Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

Docket No. 104

THE UNITED STATES,

Petitioner,

vs.

ESTATE OF THOMAS S. DONNELLY, SR., ET AL.,

Respondent,

Place Washington, D. C.

Date January 12, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

THE UNITED STATES, Petitioner	)	
vs	)	No. 104
ESTATE OF THOMAS S. DONNELLY, SR., ET AL., Respondents	)	

The above-entitled matter came on for argument at 12:30 o'clock p.m., on Monday, January 12, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

MATTHEW J. ZINN, Office of the
Solicitor General of the United States
Department of Justice
Washington, D. C.
On behalf of Petitioner

DANIEL N. PEVOS, ESQ.
Southfield, Michigan
On behalf of Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 104, the United States against the Estate of Donnelly, and others. Mr. Zinn, you may proceed whenever you are ready.

ORAL ARGUMENT BY MATTHEW J. ZINN, OFFICE OF THE SOLICITOR GENERAL, ON BEHALF OF THE PETITIONER

MR. ZINN: Mr. Chief Justice, and may it please the Court: This is a Federal tax-lien case here on a writ of certiorari tothe United States Court of Appeals for the Sixth Circuit. It involves the question of whether a Federal tax lien with respect to a parcel of improved real property, located in Livingston County, Michigan, is prior to the interest in that property, by the subsequent purchasers of the property.

The United States, acquired its lien in 1950 when it secured a tax court judgment against Thomas Donnelly for some $26,000. When that judgment went unpaid the United States acquired a lien under Section 3670 of the Internal Revenue Code of 1939, which appears at Page 17 in the appendix and the lien arose in favor of the United States, and I quote:

"Upon all property and rights to property, whether real or personal, belonging to such person."

In 1945 in this Court's decision in the Glass City Bank case it was held that the lien of the United States under Section 3670 applies not only to a tax payer's present property,

but also to any after-acquired property, to insure that its lien would be prior the interest of subsequent purchasers and others, however, the United States must give due notice of the lien by filing a notice of the lien in accordance with the provisions of Section 3672 of the Internal Revenue Code, which also appears, beginning on Page 17 of our brief.

Section 3672 provides that, and I quote: "Such liens shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice thereof has been filed by the collector, (1) In the office in which the filing of such notice is authorized by the law of the state or territory in which the property subject to the lien is situated, whenever this State or territory has by law authorized the filing of such notice in an office within the state or territory, or (2) In the office of the Clerk of the United States District Court for the judicial district in which the property subject to the lien is situated, whenever the state or territory has not, by law, authorized the filing of such notice in an office within the state or territory."

In short, the question of whether the United States is to file locally under Subdivision 1 of Section 3672(a) or subdivision 2 thereof, turns on whether the local law authorizes local filing.

The Michigan statute which purported to authorize local filing here appears on Page 18 of our brief. And, with

respect to real property it provides in the prepenultimate line on Page 18 that a description of the land upon which a lien is claimed is to be included in the notice of the lien.

The consistent practice of the United States, however, is not to describe any property in a notice of lien, but simply to file what is commonly referred to as a blanket notice of lien, which merely reechoes the provisions of 3670, names the taxpayer and specifies the amount of his indebtedness to the United States.

In United States against Union Central Life Insurance Company, decided by this Court in 1961, it washeld that the Michigan law, because of its description requirement, did not authorize local filing and that the United States in that case had properly filed its notice of lien in the Federal District Court.

According, from the opinion of Mr. Justice Black, 368 U.S. 296: "The Michigan law authorizing filing only if the description of the property was given, placed obstacles to the enforcement of Federal tax liens that Congress had not permitted, and consequently, no state officer was 'authorized' for filing within the meaning of the Federal statute. It was therefore, error for the Michigan courts to fail to give priority to the Government's lien here, notice of which had been filed in the District Court in accordance with Federal Law."

As in the Union Central case, the United States here, filed its tax lien in the Eastern District Court for Michigan, rather than with the local office of the Recorder of Deeds for Livingston County. And the question is whether its filing is proper under Section 3672 of the 1939 Code.

The taxpayer, Thomas Donnelly, acquired the property in question here in 1949 by purchase, with his wife, as tenants by the entireties, and was held by the entireties until 1960 when Mrs. Donnelly died, and by operation of law, Mr. Donnelly became the sole owner. Shortly after Mrs. Donnelly's death, Mr. Donnelly sold the property to Mr. and Mrs. Carlson, who are the real parties in interest here. The Carlsons were bona fide purchasers of the property, admittedly. They had an abstract prepared by the Livingston County Abstract Office, which covered only the local filings in Livington County, Michigan, and which, specifically accepted, covering any filings that were made in the Federal District Court for the Eastern District of Michigan.

The attorneys who passed upon the marketability of the title for the Carlsons relied upon the abstract that had been prepared by the Livingston County Abstract Office, and accordingly, they did not find notice of the Federal tax lien that had been filed in the District Court.

After the Carlsons purchased the property in 1960 the United States moved to foreclose its tax lien. When the

Carlsons objected they moved for summary judgment in the District Court and summary judgment in their favor was granted. The Sixth Circuit affirmed on appeal without opinion.

Q Is this a relatively unique situation that is involved in this case, or is it just elsewhere in the country, too?

A So far as the description requirement, Your Honor?

Q No; so far as the position that the Government is in here. Is this case a kind of sport, that's what I'm really trying to get at.

A We don't think it is. Thereare several hundreds of cases in Michigan which we thinkthe decision here would control, and in addition, as we pointed out in our brief, there are some 40,000 tax liens that might be cast in jeopardy in four other states: Illinois, Pennsylvania, Wisconsin and Massachusetts if the Court were to affirm the judgment below.

Q Why is it that title-searchers don't search for these liens in the Federal records?

A I, frankly, don't know, Your Honor. It seems to us that they have every reason to do so, as I hope to explain later on.

Q But, of course, the Government doesn't suggest the Carlsons or the title searchers or their lawyer had any actual knowledge of the filing --

A We concede that they are bona fide purchasers.

Q But you do say that they should be charged with the knowledge of that filing?

A Yes, sir; we do. We say so because we think Union Central is --

Q This is rather tough on the Carlsons; isn't it?

A It is.

Q Except that there wasn't any reason to do so, for the title-searchers to do so at the time the search for this title was made, unless I misunderstand something here, because of the existing decision in the United States Court of Appeals for the Sixth Circuit; is that correct?

A We think there was every reason for them to do so, even though they had -- the Youngblood decision, is that the one that you are referring to?

Q That's the one I had in mind, I think; yes, in which -- and that was the law, so far as Michigan liens went at the time that this search was made; wasn't it?

A I don't think it was.

Q What's the date of Union Central?

A 1944. And Union Central held that a local Register of Deeds was not permitted to accept for filing a nondescriptive Federal notice.

Moreover, in 1945 --

Q Did you say the date of the Union Central was

1944? You misspoke on that.

A The date of Youngblood.

Q Youngblood; yes.

A And Youngblood held that a local Register of Deeds is not entitled to accept for filing a nondescriptive Federal notice. That was the only issue in that case, Your Honor. The United States moved tomandamus the Register of Deeds of Wayne County and the Court did go on, as we can see quite clearly, to say that the Michigan Law was an authorized law within the meaning of 3672. But we would suggest that that all dictum; the only issue in that case was whether the United States was entitled to file a nondescriptive notice in the local Michigan courts.

But, there are a number of other reasons why a title-searcher in 1960 should have searched the Federal files, as well as the local files. One year after Youngblood was decided, the court held in the Glass City Bank case that the United States' tax lien under 3670 applied to after-acquired property.

Now, after-acquired property cannot be described in a notice which was previously filed, so we think a reasonable lawyer or reasonable title-searcher would well have been on notice as to the possibility of the liens that were Federally-filed.

Moreover, in 1952, as we pointed out in our brief, an article appeared in the Michigan Law Review, which said that

lawyers perhaps have a need to check Federal filing.

In 1958 --

Q And on what grounds?

A On the grounds that the Glass City Bank and the ground that the statute and legislative history as construed by the Sixth Circuit were just construed wrong.

Q On the ground that that decision might be wrong and might some day be overruled.

A Well, I don't know overruled. As I say, we view the remainder of the opinion in Youngblood, beyond the point where the court held that a Federal nondescriptive was not entitled to filing as dictum.

Now, I conceded that the court made it quite clear that it was reaffirming its decision in the Maniachi case, but nevertheless was dictum. Glass City and Youngblood, it seems to us, cannot stand together and Glass City was decided only a year after Youngblood.

The Wright article in 1952, we think, suggested that a problem existed and in 1958 in the Rasmussen case, the Eighth Circuit reached exactly the contrary conclusion from the conclusion which the Sixth Circuit had reached in its dictum in Youngblood.

And so, by the time the Carlsons purchased this property in 1960 it seems to us that it was clear enough that there was a problem. But we don't say that the law was clear;

we do say that there was confusion; and we think this confusion was recognized by the title-searchers in Michigan and that is the reason why they accepted from the abstract, to get themselves off the hook from Federal filings.

All of these reasons, we think, undercut the argument that the Carlsons made that they justifiably relied --

Q In terms of the hardship or good faith, would there not be exception in the title opinion to put a reasonable person on notice that there might be an inquiry to be made at the District Clerk's office?

A We think it would, but respondents tell us that everybody did it the other way and nobody paid attention to the Federal filing.

Our position here is: where they're asking that Union Central be applied perspectively only is that they have to show some real justifiable reliance to warrant an exception to the general rule applied by this court that its decisions apply retrospectively as well as prospectively and we don't think they have; indeed, the Mortgagee in the Union Central Case, was in precisely the same position as the Carlsons were here. They couldn't have known that Youngblood was going to be discredited by this Court, but there is no hint in Mr. Justice Black's opinion that that decision was to be prospective only.

Regarding this question of prospectiveness versus retroactivity, we have reviewed the --

Q Might I ask: is the Federal requirement still of a filing only in the District Court?

A Either the District Court, Your Honor, or locally.

Q In other words, the law is the same today as it was then?

A Yes, for all practical purposes, although it's somewhat more complicated, as are most provisions ofthe Internal Revenue Code now.

Q I wouldn't just say "most." I would not limit it to most.

Q The Michigan Law has been changed?

A Yes, it was changed in August of 1956.

Q Right.

A At which time Michigan adopted the Uniform Tax Lien Registration Act.

In addition to the justifiable reliance claim, the Court in its decision in the Linkletter case and the progeny of that case, largely in a criminal area, in deciding whether a decision should be applied prospectively or retroactively.

And more recently in Cipriano against City of Yuma, a voting rights case, have looked to three factors to determine whether it should be retroactive or not. The first, as we have mentioned, is justifiable reliance and for the reasons I have outlined, we don't think that the Carlsons could have justifiably

relied.

The second factor is whether the purpose of the new rule would be frustrated if the decision were applied prospectively only. Here we think it would because, as a result of the change in Michigan Law to which Mr. Justice Stewart referred, there would be no other cases, probably, that would be governed by Union Central and Union Central will stand by itself as a one and only decision having no application outside of its four corners.

Finally, the Court has looked to whether the effects of holding a decision prospective in the criminal area, whether the effect of that would impair the adminisration of criminal justice, and it seems to us that the analogy here is: what would it do to other Federal tax liens? And again, as I have noted, it would cast a cloud on some 40,000 of them.

So, for all of these reasons, I don't think that Union Central can be considered a "Prospective only" decision; that it is clearly governing here. The same law was construed by this Court eight years ago when it was held not to authorize a Federal filing.

I might add that the --

Q When did the Court first hold that you could apply prospectively only?

A When did the first --

Q What was that case; what date; do you remember?

A Well, one of the earliest cases would be the Chicot County case. But, as I say, I think that since Linkletter in 1965 the courts have been faced with a series of problems, largely in the criminal area, but more recently in Cipriano against City of Tulsa.

Q Well, Linkletter was after the Union Central?

A Oh, yes.

Q But in similar cases, particularly cases involving property rights and reliance, the seminal case is the Chicot County Drainage District case; isn't it?

A Yes, but --

Q Which was long before Union Central.

A That's true, Your Honor, but that case, it seems to us, was largely based on considerations of res adjudicata. The parties in interest there, having themselves litigated the case, whereas here the Carlsons, admittedly, were not parties to the Union Central decision and we don't think that the considerations are at all the same and in any event, we don't think their reliance is justifiable, for the reasons I have outlined.

I might say that the Carlsons did have a terrible problem here, but so does the Internal Revenue Service in filing these liens. In the Maniachi case, which was decided by the Sixth Circuit in 1940, the United States filed its lien both Federally and locally and its interest was held subordinate

to the interest of a subsequent bona fide purchaser.

In Youngblood, it tried to file its notice Federally and it was held it was not entitled to file its notice Federally. And here again it is done so.

The Sixth Circuit, it seems to us, has held that no matter what the United States does to file a Federal tax lien, whether it be local or Federal, it cannot prevail.

The District Court, in addition to relying on its prospectivity argument, also found that Union Central was distinguishable. It said that there was an unsuccessful filing attempt in the Union Central case with the local Register of Deeds. That is not the case so far as the opinion of this Court and the records show, although it was stipulated in that case that the Oakland County Register of Deeds had a policy of not accepting nondescriptive Federal filings.

The point the District Court seems to make is that had the United States attempted tofile locally it would have been accepted by the Register of Deeds here, and therefore this would have givennotice to the Carlsons. We don't know if that is the case or not, because the United States did file a nondescriptive notice in Maniachi and it was held that the subsequent purposes, nevertheless, prevailed.

Moreover, the law as expounded by the Michigan Attorney General in 1953 in his decision that Federal nondescriptive notices were not entitled to be filed locally, was

nothing new. If I may quote from the decision in Youngblood in 1944: "No ambiguity appears in the Michigan Statute; its mandate that the notice of lien shall contain a description of the land is unmistakable and the authority of the Register of Deeds, a ministerial officer, is clearly limited to the recordation of only such notices of United States tax liens as comply with the requirements of the statute."

This is what the Sixth Circuit held in 1944 and this is what the Attorney General held in his opinion in 1953. It was nothing new.

The question is not whether a local Register of Deeds would or would not have accepted a nondescriptive Federal filing.

Q You did make a nondescriptive Federal filing in Wayne County; didn't you?

A Yes, Your Honor.

Q And that was accepted?

A Yes, it was.

Q By the Registrar.

A Apparently contrary to what the clear law of Michigan was as construed by the Sixth Circuit in the Youngblood case.

But the point is that whether a filing would or would not have been accepted, is not the issue; the question is whether the local law authorized a filing on the basis and on the

conditions that the Michigan Statute plainly imposed. And that question was answered by this Court in the Union Central case; negative. We think that Union Central is controlling here and that the judgment below must, therefore, be reversed upon the authority of Union Central.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Zinn.

Mr. Pevos.

ORAL ARGUMENT BY DANIEL N. PEVOS, ESQ.

ON BEHALF OF RESPONDENTS

MR. PEVOS: Mr. Chief Justice, and may it please the Court: As my learned colleague indicated, this is really the case of the United States against Oscar and Genevieve Carlson, and not the estate of Donnelly, who has been dead now for some six years and who would care less as to what the outcome of this matter is.

But, as indicated, the home of the Respondent Carlson stands in jeopardy at some $36,000 in tax liability of the late Mr. Donnelly, whose relationship with Carlson was merely that of seller to buyer. And Carlson is the admitted.

Q Why is it that in Michigan there is no search for Federal liens, by title-searchers or lawyers?

A Mr. Justice Brennan, in 1923 --

Q The reason I ask is this was just commonplace when I was in practice in my home state. You just ordinarily -- if you had a title search you always asked for, the Federal

District Court for a certificate of Federal tax liens as you asked local county court and the Secretary of State for state liens.

Q Well, perhaps my learned colleague didn't quite make it clear as to what the Internal Revenue Code, Section 3670 or presently Section 6323(a) provided that notice of the lien in order to be effective against subsequent purchasers, mortgagees, et cetera, would be filed with the local office if the state had desgnated such a local office and then provided that in the event the state had not designated such local officer, then the Federal filing would be applicable.

As a matter of fact, the State of Michigan, since August of 1956 there has not been a Federal filing, because at that time Michigan adopted the Uniform Federal Tax Lien Registration Act and brought itself into line with probably all the other 50 States, with the exception of the states now that the Government contends has adopted a bad form. I think four states remain by my learned colleague.

But, once the state has designated such a local office for the filing of a Federal tax lien notice then there is no requirement of filing these with the Federal Government and the Federal Government --

Q See, we didn't have that in New Jersey and we simply went and always asked for a certificate of liens from the United States District Court Clerk. That happened with every

property transfer. I just wonder, that apparently did not obtain in Michigan?

A I don't think it obtains in most states, Mr. Justice, because most states have --

Q Maybe it doesn't in New Jersey any more. It's been a few years back. This may be so.

A But, in thosestates that have a state law designating the place to file a Federal tax lien notice, the notices are filed in that state office and not the Clerk of the Federal Court, which was the -- well, they are not filed with the Federal Court.

Q What is your hypothesis as to why the title attorney would took an exception indicating that he had not searched for Federal tax liens?

A Well, Mr. Justice, I don't think that that was correctly stated by my learned colleague. In 1944, as has been indicated, the Youngblood case was announced by the Court of Appeals for the Sixth Circuit, and as a matterof fact, there was never any attempt on the part of the Government to even ask for certiorari of that case. So, from 1944 on, as far as practitioners were concerned in the State of Michigan, the Youngblood case represented the highest interpretation of the validity of the Michigan Recording Act and the Michigan Recording Act designated a local office for the filing of Federal tax liens. Now, the court, in its wisdom, in the Union Central case in 1961

decided that this particular Michigan Act was invalid as to the facts involved in that case, because of that clause of the Michigan Act which requires the Government to put the description of land in the notice that they were filing, but until this Court made that pronouncement at the end of 1961, as far as practitioners were concerned, in the State of Michigan, notwithstanding a learned Law Review article and a few people that may have had some doubts about the Youngblood case, the Youngblood case was the law.

Q What was the date of the opinion; the title opinion in this case?

A The title opinion in this case, Mr. Chief Justice, was in either July or August of 1960. The purchase was shortly thereafter and the purchase was consummated approximately 16 months before the decision of this court in the Union Central case.

Q But something led the title-examiner, the title-searcher to draw attention to the Federal tax lien problem; did it not?

A No, Mr. Chief Justice. Let me explain. In a state that has a version of the Uniform Tax Lien Registration Act, all these notices must be filed, Federal notices must be filed in a local office.

So, if the state has the Uniform Act the title company is not going to go to the Federal office to check for tax liens,

because the liens aren't going to be there. As I indicated, since August of 1956 in Mivhigan there has not been such tax lien notices filed with the Federal Court. They have all been filed with the Registers of Deeds in the counties, because Michigan at that time went into line with the rest of the states in adopting the Uniform Recording Act.

Q But why, then, as the Chief Justice asked, would you put in this exception in the title opinion?

A Because the title company would be justified in relying on the records of the Register of Deeds office, Mr. Justice White.

Q What did the exception say?

A The exception said: "This abstract of title covers matters on file in the office of the Register of Deeds in Livingston County, Michigan. It does not contain matters of record in the Circuit, Federal or Probate Courts. If an examination of these matters is required, an extra charge will be made," or words to that effect.

Q Didn't mention taxes?

A No; it just said Federal Courts, the State Circuit Courts and Probate Courts. In other words, it didn't single out the Federal tax liens as something to disregard, I'll say.

Q It could have been something in regard to judgment?

A That is correct. In other words, if the judgment was entered in the Circuit Court, which may have affected land, unless the parties to that suit saw that that judgment was filed with the Register of Deeds, then the abstract company wasn't going to pick it up. In an effect, under Michigan Law, there would be a question as to whether he would be affected by such a judgment without that recording.

Q But is the title opinion in the appendix somewhere? Where does this disclaimer or caveat appear in the record we have before us here?

A I believe it is in the appendix, Mr. Justice Stewart, but I believe it's in the argument portion. The abstract itself, was not appended to the record in the lower court; it is not an exhibit in this particular matter.

I believe it was read to the trial court during argument that would appear in the appendix under the record --

Q Actually, during the colloquy or something. I just wondered how we know -- how my brothers know that this is -- that this title appeared in the opinion, in the title opinion. It's somewhere here in the appendix in the colloquy portion?

A Yes, colloquy between counsel and the court; yes.

My learned colleague also has ignored the fact thatin the Spring of 1961, which was approximately eight months after

the Carlsons bought the property in Livingston County, the Government filed notices of tax lien with the Register of Deeds in Livingston County and the Register of Deeds in Genessee County, Michigan. The late Mr. Donnelly was a resident of Wayne Wayne County and admitted that in 1950 when the day before the Federal tax lien notice was filed with the Federal Court, a filing was made and accepted by the Wayne County, Michigan Register of Deeds, the county in which Mr. Donnelly resided. The filings in 1961, eight months after the Carlsons purchased, were eight months before the Union Central case.

Now, the Government says that these filings don't mean anything; that they are superfluous. But the question here involves whether this Court should consider the Union Central case to be prospective or retroactive and if the Government was confused as to its responsiblity of filing notices with the Register of Deeds, then Mr. Carlson certainly had no more knowledge than the Government of what this Court would do months later in the Union Central case.

The Government filed locally. If there was no requirement or if it didn't feel that it had a requirement of filing locally, it could have relied --

Q That is to say the Government --

A In the decision in Union Central. Union Central was in December of 1961; this property was purchased in August of 1960, about half-way between the time of purchase and

the time of the Union Central decision, the Government took a notice of lien and filed it with Livingston County, the very same county where this property is located, but it was months after Carlson bought the property.

Q That was a lien arising from some other --

A No, no; it wasthe same lien, Mr. Justice; the same lien against Donnelly from 1950. They just took the notice out to that county.

Now, in practice, if a man lives in a county, the state has a valid recording law and they will normally file that lien in the county of residence, but if the Internal Revenue Service becomes aware of the fact that the man has property in another county they will take a similar notice to that other county and file with the Register of Deeds.

Well, they became aware in 1961 that Mr. Donnelly may have had property in Livingston County. They filed the notices at that time, but that filing didn't help the Carlsons, because they had purchased the property and paid theirmoney and that was it.

Q Well, your point is: it didn't help the Government.

A Well, it didn't help the Government, but it showed that the Government was no greater -- had no greater idea of what the end result of this confusion of Michigan Law, because of perhaps, the Youngblood case, than the Carlsons had.

The Carlsons and their attorneys relied on an abstract and this was a clear exception. It was not something that the abstract company singled out for the Carlsons. This exception appeared in each and every page of every abstract issued by this Livingston County office.

Now, the Michigan statute that this Court construed in the Union Central case, was on the books in the State of Michigan for approximately 36 years before it was repealed in 1956. At the time of the Union Central case, the Michigan statute had been on the books almost 40 years. The Youngblood case was the highest pronouncement of law at that time, the time of the Carlsons' purchase; and as the trial court, and as affirmed by the Court of Appeals believed, the statute, the Michigan statute had every appearance of being upheld. This Courthad a situation before it in the Union Central case where in 1953 the Michigan Attorney General rendered an opinion saying that from that time on the Registers of Deeds couldn't take Federal notices without a legal description and in the Union Central case it says from the time of that opinion until 1956, which was the repeal date of that Michigan statute that was construed by this Court, the Registers of Deed would not accept Federal tax lien notices.

And the trial court, and we concur, found that this Court made it's interpretation of the 1923 Michigan statute in light of the facts which existed between 1953 and 1956 and that

this Court did not intend in the Union Central case to go back 30 years and strike out the entire series of transactions and filings in Michigan for a 30-year period. At the very most this Court talked about a three-year period.

The Carlsons -- the lien in this matter was filed in 1950 at a time before the facts which were referred to in Union Central occurred, and the trial court distinguished this case from the Union Central case. But the trial court went on further with the decision in the Chicot County case and the other decisions in this case, indicating that when vested rights are involved, that this Court may, in those circumstances, determine that its decisions would be prospective, rather than retrospective as to the effect of transactions which occurred before the decision of this Court.

Now, I grant you the Government argues in this case that the Chicot case and the Rockaway New Supply case, the Linkletter case, all dealt with other area, but the premises therein that a right becomes vested, that this Court has a right to make such a determination that these rights shall not be affected by the decision and that these decisions should not be retroactive where the effect would be such as it is in the Carlson case.

The Government is well able to protect itself in tax lien matters and has shown the ability to protect itself. This Court should keep in mind in deciding whether to make the Union

Central case retrospective as far as the Carlsons are concerned. The fact that the tax liens were filed in 1950; the foreclosure was not filed until December, 1966, almost four years after Donnelly died, during which time the assets of Donnelly, if he had any, could have dissipated and 16 years, almost 17 years after the tax lien notices were filed, during which time there were two extensions of Donnelly's liability. One extension, which we don't admit the validity of was signed after Donnelly sold his property to the Carlsons.

So, in other words, Donnelly, in 1961 signed an extension agreement with the Government, continuing that liability for another five years and he didn't own the property any more.

Now,this issue was not litigated in the lowercourt, but it shows the equities of the situation in this matter, and the equities are, basically, what the trial court and the Court of Appeals felt should be considered in whether or not this Court should be retrospective or prospective.

Q But,are the equities any different, really, for a man who got in this predicament after the holding in Union Central, if he did not exercise the cautious approach and check the Federal?

A Well, Mr. Chief Justice, I would not defend the same position of a man who, after Union Central becomes the law of the land, would go ahead and buy a piece of property without inquiring into the question of whether the notice was properly

recorded.

As far as Union Central is the law of the land -- as far as that is concerned, and we're not taking the position that there could be any argument at that point. This is exactly the point that I would like to make in regard to this scare tactic that I feel the Government has used here, talking about the effect on 40,000 titles in four other States, other than the State of Michigan. Each of the statutes involved in that situation was adopted after the Union Central case, so if property purchasers, lawyers, Federal Examiners, et cetera, in the four States concerned want to determine the relative effects of the statute, they have Union Central to look at; they don't have a case on the books for 15 years that says just the opposite of Union Central, which was the case in Michigan with Youngblood.

And on appeal from decision of the second highest court, deciding that Michigan had a valid statute, Illinois, Wisconsin, Pennsylvania, and these are post-Union Central statutes, and I say that the people in those states should let the chips fall where they may. The Government shouldn't use this decision as a way of litigating the validity of the statutes in these four states.

Q Have you read the briefs in the Union Central case?

A Not all of them, Mr. Justice Black.

Q Do you know whether anyone suggested any possibility of prospective application or retrospective application as distinguished from one another?

A I cannot anwer that truthfully. I do not know that this issue was raised in that case, Mr. Justice Black. Union Central seemed to be a rather unique case at the time. Michigan was the only state that had that particular section at the time.

Q I haven't read the briefs recently, but I do not recall that any such question came up in any form in that case.

A I don't believe that the issue was raised. I believe that the trial court and the Court of Appeals here had the question before of a situation that occurred before this Court's decision and whether this Court's decision should be made retroactive or not.

Q Excuse me, Mr. Pevos.

A Yes, Your Honor.

Q If Union Central is held to be retroactive, do the Carlsons lose?

A The Carlsons will be faced with a $36,000 --

Q In other words, they lose. They lose.

A That is right.

Q Well, I thought you had other claims before the District Court that that Court did not reach because it

decided its -- on this issue. But even if Union Central is retroactive, it is my understanding that you had other plans peculiar, perhaps, to your case.

A That is correct, Mr. Justice --

Q And even we should hold that the Union Central decision is fully retroactive, then our actions should be, in your submission, we should remand the case for the courts to turn their attention to their other claims.

A This would be correct, Mr. Justice. I mis-spoke myself.

Q What other things?

A We have, among other things, Mr. Justice, we contest some of the factual allegations, such as the signing of extensions. We don't know whether the amount shown is correct.

Q Questions of fact?

A There are factual issues. This goes up on summary judgment before the District Court, Mr. Justice. We do have the issue I mentioned as to the validity of the signing of an extension after the property is sold by the taxpayer. There has been no precedent on this by this court or for that matter, by any other court that I can find; and the issue was not litigated before and would have to be litigated.

Q Wasn't it noted in the Union Central case here that the court in Union Central was reviewing a decision of the State Supreme Court of Michigan?

A That is right, Mr. Justice White.

Q It is cited here that the Michigan decision was in conflict with the Court of Appeals decision in the Eighth Circuit.

A That is correct, but the time sequence would indicate that the Michigan decision was after the Carlsons' purchase and came to this Court after the Carlsons' purchase.

Q But I would take it that the Union Central case had been in litigation for some time.

A No. In the State of Michigan at that time only the Supreme Court decisions were printed. I cannot say when the Circuit Court litigation which was involved in the Union Central case was actually filed, but my recollection was that it was brought before the Michigan Supreme Court for a decision which became known to the public in 1961. When the Michigan Court ruled against the Government, certiorari was granted by this Court in the case. So that here all of these events were after the Carlson's purchase. There was no knowledge on their part, or for that matter, by the Bar in general that this issue was going to litigated by this Court in '61.

Q Well, was there any way for them to acquire knowledge?

A Only by word of mouth, Mr. Justice. As I say, the only Michigan decisions that were printed at that time were the Supreme Court. Now there is an intermediary appeals court

in Michigan where they have printed decisions; they did not have that court at that time.

So, the Michigan Supreme Court decision was printed in '61, which was, again, as I say, after the Carlsons' purchase.

Q But it was decided in '60?

A I believe it was decided in '61, Mr. Justice.

Q But the Union Central?

A That was decided in December of 1961. And I believe that the --

Q No, but in the Michigan Court.

A The Michigan Court, if I recall, was in the early part of 1961. It was after the Carlson's purchase; that, I am sure of.

Q Well, the date on the opinion is September 16, 1960.

A '60? Then I stand correct, except that it was, again, about six weeks after the Carlson's purchase.

Q So, it had been in the lower courts; it had been decided in the Circuit Court, obviously, before the purchase?

A This is true. The Circuit Court in another county --

Q And in the District Court?

A No; the District Court was not --

Q But there were just two levels?

A At that time there was the Circuit Court and an appeal directly to the State Supreme Court. And the decision of the Circuit Court was not generally made public unless somebody happened to be familiar with it or come across it in a newspaper.

We have not discussed today the issue that we have raised here in regard to the necessity of recording a tax lien notice when after-acquired property is involved. Now, the matter is covered in our brief; we feel that it is an issue that has never been passed upon by this Court. And this is that the entireties property which was acquired by Donnelly and his wife in 1949, was not Donnelly's; for that matter, was not Donnelly's for the tax lien notice to attach to, until 1960, when Mrs. Donnelly died and the property at that time became that of Donnelly and we cited in our brief, the Hutcherson case, as well as the Nathanson case and the American National Bank case, dealing with law similar to Michigan; or the Nathanson case, Michigan Law.

All of which says that in an estate by the entirety, neither the husband or the wife individually, own an interest in the entireties property which is capable of standing alone; of being levied upon for the tax liability of one spouse.

The Hutcherson case by the Court of Appeals, as well as the American National Bank case, both indicate that the

Federal tax lien does not attach to entireties property until the death of one of the spouses.

It is our position that a clear reading of the Internal Revenue Code recording provision would require the filing ofa notice as against after-acquired property in a state where such a notice had not been previously filed at the time such property was acquired by the taxpayer.

Now, the Glass City Bank case, as my learned colleague indicated, says that a tax lien attaches to after-acquired property. But there is a void as far as the law is concerned, as to what the Government must do to protect that tax lien against such after-acquired property.

The lien is a legal status; the notice of thatlien is a notice to the world which protects that lien as against intervening third parties and in this situation the Government has said, in effect, that if Union Central applies to the Federal filing of the notice in this case in 1950 that that notice in 1950 is good in perpetuity to all notices filed in the Federal Court on forever until those liens are no longer enforceable.

We feel that this is not the law and is not the intent of the law. The Internal Revenue Code says that notice shall be filed whenever the state has designated a state office. The word "whenever" means at such time as, and I don't think that the Internal Revenue Code has to be construed tomean that a notice filed in the Federal Court is good forever; I'm not

saying that it affects liens that were in existence against property in existence when the lien was filed. But, if the state adopts a valid state recording law it is our contention that the Government must, at that time, go and comply withthat state law as to the property which comes into existence after that state law is adopted.

Q Mr. Pevos, the record, as I read it, indicates that the Court, I think it was the Court, the United States District Judge made some inquiry about whether purchasers have any right of action back against the abstract company, the title company that prepared the abstract; and either your response or that of someone else, speaking for the litigating party -- yes, I think it was your statement -- that there was no action against the abstract company because they protected themselves by making an exception with respect to liens which were on file with the Federal District Court, among other questions.

Now, wasn'tthat enough, when we were talking about the equities; isn't that situation enough to put the purchaser and his attorney on notice?

A Mr. Chief Justice, as I said before, this exception was not something that they typed in just for Mr. Carlson.

Q Well, they typed it in for everybody, but for what reason?

A On hindsight.

Q To protect themselves.

A On hindsight, Mr. Chief Justice. In other words --

Q I would regard that as foresight on the part of the abstract company; not hindsight.

A Well --

Q They protected themselves, as you indicated to the trial judge, by having that exception saying they were calling attention to possible liens that they have not searched for.

A Well, Mr. Chief Justice, and again, this is from my own knowledge and whether I can say this to be considered by this Court, I will say that as of 1970 the abstract companies in Michigan use that same exception, the difference being that now there aren't tax liens filed in Federal Court anyway, and the exception doesn't mean anything. But, if for some reason this Court, in some other situation a year from now determined that the present Michigan law was invalid, then we would have the same problem all over again.

In other words, they have that in there because they dont look at the Federal Court and they didn't look at the Federal Court recordings in 1960 in this transaction because it had been assumed for almost 40 years that they didn't file tax liens in Michigan in the Federal Courts.

Q Well, absent that statement by the abstract companies, they might well be liable to the purchaser; would they not?

A If they did not indicate that a separate request would have to be made to the Federal Court, it very well could be; yes, Mr. Chief Justice.

Q So that their foresight, as distinguished from hindsight, their foresight has protected them in the same manner the purchaser could have protected himself, by saying, in effect, if his lawyer was not experienced enough: "What do you mean by this, and how much does it cost?" And, upon finding that it would cost $3.00 or $4.00 to make that search routinely, or even less, depending upon the number of entries, he would have been protected; wouldn't he?

A I would say that that may have been but at the time there would have been a question whether or not even the entry of a Federal recording would have been anything except actual notice, as opposed to constructive notice, until the Union Central case was handed down. The Federal filing may not have been a valid finding, even if it was there, and I believe that there is a void, Mr. Chief Justice, in the law as to whether actual notice stands in the place of constructive notice in regard to the Federal tax lien notice filing. That, I don't think has been fairly raised.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Pevos.

Q Mr. Zinn, may I ask at the outset, the question I asked your adversary: if we hold that Union Central is effective only, does the Government lose?

A Yes; it does.

REBUTTAL ARGUMENT BY MATTHEW J. ZINN,
OFFICE OF THE SOLICITOR GENERAL, ON
BEHALF OF PETITIONER

MR. ZINN: Mr. Chief Justice, and may it please the Court: Just two or three brief points.

First, here, Respondents are asking that a decision of this Court be applied prospectively only. Theypointed to the fact that the United States filed locally in Wayne County in 1950 and locally in Genessee and Livingston Counties in 1960. This is the case. The law was confused, but the Respondents are the ones that are asking that it be applied prospectively only. And, contrary to what the District Court said on Page 56 of the record, the next to last line: "Prior to that decision," referring to this Court's decision in Union Central, "hhere was no indication that such statute would be declared to be illegal. On the contrary, every indication was that the statute would be upheld."

We have outlined previously that it was not just the Law Review article in 1952 pointing out the problem, the Glass City Bank and Youngblood cannot stand together. That was a

decision of this Court and that shouldhave put on notice, reasonable purchasers of property and others in Michigan.

Q What two cases could not stand together?

A Youngblood decided by the Sixth Circuit in 1944 and holding that the --

Q And Union Central?

A No; the Glass City Bank. The Glass City Bank said that the United States' lien applies to after-acquired property and there is no way to describe after-acquired property in a notice, because we don't know what the property is going to be.

Respondents seem to support the judgment below on the ground that the United States should have refiled in 1960, after Michigan had passed the Uniform Tax Lien Registration Act in 1956. With regard to that, I think that the differences between this Court's views and that of the Sixth Circuit, are made quite clear.

With reference to the Sixth Circuit's opinion in the Faulk case which is pending on the Government's petition for certiorari, Number 244 and the statement of Mr. Justice Black's in the Union Central case. In order for the United States to refile every time a deliquent taxpayer acquires property afterwards it has to follow that taxpayer around and keep tabs on him.

Now,in the Faulk case, which is quoted on Page 13 of Respondent's brief, the Sixth Circuit said, and I quote:

"Some scrutiny of the affairs of delinquent taxpayers sufficient to enable it to know where to properly file notice of lien, seem tohave been contemplated by this entire statutory scheme, requiring the Government to investigate the affairs of the delinquent taxpayer to determine to what property the statutory lien attaches and therefore, where to properly file the required notice of lien in no way cuts down on the broad scope of the lien." That is not the case and that is to be compared with the statement of Mr. Justice Black, 368 U. S. 294, and I quote:

"It's obvious that this expansive protection for the Government, that is, the protection that its lien runs to after-acquired property would be greatly reduced if to enforce it, Government agents were compelled to keep aware at all times of all property coming into the hands of its tax delinquents."

The Sixth Circuit has been out of step since the Maniachi case in 1940. The United States files both locally and Federally in that case, and it lost. It attempted to file locally in Youngblood and it lost. Union Central is controlling here and there is no basis for prospective only holding.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Zinn. Thank you, Mr. Pevos. The case is submitted.

(Whereupon, at 1:30 o'clock p.m. the argument in the above-entitled matter was concluded)