

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, BY AND THROUGH INTERNAL
REVENUE SERVICE, Petitioner v. BRUCE J.
McDERMOTT, ET AL.

CASE NO: 91-1229

PLACE: Washington, D.C.

DATE: Monday, December 7, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, BY AND THROUGH :
4 INTERNAL REVENUE SERVICE, :
5 Petitioner :
6 v. : No. 91-1229
7 BRUCE J. McDERMOTT, ET AL. :

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9 Washington, D.C.
10 Monday, December 7, 1992

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:02 a.m.

14 APPEARANCES:

15 JAMES A. FELDMAN, ESQ., Assistant to the Solicitor
16 General, Department of Justice, Washington, D.C.; on
17 behalf of the Petitioner.
18 T. RICHARD DAVIS, ESQ., Salt Lake City, Utah; on behalf of
19 the Respondents.

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1 PROCEEDINGS

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 91-1229, United States, by and
5 through the Internal Revenue Service v. Bruce J.
6 McDermott.

7 Mr. Feldman.

8 ORAL ARGUMENT OF JAMES A. FELDMAN

9 ON BEHALF OF THE PETITIONER

10 MR. FELDMAN: Mr. Chief Justice, and may it
11 please the Court:

12 This case concerns the relative priority of a
13 Federal tax lien and a private state law lien as to a
14 specific piece of real property that was acquired by the
15 debtor after the date the Federal tax lien was filed. It
16 is after-acquired property in that sense.

17 The relevant facts can be summarized simply.
18 The Federal tax liens at issue in this case arose on
19 December 29, 1986 at the time the taxes against the debtor
20 were assessed. On July 6, 1987 respondent Zions docketed
21 its judgment against the debtors. That judgment under
22 state law constituted a lien against the debtors' real
23 property, then owned and after-acquired. On September 9,
24 1987, about 2 and a half months later, the IRS filed a
25 notice of Federal tax lien. And finally about 2 weeks

1 after that on September 23, 1987 the debtors acquired the
2 subject property known as the South Street property, the
3 right to which are at issue in this case.

4 The order therefore was the Federal tax lien
5 arose, then the state judgment was docketed, then the
6 Federal tax lien was filed, and then the debtors acquired
7 the property. And the question is whether the IRS's lien
8 has priority as to that piece of after-acquired property.

9 The general rule as to the priority of a Federal
10 tax lien is that a Federal tax lien has priority over all
11 competing interests unless at the time the Federal tax
12 lien arose the competing interest was specific and
13 perfected. The rationale, I think, of that rule is that
14 the Federal tax lien can only take so much of the property
15 as is the debtors' and if at the time the Federal tax lien
16 arises some other lien has come and essentially grabbed a
17 part of that property, the Federal tax lien can only take
18 the balance of the interest that was the debtors'.

19 Now, there are exceptions to that rule and one
20 of the exceptions is section 6323(a), and that provides
21 that a Federal tax lien is not valid against a judgment
22 lien until the Federal tax lien is filed. Now respondent
23 claims that in this case, this case arises, he is entitled
24 to the benefit of 6323(a), and the effect of that
25 provision therefore is just to move the date from the date

1 of assessment, from the date the tax lien arises on which
2 you determine priorities, to move the date until the date
3 the tax lien was filed, which in this case was September
4 9, 1987.

5 I think there are thus two issues in this case.
6 The primary question and the one that the court of appeals
7 got wrong was whether the debtors' interest was specific
8 and perfected as of September 9, 1987. In our view, I
9 mean, in our view the lienholder's interest was not
10 specific and perfected as of that date, and accordingly
11 the tax lien would have priority.

12 There is a second question which the court of
13 appeals didn't rely on, but I think maybe the district
14 court did, and that is whether the fact that the Federal
15 tax lien attached to the property at the same time as the
16 state tax, as the judgment lien, whether that alters the
17 result that would follow from a finding that the state
18 lien wasn't specific and perfected as of the date of
19 filing of the Federal tax lien.

20 QUESTION: May I ask, Mr. Feldman, now, if we
21 weren't dealing with after-acquired property but had a
22 judgment lien on all property of the debtor, would you
23 think a subsequently filed Federal lien would take
24 priority?

25 MR. FELDMAN: If, well, I think that that is

1 exactly what this Court decided in the case of United
2 States against Vermont.

3 QUESTION: Yes, I thought so too.

4 MR. FELDMAN: And the issue in that case was
5 whether a lien is sufficiently specific, that is if it
6 just identifies all of the debtor's property rather than
7 giving a specific legal description of the property.

8 QUESTION: That's pretty specific, if it
9 attaches to all.

10 MR. FELDMAN: Right. And this Court held that
11 that was sufficiently specific. And I think the task that
12 is derived from Vermont is whether, on the date of filing
13 of the Federal tax lien whether, if you can determine on
14 that date that a particular piece of property was subject
15 to the judgment lien, then it was specific and perfected
16 on that date. If you can't --

17 QUESTION: Well, is it enough that you can say
18 it's clear that any subsequently acquired property will be
19 immediately covered by the judgment lien? And it is clear
20 that it would be, isn't it?

21 MR. FELDMAN: Yes, I don't think -- there's no
22 question under state law that judgment lien --

23 QUESTION: So specificity isn't a problem.

24 MR. FELDMAN: Right. We don't think specificity
25 is a problem. The problem is that under the settled task

1 for whether a judgment lien is specific and perfected is
2 whether the identity of the lien or the amount of the lien
3 and the property subject to the lien were established.

4 In this case the property subject to the lien
5 was not established as of the date on which you measure
6 the priorities, which is September 9, 1987.

7 QUESTION: Well, whose lien attached first in
8 your view, or were they simultaneous?

9 MR. FELDMAN: Well, that actually gets to the
10 second question I mentioned. Both liens attached to the
11 property at the same time, but there's nothing hinges on
12 when the Federal lien attached to the property. The case
13 turns on, the question is whether as of the date of notice
14 whether the state lien had already attached to the
15 property. And since, in our view since it hadn't --

16 QUESTION: Well, what's the statute designed to
17 protect, reliance interests --

18 MR. FELDMAN: Yes.

19 QUESTION: -- of the creditor?

20 MR. FELDMAN: Yes, primarily.

21 QUESTION: And does the creditor have the
22 judgment lien credit or have any reliance interest on
23 property subsequently acquired, do you think?

24 MR. FELDMAN: I don't think he does. I think
25 actually if you look at the statute and you look at what

1 Congress did in 1966 when it overhauled the statute and
2 passed the Tax Lien Act, it specifically dealt with the
3 question of after-acquired property and it looked at all
4 the types of after-acquired property and types of security
5 interests and made a narrow exception to the general rule
6 of Federal priority as of the date of notice was filed, a
7 narrow exception to that rule for certain kinds of
8 commercial financing transactions, only as to certain
9 kinds of property, and only for a limited period of time,
10 that is 45 days after the tax lien was filed.

11 QUESTION: If there had been no Federal
12 Government here but we had a situation of private parties,
13 what would be the result under the Uniform Commercial Code
14 of state law generally for after-acquired property?

15 MR. FELDMAN: It's a little bit hard to answer
16 that question because the Federal Tax Lien, I'm not sure
17 what, how, that is not something that is governed by the
18 Uniform Commercial Code. There would be some interest in
19 property, certainly the interest of a purchased money
20 lender or the interest of an inventory financier or an
21 accounts receivable financier, just the parties who are
22 protected by the Tax Lien Act. Those interests under the
23 UCC as a general matter, although it's quite complex,
24 would have priority over a judgment lien creditor as to
25 the after-acquired property.

1 But, on the other hand, a Federal tax lien
2 itself is not subject to the UCC and it's difficult to say
3 what, there's no, really no other way to answer that
4 question.

5 QUESTION: Is your argument that nothing turns
6 on when the Federal tax lien was perfected?

7 MR. FELDMAN: Nothing turns on when it attached,
8 and I think that follows from a number of --

9 QUESTION: Well, is that the same as perfected?

10 MR. FELDMAN: Yes, I think that's part of
11 perfection. If you look at the test for perfection it's
12 whether the identity of the lienholder, the amount of the
13 lien, and the property subject to the lien was
14 established. And I think part of establishing that the
15 property was subject to the lien was establishing that
16 this particular lien had taken hold of this particular
17 property.

18 QUESTION: So everything turns on when the
19 judgement creditor's lien perfected, but nothing turns on
20 when the Government's lien was perfected?

21 MR. FELDMAN: Right. The relevant thing you do
22 is take, what you do is you take a snap shot of the
23 situation as of, in ordinary cases as of the date the
24 Federal taxes were assessed, but in cases under 6323(a) at
25 the date that the tax lien was filed. You take a snap

1 shot of that situation and say as of that date had the
2 judgment lien attached to the property at, was a definite
3 amount, was the identity of the lienholder specific. If
4 it wasn't, then the tax lien takes the property and the
5 judgment lien is junior to it.

6 If it had already attached to that property and
7 was established as of that date that that particular piece
8 of property was subject to the lien, then that lien would
9 be superior to the Federal tax lien.

10 QUESTION: What happens with the proceeds in a
11 title company? Suppose the judgment lien creditor is
12 superior to the Government because its lien was perfected
13 before the assessment and before notice of the lien, and
14 then the property is sold and money is sitting in the
15 escrow company. Does the judgment creditor's lien follow
16 that money, or is this after-acquired property so that the
17 Government's subsequent lien could now attach and be
18 superior?

19 MR. FELDMAN: The question there would be
20 whether you trace the proceeds of the property, whether
21 the lien on the property attaches also -- you trace the
22 priorities through to the proceeds. I can't tell you for
23 sure. I think that you do, but I can't give you a firm
24 answer on that.

25 QUESTION: What if the South Street property

1 here had been purchased with an exchange of other real
2 property to which the judgment creditor's lien had
3 attached, then surely it would carry over to the South
4 Street property, would it not?

5 MR. FELDMAN: Right. I would think it would.
6 In this case it wasn't, the debtor had no rights in the
7 South Street property to which the judgment lien could
8 attach as of September 9.

9 QUESTION: Well, how was the, what was the
10 consideration for the acquisition of the South Street
11 property?

12 MR. FELDMAN: The debtor had previously owned
13 the property and had sold the property. He had
14 essentially what amounts to a mortgage, except that under
15 Utah state law in this circumstance it was considered an
16 interest in real property, in personal property and not
17 real property.

18 QUESTION: And therefore the judgment creditor
19 lien didn't attach?

20 MR. FELDMAN: It didn't attach because it was
21 personal property at that time and the judgment lien only
22 attaches under state law to real property. It was only
23 when that interest became a real property interest of the
24 debtors, which was on September 23, after the Federal tax
25 lien was filed, it was only then that the judgment lien

1 attached to the property.

2 QUESTION: Mr. Feldman, in a case of
3 simultaneous perfection do you take the position that
4 6323(a) breaks the tie?

5 MR. FELDMAN: I think our position is that, if
6 you mean a case of simultaneous attachment, if we're
7 talking specifically about that type of perfection --

8 QUESTION: Yes.

9 MR. FELDMAN: It would be our view that both the
10 amendments, the clear intent of the amendments which is to
11 limit the extent of a security interest in after-acquired
12 property for a period of 45 days and only in certain given
13 cases which did not include judgment liens, it would be
14 our position that both that and 6323(a) and (c), I'm
15 sorry, 6321 and 6323(a), all of those support our
16 position.

17 6321, which is the basic rule, says that the
18 Federal tax lien arises at the time the taxes are
19 assessed. It doesn't say at the time the taxes are
20 assessed or attached, whichever is later, or if there is
21 some kind of perfection that it arises at a different
22 time. That states a Federal rule that for purposes of,
23 for Federal law the Federal tax lien arises at the date
24 the taxes are assessed.

25 Now, 6323(a) switches that, moves that, just

1 simply moves that date back to the date that the notice is
2 filed, but you still do the same thing on that date that
3 you would do in one of the other cases under 6321, which
4 is you look as of that date as to whether the judgment
5 lien had attached.

6 QUESTION: What does that tell you about
7 simultaneity, when two of them attach at precisely the
8 same moment?

9 MR. FELDMAN: I guess, I think the import of our
10 argument is that the date that the Federal tax lien
11 attaches in an after-acquired property case is not a
12 legally significant date, that Congress set those legally
13 significant dates as being either when they're assessed or
14 when the tax lien is filed. The fact that it attached at
15 a later date is not legally significant. And in fact when
16 Congress considered the after-acquired property issue, in
17 all cases of after-acquired property you're going to have
18 situations similar to this in which the state lien and the
19 Federal lien, or the judgment lien and the tax lien attach
20 at the same moment to the property.

21 Congress wanted to limit the cases in which a
22 private party could have superiority over the Federal tax
23 lien among those cases of after-acquired property in very
24 limited ways, only for a period of 45 days, for example.
25 If the court of appeals were right here the judgment

1 creditor has a far superior interest to those the Congress
2 specifically wanted to give priority to in the Tax Lien
3 Act because the judgment lien would be good indefinitely
4 for after-acquired property. If the debt -- it's true in
5 this case it was 2 weeks, but if the debtor had acquired
6 the property a year later under the court of appeals'
7 opinion the result would have been exactly the same.

8 And I don't think that's consistent with what
9 was Congress' decision to limit very carefully the classes
10 of after-acquired property that would have, as to which a
11 private creditor would have superiority over the Federal
12 lien.

13 QUESTION: Mr. Feldman, are you talking about
14 Congress' decision -- you're talking about the 1966
15 decision?

16 MR. FELDMAN: Yes, because that's where it --

17 QUESTION: Is it your view that the law with
18 respect to the issue that's before us today changed in
19 1966?

20 MR. FELDMAN: No, it's not. I think --

21 QUESTION: So we really, the 1966 act really
22 does shed any light on the problem that we have before us,
23 does it?

24 MR. FELDMAN: Well, let me put it this way.
25 The, I think the rule of law that we're suggesting governs

1 this case was clear long before 1966.

2 QUESTION: So you don't need to rely on it.

3 MR. FELDMAN: I don't have to rely on that, but
4 I do think Congress then enacted those amendments in 1966
5 in reliance on that.

6 QUESTION: In other words you're relying on what
7 you perceive to be Congress' understanding in 1966 as to
8 what the law then was?

9 MR. FELDMAN: That's correct. And I think that
10 by enacting the statute that it did in 1966 it really
11 adopted that prior law, and the exceptions to the rules
12 about after-acquired that it enacted in 1966 wouldn't make
13 any sense if it turned out that other, all kinds of other
14 security interests other than the ones Congress named had
15 a priority over the Federal lien that was so much more
16 substantial than the priority that Congress chose to give
17 the particular classes of creditors.

18 QUESTION: Where do you first quote the 1966
19 statute in your briefs or cert petition?

20 MR. FELDMAN: In the brief -- excuse me?

21 QUESTION: Where do you first quote it in your
22 papers, the 1966 -- I know it's in the reply brief. Was
23 it in the --

24 MR. FELDMAN: Oh, no, it was in our brief. It
25 was on about page 15, the section from 15 to 18 addresses

1 the 1966 act. I think there is another line of cases
2 that --

3 QUESTION: Oh, I had the wrong brief. Yes,
4 thank you.

5 MR. FELDMAN: There's another line of cases that
6 also suggests the same result, and that is this Court has
7 never specifically addressed a case involved after-
8 acquired property but it has addressed cases involving a
9 very closely analogous situation, and that is what might
10 be called after-acquired debt or after-incurred debt.

11 In the cases of United States against Pioneer
12 American Insurance, United States against Equitable Life
13 Insurance, those cases involved mortgages that included
14 clauses providing that if the mortgage was foreclosed that
15 the attorneys' fees for the foreclosure would be added to
16 the principal amount of the debt due secured by the
17 property. In both of those -- and so those cases involved
18 after-incurred debt, a debt that is added on to the
19 secured amount. In both of those cases those attorneys'
20 fees were incurred after the Federal tax lien was filed,
21 and in both of those cases this Court held that that
22 after-incurred debt, that the security interest as to that
23 after-incurred debt was junior to that of the Federal tax
24 lien.

25 I think the same result, there's no reason not

1 to adopt the same reasoning and the same result --

2 QUESTION: What was the reasoning in those
3 cases? Would interest that accrued later be junior to?

4 MR. FELDMAN: You know, I'm not sure what the
5 rule was before 1966 as to interest. I believe that in
6 1966 Congress specifically provided for interest and
7 actually provided for some other kinds of costs that were
8 attendant, for instance on a mortgage, to be included in
9 the principal amount as a specific exception to the
10 general rule.

11 But the point was that these after-incurred
12 debts in this Court, this Court decided in two different
13 decisions that these after-incurred debts, even if they
14 were relatively certain in amount and relatively certain
15 to be incurred, that the security interest as to those
16 debts was junior to the Federal tax lien.

17 QUESTION: What was the reasoning of the Court?

18 MR. FELDMAN: It was applying the test for
19 perfection that I have suggested here, which is, in those
20 cases the amount of the debt -- you remember the test
21 requires the identity of the lienholder, the amount of the
22 debt, and the property subject to the debt be established.

23 QUESTION: That would go for interest too, I
24 would think.

25 MR. FELDMAN: It probably would, yes. I think

1 that's right.

2 QUESTION: It seems a rather strange ruling.

3 MR. FELDMAN: That's right. Well, Congress did
4 take care of some of those situations elsewhere in the
5 amendments in provisions other than those that I was
6 talking about before. In any event, I don't, there's no
7 reason why the, why if the amount of the debt was not
8 clear because the debt hadn't actually been incurred at
9 the date of filing, therefore the interest in that, that
10 after-incurred debt was not superior to the Federal tax
11 lien, there's no reason why the court of appeals ruling
12 that after-acquired property should be treated any better.
13 I think those cases provide a close analogy to the
14 decision that should be reached here.

15 QUESTION: You agree, don't you, Mr. Feldman,
16 that if the South Street property had been owned by the
17 debtor here at the time that the judgment lien was filed
18 in Salt Lake County, then the judgment creditor lien would
19 be prior?

20 MR. FELDMAN: Yes. If the taxpayer acquired an
21 interest in that property, a real property, an interest in
22 the property recognized by state law between July 9, 1987
23 and September 9, 1987, at any point during that time, that
24 interest, the judgment lien would have a superior interest
25 in that property to the Federal tax lien. But it's our,

1 in this case because the debtors' interest in the property
2 was not acquired until after the Federal tax lien was
3 filed, the Federal lien should be superior.

4 If there are no other questions I'd like to
5 reserve the balance of my time.

6 QUESTION: Very well, Mr. Feldman.

7 Mr. Davis, we'll hear from you.

8 ORAL ARGUMENT OF T. RICHARD DAVIS

9 ON BEHALF OF THE RESPONDENTS

10 MR. DAVIS: Mr. Chief Justice, and may it please
11 the Court:

12 In 1827 Justice John Marshall enunciated what
13 was, he deemed, a cardinal rule, which was a prior lien
14 gives a prior claim entitled to prior satisfaction from
15 the subjected binds. This has become known as the
16 doctrine of first in time as first in right, and it has
17 become the general Federal common law in the area of
18 competing lien claims. This has also been adopted and
19 codified by use of the, for the Government in establishing
20 the competing liens between a Federal tax lien and certain
21 competing liens as provided in section 6323.

22 Because of a contractual stipulation which
23 preceded the litigation in this matter and the
24 acquiescence by the IRS in the Tenth Circuit opinion in
25 all but one issue, the facts of this case are very simple

1 and make a singular issue presented to this Court. That
2 is will this Court apply the first in time rule in favor
3 of a prior perfected judgment lien over a subsequently
4 filed Federal tax lien when property purchased by the, as
5 against property purchased by the debtor subsequent to all
6 the liens, the after-acquired issue.

7 The facts are not in dispute. It is important
8 to note that Zions Bank did everything that was required
9 of it to perfect under state law a general lien on all
10 real property owned by the debtor located in the County of
11 Salt Lake.

12 Section 6232 does not explicitly resolve the
13 issue of after-acquired property, but it provides the
14 framework which, very compatibly with prior decisions of
15 this Court and with the intentions of Congress as shown
16 since the institution of the Federal tax lien in 1866,
17 allows a consistent pattern of recognizing the integrity
18 of a judicial judgment lien obtained by a private party.

19 QUESTION: The Government's argument, Mr. Davis,
20 as I understand it, is that the property used to purchase
21 the South Street property was property to which the
22 judgment creditor's lien did not attach under Utah law.
23 Do you dispute that?

24 MR. DAVIS: I do not. That is correct.

25 QUESTION: So that when the South Street

1 property came into the hands of the debtor it had not been
2 previously subject to any lien under state law.

3 MR. DAVIS: Not pursuant -- that is correct as
4 the facts in this case have been shaved down. Both
5 parties have, they abandon whatever rights they had to any
6 property of Mr. McDermott, or any rights they had to this
7 property until the property was repurchased by McDermott
8 at the foreclosure sale. Then both liens attached to that
9 property simultaneously. The question is whether the
10 prior entry of the judgment lien has any effect at all as
11 against a subsequent filing of the notice of tax lien. We
12 believe it does.

13 The choateness doctrine, as it has been declared
14 by this Court, was codified by the Treasury Department in
15 its regulations. It requires, it sets forth, as counsel
16 has stated, a requirement of the establishment of the
17 amount of the lien, the identity of the lienor, and the
18 establishment of what property is to be liened. The
19 property, being general in nature, is sufficient under
20 prior pronouncements of this Court.

21 QUESTION: I don't know -- I don't see how the
22 third requirement is met. You don't know what property it
23 attaches to until some property is after-acquired. If
24 other real estate had been acquired it would have attached
25 to other real estate. If this real estate had not been

1 foreclosed upon, this real estate, it would not have
2 attached to this real estate. How can you possibly say
3 that the property has been identified?

4 MR. DAVIS: This issue, I think it's a
5 difference between the word identified and established.
6 The standard is not now, nor ever has it been through this
7 Court or by statute, that the property must be identified,
8 merely that it must be established. That was the issue
9 which came before this Court in both the New Britain and
10 Vermont cases. Both of them sought -- well, the most
11 relevant one would be the Vermont case wherein a prior
12 state lien which was general in nature was attacked by the
13 general Federal tax lien, which was also general. This
14 Court held that the fact that the state lien was general
15 in nature, covering all of the property, it identified no
16 property in particular, was sufficient.

17 QUESTION: It was all, it covered all extant
18 property. If you ask what property is covered you could
19 have pointed, you say it's this property or this property
20 or the other property. In your case if you asked what
21 real estate is covered by this lien you'd say well, gee,
22 I, I, it covers this current real estate, but what future
23 real estate I can't tell you until he acquires it. That's
24 quite different from the Vermont case, it seems to me.

25 MR. DAVIS: There's no question the facts are

1 different, and I agree, but I think this is not an
2 illogical step to say that a general lien which is
3 established upon all property, either now or hereafter
4 acquired, is still on all property, whether now or
5 hereafter acquired. And the establishment is set forth.
6 It's not the identity that's important, but it's the
7 establishment of that property, the fact that it's all
8 property. That's how I read that case.

9 QUESTION: Well, I don't find, I find that not
10 only not in accord with the 1966 understanding of
11 Congress, but not in accord with what in general
12 commercial law is regarded to be the perfection of a lien.
13 I think just the common law understanding is that the lien
14 doesn't attach until the property is identified, and
15 that's why the provision of the Uniform Commercial Code
16 containing an after-acquired property clause was a real
17 innovation, because it was generally understood in the
18 common law that you can't attach until you know what the
19 property is. It's simply --

20 MR. DAVIS: I believe that's the case with the
21 Uniform Commercial Code. I believe there is a distinction
22 between personal property and real property, and we're
23 only dealing with real property. The common law in the
24 State of Utah and the Federal common law is predicated
25 upon first in time and first in right and does not require

1 that that property be specifically identified. All
2 property which is covered by a lien is subject to that
3 lien when it states all property.

4 I believe that the Uniform Commercial Code is
5 directed only to personal property because of its nature,
6 which can, it can be consumed or transported and other
7 issues that way. As far as real property it stays and is
8 subject to permanency as set forth in the recorder's
9 office in the relevant county.

10 QUESTION: I understand, of course the UCC
11 applies only to personal property, but what I'm suggesting
12 is that it made an innovation with respect to personal
13 property, and that the old law with respect to personal
14 property was the same as the old law with respect to real
15 property, that you don't have a perfected lien until you
16 know what the property is. Do you think in common law it
17 was, there was a distinction between personal and real
18 property, you could perfect a lien before you knew what
19 the property was?

20 MR. DAVIS: Certainly there could be no lien
21 until the property was established upon which that lien
22 could be set.

23 QUESTION: Sure.

24 QUESTION: In the Vermont case, Mr. Davis, the,
25 as I understand it under Vermont law the lien attached to

1 all of the debtor's real property and it wasn't any more
2 specific than that, but you could at least go into county
3 or I guess in Vermont town recording offices and find out
4 what property the debtor had as of the time. Here in July
5 there was no way to identify the South Street property as
6 property of the debtor.

7 MR. DAVIS: The debtor had no real property
8 interest in that, in the South Street property, that's
9 correct.

10 QUESTION: Well, no -- yeah, no real property,
11 so this is certainly a case that is not in any way
12 controlled by the Vermont case.

13 MR. DAVIS: It's not controlled by it, it's just
14 the same reasoning that I would put forth that a specific
15 lien is not required, a general is sufficient.

16 QUESTION: Well, but, but in, the words may not
17 be all that important but under Vermont law as of the time
18 the lien was filed you could, you knew what specific
19 pieces of real property that lien attached to.

20 MR. DAVIS: It would be discoverable, that's
21 correct.

22 QUESTION: Yeah. And under your theory
23 certainly that wouldn't be the case.

24 MR. DAVIS: Generally that is correct. This
25 case had specific facts which made it different as a

1 matter of fact. Zions did understand the fact that it
2 would, that the debtor would be obtaining title to that
3 property soon or there was a good chance that was
4 happening, because --

5 QUESTION: But that doesn't, that doesn't affect
6 the lien.

7 MR. DAVIS: That did not affect the lien, but it
8 gave, Zions had knowledge that that would be coming into,
9 that the property would be coming into Mr. McDermott's
10 hands because of the nature and the assessing of the
11 foreclosure notices.

12 QUESTION: But that can't bind another judgment
13 and it certainly can't bind the Government, the fact that
14 Zions may have had knowledge.

15 MR. DAVIS: All parties had knowledge because
16 that was recorded. For the foreclosure a lien, a notice
17 of the foreclosure had to be filed. That was why, and
18 it's that issue of reliance which was addressed earlier
19 which is important. Reliance was important to a judgment
20 lien. A creditor who has a lien or who has a claim
21 against a party will not pursue that party if he knows the
22 party is impecunious, if he knows there will be no
23 property thereafter to obtain.

24 In this case and in many cases where the
25 creditor understands that the party is going to be

1 obtaining property either through foreclosure or gift or
2 devise or some such way, there would be a reliance that
3 was exercised on the half of that judgment lien creditor.

4 QUESTION: But how does that fit into the
5 congressional statute here, the fact that the competing
6 judgment lien creditor may have relied on the judgment
7 debtor to eventually acquire property?

8 MR. DAVIS: I think the statute is silent as to
9 after-acquired property. I think the framework which
10 allows the recognition of a general lien is as far as we
11 can go in looking at the statute to find whether this will
12 fit within the choateness doctrine.

13 QUESTION: I didn't know that choateness had
14 anything to do with reliance.

15 MR. DAVIS: I think the reason for, the
16 choateness doctrine requires that the lien be, that the
17 lienor be identified, the amount be ascertained, and the
18 property be established. I believe the reason for that is
19 so that anyone else can rely upon what that lien is all
20 about. I think the service is entitled to reliance also
21 upon the actions of other entities. I think that
22 Congress, not only in 1966 but beginning in 1913 and again
23 in 1939, began not to cut back on private competitors with
24 Federal tax liens, rather to allow those liens to compete
25 fairly as on an equal footing with the Federal tax lien.

1 I think the, it's important to understand the
2 time of perfection in either lien or both liens is
3 important in any case, whether it's before or after the
4 acquisition of property to which that lien will apply, to
5 encourage the diligence of filing, the diligence of
6 enforcement of claims and liens upon property. If that
7 does not happen the secret lien doctrine, which was the
8 beginning doctrine which was used in 1866, then carries
9 over. Basically what we have here is a secret lien of the
10 United States which comes in and primes a lien which was
11 placed by a private lien claimant.

12 I believe that the congressional intent clearly,
13 under 1966 acts and prior to that as reviewed by various
14 Federal courts, states that the purpose of that act was
15 merely to put them on equal footing and encourage both
16 parties to act diligently in obtaining what rights they
17 are going to receive.

18 Only two circuits have looked at simultaneous
19 attaching or perfection. Those are the Fifth Circuit in
20 the Southern Rock case, and the Tenth Circuit in
21 McDermott. Both circuits saw that it was important to
22 encourage the diligence, encourage that parties can rely
23 upon record title acts in the various counties in which
24 the liens are set.

25 Zions acted diligently. It performed all acts

1 required of the bank to perfect its general lien on all of
2 Mr. McDermott's real property located in Salt Lake County.
3 It is neither logical nor equitable to allow a 2 month
4 later lien come and prime and subordinate the bank's lien.
5 The integrity of the record title acts throughout the
6 county or the country relies on the consistent judicial
7 support of preferring a prior recorded lien to those
8 subsequently recorded.

9 The judicial and legislative preference for
10 Justice Marshall's cardinal rule over the IRS's current
11 desire to resurrect the secret lien doctrine must continue
12 to protect all creditors and preserve confidence in the
13 system.

14 If I might digress a bit on the 1966 act, as
15 the, as counsel mentioned, that several amendments to that
16 act showed that Congress tried to cut back on private
17 rights. Basically those concerned issues which are not
18 relevant to this matter. The UCC issue, the purchased
19 money security interest, neither of those are relevant to
20 this case nor the issues at this Court. Basically the
21 Congress gave the judgment lien creditor a priority to act
22 on an equal footing requiring recording, perfection in a
23 traditional manner of perfection of real estate liens,
24 equally, without regard to the supreme rights of the
25 sovereign.

1 This Court can accomplish the reaffirmation of
2 the principle of first in time by reaffirming, by
3 affirming the decision of the Tenth Circuit and allowing
4 the general lien to have attached effectively to the
5 after-acquired property.

6 Thank you.

7 QUESTION: Thank you, Mr. Davis.

8 Mr. Feldman, you have 12 minutes remaining.

9 REBUTTAL ARGUMENT OF JAMES A. FELDMAN

10 ON BEHALF OF THE PETITIONER

11 MR. FELDMAN: I just wanted to mention, Mr.
12 Chief Justice, section 6323(e), in response to your
13 question before, would give the holder of a security
14 interest that's superior to a tax lien a right to the
15 interest that accrues even after the tax lien was filed.
16 That's 6323(e).

17 QUESTION: Thank you.

18 MR. FELDMAN: If there's no other questions --

19 QUESTION: Mr. Feldman, I do have a question. I
20 meant to ask this before. At page 14 of your brief you
21 address the hypothesis that the liens were, became, were
22 perfected simultaneously, and you say in effect that the
23 statute says that if the private lien were not, did not
24 attach first then the Government, the Government wins a
25 tie. And you seem to be quoting the statute, but I don't

1 think the statute says that. And I wonder could you
2 comment a little bit on what, why you would say if there
3 were a tie you wouldn't somehow or other share the
4 proceeds or something, but rather would give the
5 Government priority?

6 MR. FELDMAN: Yeah, I mean, there's two, I think
7 there's two distinct questions there. One is where there
8 really is a tie would be a case, I would regard a case as
9 for instance the Fifth Circuit case, the Southern Rock
10 case, where there really was simultaneously with the
11 Federal filing there was a state filing, and that would be
12 a real tie case.

13 I think the underlying rationale, even in a case
14 like that the Government should win, because I think the
15 underlying rationale is that unless the prior, is that the
16 Federal tax lien is a very potent form of lien and unless
17 at the time the Federal tax lien either arises or is
18 filed, if at that moment the other lien hasn't already
19 taken the property the Federal tax lien is what attaches
20 to the debtor's property and has a superior interest then.

21 QUESTION: But this is, there's no specific
22 statutory provision addressing the question, is there?

23 MR. FELDMAN: I think that you could read the
24 word until in 6323(a) to accomplish that.

25 QUESTION: That's what you'd rely on?

1 MR. FELDMAN: Yes.

2 QUESTION: Is there a regulation specifically on
3 the point you're making?

4 MR. FELDMAN: I don't think there's a regulation
5 specifically on the point I'm making. There is, the
6 regulation does make clear that in a case like this the
7 respondent is not a judgment lien creditor because in
8 order to, it can't take advantage of the 6323(a) exception
9 because under the statute you're not a judgment lien
10 creditor unless, as this Court has said repeatedly, your
11 interest, the identity of the lienholder, the amount of
12 the lien, and the property subject to the lien are
13 established at that point in time.

14 QUESTION: You say in this case there wasn't any
15 tie at all --

16 MR. FELDMAN: No, in this case there wasn't a
17 tie. In this case --

18 QUESTION: -- because your lien was filed
19 earlier.

20 MR. FELDMAN: That's -- well, we were -- no, we
21 filed later than they filed, but as of the time we filed
22 they didn't have any interest in this property at all. In
23 fact it's a stronger case than the numerous cases --

24 QUESTION: But you, your lien, you think your
25 lien attached to this after-acquired property as of the

1 date that you filed, first filed your lien?

2 MR. FELDMAN: That would be one way to put it.
3 I think that the --

4 QUESTION: Well, that's the only, that's what
5 you're claiming.

6 MR. FELDMAN: Right.

7 QUESTION: Otherwise there would be a tie.

8 MR. FELDMAN: I think the question of when our
9 lien attached to the property is not a legally, there's
10 nothing that makes that a legally significant question.
11 If it -- then that is really to say the same thing as the
12 date of attachment was as of the date that it was filed,
13 or in the case that didn't come within one of the 6323(a)
14 exceptions it would be when the Federal tax lien arises,
15 which Congress provided was the date of assessment.

16 QUESTION: And why did your, why did the
17 Government's Federal tax lien in September attach to the
18 South Street property when the earlier July lien didn't?

19 MR. FELDMAN: Again, I think the key point is
20 that the date --

21 QUESTION: Well, answer my question.

22 MR. FELDMAN: Right. We did, we attached to the
23 property on September 23, 1987, on the same date as
24 respondent --

25 QUESTION: Why? Because your lien covered

1 personal property as well as real property?

2 MR. FELDMAN: Well, that's a separate question.
3 We, our lien did cover real property as well as personal
4 property. It was the holding of the district court that
5 we waived our rights to the taxpayer's personal property.
6 We think that was mistaken, but we didn't, don't challenge
7 that here.

8 QUESTION: So when did your lien take effect?

9 MR. FELDMAN: Our lien attached to the property
10 on, at the same time as respondents', on September 23,
11 1987, but the priority of the Federal lien should be
12 determined as of the date of filing. The question is
13 whether as of the date we filed, whether at that point
14 respondents' lien was specific and perfected, and it
15 wasn't in this case.

16 QUESTION: So you say your lien as of the date
17 of filing covered the South Street property?

18 MR. FELDMAN: Yes. I mean, that would, legally
19 that would be, that would have the same effect as the --

20 QUESTION: Obviously, you know, you're not, you
21 don't feel comfortable saying yes. Why not?

22 MR. FELDMAN: Well, I think the Federal lien
23 attached on September 23, 1987. I just don't think that
24 attachment is a relevant question to ask in determining
25 who has, attachment of the Federal lien --

1 QUESTION: Well, permit me an irrelevant
2 question then.

3 (Laughter.)

4 MR. FELDMAN: Yes. I'm comfortable in saying
5 that on September 23, 1987 that was the date that the
6 Federal lien attached.

7 QUESTION: Attached to the South Street
8 property.

9 MR. FELDMAN: That's right. But that the
10 priority of the United States, as is the case with many of
11 the exceptions in the Tax Lien Act and elsewhere in the
12 UCC when you're dealing with prior, with private
13 creditors, it is frequently the case that the priority is
14 not measured from the date of attachment but is measured
15 from some other date. And it's our position that under
16 Federal law the priority is measured from the date of
17 filing in the 6323(a) case.

18 QUESTION: Well, this is, you know that there is
19 no such word as choate, but choate is to inchoate as sult
20 is to insult. I mean --

21 (Laughter.)

22 MR. FELDMAN: Have I used the word?

23 QUESTION: Somebody has used it around here. I
24 heard it.

25 MR. FELDMAN: I've been trying not to. Thank

1 you.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
3 Feldman.

4 The case is submitted.

5 (Whereupon, at 10:42 a.m., the case in the
6 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

United States, by and through Internal Revenue Service

✓ Bruce J. McDermott

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BY Ann Marie Federico

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