don't own anything.
24 Under State law they do own something. They own something
25 significant, as the supreme court of Michigan has said,

1 and let me give you an example of how courts have been
2 blinded by this fiction.

3 The line of cases that respondent relies on
4 begins with the Eighth Circuit decision of the United
5 States v. Hutcherson in 1951. In that case, which started
6 us down this path, the court made what are now clearly, I
7 think, two errors under this Court's precedents. The
8 first error that the court made was to say that we own --
9 that this question about what's property or a right to
10 property is solely a question of State law.

11 Well, we know that what's a question of State
12 law is what are the interests created, but whether it's
13 property or right to property is a question of Federal
14 law. The Court made that clear in '56 in Bess, emphasized
15 it again in National Bank of Commerce, and held it
16 specifically, what, two terms ago.

17 Now, the other thing that Hutcherson got wrong
18 right from the beginning was this idea that you -- that
19 the fiction of State law is controlling, and I'm -- what
20 the court said is, the interest of a tenant by the
21 entirety in the property cannot be subject to the Federal
22 lien because, in the words of the court, that interest is
23 like a rainbow in the sky, or like the morning fog rising
24 across the valley.

25 Well, once we get past the metaphorical fog,

1 there is indisputably actual value at the end of this
2 fictional rainbow. It is -- these people have pecuniary
3 rights, the rights to receive money, and in this case the
4 tenant had a right to receive half the proceeds of the
5 sale, and the United States is attaching that right to
6 receive money just like it would any other right to
7 receive money.

8 QUESTION: These are all contingent rights.
9 Would the Government attach or foreclose a piece of real
10 estate that had been bequeathed to the taxpayer's brother
11 and which would eventually come to the taxpayer,
12 perhaps --

13 MR. JONES: No.

14 QUESTION: -- depending upon what contingencies
15 occurred?

16 MR. JONES: And the Court made that point in
17 Drye. It made the difference between what is a legally
18 protected right and what is a -- what was the word you
19 were using?

20 QUESTION: Contingent.

21 MR. JONES: No, not a contingency.

22 QUESTION: A contingency.

23 MR. JONES: It was --

24 QUESTION: Expectancy.

25 MR. JONES: An expectancy, thank you. An

1 expectancy is something that is not a legally protected
2 right. The expectancy that was described in Drye was the
3 hope that the will on which you're a beneficiary won't be
4 changed before the decedent dies.

5 You have no right that the decedent won't change
6 the will. That's just an expectancy. But once the
7 decedent died, the right, the legally protected right that
8 was at issue in Drye was the irrevocable right to inherit
9 or to disclaim.

10 Now, once this tenancy has been created, these
11 tenants have these vested rights. Now, their rights may
12 be contingent in terms of events happening in the future,
13 but it's nothing more -- nothing is more common than to
14 say that a contingent right is a property interest.

15 QUESTION: Well --

16 QUESTION: Certainly the community property
17 States, the concept of a marital community has some
18 significance, I think. It isn't just a rainbow in the
19 sky. That doesn't mean that you don't look at what rights
20 the individual members of the community may have, but what
21 you're saying is --

22 MR. JONES: Well --

23 QUESTION: Go ahead.

24 MR. JONES: If I might, in a case called United
25 States v. Mitchell, involving the community property right

1 of a spouse to disclaim her interest in the income of her
2 spouse, this Court said that the disclaimer, this
3 retroactive disclaimer, this fiction of State law would
4 not be recognized and would not upset the application of
5 Federal tax principles.

6 QUESTION: But it was retroactive.

7 MR. JONES: It was a fiction.

8 QUESTION: Before the disclaimer occurred
9 there's no doubt who was entitled to the money. She was,
10 and this was more than a fiction. It was undoing a
11 property right that the State recognized until the
12 disclaimer occurred.

13 MR. JONES: Well, and indeed the State
14 recognizes these property rights. The State says there's
15 significant interest in property, and it isn't silly just
16 for me to stand here and say it's a fiction. It is a
17 fiction. This Court has said it's a fiction. In 1930 --

18 QUESTION: Mr. Jones, would you comment on one
19 aspect of the case that troubles me? Let's assume -- I
20 think there are two court of appeals decisions out there
21 that are squarely on point and against you, and you say
22 are incorrectly decided.

23 MR. JONES: Yes.

24 QUESTION: Let's assume they are incorrectly
25 decided, but they've been the only guidance for the tax

1 bar for 40 or 50 years, and is there other reliance
2 interests that the tax bar can say, well, we always
3 thought that, given those cases that Congress had not
4 sought to overrule, we have a right to follow them?

5 MR. JONES: Well, the tax bar is not a party to
6 this case, and -- but that's --

7 QUESTION: No, but we have to be concerned
8 about --

9 MR. JONES: Okay, well, that's --

10 QUESTION: -- the community's reliance on
11 decisions that have been given by the Federal courts.

12 MR. JONES: The answer -- I believe the answer
13 to your question is no, that there is no embedded reliance
14 on this principle because, as we pointed out in our brief,
15 even in Michigan there is an express caution given by the
16 State bar to title examiners saying that, in light of the
17 1975 enactment of this statute that gives each spouse an
18 equal right to all of the income and profits from the
19 property, that the State bar advised title examiners that
20 they could not give an opinion that the interest of an
21 individual spouse was not subject to the lien.

22 Moreover, in 1983, I believe it was, this Court
23 had a discussion about the status of tenancy by the
24 entirety under the Federal lien, and the majority opinion
25 in a footnote questioned these older cases, so I do not

1 think that a title examiner, especially in Michigan, would
2 be able to say that he had upset settled expectations.

3 QUESTION: So this case involves only Michigan,
4 and if you have States that do not provide that the --
5 each spouse has an interest in the income, it might be a
6 different answer.

7 MR. JONES: There is, indeed, a narrow basis
8 that you just described for resolving this case, and it
9 would be an appropriate way to resolve the case because we
10 have the fund -- we have here the voluntary -- the sale,
11 with the proceeds available for distribution, so we don't
12 have to reach the broader question of whether the
13 existence of the right of survivorship, which is an
14 undisputed personal interest, is sufficient for the lien
15 to attach and, a la Rodgers, be subject to a foreclosure
16 action. It would -- and --

17 QUESTION: I must say, when you get to the
18 survivorship, that's there I have real problems with your
19 case. I could just -- you answered my earlier
20 hypothetical by just saying, well, you know, there's a
21 contingency that the will might be changed. Well, let's
22 assume it's not a will. Let's assume it's an irrevocable
23 trust, under which you have a contingent future interest.
24 Would you really say that the Government can move against
25 the entire corpus of the trust just because there's a

1 contingent future interest on the part of a defaulting
2 taxpayer?

3 MR. JONES: The Government's lien attaches to
4 the interests of the contingent remaindermen, and there
5 are cases on that very point. I am not familiar with the
6 problem I think you're describing which is, well, can you
7 then foreclose on the trust, and how would we value --

8 QUESTION: Well, that's how the statute reads.
9 You can assert the lien on any property in which the
10 taxpayer has an interest.

11 MR. JONES: That's correct.

12 QUESTION: And you're saying the taxpayer has an
13 interest --

14 MR. JONES: Yes.

15 QUESTION: -- in this trust --

16 MR. JONES: Yes.

17 QUESTION: -- in which he has a future
18 contingency.

19 MR. JONES: That's correct.

20 QUESTION: I mean, that's a -- I --

21 MR. JONES: That's correct, but also that
22 section 7403 reserves the right of a district court not to
23 award foreclosure and, of course, foreclosure requires the
24 Government to do something.

25 QUESTION: We hope you get a tenderhearted

1 district judge. I don't think that that's --

2 MR. JONES: Well, the United States, so far as I
3 know this controversy that you're concerned about has not
4 been presented in an actual case, so I'm not sure that
5 it's a -- I mean, it's a theoretical issue that I don't
6 believe has been confronted, but what has been confronted
7 is, does the lien attach to contingent remainders, and
8 that's In re -- well, there's a lot of In re's. I think
9 it's Rosenberg's Will is the leading case on this. We
10 cited it in a footnote, and it explains that the Federal
11 tax lien applies to all property and rights to property.

12 QUESTION: Well then, how -- do you then value
13 the contingent remainder?

14 MR. JONES: Well, as I was saying, I don't know
15 of a case where a foreclosure has been sought on a
16 contingent remainder. What's probably the more likely
17 result, because it's the more economical result, is to
18 wait for the contingency to occur, and that's --

19 QUESTION: And the case you're talking about
20 where a lien was asserted against the contingent
21 remainder, what was it asserted against, after the
22 remainder had no longer been contingent?

23 MR. JONES: I would -- I'm -- to be honest, I
24 would be guessing, but my guess is --

25 QUESTION: Okay. I mean, that's a different

1 question.

2 MR. JONES: Well, the --

3 QUESTION: I want a case in which, on the basis
4 that the taxpayer had an interest --

5 MR. JONES: Right.

6 QUESTION: -- had a purely contingent interest
7 in some corpus. The Federal Government was enabled to
8 assert a lien against the entire corpus. That seems to me
9 extravagant.

10 MR. JONES: Well, as you use the word
11 contingency, that would include Rodgers, because that was
12 a case where there was -- a right of survivorship was the
13 valued interest, but there's also the Bank One case,
14 Spendthrift Trust, the right of a person to obtain income
15 from a Spendthrift Trust is subject to the Federal lien.
16 Any kind of right, legally protected, valuable interest
17 has been subjected to the Federal lien, and what the --
18 this case reduces to is the idea that simply by, that even
19 though they've, the State recognizes that there are
20 valuable, legally protected interests in each spouse, that
21 by calling it a -- a something else, that the lien
22 wouldn't apply, and that's exactly what the Court
23 indicated in Drye shouldn't happen, that the Court
24 indicated that the mere fact that the State doesn't
25 characterize this valuable, legally protected right as

1 property doesn't prevent the Federal lien from attaching.

2 I would like to reserve my time for rebuttal.

3 QUESTION: Very well, Mr. Jones.

4 Mr. Sutton, we'll hear from you.

5 ORAL ARGUMENT OF JEFFREY S. SUTTON

6 ON BEHALF OF THE RESPONDENT

7 MR. SUTTON: Thank you, Mr. Chief Justice, and
8 may it please the Court:

9 There are some serious misunderstandings about
10 the meaning of Michigan law which go to the heart of the
11 proper resolution of this case under Federal law. First
12 of all, the Government has relied very heavily on a 1975
13 Michigan statute that says, spouses in a tenancy by the
14 entirety have equal rights to rent and income and to
15 profits. That's section 1 of the statute that I just
16 quoted.

17 If you look at page 209 of that statute in the
18 Sixth Circuit appendix, regrettably not in your appendix,
19 you'll see that the second section of that statute says
20 that only applies to tenancies by the entirety created
21 after 1975. This tenancy was created in 1972. That
22 statute is utterly irrelevant. It in all events was
23 designed primarily just to deal with what happens when the
24 tenancy ends, that is, when there's a divorce, just to
25 make sure that both spouses have a right to the property.

1 A second misunderstanding, the Government says
2 that the rights to proceeds, once you have proceeds as a
3 spouse, that somehow that means the tenancy is over and
4 the creditors, Federal, State, city, private, can get at
5 it. That's wrong. Under Michigan law, Muskegon Lumber,
6 1953, Michigan supreme court case, says that it continues
7 as a tenancy in the entirety. Why? Because most people
8 sell their house to buy another. You wouldn't destroy
9 it --

10 QUESTION: Well, we're not used to resolving
11 questions of State law here. If you say the State law of
12 Michigan is one thing and the Government says the State
13 law of Michigan is the other, it's difficult for us to go
14 in and referee the thing. What is the strongest Michigan
15 case for your point of view?

16 MR. SUTTON: Your Honor, 1885, Vinton v. Beamer,
17 going forward to Sanford, going to Budwit v. Herr -- those
18 are, you know, separated by 20 or 30 years each -- every
19 single one of them makes clear that with respect to the
20 specific belonging-to language in this statute there is no
21 interest that belongs to one spouse or another. They're
22 indivisible interests. There's a unity of title and,
23 critically, if that unity of title is broken, Michigan law
24 says under Budwit v. Herr, a Michigan supreme court
25 decision, the tenancy is destroyed.

1 QUESTION: And you say the 1975 statute does not
2 affect this case at all?

3 MR. SUTTON: It's irrelevant, Your Honor. By
4 its terms it only applies to tenancies that are created
5 after 1975. That's section 2. It's in the act. That's
6 not legislative history. That's in the act.

7 QUESTION: Mr. Sutton, how does it differ from
8 other cases where under State law a predator can't touch
9 the thing, like a Spendthrift Trust, or like what was
10 involved in Drye? Even though not a single predator in
11 that State could touch that inheritance, the Federal
12 taxing authorities could, so there are many situations
13 where the property is exempt from reach, even where the
14 State doesn't call it property, calls it something else,
15 but the elements of what the person had leads the Federal
16 authorities to say this is the property of so-and-so, as
17 in the Spendthrift Trust, as in the case of the
18 disclaiming heir in Drye, so why is this any different?

19 MR. SUTTON: This is not a disclaimer or
20 exemption case for this basic reason. We're not relying
21 on the results under Michigan law. We're relying on the
22 rationale under Michigan law for the exemption. The
23 rationale under Michigan law is that neither spouse owns
24 an independent interest in any respect. Not even the
25 survivorship right under Sanford is considered an

1 independent interest.

2 QUESTION: Why was that different from a State
3 law that said Mr. Drye never had anything, we assume under
4 our State's law that he predeceased his mother?

5 MR. SUTTON: Your Honor, under Arkansas law in
6 Drye, the opinion notes that he did have a right to
7 alienate that interest once his wife died. That's exactly
8 what -- that was the point of the decision. For 9 months,
9 he had a right of control over the property and it may be
10 helpful -- I want to make sure I'm answering your
11 question -- to think about these interests in present
12 terms and future terms, and if you talk about present
13 interest, I think the way Drye talks about it is, you have
14 to have a present interest of pecuniary value over which
15 the taxpayer has exclusive dominion. That is not true in
16 a tenancy by the entirety. The closest you can come to
17 finding something over which the individual taxpayer might
18 have dominion of control are the future interests, the
19 right to proceeds, the right -- survivorship rights if you
20 outlive your spouse.

21 QUESTION: Could the Congress with ease enact a
22 statutory amendment to make tenants by the entirety
23 subject to liens?

24 MR. SUTTON: Absolutely, Your Honor. I would
25 submit that that's one of the strongest points supporting

1 Mrs. Craft's position. For 136 years --

2 QUESTION: Well, I mean, if you were a Senator
3 from Michigan wouldn't you say, well, you're taxing
4 property that doesn't belong to the taxpayer, this is
5 improper as a matter of law?

6 MR. SUTTON: That's exactly what Tyler
7 recognized, the 1936 or so U.S. Supreme Court decision
8 that yes, these are fictions under State law but, under
9 the Supremacy Clause, the Federal Government is entitled
10 to disregard them if it wishes and, notably in the estate
11 tax setting, that's an estate tax case, the Court -- in
12 that law, Congress specifically said tenancies by the
13 entirety are covered by the estate tax. Indeed, page 502
14 of Tyler says, but for the specification of tenancies by
15 the entirety by terms, the estate tax would not cover
16 those interests.

17 QUESTION: Well, our --

18 MR. SUTTON: That's our case. That's this case.

19 QUESTION: Our universe here is that the State
20 defines what's property and the Federal Government defines
21 what property can be liened.

22 MR. SUTTON: Yes, Your Honor.

23 QUESTION: That doesn't quite work, because one
24 of the sticks in the property definition is the right to
25 be liened, and so we're compromising that dichotomy even

1 by stating it, and it seems to me that all the Government
2 is doing here is saying, we're saying what property can be
3 liened, we're entitled to define that one stick in the
4 bundle.

5 MR. SUTTON: I'm not relying, Your Honor, on
6 what's lienable and what's not. Well, I am in terms of
7 the common law background. That's highly relevant that in
8 1866 no one would have thought this was a lienable
9 property interest, but when it comes to the present
10 Michigan law, I'm not relying on whether it's lienable
11 under Michigan law. I'm relying on why that's true, the
12 rationale for why it's not lienable.

13 You can't lien -- maybe this is the better way
14 to put it. You can't lien an innocent property owner's
15 property. If everything they're saying is true about this
16 somehow belonging to Don Craft, it is most assuredly also
17 true that it belonged to Sandy Craft, and Justice
18 Ginsburg, she did file her tax returns, independent tax
19 returns. She paid her taxes, and there's no more right
20 for the Federal Government to put that lien on your
21 property or mine, that it was --

22 QUESTION: Well, but if you're right about that,
23 Mr. Sutton, then your statement that Congress could easily
24 amend the statute to collect in this situation probably
25 isn't correct.

1 MR. SUTTON: Well, Your Honor, I did not mean to
2 say -- I did say easily, and I misspoke, and I'm glad to
3 have an opportunity to correct.

4 I think it would be very difficult, because of
5 the fact that under Michigan law the property ownership
6 interest might create a situation where the minute you
7 foreclosed, great, you got \$100,000 for Don's interest in
8 the property. Every dollar they took belongs to Sandy, so
9 it's -- it is a difficult area to regulate. It would be
10 a -- and -- but that's again exactly why, in gift tax,
11 estate tax, fair debt collection -- that's the Federal
12 fraudulent conveyance law, bankruptcy, every one of these
13 areas not only mentions the tenancy specifically, but it
14 then goes on to do what Justice Kennedy and Mr. Chief
15 Justice Rehnquist's questions indicate. You've got to be
16 very specific about how in the world you value these
17 interests, and what you decide to do once you've decided
18 to regulate them.

19 QUESTION: Mr. Sutton, is it true that any
20 conventional property interest in Michigan can be held in
21 the entirety form?

22 MR. SUTTON: No, Your Honor. Personal
23 property -- it does not apply to personal property. The
24 only exceptions are proceeds from real estate, the example
25 I gave when you sell the house.

1 QUESTION: Does --

2 QUESTION: What about -- bank accounts can't
3 be --

4 MR. SUTTON: No, Your Honor.

5 QUESTION: And shares can't be --

6 MR. SUTTON: No, Your Honor. No.

7 QUESTION: What about the income from the real
8 estate? Is it your position that before this statute was
9 passed even the income from the real estate was held --

10 MR. SUTTON: Absolutely, and that's --

11 QUESTION: -- in tenancy by the entirety?

12 MR. SUTTON: Let me give you -- S&B Trust, it's
13 one of the cases we've cited, says that very point, and
14 that makes sense. It's still property that they -- it
15 came from their joint marital asset, and they use it
16 together.

17 I want to go --

18 QUESTION: How does it differ from community
19 property?

20 MR. SUTTON: Community property has several
21 differences. It's much more like a joint tenancy. First
22 of all, you can petition, which incidentally is exactly
23 what the effect of this statute is, to by law petition
24 their interests. Secondly, you have shares in the
25 property, and this is exactly like Rodgers and National

1 Bank of Commerce. There were divisible shares that could
2 be levied.

3 QUESTION: I thought the community property is
4 owned by the community, which is a separate entity.

5 MR. SUTTON: No, Your Honor.

6 QUESTION: Community property is not owned by a
7 community which is a separate entity?

8 MR. SUTTON: No. It really works a lot like the
9 homestead. I want to be clear here. It's true that the --
10 in one sense the home in a community property State or a
11 homestead State is still one where they both have
12 interests as to all the property, so in that respect
13 you're right, they still have joint interests. But the
14 critical legal distinction respecting the 19th Century all
15 the way to this century is that in one setting you had
16 divisible shares, and that's why one spouse in a home
17 State setting, community property setting, could
18 unilaterally incumber or destroy the tenancy.

19 QUESTION: I'm not sure you can generalize as to
20 community property. I think the law varied in -- among --
21 between the community property States. Some would say one
22 thing, some would say the other.

23 MR. SUTTON: Your Honor, you're right, and if
24 I --

25 QUESTION: The hornbook that we looked up just

1 says that community property can be severed only with the
2 consent of both spouses in the event of divorce, or in the
3 event of death of one of the spouses. It's a book called
4 Real Property, by Bernhardt and Burkhardt.

5 MR. SUTTON: Well --

6 QUESTION: Again, I don't know that that's
7 authoritative, or maybe we made a mistake, but it
8 certainly was my impression that community property is
9 owned by a community, which is a different legal entity,
10 and I also thought that community property couldn't be
11 separate without the consent of the spouse.

12 MR. SUTTON: Well, that -- Your Honor --

13 QUESTION: Is that wrong?

14 MR. SUTTON: -- if -- let's assume for the sake
15 of argument, and I'm not -- let's assume it's true, you
16 said it's true, that community property States are just
17 like tenancy-in-the-entirety States. That's fine by us.

18 QUESTION: Well, I know, but all it means is --

19 MR. SUTTON: The exact same argument applies.

20 QUESTION: -- that if you're right, that in
21 probably a third or more of the country, suddenly the IRS
22 can't assert any liens, and it's a little tough to believe
23 that Congress would have thought that that's what it was
24 doing with this statute.

25 MR. SUTTON: Oh, Your Honor, I respectfully

1 disagree. In the very -- the backyard of Congress they
2 are saying tenancies by the entirety are exempt. I mean,
3 in the District of Columbia, which Congress has sovereign
4 prerogatives over, they've said from the beginning that we
5 favor these marital community property interests over
6 those of creditors.

7 QUESTION: Mr. Sutton --

8 QUESTION: Yes, that may be, but why -- I mean,
9 here, a lot of property in this country is owned by
10 communities, i.e., the husband and wife together, and I
11 imagine that people are quite free to take their real
12 property in the form of tenancy by the entirety.

13 All right, now here the property interest is
14 definite. There's no doubt that the husband is entitled
15 to a lot of money, and there's nothing imprecise about it,
16 nor is there really anything speculative about it, unless
17 you go and divide it into a present and future. All those
18 divisions you've made are purely legal ways of looking at
19 what in reality is an absolutely precise and valuable
20 property interest owned by the husband.

21 All right, now why should I accept an
22 interpretation that's going to exempt vast amounts of
23 property from this statute --

24 MR. SUTTON: A couple of thoughts, Your Honor.

25 QUESTION: -- under those circumstances?

1 MR. SUTTON: This is not a community property
2 case, and I think it would be dangerous for me to --

3 QUESTION: But I'd like to know what the
4 implications are --

5 MR. SUTTON: If --

6 QUESTION: -- because it's one thing if we're
7 deciding a case -- yes.

8 MR. SUTTON: If you find, in each of the States
9 that you're concerned about, the interests are defined
10 just as they are in Michigan, which is to say, it's an
11 indivisible interest, no shares, it follows just from what
12 you've said in Rodgers and National Bank of Commerce that
13 you can't lien the property, and what you've got to do is
14 wait for a survivorship interest, wait for a sale,
15 destruction of the tenancy.

16 But if there's a problem here, Your Honor,
17 Congress has known about it. This has been true for 136
18 years.

19 QUESTION: Mr. Sutton, how many States are there
20 that have tenancies by the entirety?

21 MR. SUTTON: 14 that have them in the
22 traditional way we're talking about, where it's an
23 indivisibility of title, plus the District of Columbia.

24 QUESTION: And some of them, at least according
25 to a case that both of you cited, do provide tenancy.

1 Tenancies by the entirety can hold business assets,
2 personal property, even money may be held in some States,
3 so if your theory holds, then a couple could insulate
4 everything that they have simply by holding it all --

5 MR. SUTTON: Well, to the extent Congress is
6 worried about that, it's surprising in 1954 that they
7 didn't amend the statutes, even more surprising --

8 QUESTION: Well, didn't this Court comment on
9 that in the Rodgers decision by saying that the fact that
10 Congress didn't do something -- you can't infer much from
11 not doing, according to this Court. Maybe the Senate
12 rejected the clarification that the House sought, not
13 because it disagreed with it, but more likely because it
14 found it superfluous.

15 MR. SUTTON: The 1954 history is relevant, I
16 would think all would agree, when it comes to the notion
17 that somehow this is a great tax-avoidance problem.
18 Congress at a minimum was told about this issue and
19 decided not specifically to do anything about it. Whether
20 the law was changed or not --

21 QUESTION: And this Court commented on it, that
22 maybe Congress didn't do anything because it thought that
23 the -- this --

24 MR. SUTTON: Your Honor, by 1966 -- I mean --
25 well, by the present, we've got seven courts of appeals.

1 Every court of appeal that's looked at the issue has said
2 the tax lien does not apply when just one spouse has a tax
3 debt. In 1990, critically --

4 QUESTION: In this particular case, wasn't the
5 Sixth Circuit saying, well, maybe there are good arguments
6 on both sides, but we've got that old precedent that we
7 have to follow. Wasn't that the background of this case?

8 MR. SUTTON: I'm not sure what the Sixth Circuit
9 had in mind, but it certainly followed its precedent,
10 didn't think Drye, Irvine had changed the law
11 necessarily --

12 QUESTION: Well, it couldn't have thought about
13 Drye the first time around, because Drye wasn't there.

14 MR. SUTTON: No, but the second time it did.

15 QUESTION: They had already made the decision.
16 Then there was a big discussion about law of the case and
17 law of the circuit, so I don't think that they ever had
18 this case with Drye squarely in front of them, because
19 they decided the basic case without Drye and later they
20 were relying on law of the case, law --

21 MR. SUTTON: Well, I certainly don't know why
22 each court of appeals has done what it did, including the
23 Sixth Circuit, but the fact is, they've all done the same
24 thing.

25 I think it's also notable to the extent there's

1 a tax avoidance concern lurking here, why is it in 1990,
2 when Congress passed the Fair Debt Collection Act --
3 that's the Federal fraudulent conveyance statute -- why
4 did it specifically exempt tenancy by the entirety
5 property? Under that law today you could do exactly what
6 happened in this case and the Federal Government would
7 have nothing to say about it.

8 QUESTION: I suppose, if you follow the -- your
9 rationale to its furthest extent in a State such as the
10 one Justice Ginsburg referred to in which business assets
11 can be held in tenancy by the entirety, a husband and wife
12 could hold a -- have a closely held corporation by the
13 entirety and, on your theory, they wouldn't even be liable
14 for income tax because it would be the entirety alone that
15 would be liable. Is that the --

16 MR. SUTTON: No. No, Your Honor.

17 QUESTION: -- fair consequence of what you're
18 saying?

19 MR. SUTTON: Under section 61, which is the
20 provision of the Internal Revenue Code that taxes
21 property, income from tenancy by the entirety property is
22 still taxed. It's never been a --

23 QUESTION: No, but the income goes into a bank
24 account held by the -- held in entirety form. If they're
25 careful enough, so that they set up their corporation,

1 their savings account, their checking account,
2 everything's held in entirety form, there wouldn't be any
3 individual taxpayers under your theory.

4 MR. SUTTON: Well, I'm not going to be in a
5 position to cite any cases for this point, the point that
6 I'm going to make, so you're going to want to check me on
7 it, but I don't think there's any doubt that when it comes
8 to income from tenancies-by-the-entirety property, the
9 case law, the code, the regulations make it clear that
10 they're still -- you're still taxable. It's just a
11 question of --

12 QUESTION: Well, I don't think there's any
13 doubt, either, but I think the fact that there isn't any
14 serious doubt about it is, at least so far as the States
15 that Justice Ginsburg's example referred to, there also is
16 an inconsistency between the fact that we have no doubt,
17 as you say, about taxability and the consequences of your
18 theory.

19 MR. SUTTON: Well, it's a -- they're very
20 different concepts and maybe it's important, particularly
21 in light of Justice Breyer's comment about this just
22 seeming to be a fiction, there's a real function behind
23 this concept, and the function is that, while the tenancy
24 is premised on this nice notion of two hearts beating as
25 one, the fact is that doesn't always happen, and the whole

1 point of the tenancy and the indivisibility of title is
2 that it precludes one spouse unilaterally from destroying
3 or otherwise encumbering the tenancy.

4 Keep in mind, that's exactly what happened in
5 this case.

6 QUESTION: Well, but the --

7 QUESTION: Then in your mind the critical factor
8 is the factor that creditors under State law can't get a
9 hold of it.

10 MR. SUTTON: No, Your Honor. If it's
11 indivisibly owned, that means that every lien on Don's
12 interest was a lien on Sandy's interest, and Sandy paid
13 her taxes. If there's one first principle of lien law,
14 it's that --

15 QUESTION: Okay. Then you're saying it's the
16 theory of the thing.

17 MR. SUTTON: It's --

18 QUESTION: Okay. If it's the theory of the
19 thing --

20 MR. SUTTON: It's a theory that has a fact --

21 QUESTION: If it's the theory of the thing,
22 primarily, plus the fact -- all right. If it's the theory
23 of it, why --

24 QUESTION: Go ahead.

25 QUESTION: If it's the theory of it, doesn't the

1 same theory exist with community property? Doesn't the
2 same theory exist with joint tenancies? For all I know,
3 the same theory exists when people said, you don't own any
4 land, you just hold it from the king, and you have feudal
5 obligations unless you pass along the seasons. I mean,
6 that's -- if we're going on the theory of the thing --

7 MR. SUTTON: I really hope I can clarify this
8 because I do think it cuts the heart of this case. Most
9 States that don't have tenancies by the entirety do have
10 joint tenancy, so that really is the key comparison, and
11 as to those States, when you have a joint tenancy, first
12 of all they are divisible interests.

13 If they're divisible interests, that means one
14 spouse unilaterally can incumber and in some instances
15 sell that right, whether it's a future right, the right of
16 survivorship, or a present right with respect to some
17 interest in the property, so that's the whole point. The
18 whole point is, in those States people have decided to
19 marry, buy property together, but yet from the beginning
20 one spouse unilaterally could destroy or incumber the
21 property.

22 In a tenancy by the entirety, at the outset,
23 every decision you make regarding that property has to be
24 made with the consent of your spouse.

25 QUESTION: Well, is the question of taxability

1 at bottom a question of Federal law, do you suppose?

2 MR. SUTTON: I would submit, Your Honor, that
3 when it comes to the tax lien statute the Court has said
4 several times that Congress did not define the words,
5 property, rights to property belonging to. We look first
6 to State law --

7 QUESTION: But is it a question of Federal law,
8 and as a policy matter we generally look to State law?
9 But isn't that itself a question of Federal law, the
10 extent to which we're going to look to State law?

11 MR. SUTTON: Well, Your Honor, I had thought
12 that you take the State law's property interests as you
13 find them in the 50 or 51 jurisdictions, depending on how
14 you want to look at it, and then, depending how the
15 States --

16 QUESTION: But for tax purposes, I'm just
17 wondering if at bottom it isn't, in fact, a question of
18 Federal law.

19 MR. SUTTON: It is a question of Federal law
20 what the, quote, consequences of those State law
21 definitions are, but let me give you, I think, a good
22 indication of this, and it relates to a hard issue raised
23 by Justice Ginsburg. What about tenancy by the entirety
24 where it was a joint bank account, which is clearly a much
25 harder case, not presented here. Here, we're talking

1 about the marital home.

2 But in National Bank of Rodgers, which was about
3 a joint tenancy, the Court said in a 5-4 decision that you
4 could levy on one person's joint bank account. Why was
5 that? Because under State law, the taxpayer, or he had a
6 right to all of the money in the account unilaterally,
7 whenever he wanted it, and if he misused it, that was
8 simply to be a fight among the other joint tenants.

9 Justice Blackmun in writing that decision made
10 it crystal clear that that case turned on the fact that
11 under State law the taxpayer had a unilateral right to
12 take all the proceeds. If that State law had said
13 differently, that the only way you can take out the
14 proceeds is with the consent of the spouse, there's --

15 QUESTION: Which case are we talking about now?

16 MR. SUTTON: National Bank of Commerce, 1985,
17 joint bank account. If that State law had said, the only
18 way you can take out the money in the bank account is with
19 the consent of the other, the Court, by the terms of its
20 decision, would not have allowed that levy, and remember,
21 the levy and lien statutes have the exact same language,
22 which, you know, in order to lien something you've got to
23 be able to levy it, generally speaking.

24 So I don't -- that proves to me -- I hope this
25 answers your question, Justice O'Connor -- that these

1 definitions of State law do matter. They are controlling
2 when it comes to the consequences, and I hope I've showed,
3 when it comes to --

4 QUESTION: Mr. Sutton, I think that there was
5 considerable attention in the Drye case to exactly what it
6 was you look to State law for. You look to State law to
7 find out what the person had. Whether that was
8 characterized as property or not was a Federal law
9 question, and Drye could not have been clearer that you
10 look to see what sticks the State law gives.

11 MR. SUTTON: But Your Honor, what have I said
12 that makes you think I'm disagreeing with that?

13 QUESTION: Well, I thought you said that whether
14 it's property is determined by State law.

15 MR. SUTTON: I'm simply saying the interests in
16 the property are determined by State law.

17 QUESTION: What the taxpayer had is determined
18 by State law.

19 MR. SUTTON: Exactly.

20 QUESTION: But not the label that we put on it.

21 MR. SUTTON: Absolutely.

22 QUESTION: For Federal tax purposes.

23 MR. SUTTON: Absolutely, and I'm sorry if I left
24 that ambiguous. I mean, let's talk about this in terms of
25 the classic --

1 QUESTION: Your point there is right there.
2 Your point is, I take it, that in this case State law
3 defines the property such that it belongs to both parties
4 and, indeed, it is not possible under State law without
5 the death, divorce, or consent of one of the parties for
6 anyone to get a hold of a penny of the -- of that
7 interest.

8 MR. SUTTON: Absolutely, Your Honor.

9 QUESTION: That's your point --

10 MR. SUTTON: To use the sticks --

11 QUESTION: -- that both of those things have to
12 be true, the theory and the practice.

13 MR. SUTTON: Yes.

14 QUESTION: All right.

15 MR. SUTTON: To use the sticks in the bundle
16 analogy, every interest under State law in Michigan
17 regarding this tenancy, each stick has to be exercised two
18 by two, not one by one, but every one of them is two by
19 two, husband and wife, and certainly not three by three,
20 which is what the Federal Government is saying here.

21 QUESTION: But it is for the Federal Government
22 to determine to what property the lien extends.

23 MR. SUTTON: I couldn't agree more, Your Honor.
24 I mean, not -- I wouldn't say the executive branch. I
25 mean, in the 1971 Benson decision they admitted that the

1 lien does not cover tenancy by the entirety. If you look
2 at that 1971 decision, they admitted in that case it
3 doesn't cover it, so this is not an administrative
4 deference situation at all, but the Federal Government,
5 through Congress and the President, does have a right to
6 extend it. I will admit, it's not going to be easy, and
7 if we could go back to thinking about --

8 QUESTION: Their point to the contrary is
9 basically, you're right, or assuming you're right, it's
10 still definite enough to get at, and you really violate
11 State law policy there only if you sell the property, you
12 see, but as long as -- and, indeed, if they sell it on
13 their own, that's their problem. You'll get the proceeds.
14 If they don't sell it on their own, you know, the
15 community -- if they don't sell it on their own, then it
16 becomes a question of how the judge will enforce the lien,
17 and there your clients or the equivalent would be free to
18 go in and say, don't force me to sell the property, et
19 cetera.

20 MR. SUTTON: I hope I'm responding to your
21 question. I think what I hear you saying is that boy,
22 this is just a lien, they're just placeholders, it doesn't
23 mean they'll necessarily foreclose, and therefore Sandy's
24 interests really aren't being hurt. I would submit that's
25 wrong. Sandy Craft --

1 QUESTION: You say Sandy. She's noted as the
2 respondent as Sandra.

3 MR. SUTTON: Excuse me, Your Honor. I'll say
4 Mrs. Craft, to be even more careful. Excuse me.

5 But in this particular case, the lien does have
6 an impact on their ability collectively to make decisions
7 about the property. Let's say the month after the lien
8 attached, they decided, we need to borrow against the
9 house to have enough money to pay for our kids' college
10 education, because the roof has collapsed. They can't do
11 that.

12 Prior to the lien, she had a right to make a
13 decision not with the Federal Government about how to use
14 this property, but with her husband, and a classic tenet
15 of lien law is you get no more lien rights than the debtor
16 had, and you've got a situation here where they're 1)
17 trying to act as a spouse, but 2) dictating how this
18 property ought to be used, when that was a decision that
19 under Michigan law only the two spouses could make
20 together.

21 I want to go back to a point that I went over a
22 little bit too quickly. The consequence --

23 QUESTION: I'd just like to ask you one question
24 about Michigan law in origin, because you said this goes
25 back to 1866, so it was probably before the Married

1 Women's Property Act, so -- at least in some States it
2 was, so whatever rights there were to control and make
3 decisions, they were all in the husband at that time.

4 MR. SUTTON: Most of the Married Women's
5 Property Acts, almost all of them were passed before 1866,
6 so first of all that defect, I would call it, in the old
7 tenancy simply was no longer true, and even in some States
8 where that continued, it was still this, I guess it's jure
9 uxoris concept, that it wasn't the husband as an
10 individual having an opportunity to do this, it was the
11 husband acting on behalf of the wife, but that just isn't
12 true under Michigan law. They still have these equal
13 interests in the property, as proved by the fact of what
14 happens on a divorce.

15 The point I glossed over and I wanted to make
16 sure was understood, the issue here is not just whether
17 the lien attaches to the tenancy, I would submit that
18 under Michigan law, if a lien does attach, it destroys the
19 tenancy, so we have a situation where a unilateral act of
20 one spouse has destroyed the tenancy by operation of law
21 under Michigan.

22 It becomes a tenancy in common that destroys the
23 right of survivorship, and that also means because there
24 are now divisible interests in the property that one
25 spouse, unilaterally again, can incumber the property and

1 expose the marital home to these debts of just one spouse,
2 so this is not just a modest question then.

3 QUESTION: But --

4 QUESTION: I thought, Mr. Sutton, this is a
5 question of what the Federal taxing authority can do.
6 Everything that you've been speaking about is something
7 that Michigan can say, no creditor of these people --

8 MR. SUTTON: Your Honor, I agree with you,
9 Michigan could change the law, though I think at that
10 point the rationale and the effect would line up.

11 QUESTION: I don't think there's any question
12 that Michigan law, just as Arkansas law, continues to say,
13 creditors, you can't get at this disclaimed property, same
14 thing Michigan can say. The only thing that Michigan
15 can't control if this decision should go the other way is
16 what the Federal taxing authorities can do, not one thing
17 about any other creditor under Michigan law.

18 MR. SUTTON: The problem for people like the
19 Crafts is that they've already said it. In *Budwit v. Herr*
20 they say, the minute you destroy the unity of ownership
21 you destroy the tenancy, so I --

22 QUESTION: Isn't the concern that the tenancy
23 not be destroyed, in effect as a result of a consensual
24 act by one of the spouses, an alienation by a spouse
25 alone --

1 MR. SUTTON: The nonconsensual act, right.

2 QUESTION: -- the incurring of debt by one
3 spouse alone as a consensual act, i.e., going on a
4 spending spree?

5 But here, the consensual act of the spouse has
6 nothing to do with it. It's not a consensual act of the
7 spouse that the spouse has to pay income act --

8 MR. SUTTON: Oh, but Your Honor, it is.

9 QUESTION: -- and therefore it seems to me
10 outside the rationale that you're proposing for the
11 tenancy.

12 MR. SUTTON: I respectfully disagree, Your
13 Honor. It's exactly the rationale. There's no difference
14 from Mr. Craft unilaterally trying to incumber the
15 property with his own loan, using the property as a
16 mortgage to back it up.

17 QUESTION: Sure it is. He goes out and says, I
18 want a loan to buy a Cadillac. That's certainly a fair
19 concern of the State in protecting the wife. That concern
20 doesn't extend to a situation in which the tax law of the
21 United States says, you're going to pay tax on your income
22 whether you like it or not.

23 MR. SUTTON: But Your Honor, it's a unilateral
24 act, number 1, by the spouse, and number 2, it is a lot
25 like a loan.

1 QUESTION: What's a unilateral act, earning the
2 money?

3 MR. SUTTON: It is a lot like a loan, Your
4 Honor. If you need \$50,000 a month to support some bad
5 habit, you can get it by borrowing from a bank or not
6 paying your taxes. It has the exact same effect when it
7 comes to the unilateral conduct of one spouse undermining
8 the marital property. But again --

9 QUESTION: And then, if Congress said this
10 explicitly, the same thing would follow, everything that
11 you said. Congress would then be destroying --

12 MR. SUTTON: They could do what they did in the
13 estate tax, which is regulate it specifically. I would
14 submit, it is not an easy process.

15 QUESTION: I thought that the -- oh.

16 MR. SUTTON: Why doesn't Mrs. Craft have a
17 takings argument the minute this lien attaches for the
18 entire value of her property? Why is that not the case?
19 It's not obvious to me.

20 QUESTION: Just as Mr. Drye didn't when his
21 State law said --

22 MR. SUTTON: But there was only one taxpayer in
23 Drye. You didn't allow a lien -- excuse me.

24 QUESTION: Thank you, Mr. Sutton.

25 MR. SUTTON: Thank you, Your Honor.

1 QUESTION: Mr. Jones, you have 3 minutes
2 remaining.

3 REBUTTAL ARGUMENT OF KENT L. JONES

4 ON BEHALF OF THE PETITIONER

5 MR. JONES: Thank you. I have only a couple of
6 points. The first one is that the tenancy involved in
7 this case was destroyed when it was transferred from the
8 husband to the spouse. That's one. That's the first
9 instance when it was destroyed, and secondly it was
10 destroyed when the wife then sold it to a third party.

11 What we have are proceeds that are not subject
12 to a tenancy by the entirety. We have proceeds that
13 are -- to which the former tenants are each entitled to 50
14 percent. The right, their right to have 50 percent of the
15 proceeds is confirmed by 577.71 of the Michigan Code,
16 which was enacted in 1975, but it preexisted that as we
17 pointed out in the cases that we've cited in our reply
18 brief.

19 I will say that the suggestion that this statute
20 that gives each spouse an equal right in the property only
21 applies to tenancies created after 1975 is a new
22 contention. It's not addressed in the briefs. It catches
23 us by surprise, but I will point out that the Dow case --

24 QUESTION: It shouldn't be a surprise if it's in
25 the statute you're quoting to us.

1 MR. JONES: What I will -- what is in the
2 statute that I --

3 QUESTION: Is it in the statute?

4 MR. JONES: What I have in my possession is a
5 copy that says that the effective date is 1975, and I do
6 know that in Dow v. State, decided by the supreme court of
7 Michigan in 1976, they applied that statute to a tenancy
8 that had been created prior to 1965. This statute that
9 was enacted in 1975 reflects a policy of, I suspect, every
10 State in the modern era to recognize the equal rights of
11 the spouses and the tenants in the property, and not to
12 respect --

13 QUESTION: Suppose it didn't. I mean, is it
14 your -- are you conceding, then, that the Government
15 cannot assert a lien on a real tenancy by the entirety?

16 MR. JONES: No, not at all. I'm saying that we
17 have such a lien in this case, both from the right of
18 survivorship, if we ever had to get there, but more
19 importantly because we have a lien in the right to receive
20 proceeds. This statute that was enacted in '75 does not
21 directly address the proceeds issue. The proceeds right
22 preexisted the statute. What the statute addressed was
23 the equal right to income during the existence of the
24 tenancy by the entirety, and the equal right to control
25 the management.

1 QUESTION: Mr. Jones, can I ask you one
2 question? I hate to take up your reply time. In your
3 view, will the decision in this case control in community
4 property States, raising the same question?

5 MR. JONES: Well, I think the principles that
6 you apply will, of course, control, and --

7 QUESTION: Yes, but --

8 MR. JONES: And whether a decision in this case
9 addressed principles that would extend or apply in that
10 situation as well as this, I can't say. I --

11 QUESTION: Can -- do they -- in a community
12 property State, can one spouse force division over -- to
13 an unwilling spouse?

14 MR. JONES: Under State law there are
15 limitations, but those State law limitations have already
16 been held to be ineffective against Federal tax
17 provisions.

18 QUESTION: But the community property is subject
19 to the debts incurred during the marriage?

20 MR. JONES: That's correct and, again, in the
21 Mitchell case the Court held that State law fictions about
22 the relative rights in community property States are no
23 more binding on the Federal tax collector than in other
24 contexts.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Jones.

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The case is submitted.

(Whereupon, at 11:01 a.m., the case in the
above-entitled matter was submitted.)