

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ROHN F. DRYE, JR., ET AL., Petitioners v. UNITED
STATES

CASE NO: 98-1101 C-1

PLACE: Washington, D.C.

LIBRARY

DATE: Monday, November 8, 1999

NOV 17 1999

PAGES: 1-42

Supreme Court U.S.

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

ORIGINAL

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

1999 NOV 16 P 3:49

OR THE

UNITED STATES

CAPTION: BOHNER, DREW ET AL. v. BARRER, JAMES

PAGES

CASE NO. 98-1115

PLACE: Washington, D.C.

DATE: Monday, November 8, 1999

PAGES: 43

ALLERSON REPORTING COMPANY

1411 17TH STREET, N.W.

WASHINGTON, D.C. 20036

202 338 2200

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X
3 ROHN F. DRYE, JR., ET AL., :
4 Petitioners :
5 v. : No. 98-1101
6 UNITED STATES :

7 - - - - -X
8 Washington, D.C.
9 Monday, November 8, 1999

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:05 a.m.

13 APPEARANCES:

14 DANIEL M. TRAYLOR, ESQ., Little Rock, Arkansas; on behalf
15 of the Petitioners.

16 KENT L. JONES, ESQ., Assistant to the Solicitor General,
17 Department of Justice, Washington, D.C.; on behalf of
18 the Respondent.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	DANIEL M. TRAYLOR, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	KENT L. JONES, ESQ.	
7	On behalf of the Respondent	21
8	REBUTTAL ARGUMENT OF	
9	DANIEL M. TRAYLOR, ESQ.	
10	On behalf of the Petitioners	39
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 98-1101, Rohn F. Drye v. United States.

5 Mr. Traylor. You're the only lawyer to come by
6 himself we've seen in a long time.

7 (Laughter.)

8 ORAL ARGUMENT OF DANIEL M. TRAYLOR

9 ON BEHALF OF THE PETITIONERS

10 MR. TRAYLOR: Mr. Chief Justice, members of the
11 Court, may it please the Court:

12 For our Socratic dialogue I am armed with a
13 borrowed Gideon and the fruit. This is -- these aids go
14 right to the jugular of this case, and the genesis of the
15 case, which is Chapter 3 of Genesis.

16 What we have here is, when the serpent extended
17 the fruit to the offeree, free will said that the offeree
18 had a right to accept or reject the gift. Assuming that
19 that offeree was a tax delinquent, the Government's
20 position is that their 6321 Federal tax lien attached at
21 the moment that the serpent extended the fruit. That is
22 not --

23 QUESTION: Well, of course, the IRS was not in
24 Paradise.

25 (Laughter.)

1 MR. TRAYLOR: I'm -- that is where the case
2 starts, is with the idea of free will, that people have a
3 right to accept or reject a gift. The Government don't
4 believe that. They believe that when you have the right
5 to make that decision and grab the fruit, that their lien
6 attached to that personal right of decision to elect.

7 I don't believe that that's the law of this
8 Court, as announced by this Court. I don't believe --

9 QUESTION: Mr. Traylor, the Government is not
10 relying on the Good Book, but it is relying on title 26 of
11 the Internal Revenue Code and there the matter of
12 disclaimer is dealt with in the estate and gift tax
13 context, but it isn't -- the permission for a disclaimer
14 appears expressly in the estate and gift tax.

15 There is no such provision for the Tax Lien Act,
16 so the Government is saying, Congress did not choose to
17 provide for disclaimer in that context, so there is none.

18 MR. TRAYLOR: What Congress said was that for
19 their tax lien to attach, the taxpayer must have property
20 or rights to the property. When Mrs. Drye died, at the
21 instant of her death, the Government's position is that
22 Mr. Drye acquired a right to property, or property in her
23 estate. That is not the law of the State of Arkansas, and
24 it is not the law that this Court has pronounced.

25 QUESTION: But as I understood it, Mr. Traylor,

1 at least the Eighth Circuit felt that way, that under
2 Arkansas law your client acquired a property interest upon
3 death, because he didn't remit it for a number of months
4 afterwards.

5 MR. TRAYLOR: Well, he has 9 months within which
6 to make that personal --

7 QUESTION: Yes, well, who owned the real estate
8 during the 9 months before the decision was made? Who
9 owned it, do you suppose?

10 MR. TRAYLOR: The law is very clear that the
11 estate owned it.

12 QUESTION: You don't think, in the case of real
13 property, that the title went to the beneficiary --

14 MR. TRAYLOR: Absolutely not.

15 QUESTION: -- under Arkansas law?

16 MR. TRAYLOR: Absolutely not.

17 QUESTION: Let me ask you this. Did Mr. Drye
18 have a right to transfer whatever right he had to his
19 mother's estate before he acquired it --

20 MR. TRAYLOR: He would acquire --

21 QUESTION: -- under Arkansas law?

22 MR. TRAYLOR: -- acquire that right if, and only
23 if, he accepted, took a bite of the apple.

24 QUESTION: You don't think there's any way,
25 under Arkansas law, that before all of this happened, even

1 before his mother died, could he transfer whatever right
2 he had to someone?

3 MR. TRAYLOR: Only if he took a bite of the
4 apple. Nothing vests until you accept the gift, the offer
5 of the gift. You -- there has to be an act of an
6 acceptance. At that point, Mr. Drye would acquire an
7 interest or a property in his mother's estate sufficient
8 for the tax lien to attach. That never happened.

9 QUESTION: Mr. Traylor, the district judge who,
10 I'm sure, must have been an Arkansas practicing lawyer
11 before he was appointed to the bench, found against you on
12 this point, and the court of appeals, which certainly
13 knows more about Arkansas law than we do, found against
14 you, saying that there was a property interest under
15 Arkansas law, so you have kind of a heavy burden to
16 persuade us otherwise.

17 MR. TRAYLOR: Well, very simply, Judge Howard in
18 the Eighth Circuit got it backwards.

19 QUESTION: They don't realize it, though.

20 (Laughter.)

21 MR. TRAYLOR: They will when this Court
22 instructs them what the fact of the matter is, and the
23 fact of the matter is that the Fifth -- the Fifth Circuit
24 and the Ninth Circuit on -- I'm on all fours in near
25 identical facts -- found just the opposite, on very recent

1 opinions.

2 QUESTION: But they didn't do it on the grounds
3 that you had no property interest. They did it on the
4 grounds that the disclaimer relates back, isn't that
5 right?

6 MR. TRAYLOR: I don't think, Your Honor. I
7 think that they found that the taxpayer in both States
8 never acquired an interest sufficient for a tax lien to
9 attach. This is not really about the disclaimer and the
10 relation back. It's whether anything ever vested, a right
11 in property, or property itself, that under Federal law is
12 sufficient.

13 QUESTION: Let me ask you this. If the
14 administrator had announced that he was going to liquidate
15 the estate and take the money and go to Las Vegas and have
16 a good time, would you have had the right to do anything
17 about that, your client have the right to do anything
18 about it?

19 MR. TRAYLOR: Well, see, my client was the
20 administrator --

21 QUESTION: Would he have sat back and said, too
22 bad, I have no property interest, or rights to property,
23 so I guess the administrator can look forward to a good
24 time?

25 MR. TRAYLOR: Had he disclaimed prior to that --

1 QUESTION: That's not my question. He hadn't
2 taken any action one way or the other. The administrator
3 is on the way to Las Vegas. Can he do anything about it?

4 MR. TRAYLOR: Yes.

5 QUESTION: What?

6 MR. TRAYLOR: He can accept -- he can take a
7 bite of the apple and go to State court and say, enjoin
8 that administrator from going to Las Vegas.

9 QUESTION: And he would say, when he got to
10 court, would he not, I have a right to inherit that
11 property if I want to, and therefore he can't go to Las
12 Vegas with it?

13 MR. TRAYLOR: He's bitten the apple, and he's --
14 the tax lien has attached.

15 QUESTION: Let's assume you are representing
16 him, and he says, I'm not biting the apple, I am simply
17 asserting a right to bite the apple, haven't bitten yet.
18 Can he stop?

19 MR. TRAYLOR: I believe that by -- that that
20 would be an act of acceptance by going to court and saying
21 that I am protecting my interest.

22 QUESTION: And he had a right to do that, I take
23 it?

24 MR. TRAYLOR: I am acknowledging --

25 QUESTION: And he has a right to go into court

1 and do that, doesn't he?

2 MR. TRAYLOR: He has a right to do that when he
3 does it.

4 QUESTION: But not before?

5 MR. TRAYLOR: That is exactly right.

6 QUESTION: He creates it himself?

7 MR. TRAYLOR: It's inchoate. It's unvested.

8 QUESTION: He creates the right himself?

9 MR. TRAYLOR: By an act of faith --

10 QUESTION: The law of the State has nothing to
11 do with it?

12 MR. TRAYLOR: -- an act of free will.

13 QUESTION: Yes, but may I suggest the difference
14 in your hypothetical. It seems to me that if the offeree
15 said to the offeror, I'm not sure what I want to do. I'll
16 let you know in 30 days. During that 30 days, the offeror
17 could have taken the apple back. But in Arkansas the
18 court would not have allowed the offeror to take it back
19 for 30 days, because he has a 9-month period in which to
20 make a decision.

21 MR. TRAYLOR: This Court -- well, Congress has
22 said that you have a reasonable period of time within --
23 to make that election. The State of Arkansas has said
24 that you have a reasonable period of time to make that
25 election.

1 QUESTION: Where did Congress say that?

2 MR. TRAYLOR: In their identical qualified
3 disclaimer for gift and generation --

4 QUESTION: Where they say, for purposes of this
5 subchapter, being the estate and gift tax, so it's clear
6 that they didn't say it with respect to tax liens.

7 MR. TRAYLOR: It's in the same book. I would
8 say --

9 (Laughter.)

10 QUESTION: It's not in the same subchapter.

11 MR. TRAYLOR: A different subchapter. I'm not a
12 tax expert, but I can tell you for sure that the model
13 probate code of which Arkansas, Texas, Arizona, North
14 Dakota, and by my count 30 other States have said that you
15 have 9 months as a reasonable -- and it tracks the Federal
16 system.

17 QUESTION: Mr. Traylor, what about stock
18 options? Are they taxable as property? I mean, I have an
19 option to buy stock in a company that I've worked for for
20 a number of years. I don't have to exercise the option.
21 I can just let it lapse.

22 MR. TRAYLOR: If you are a tax delinquent, a
23 6321 Federal tax lien has attached to your rights in those
24 stock options, and --

25 QUESTION: I thought so. Now, how does that --

1 but how does that square with your case? I have free
2 will.

3 MR. TRAYLOR: Well, because you --

4 QUESTION: I don't have to bite the apple.

5 MR. TRAYLOR: No. You have --

6 QUESTION: I can let the stock option just
7 lapse.

8 MR. TRAYLOR: You have a vested interest.

9 QUESTION: Oh, I don't have a vested interest.
10 I have an ability --

11 MR. TRAYLOR: Because --

12 QUESTION: -- to assert an interest by agreeing
13 to exercise the option, but I don't have to agree to
14 exercise it.

15 MR. TRAYLOR: Assuming the options are not
16 underwater, then that stock option is property or rights
17 to property for 6321 because it's transferable and has
18 pecuniary value.

19 QUESTION: Transferable?

20 MR. TRAYLOR: You could transfer the option to
21 another.

22 QUESTION: No. This is a nonassignable option.

23 MR. TRAYLOR: The Government says
24 transferability, and I really don't care about -- but it
25 has pecuniary value.

1 QUESTION: It has pecuniary value only -- so
2 does your client's, only if exercised. I have a
3 nontransferable option to buy this stock. The employee
4 can only exercise it personally. He can't assign it to
5 anybody else.

6 MR. TRAYLOR: I believe the Government could
7 come and seize that option and step in --

8 QUESTION: I'm sure it can.

9 MR. TRAYLOR: And step into your shoes.

10 QUESTION: And I don't understand why it can't
11 come and seize your client's interest in the estate.

12 MR. TRAYLOR: Because nothing had ever vested.
13 It was a personal right of decision that was without
14 pecuniary value. It was nontransferable. It's not
15 recognized at law or in equity in Arkansas.

16 QUESTION: How does that differ from the
17 stock -- does my stock option have any pecuniary value, if
18 I cannot assign it to anybody? I couldn't sell it to
19 anyone. I can't get a bank loan on it.

20 MR. TRAYLOR: The Government can step into your
21 shoes and exercise --

22 QUESTION: Of course.

23 MR. TRAYLOR: Can the Government step in --

24 QUESTION: Why? Because it's property. Because
25 it's property. So why can't the Government step into your

1 client's shoes --

2 MR. TRAYLOR: Because --

3 QUESTION: -- and exercise it because it's
4 property?

5 MR. TRAYLOR: Because the right of election is
6 not property. It has no value. My client can't take a
7 nickel for his right of decision. By definition, a
8 disclaimer has to be without consideration, otherwise the
9 Government would have sued us under the Federal Debt
10 Collection Procedures Act of 1990, the fraudulent
11 transfer.

12 In fact, that is what Judge Howard has called
13 me, and Judge Brantley, the chancellor and probate judge
14 who adjudicated the disposition of this interesting
15 question, called us both a -- fraudulent transferors.

16 This thing is -- Mr. Drye's disclaimer, his
17 personal right of election, it's one of two things. It
18 was either a lawful act or a fraudulent transfer. It's
19 either a transfer, or it's not. I suggest it --

20 QUESTION: I don't understand this very basic
21 thing. It seems to me that if I have a right to receive
22 the entire estate, a right to receive it if I want it,
23 then I have something of large value, and it's up to me
24 whether I want to realize on it. But to say that it's
25 valueless until he takes a bite of it, I mean, he's -- he

1 can realize on it if he wants to. He's solely in control.

2 MR. TRAYLOR: Your Honor, it's been the common
3 law of England and this country, codified by statute in
4 Arkansas, until you take that bite of the apple, you do
5 not have a vested interest in her estate.

6 QUESTION: That's, you say is the Arkansas law.
7 There are States, are there not, where a person in the
8 position of Mr. Drye would be deemed to have had the
9 property and then given it up.

10 MR. TRAYLOR: Absolutely.

11 QUESTION: And then -- so if we took your view
12 of it, it would depend which State you come from whether
13 the tax lien would attach.

14 MR. TRAYLOR: That is correct, and one of the
15 beauties of our Federal system that different States
16 define their interest a little bit different.

17 QUESTION: Suppose --

18 QUESTION: Has the supreme court of Arkansas
19 ever held that the sort of expectancy that your client had
20 before he disclaimed was transferable, or saleable, or
21 that it was not transferable or saleable?

22 MR. TRAYLOR: Has never interpreted our probate
23 code since the model act was adopted in '84.

24 To answer your question, sure. I mean, if
25 Mr. --

1 QUESTION: No, I'm asking you a specific
2 question about the holdings of the supreme court of
3 Arkansas. Has the supreme court of Arkansas ever held
4 that the sort of interest your client had before he
5 disclaimed was or was not transferable or saleable?

6 MR. TRAYLOR: The court would say that it is a
7 transferable interest, and once you have transferred it,
8 you've bitten the apple, your right to --

9 QUESTION: No, I mean before you disclaimed.
10 During the period before you disclaimed, has the supreme
11 court of Arkansas ever said whether or not that interest
12 was transferable or saleable?

13 MR. TRAYLOR: I'm doing my best, Your Honor.
14 It's -- that is an act of the bite of the apple, and --

15 QUESTION: I'm not -- don't tell me about the
16 bite of the apple any more. Just tell me what the supreme
17 court of Arkansas has done, or if it hasn't done
18 anything -- I mean, this seems the key to your whole case,
19 and if there's a case out there that is -- shows the
20 Eighth Circuit and the district court were wrong, you
21 should surely have it. What is that case?

22 MR. TRAYLOR: The Fifth and Ninth Circuit
23 decisions.

24 QUESTION: What about the Rutherford case of the
25 State of Arkansas, which as I understand it says that one

1 can agree to convey an expectancy in an estate?

2 MR. TRAYLOR: You can.

3 QUESTION: All right, so why doesn't that
4 indicate that a transfer of an expectancy is transferable,
5 it's property, it has value? That's what I get from the
6 Rutherford case, and it seems to me that's the case we
7 ought to talk about. Now, maybe you have ways to
8 distinguish it.

9 MR. TRAYLOR: Because it begs the question. The
10 interest has already vested. The act of assignment of
11 the --

12 QUESTION: An expectancy is not vested.

13 MR. TRAYLOR: It is once you assign it. You can
14 no longer disclaim. It would be a bar to disclaimer.

15 QUESTION: Well, I guess after you accept the
16 devise, and while the estate is still in administration,
17 what you have might be called an expectancy.

18 I'm not sure I'm that interested in what the
19 supreme court of Arkansas has to say. To come back to my
20 stock option example, suppose the State of Delaware, in
21 order to make itself even more attractive to corporations,
22 passes a law that says, henceforward stock options in the
23 stock of Delaware corporations are not property --

24 MR. TRAYLOR: This Court --

25 QUESTION: -- would the Federal Government still

1 be able to tax those, stock options?

2 MR. TRAYLOR: This Court answered that question
3 very clearly in the National Bank of Commerce case, which
4 I believe to be the leading case on the question, and
5 States can't define what is or is not property.

6 QUESTION: For purposes of the Federal tax law.

7 MR. TRAYLOR: Yes.

8 QUESTION: So --

9 QUESTION: You say States can't define what is
10 or is not property for purposes of Federal tax law?

11 MR. TRAYLOR: They cannot.

12 QUESTION: I thought our cases held just the
13 opposite, that the statute says if you have property the
14 Government can get it, but whether or not you have
15 property is up to State law.

16 MR. TRAYLOR: You look at the interest under
17 State law, and then under National Bank of Commerce you
18 then look to see if that interest is property or rights to
19 property, and the definition primarily is, does it have
20 pecuniary value.

21 QUESTION: The State law defines your rights,
22 but whether that bundle of rights, whatever it is, rises
23 to the level of being property under the Internal Revenue
24 Code is a matter of Federal law.

25 MR. TRAYLOR: Precisely, because of your

1 Delaware example. You can't let States define what has
2 incumbered the tax man.

3 QUESTION: Then it's irrelevant for our purposes
4 that as a matter of Arkansas law the decision to disclaim
5 relates back to the date of death, and that therefore
6 the -- as a matter of Arkansas law he never had any
7 property. That's irrelevant, is that right?

8 MR. TRAYLOR: My best answer is, you look in
9 depth at State law to ascertain what is the nature of the
10 interest or right under State law, and if you'll do that
11 in this example, you will find that Mr. Drye never
12 acquired an interest sufficient to be defined under
13 Federal law as property, or rights to property.

14 QUESTION: Mr. Traylor, I'm just curious about
15 why the taxpayer, Mr. Drye being in this situation, he
16 didn't have his mother write a will leaving the estate to
17 the daughter.

18 MR. TRAYLOR: We had an appointment with her on
19 the day of her death to execute a will. That really
20 affected -- I mean, that's why my name is in the caption.
21 I mean, that was what was to happen, and it's just one of
22 those things in life that, in fact, Mr. Drye did not want
23 to go talk to his mamma and tell her -- Mr. Drye was 70,
24 his mamma was almost 92, I believe, at the time. He
25 didn't want to go tell his mother, sign this piece of

1 paper so that we don't have to be up here today.

2 QUESTION: If he had done that, what if you --
3 if it's not an intestate disposition, but there is a will,
4 and you are one of the beneficiaries of the will, all
5 right, and what if you say, I don't want this property.
6 You simply decline the bequest.

7 MR. TRAYLOR: That has been the common law of
8 England and this country for --

9 QUESTION: You can do it?

10 MR. TRAYLOR: -- hundreds of years.

11 QUESTION: You can do it?

12 MR. TRAYLOR: Absolutely.

13 QUESTION: And are you -- is that considered --
14 your interest in that bequest considered property for
15 purposes of the Federal tax law?

16 MR. TRAYLOR: The Fifth and Ninth Circuit said
17 it wasn't. The only circuit that has said it is is the
18 Eighth Circuit.

19 QUESTION: No, I'm talking -- yes. I'm not
20 talking about intestate disposition. I'm talking about a
21 bequest, and --

22 MR. TRAYLOR: The Fifth and Ninth Circuit were
23 both -- were both bequests.

24 QUESTION: Do you think the two should be the
25 same?

1 MR. TRAYLOR: Absolutely, and that was the
2 purpose that the commissioners on uniform State laws got
3 together and said, look, there isn't any reason -- for the
4 last 500 years we have let people have the freedom to
5 decline gifts in -- bequests, not make a person an owner
6 against their consent, but if it's an inheritance you will
7 take, whether you will or not. That was the law in
8 England and the United States for a long time.

9 The commissioner got together and said, look,
10 there isn't any reason for that, particularly as you look
11 at the Federal tax consequences. One is a transfer, one
12 is not.

13 They got together back in the mid-sixties, they
14 removed the common law anomaly of -- feudalism is where
15 that distinction arose hundreds and hundreds of years ago,
16 and the State of Arkansas has adopted it, Texas, Arizona,
17 North Dakota, and by my count 30 other jurisdictions.
18 They have removed the distinction between the two of them.

19 This case is -- the Fifth Circuit decision is
20 right on point, and it's the best analysis that I have
21 seen of it, and the recent Ninth Circuit decision. Both
22 of them to me are very thoughtful decisions, and I
23 understand that this is not a very palatable result that
24 has resulted.

25 Mr. Drye didn't pay his taxes. The Government

1 needs the taxes, and through this sleight of hand -- but
2 these people across the street over --

3 QUESTION: The Government doesn't really need
4 the tax. They had a surplus, I think.

5 (Laughter.)

6 MR. TRAYLOR: Well, the people across the street
7 in Congress can very easily change it. In their wisdom,
8 they have chosen not to make a disclaimer a fraudulent
9 conveyance. In fact, in the State of Arkansas Mr. Drye
10 would not have had this ability to have disclaimed up
11 until about the mid-eighties, because at that time the law
12 was an insolvent beneficiary could not disclaim. That bar
13 was removed, oh, in the mid eighties.

14 Chief Justice, if I might, if there's no other
15 present questions, could I reserve the balance of my time?

16 QUESTION: Yes, you may.

17 MR. TRAYLOR: Thank you.

18 QUESTION: Mr. Jones, we'll hear from you.

19 ORAL ARGUMENT OF KENT L. JONES

20 ON BEHALF OF THE RESPONDENT

21 MR. JONES: Mr. Chief Justice, and may it please
22 the Court:

23 I want --

24 QUESTION: Mr. Jones, you don't have a stick
25 that you're going to turn into a snake or anything like

1 that, do you?

2 (Laughter.)

3 MR. JONES: I knew this day was going to come.
4 I just was hoping it wouldn't be today.

5 (Laughter.)

6 MR. JONES: I wanted to say 5 seconds' worth
7 about the apple, and then talk about the law.

8 This case does not involve an offer of a gift.
9 This case -- an offeree doesn't have any legal rights in
10 the proposed gift. He can't enforce the offer. This case
11 involves an intestate succession to which petitioner is
12 the sole heir, had lawfully and legally enforceable rights
13 in Arkansas.

14 With that background, I'd like to now talk about
15 what the legal issue is. The legal issue is, what's the
16 scope of the Federal tax lien? Section 6321 of the
17 Internal Revenue Code creates a Federal lien in all
18 property and rights to property of any delinquent
19 taxpayer, and in a long series of cases, beginning with
20 the Glass City Bank case in 1945, the Court has plainly
21 set out the way that we're supposed to answer these
22 questions.

23 First, you look to State law to see what the
24 nature of the interest that the taxpayer has is, and then
25 secondly, Federal law governs the determination of whether

1 that interest is property or rights to property under the
2 Federal lien.

3 QUESTION: Would you treat testate and intestate
4 the same?

5 MR. JONES: Almost certainly the answer would be
6 the same, and certainly the method of answering the
7 question is the same. The method is, did the taxpayer
8 have a valuable, legally protected right to receive the
9 property.

10 QUESTION: If you treat testate the same, then
11 what about the Government's attaching a tax lien to a gift
12 that I've offered? I haven't died yet, but I've offered
13 my son a particular gift.

14 MR. JONES: Your son would have no legally
15 protected right, no enforceable right to make you transfer
16 that property to him. That's why I wanted to make that
17 point at the beginning. This case does not involve that
18 situation.

19 QUESTION: What if State law is that, like an
20 offer, the offer of a gift remains open until it's
21 accepted?

22 MR. JONES: I'm not sure what that would mean,
23 but if I understand it correctly, you're saying that --

24 QUESTION: It means, all he has to say is, I
25 accept, and the property --

1 MR. JONES: Oh, he has a legally enforceable
2 right under State law to accept.

3 QUESTION: To accept the gift?

4 MR. JONES: That is a valuable interest, a
5 valuable, legally protected right that this Court has
6 explained in many cases. It falls within the Federal
7 concept of what's property for purposes of the tax lien.

8 QUESTION: Supposing that you have some State
9 court cases on the subject that don't speak directly to
10 the issue in question. What is the test? What do you
11 look for in State law to see whether the person has a
12 legally protected interest?

13 MR. JONES: Well, one clear example is the
14 situation we have here, where it's the sort of interest
15 that can be transferred, that the State will allow you to
16 transfer the interest.

17 QUESTION: Transferability is sufficient, then?

18 MR. JONES: That would certainly be sufficient
19 to indicate that it was a legally protected right.

20 QUESTION: But you don't think it's necessary?

21 MR. JONES: No, sir, not at all. I think there
22 are lots of legally protected rights that involve property
23 interests that you can't transfer, like a spendthrift
24 trust. Indeed, that's where this money ended up in this
25 case.

1 QUESTION: It's true that this is a little
2 unusual in that here you have the Arkansas statute, which
3 says for all purposes, once it's disclaimed, it
4 disappears. It's not like a stock option in that sense,
5 which I guess for a lot of purposes of State law, even
6 after the expiration date, State law might have had some
7 bite. I mean, there are all kinds of State laws.

8 So I looked up the bankruptcy law to see how
9 Federal law treats it. It seems to me that under the
10 bankruptcy provisions this would not count as an interest
11 in property for purposes of a fraudulent transfer. I can
12 check it again, but I don't know if you've looked into
13 that.

14 MR. JONES: I'm not prepared to address that
15 question.

16 QUESTION: Well, if it turns out that for
17 bankruptcy purposes this isn't treated as an interest, I
18 mean, I -- why -- you haven't thought about it, so I --
19 you're not --

20 MR. JONES: Well, I -- even without thinking
21 about it in much depth at all, I mean, what we're dealing
22 with is not only section 6321 of the Internal Revenue
23 Code, but a fairly large body of precedent of this Court
24 under that statute, and --

25 QUESTION: Well --

1 QUESTION: On the precedent, I couldn't find
2 any. That is to say, the reason is, statutorily this
3 doesn't count as a property right for tax purposes,
4 because they have all these statutes, you know, that let
5 you disclaim. Then I couldn't find something other than
6 that. Now, tell me, what is -- what do you --

7 MR. JONES: I'm not even sure what you're
8 referring to, these statutes that let you dis --

9 QUESTION: You have a gift tax, you have an
10 estate tax --

11 MR. JONES: Only for those purposes. The
12 Internal -- what -- and, of course, that's an entirely
13 different subject.

14 QUESTION: Yes.

15 MR. JONES: The reason that the disclaimers are
16 allowed if they're made within this window under -- for
17 purposes of the gift and estate tax, is to avoid imposing
18 a double tax on what's essentially a single flow-through.

19 But the reason that the Federal tax lien reaches
20 this property is because the taxpayer had that legally
21 enforceable right to decide what he wanted to do with it,
22 which was a valuable right, and the fairness interest that
23 I think Congress is concerned about under the Tax Lien Act
24 is the fairness of requiring taxpayers B, C, D, and E, to
25 pay more than their fair share to make up for the fact

1 that taxpayer A hasn't paid his taxes.

2 QUESTION: You were going to tell me some
3 Federal precedent.

4 MR. JONES: Yes. Well, to me the case that
5 really tells us how to decide this question is the
6 National Bank of Commerce case, where the Court said that
7 in view of the comprehensive nature of the statutory
8 language that Congress employed, that this lien reaches
9 every valuable right, every species of right or interest
10 that a taxpayer might invest in --

11 QUESTION: Every specie of right or interest, so
12 in fact you would say this reaches even a similar
13 situation under a will where the testator isn't dead yet?

14 MR. JONES: Well, I -- the testator can revoke
15 his will. We're talking --

16 QUESTION: Exactly, so --

17 MR. JONES: But what we're talking about is
18 something that is a right that the taxpayer has, and under
19 Arkansas law, for example, the taxpayer could assign his
20 expectancy in such an estate, and so I suppose we could
21 take the position, which we don't need to reach in this
22 case.

23 QUESTION: Well, but the devisee has no action
24 against the testator to --

25 MR. JONES: Of course not.

1 QUESTION: -- if the testator revokes.

2 MR. JONES: Right, so I mean, it would be very
3 hard to figure out what would be the value that the lien
4 would attach to.

5 But what I want to -- the point I keep heading
6 toward is that in National Bank of Commerce what the Court
7 said was that nothing more than common sense is required
8 to conclude that a right to receive property is itself a
9 interest in property that the lien attaches to, and that
10 is precisely the nature of the interest that the taxpayer
11 in this case has.

12 QUESTION: What is the legal error of the Fifth
13 Circuit right?

14 MR. JONES: The Fifth Circuit in Leggett was
15 wrong exactly for the reasons I've just described. In
16 Leggett, the Court said that the Federal lien doesn't
17 attach to this right to receive property because under
18 State law that is just a personal privilege, and it's not
19 a property interest for purposes of State law.

20 And that's flatly inconsistent with the two
21 fundamental holdings of the Court in National Bank of
22 Commerce, the first of which is that Federal law, not
23 State law, governs in deciding what's property under the
24 tax lien and, secondly, that the right to receive property
25 is property under the tax lien.

1 QUESTION: So you look to State law to find the
2 nature of the interest, and you look to the Federal law to
3 see if it's property?

4 MR. JONES: That's exactly what the Court held
5 in National Bank of Commerce.

6 QUESTION: Well, that's a little bit more
7 intricate, more intricate than one needs, perhaps.

8 MR. JONES: Well, these intricacies rarely
9 arise, but when they arise, that's how they're to be
10 resolved.

11 QUESTION: What was the interest under Texas
12 law? Was it Texas the Fifth Circuit was deciding?

13 MR. JONES: Yes. It was -- I -- it was interest
14 under a will, but the principles of property that govern
15 the disposition of that interest are the same, whether
16 it's intestate or testate and, indeed, as we pointed out
17 in our brief, the State court -- I mean, I'm sorry, the
18 Fifth Circuit in Leggett seems to us to have erred in its
19 description of how State law operates, to say all they had
20 was a right of decision.

21 They had a lot more than a right to decision.
22 As the Eighth Circuit pointed out in this case, under the
23 similar provisions of Arkansas --

24 QUESTION: Excuse me, a right of rescission or
25 decision?

1 MR. JONES: Decision is what the Fifth Circuit
2 called it.

3 Under the State law they have an absolute right
4 to receive the property without doing anything. They
5 don't have to make a decision, any more than I have to
6 make a decision to withdraw money out of my bank account.
7 It's still my property. If I withdraw it --

8 QUESTION: He has a property right, but does he
9 have a property right in the assets of the estate?
10 Let's --

11 MR. JONES: Yes.

12 QUESTION: Well, I --

13 MR. JONES: There's a right to receive it.

14 QUESTION: Suppose I make you a contractual
15 offer that is open for 90 days, and under most States'
16 laws nowadays, if I say it's open for 90 days, you can
17 count on that. That is worth something. It's a
18 beneficial contract to you.

19 MR. JONES: If it's an irrevocable offer for 90
20 days.

21 QUESTION: It's an irrevocable offer for 90
22 days.

23 MR. JONES: Then you have a right to accept it.
24 It's a valuable right.

25 QUESTION: You have a right to accept it.

1 MR. JONES: It's subject to Federal lien.
2 QUESTION: Right, now what would you slam your
3 lien on, my -- the property that I have -- that's the
4 subject of the contract?
5 MR. JONES: What I would -- the lien would be --
6 I would have the -- I would -- it depends at what stage
7 we're at. If I -- if I try to --
8 QUESTION: The 90 days have gone by.
9 MR. JONES: If I try to --
10 QUESTION: The 90 days have now gone by, the guy
11 never exercised the --
12 MR. JONES: Oh, the offer wasn't accepted?
13 QUESTION: It wasn't accepted.
14 MR. JONES: Has it expired?
15 QUESTION: It's expired.
16 MR. JONES: Well then, there's nothing left for
17 us to attach to.
18 QUESTION: Well, he had a power to accept it.
19 He just didn't. Just as in this case he had a power to
20 accept it, but he didn't.
21 MR. JONES: No, he doesn't have a power to
22 accept it. He has the right to accept it. It's not a
23 power, it's a right. He can --
24 QUESTION: Okay, I'll call it a right in the
25 other case, too, then.

1 MR. JONES: He can transfer --

2 QUESTION: They're both the same.

3 MR. JONES: This really is a fundamentally
4 different concept. He can transfer this right away. He
5 can, quote, disclaim it, which the Court said in the -- in
6 the Irvine case was an indirect transfer of it. He can
7 get rid of it.

8 But as this Court's held in Best, and Phelps --

9 QUESTION: What do you mean, transfer it? Can
10 he give it to somebody else to accept it?

11 MR. JONES: Who? We're talking about this
12 taxpayer?

13 QUESTION: Yes.

14 MR. JONES: Yes. He could transfer his right to
15 receive the property by an assignment under State law.
16 Indeed, you don't have to look further than the State's
17 disclaimer provisions to see that an assignment -- that
18 this interest can be assigned, because once you've
19 assigned it, you can then no longer disclaim it.

20 QUESTION: Well, I suppose the same in the
21 contract case. I could say, you know, if I accept this
22 contract, I assign to you my rights under it.

23 MR. JONES: And the Federal --

24 QUESTION: You can't accept it for me, but if I
25 do accept it, you'll have my rights under it. I see no

1 difference in the two cases, and I don't -- in other
2 words, I acknowledge that it's property, but is the
3 property the assets of the estate, or is it, rather, this
4 right to accept it, which is intangible, and which I don't
5 know how you can --

6 MR. JONES: The easiest way to answer it is by
7 reference to the Court's decision in the Phelps case. The
8 Federal lien attaches to the property and to -- however it
9 is transferred, and to anything substituted for it, and
10 because of that, the lien exists at all phases of this --
11 I'm sorry, at all phases of this --

12 QUESTION: Well --

13 MR. JONES: -- factual pattern.

14 QUESTION: But it seems to me that's too fast to
15 say the lien attaches to the property. I agree, but what
16 is the property? It is not the assets of the estate. It
17 is his right to obtain those assets.

18 MR. JONES: It's his right to receive them
19 initially.

20 QUESTION: Okay.

21 MR. JONES: And then when he transfers that
22 right the lien follows that along to whoever obtained that
23 right. In this case, it was his daughter, and then it
24 attached to the assets themselves when she received them,
25 and then it continued to attach to the assets as they were

1 transferred to the trust, and because it continued to
2 exist in these properties, the properties were lawfully
3 seized for collection of taxes. That's the fact pattern.

4 There was one other opinion of the court of
5 appeals that I do need to discuss, the Mapes decision in
6 the Ninth Circuit, which reached a similarly incorrect as
7 Leggett, but did it by a different route.

8 What the Court held in the Mapes case was that
9 the Federal lien doesn't attach to the taxpayer's right to
10 receive the estate, because once the taxpayer renounces
11 the interest, it's said to be renounced for all purposes
12 under State law, and the Court said, therefore the
13 taxpayer should be treated as if he never owned an
14 interest in the property.

15 The clear error in that decision is, the court
16 didn't cite any of this Court's decisions and, in
17 particular, didn't cite the Mitchell case, where this
18 Court held that a retroactive renunciation of a property
19 interest -- and I'm quoting -- should not be
20 misinterpreted as an indication that the taxpayer never
21 owned an interest in the property.

22 This Court has consistently held that you look
23 to the realizable economic value of the taxpayer's rights,
24 and you don't look to the State law fictions of
25 retroactive renunciations and disclaimers. As the Court

1 held in the Irvine case, Federal tax law is not struck
2 blind by the State's legal fiction of a retroactive
3 disclaimer.

4 The lien attached to the rights at the time that
5 it arose, and subsequent dispositions of that, of the
6 interest could not destroy the Federal lien.

7 Unless the Court has further questions --
8 QUESTION: I do, actually. I might -- I have
9 one, and you're probably not going to have an answer,
10 because we haven't looked it up, and I haven't, either,
11 but as I was looking at the bankruptcy law, the reason
12 that I was concerned is the following.

13 Imagine the taxpayer in this case had done just
14 what he did, but he did it 30 days before going bankrupt.
15 What -- if I'm right about the bankruptcy law, the
16 interpretation would mean, if we got yours, is that his
17 creditors, who were private, couldn't get at the money,
18 and the reason is, it would not be a, quote, interest in
19 property, but the Government, as taxpayer, would be able
20 to get at the money, and the reason would be because it
21 is, quote, a right to property.

22 MR. JONES: Well --

23 QUESTION: Now, that seemed, you know, a little
24 odd.

25 MR. JONES: That is possible. I'm not in a

1 position to say yea or nay, but I can say it's a very
2 common situation that the Federal tax lien applies in a
3 situation where private creditors have no opportunity
4 to -- I mean, that's what the Best case was precisely
5 about.

6 And the courts held that it doesn't matter
7 whether under other law, State law in that case, whether
8 you have a -- whether other creditors could seize it.
9 This is a question of Federal law under section 6321, and
10 under the Federal law, if the Federal law provides a lien,
11 that's the answer to the question.

12 QUESTION: And --

13 QUESTION: Mr. Jones, can I pursue -- you said
14 that the lien attaches to his right to get the property.
15 If he exercises that right, it attaches to the property
16 which is the product.

17 But if he doesn't exercise the option, and
18 somebody else gets the property, that -- I don't see it as
19 being the product of his option any more. How can you --

20 MR. JONES: I don't -- what do you mean by
21 doesn't exercise the option that -- this taxpayer doesn't
22 have to do anything to get the property. It's his
23 automatically.

24 That's the point I was trying to make earlier.
25 He can transfer his right, but if he doesn't do anything,

1 if he doesn't write a disclaimer, he doesn't make an
2 assignment, that property comes to him. Why? Because he
3 already has a vested right to receive that property under
4 State law.

5 QUESTION: Well, indeed, this was real property,
6 I take it --

7 MR. JONES: Some of it.

8 QUESTION: -- and I thought the title went to
9 Mr. Drye immediately, subject to this State law right to
10 disclaim later, but I thought he held the title
11 immediately. Is that right, or wrong?

12 MR. JONES: That's the way the court of appeals
13 described it, and that's my understanding of Arkansas law
14 as well.

15 The court of appeals, I --

16 QUESTION: But again, that's not necessary to
17 your position, as I understand your position.

18 MR. JONES: No. No.

19 QUESTION: It would be different, though, would
20 it not, if State law provided that a beneficiary, an
21 intestate -- an heir has to file a piece of paper in court
22 identifying himself or herself and saying affirmatively, I
23 want the money?

24 MR. JONES: It would only be different if the
25 right were not --

1 QUESTION: He would have no right to the money
2 unless he filed that piece of paper?

3 MR. JONES: Well, if they had the right to the
4 money, if they had a legally protected right to --

5 QUESTION: But he had to take an affirmative
6 step to do it?

7 MR. JONES: That goes back to the colloquy I had
8 with Justice Scalia. If he has a legally protected right
9 that is vested in him to receive this money --

10 QUESTION: As a matter of State law, though, the
11 nature of the interest -- the nature of the interest is,
12 he has nothing, unless he files that piece of paper.

13 MR. JONES: Well, you -- that's an interesting
14 point. I really haven't thought about that.

15 QUESTION: It's different.

16 MR. JONES: If he had to take a specific act,
17 and he doesn't take the act, that would be a harder
18 problem, and I'm not sure how we come out. This case is
19 not like that.

20 QUESTION: You say the --

21 MR. JONES: I want to point out, the Eighth
22 Circuit said that he doesn't have to do anything.

23 QUESTION: No, I understand. I understand that.

24 But the Commerce case was a bank account. I
25 mean, he clearly owned the money. It's just a question of

1 how much, between the joint account, isn't that right,
2 because he had -- you relied there on the fact he had a
3 right to withdraw the money.

4 MR. JONES: He had a right to receive the money,
5 which is -- I'm using the words of the Court in the
6 National Bank of Commerce case, and they pointed out that
7 it didn't matter whether that was a right that the State
8 law would call a property right. It didn't matter that he
9 couldn't get the money until some day in the future. What
10 mattered was that at the time the lien attached, he had a
11 vested right to get that money at some point.

12 QUESTION: Thank you, Mr. Jones.

13 Mr. Traylor, you have 5 minutes remaining.

14 REBUTTAL ARGUMENT OF DANIEL M. TRAYLOR

15 ON BEHALF OF THE PETITIONERS

16 MR. TRAYLOR: Thank you, Your Honor.

17 The Government has taken all of my cases.
18 They're -- Mitchell, down in Louisiana, those delinquent
19 taxpayers, they had a present right, and then they tried
20 to disclaim it, and the Court said, look, an act of God
21 cannot remove a Federal tax lien once it's attached, and I
22 agree with that. The question -- the problem here is, it
23 never attached.

24 Irvine, the Court recently has stated that
25 the -- this idea of acceptance or rejection of estates can

1 be based on a gift theory. That is what we're talking --
2 we're not talking about a mechanism to defeat creditors.
3 We're talking about transfer and succession of estates.

4 Best, that's my case. The delinquent taxpayer
5 at any time could go get the cash value of his life
6 insurance policies. The fact that he later executed a
7 disclaimer, you can't -- a State disclaimer can't
8 extinguish a Federal tax lien once it attached. The only
9 people who can do that are the people across the street.

10 Two interesting things, the Government says
11 that, in his opening statement that -- I -- that this idea
12 of the bite of the apple, look at page 22 of their brief.
13 It says in the second full paragraph, an offer which can
14 be accepted or rejected is itself an interest in property.

15 Here's an offer you can accept or reject. The
16 Government lien has attached. I submit to you that that
17 ain't the law of the country.

18 QUESTION: Well, it's -- the Government's
19 changed his position a little bit. I -- and says that if
20 the offer is framed in such a way that the property is
21 yours unless you affirmatively reject, you have property
22 on which the lien --

23 MR. TRAYLOR: The act of doing nothing is an
24 affirmative act that cooks your goose.

25 QUESTION: The act of doing nothing is an

1 affirmative act?

2 MR. TRAYLOR: Exactly.

3 QUESTION: Let me contemplate that for a minute.

4 (Laughter.)

5 MR. TRAYLOR: Over the passage of time, and I
6 would like to --

7 QUESTION: The statute doesn't say interest, it
8 says right. It says you have a right to property, and if
9 you do nothing, and you get the property, and legally
10 you're entitled to it, how don't you have a right to
11 property? It didn't say interest.

12 MR. TRAYLOR: You have a right to accept or
13 reject, but more importantly, I would like to go to your
14 bankruptcy question.

15 QUESTION: Well, I just distinguished it away,
16 because I said it uses interest and not right.

17 MR. TRAYLOR: On the --

18 QUESTION: You go ahead and defend it.

19 MR. TRAYLOR: On the bankruptcy question,
20 whether a trustee has a right to avoid a disclaimer made
21 within, oh, I guess it would be 4 months, the Government
22 ought to read note 17 of its own brief, where they
23 represent that the trustee does have such a right. I
24 submit to you that they do not read that section of the
25 Bankruptcy Code properly.

1 The only thing that generally the bankruptcy
2 trustee can avoid are transfers. Disclaimers, by
3 definition, cannot be a transfer, because you cannot
4 accept any consideration for it.

5 QUESTION: Mr. Traylor, do I take it from what
6 you've just said, cannot be a transfer, that the estate
7 gift tax provision for disclaimer, that was unnecessary,
8 that the provision for it, for purposes of that
9 subchapter, Congress didn't need to do that?

10 MR. TRAYLOR: Congress had to do it, because it
11 treated people differently. If you received under a will,
12 you were not taxed. If you received it by an inheritance,
13 you will take it whether you will or not. You can
14 transfer it the next day, but you're going to be taxed.
15 And people raised Cain and said, what's the difference?
16 Congress said there is no difference, so we're going to
17 treat both of you the same. And then the State law
18 commissioners got on the same bandwagon and --

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
20 Traylor.

21 MR. TRAYLOR: Thank you, Your Honor.

22 CHIEF JUSTICE REHNQUIST: The case is submitted.

23 (Whereupon, at 11:53 a.m., the case in the
24 above-entitled matter was submitted.)

25

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:

ROHN F. DRYE, JR., ET AL., Petitioners v. UNITED STATES
CASE NO: 98-1101

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Mari Fedirko-----

(REPORTER)