Supreme Court of the United States

October Term, 1968

In the Matter of:

THE GAS SERVICE COMPANY, Petitioner vs OTTO R. COBURN, on behalf of himself and All Others Similarly Situated, Respondent	Docket No. 117

Pt. 2

Place Washington, D. C.

Date January 22, 1969

ALDERSON REPORTING COMPANY, INC.

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C O N T E N T S

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THE GAS SERVICE COMPANY, Petitioner;	:	
vs.	:	No. 117
OTTO R. COBURN, on Behalf of Himself and All Others Similarly Situated, Respondent.	:	

Washington, D. C.
January 22, 1969

The above-entitled matter came on for further argument at 10:12 a.m.

BEFORE:

EARL WARREN, 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
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

(The same as heretofore noted.)

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 117, Gas Service Company, petitioner, versus Otto R. Coburn.

Mr. Wormhoudt?

FURTHER ARGUMENT OF GERRITT H. WORMHOUDT, ESQ.

ON BEHALF OF PETITIONER

MR. WORMHOUDT: Mr. Chief Justice, may it please the Court:

At the close of argument yesterday, I was trying to establish that there has been in existence long before the enactment of the Federal Rules a body of law derived from the Acts of Congress and the interpreting decisions of this Court which are applicable to the jurisdictional requirements for Federal Courts, that body of law being independent of and, indeed, I think, superior to the rules of practice that this Court may have promulgated from time to time.

Because of that body of law, I think we have Rule 82 of the present Federal Rules. Rule 82 provided initially that none of the rules would be interpreted to extend or limit the jurisdiction of Federal Courts.

When the 1966 amendments were adopted, Rule 82 was restated, making reference to admiralty, but continuing the restrictive language I have just mentioned.

I submit that Rule 82 is there simply as a guide to construction and an admonition that in interpreting the rules,

shall not affect the jurisdictional standards of the lower Federal Courts.

I would now direct the Court's attention to the nature of the particular claims involved in this action. I think I mentioned yesterday that neither the District Court nor the Court of Appeals attempted to categorize the claims involved in this action as (b)(1), (b)(2), or (b)(3) claims.

I don't think there can be any question, however, that if this is a proper class action it must fall within the terms of subdivision (b)(3) of amended Rule 23, which refers in substance to cases presenting common questions of law or fact where the predominating common question would take precedence over any separate questions arising out of the claims.

Q Counsel, you do not question the proposition that this action is a class action under amended Rule 23, do you, at least -- what is it -- (b)(3)? You don't quarrel about that?

A I do not, sir. I am merely trying to --

Q Categorize it.

A -- categorize it under the rules.

I think in respondent's brief, reference is made to the fact that prior to the amendment, cases such as we have here today, involving separate and distinct claims, really amounted, under the prior rule, to a permissive joinder, en masse, so to speak, under prior Rule 23.

That being the case, I do think, then, we must

consider, as Mr. Justice White was suggesting yesterday, the logic of applying or abandoning the aggregation doctrine under (b)(3) cases to the other rules which deal likewise with permissive joinder.

Subdivision (b)(3) certainly presents an instance of permissive joinder. It provides by its own terms that any party may opt out upon receipt of notice that he has been included within that class which is in litigation before the Court. So consequently, we still have the permissive feature involved in at least Rule 23(b)(3) cases.

Q I take it you would say that in an action by stockholders in cases where they have similar claims, that if three stockholders sued the same defendant and they all were named plaintiffs, that each would have to have the necessary jurisdictional amount.

A Well, if Your Honor please, at least under the laws of Kansas, nearly all stockholder cases would have to be filed as derivative suits. There may be special instances of departures from the derivative rule, but normally stockholders actions present but a single action on behalf of the corporation and consequently, there would not be a joinder problem under the situation you put.

Perhaps there may be in other State jurisdictions. If so, I am not familiar with the problem that would be present.

Q But you think in permissive joinder cases where

each one has a distinct claim, that the three parties are permitted to join in one action suing the same defendant, that each must have the jurisdictional amount.

A I don't think there has ever been any question about that, Your Honor.

Q And the suggestion is here that -- your claim is that the other side suggests that all you have to do is to drop out the other two names and sue as a class --

A That is correct.

Q -- to avoid the same result.

A And it seems to me also, along those lines, that if aggregation has not been permitted under Rule 19 in an ordinary permissive joinder case, where all the parties are before the Court, they are identifiable, and certainly res adjudicata would apply to any matters litigated where the parties were named, that in a situation where all the parties may not actually be before the Court, there is even less reason to aggregate their claims in order to satisfy the jurisdictional amount than there would be in an ordinary permissive joinder situation.

Q Even if they are bound by the judgment.

A Yes, because I think the same principle is involved in both situations. They are all bound.

Q Well, let's take your case and let's suppose that the plaintiff here lost. Let's suppose that some other user of gas service brought a subsequent suit of exactly the same sort.

Would he be -- would the doctrine of collateral estoppel by that suit?

A May I ask if you are assuming that the subsequent suit is filed by a person who was a named party in the original action?

Q No, no. Not a named party at all. But this is suit is -- let's suppose that the present suit goes ahead to judgment and the judgment runs against the plaintiff here.

Another gas user situated in exactly the same position brings a subsequent suit. That, as you know, is sometimes a very useful way to work backwards to the nature of the action. Would he be estopped?

The suit was a matter of public record and he didn't join in it. Let us assume he could have joined in it but he didn't join in it and he brings subsequent suit.

A May we also assume that he did not out-file on receipt of the notice that the suit had been filed?

Q Well, then you are assuming that it is a class action, aren't you?

A Yes.

Q So do you concede that this is a class action in which, a compulsory class action, in which, in effect -- the kind of a class action in which joinder is compulsory in the sense that if a person in the same situation does not join, he is forever barred?

A Not on the facts of this case.

Q He must be if you say that he is bound unless -- maybe I misunderstood you -- he is bound unless he opts out. Then this is not a permissive joinder case but it is true class action.

A Well, I might suggest it is a permissive misjoinder case, then, where you have the option to take yourself out. On the facts you put, Mr. Justice --

Q I've never heard that term, but it has charm. The fact of the matter is, this is pretty close to a true class action, isn't it, if it is not a true class action, this one?

Apart from how it is phrased, I don't recall how the complaint was framed up.

A I think in a traditional sense I would have to disagree, that this is not a true class action. These claims are separate and distinct and traditionally, at least, under those circumstances, any member of the class would have had perfect freedom, prior to the enactment of this rule, to litigate where he pleases, when he pleases and --

Q I am not talking about prior to the enactment of this rule. You are addressing an argument to us on the jurisdictional amount, but I take it that your argument does not necessarily amount to a plea to us to hack away at the rule itself.

A That is correct.

Q So let's take it under this rule. Under this rule, I suggest to you that this is a -- there is a possibility that this is exactly the kind of a situation that the rule contemplated as a class action.

A Well, I think within the terms of the rule I have no disagreement with your --

Q So that if somebody doesn't opt out, he is forever barred.

A I think this is correct.

Q Then the question is, do you or do you not properly infer from those legal consequences a conclusion with respect to the jurisdictional amount, whether you call it aggregation or something else. Am I right?

A I think that is the question, and again, I may be repetitious, but I would still take the position that you must consider the nature of the claims involved in order to test jurisdiction.

Q Well, everybody here is claiming -- the claim here is exactly the same with respect to all members of a large and definable group. The only thing that differs is the amount in the case of each claimant. Now, what more do you want for an aggregation case, or whatever word you want to use?

If this is not a case in which you can put together the total amount of the claim, could you state one to me, forgetting the stockholders' derivative action cases, which I think

you properly distinguished and which was involved in the preceding case which, however, was brought as a class action? Apart from that, can you give me any case in which there can be a proper aggregation or pooling of amount?

A I think a good example would be a trustee situation under a trust indenture.

Q Well, that action would be brought by the trustee alone.

A Assuming that the trustee was somehow or other derelict in his duty with respect to the preservation of the trust property. I would think then that any beneficiary of the trust would have the right, on behalf of all the other members who are beneficiaries, to attempt to enforce or employ --

Q It is either like a derivative action or it is like this action, isn't it?

A Yes. There may be other categories where you have a fund involved where first there may be undivided interest involved in the fund. I would suggest that as a possible third category, something in the nature of title suits.

Q That is the classic third category, isn't it, under the --

A I think so. And there, as I mentioned, I don't think you have any problem of aggregation because you only really have a single claim. It does affect many people, but the claim is singular.

Q Well, do you see anything inherently inconsistent with saying that you cannot aggregate and yet that all members of this particular class would be bound by the judgment?

A No, I see nothing inherently inconsistent in that if it were --

Q There may be some reasons why you think they should not be bound, but it doesn't necessarily undermine your position that there is no aggregation.

A That is correct. I think we simply have a policy of consideration here which derives from Congress in a prior body of decisions of this Court which is, namely, to restrict access to the lower Federal Courts, to rease their case load. For that reason, we have a rule of construction which says in so many words "Let's not construe the rules to increase that case load."

The Tenth Circuit Court conceded that prior to the amendment of these rules, this case simply could not have been filed. The conclusion is that by virtue of the amendment, now it can be, and I submit that consequently jurisdiction has been large because it is now present where it was not before.

As a result, we are going to have considerably more litigation in the Federal Courts of the most complicated kind and the kind of litigation that can certainly be properly handled in State Courts, and I think both of these cases present good instances of that.

We have in this case a question of the legality of the municipal ordinance involving a franchise tax collected by a public utility which is subject to regulation by Kansas authorities. There are just simply no policy reasons apparent, apart from the so-called desirability or workability of the rules, which override the Congressional policy, I submit, of easing the workload on our lower Federal Courts.

I think at least in my district we can get a case disposed of in half the time in our State Courts.

Thank you.

Q Did I understand you to say that your State Courts procedurally allow for class actions of this type?

A Yes, in Kansas we have the equivalent of the former Rule 23.

Q So-called spurious class action.

A No, the entire former Rule 23, which included --

Q You pretty much adopted a counterpart of the Federal rules in Kansas, but haven't yet amended them.

A That is correct. So far as I know, there is no consideration being given to amending them at the present time.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Martin?

ARGUMENT OF ROBERT MARTIN, ESQ.

ON BEHALF OF RESPONDENT

MR. MARTIN: Mr. Chief Justice, and may it please the Court:

I think we have two platforms from which to look at the question before the Court, the first one being the proper effect and interpretation of amended Rule 23; and the second one being whether there is any substance to the argument here that the effect of the amended rule is to extend the jurisdiction of Federal Courts unlawfully.

Now, most of the questions that have occurred, or that have been asked from the Bench in the preceding case and in this case really concern the first question: the proper interpretation and application and the practical effect of Rule 23 on class litigation, so I want to address myself to that aspect of what we had before first.

I am embarrassed to say that I have a somewhat different view of amended Rule 23 than seems to be the view adopted by any of the three preceding counsel. I see Rule 23, as it is now amended, as an attempt to straighten out and do away with some terrible problems that confronted us in the practical application of former Rule 23.

Very briefly, what I am referring to is this: Former Rule 23 did have its origin, as one of the counsel stated, in the old equity rules. But when Rule 23 was promulgated, it

appears from the history that Professor Moore undertook to categorize the circumstances under which you could have a class action, and he came up with the three categories which were not recited in the rule by name, but were described, really, in subdivisions (a)(1), (2), and (3) of true, hybrid and spurious.

Now, he thought, and I think the Bar thought, and I think you can find in the literature statements by writers to the effect that this was a clear rule, in plain English, and everybody could understand it. I think everyone thought that those categories were going to work well, and they do work well when you are talking about property rights, and they had some historical basis.

If two people were joined together as plaintiffs to try title to a quarter section of land, it wasn't any problem to understand that they could aggregate their claims, they were all going to all be bound by the judgment. You really had one piece of litigation. We had what we called "in rem" jurisdiction and all these things were familiar to lawyers and they understood them.

Q It wasn't an aggregation; it was just one claim, wasn't it?

A Yes, sir. It was really aggregation of plaintiffs and not aggregation of claims at all.

Professor Moore attempted to apply that to class

actions. I think that history demonstrates that it works well when you are dealing with property or a fund, but class actions very quickly became broader than that. There were all kinds of rights and all kinds of situations developed chiefly by modern commerce that cried out for adjudication by class action.

It isn't a question of increasing case load; it is a question of decreasing it. When we tried to extend these categories beyond property rights, we got into trouble, and we got into bad trouble.

Rule 23 left cases spread over our reports that simply couldn't be rationalized or harmonized in certain areas, one of them being the question of jurisdiction that we have before us, both as to amount and as to diversity.

There was no problem about aggregation when you talked about a claim to try title where you had more than one party. But when you got down to what Professor Moore termed, and the committee termed, a "spurious" class action you had the literature which said this really isn't a class action at all; this is a permissive joinder device.

Then you were face to face with the problem not only as to jurisdictional amount, but as to whether or not intervenors had to show diversity.

Another area that we had which developed some terrible law was in the effect of the judgment. As a matter of fact, the burden of my argument will be that those two are bound up. If

you are going to bind the class with the judgment, then the amount in controversy is the effect of that judgment on the class, and that is the value that you have to look at.

Under old Rule 23, when we got down to the effect of the judgment, we developed a set of laws which said that in true class actions, those really involving property or something directly related to it, all of the class was bound. In hybrid class actions, they were bound, but to a lesser extent, and under different circumstances, and frankly, there were so many different decisions that I haven't been able to figure out when they are bound and when they are not in a hybrid class action.

In a spurious class action, the law is clear that no one in the class is bound except those who intervene. That seems somewhat reasonable until you carry it another step. The practice developed of starting a spurious class action. The other members of the class who were aware of this anomaly would sit on the outside and they would wait until the case was adjudicated, or almost adjudicated, until it became clear that the plaintiff was going to win, and then they would come in and intervene and say, "We want the benefits of the decree."

But the problem was that it was a one-way intervention. They could stay out and not be bound if the defendant won, and they could come in and be bound if the plaintiff won.

Further than that, the courts quickly confronted themselves with this problem: Here is what we call a class action.

The literature says it really isn't a class action; it is a permissive joinder. One of the plaintiffs, one of the members of the class, stays out for a while. As a matter of fact, there was no requirement that he be given notice. He might not know that he was being represented in court, or not represented, depending on how the court reviewed it. In any event, he stayed out.

He finally learned of it, or decided he would come in and he comes in, and the defendant says, "Well, this is a spurious class action. It isn't really a class action. Your claim is barred by the statute of limitations"; whereas, the plaintiff, the original member of the class, his claim is not.

You can't reconcile these conflicting interests. There were other problems that cropped up in trying to pigeonhole the class action. In effect, what Professor Moore did to us, and the Advisory Committee, in the framing of the original rule, was to lead us down the same path as the old common law pleaders.

Q The original Federal Rules of Civil Procedure, in other rules, provided for joinder -- joinder of parties and joinder of causes of action -- and basically there was very free joinder, and still is.

If a so-called spurious class action is nothing more nor less than something that covers permissive joinder, what would have been the point of putting it in there along with the

joinder rules?

A Well, that is what one wonders. Personally, I do not agree, from the standpoint of personal philosophy, that it was only a permissive joinder device. But that became the law, or at least everybody thought it was the law. I don't agree with that.

I think it was intended to be something more, and what I am saying is that at the present time, under amended Rule 23, it is something more and it should be.

As I see it, the effect of amending Rule 23 -- it wasn't really an amendment; it was a complete redrafting -- the effect of that has been to eliminate just exactly the problem that you mentioned, only now I don't think we have any such thing as a spurious class action. I don't think we have now any such thing as a hybrid class action.

I think that now, for the first time, and as it should be, all class actions are true class actions.

Q You do have (b)(1), (b)(2), (b)(3).

A Yes. But (b)(1), (b)(2) and (b)(3) cannot be related to true, hybrid or spurious, either historically or in the context of the rule.

What really has happened under amended Rule 23, and the answer to counsel's argument that the amended rule is going to vastly increase the case burden of the Federal Courts, is the rule itself.

Rule 23, as now amended, or new Rule 23, as I will call it, provides a very workable, precise, and careful description of what is and what is not a class action. Now, there is a little different treatment in terms of procedure given to a class action in which the cohesive force of the class is a common question of law or fact in a common interest in relief, as distinguished from that situation in which the cohesive force of the class is a joint interest in property or a fund.

But it is a procedural difference, and nothing more. It isn't a difference in substance, and it ought not to be.

Q Could one of your gas users bring an action by himself? These are gas users here, aren't they?

A Yes, sir.

Q Could just one member of this group bring his own action if he wanted to?

A He could in State Court. There might be one -- we have stipulated that we don't know of any, and I don't know of any -- but I suspect that there are industrial users who would have $10,000 and could bring one in Federal Court, but I don't know that.

Q Let's assume that two or three of them together brought their own action, naming each as a party in the Federal Court and the three of them together added up to $10,000. They didn't purport to bring a class action; they just -- the three of us are suing. It is a permissive joinder case. I suppose

it is permissive joinder, isn't it?

A It would be; yes, sir.

Q There is no aggregation there, is there?

A Absolutely none.

Q And this is because of a statute that requires $10,000.

A It is, but the amount in controversy, even though they might, by permissive joinder, style themselves as plaintiffs in the same action, rather than separately numbered cases, doesn't change the fact that the amount in controversy truly is the individual claim of each one.

Q But they say, "Well, yes, but we add up together to $10,000."

A It wouldn't make any difference.

Q But you think that one of them then could say "Well, let's two of you get out and I will bring a class action"?

A Well, Mr. Justice, the two of them wouldn't have to get out but, to take your example, one of them could say, or all three of them could say, "We are not going to" --

Q "We are just going to state our cause under Rule 23."

A "We are going to state our cause under Rule 23 and we contend that this is, in fact, a class action."

If I may give you a long answer to that question --

Q Well, if there are only three members of the

class, the three could still stay in and say, "We are suing as a class action?"

A I think I see what you are getting at. If this were a different suit, and there were three members of the class, in theory you might argue that they could.

Q You mean just by putting the Rule 23 lable on it, I could?

A Well, no, because the rules of the court would not apply the Rule 23 label --

Q It would have to be a larger number than three, and the larger number can't be ascertained.

A Yes, sir. The answer to your question is that it would be a very rare circumstance where that could conceivably be a class action because one of the requirements is that the number of the class has to be so large that it can't effectively be brought before the court.

Q But in any event, the three of them could, in your case, you think, where there are lots of gas users, un-identifiable to a great extent. They could bring a class action.

A Yes, sir. In my case, there are 18,000.

Q Even though they couldn't stay in the Federal Court themselves if they just named themselves as plaintiffs.

A Yes, sir; and the reason for that is that if three, or five get together, or one comes in and says "This is a class action and I want not only to adjudicate my rights, but the

rights of the class as a whole," then the changed procedure is this: The Federal Court is then required to give notice to all of the identifiable members of the class and inform the members of the class that this action has been brought as a class action on their behalf, who the plaintiffs are, and that they will be bound by the judgment unless they come in and option themselves out; that they have the right to option themselves out; but they also have the right to appear or not appear.

In other words, he must give a good, practicable notice. Then he is required, under the new rule, to proceed as quickly as possible to determine whether this properly is a class action, and there are various factors he must consider.

One of the things he must determine is that the class is so numerous that class action is justified; that the plaintiffs, whether they are one or three, are in a position fairly to represent and present the interests of the class. Then he must consider as additional factors under a (b)(3) action that the class action method is superior to any other available procedure for the adjudication of these claims.

He must also determine, if the case is to be maintained as a class action, what the interest is of the individuals who are controlling the litigation. He must take into account any other suits that are pending or any right on the part of any individuals to separately litigate their claims and any difficulties in management of this class action.

It gives him precise standards, but broad discretionary power. He must determine that at the beginning of the case, before he takes another step.

Now, the burden of my argument really is that whether it is a (b)(3) action, as counsel says this one is, and I agree, we pleaded it as a (b)(3) action, but we could have pleaded it under one of the other situations -- if the court has made that determination, then it is a class action and if enough people come in and decide that they want to be optioned out, that, of course, should indicate to the court that it isn't properly a class action; that there are reasons why individuals want to adjudicate their own claims.

If two or three out of 18,000 would come in and opt out, as Professor Kaplan puts it, that would be all right, but --

Q If the three people we were talking about a while ago have individual claims, when they name themselves as plaintiffs, I suppose they still have individual claims when they name themselves as plaintiffs but also purport to be bringing a class action.

If their claims are individual claims, why aren't the claims of all the unnamed members of the class also individual claims? They are individual claims, but because of Rule 23, you say that they can aggregate them.

A I say, Mr. Justice, that they are individual claims until the court says "This is a proper class action."

At that minute, they are swallowed up --

Q Then the three named plaintiffs, their claims also become a non-individual claim.

A Yes, sir; and as proof of that, as an example, they can't dismiss the case, except with the consent of the court and notice to all of the other members of the class. They lose control of their own litigation, and they should.

Q They can get up themselves. They can't dismiss the case on behalf of other people, but they can get out themselves.

A I haven't had a chance to think that one through well enough, Mr. Justice. A plaintiff could come in and start the lawsuit and option himself out, -- I suppose he could if he turned it over to someone else.

Q But he can't dismiss the lawsuit.

A He cannot dismiss the lawsuit, and that is the answer to the jurisdictional question. Everyone there is bound. Justice Frankfurter in 1942 really --

Q Well, so would the three people be bound if they just sued for themselves.

A Yes, they would, but the other --

Q All three of them would be bound by a judgment if they just sued on their on behalf.

A Yes, sir.

Q And yet there is no aggregation.

A Well, this would be true. They would be bound but the defendant would not be bound as to the other members of the class, Mr. Justice, and the other members of the class would not be bound, either.

Q That is right. But when you do purport to bring in the unnamed parties, due purport to bring what you call a class action, you say that because they are bound, therefore it is one claim and, therefore, there is, in effect, aggregation.

A Yes, sir.

Q And I'm just not sure that it necessarily follows from the fact that from the consequence of binding that there is aggregation.

A I am not saying, Mr. Justice, that it necessarily follows from that. I am not saying that that is the only argument in favor of aggregation.

I am saying that that is one of the strong arguments, and historically that has really been the effect here. When the subject matter of the litigation is shown to have the value of more than $10,000, there is no reason why a Federal Court ought not to proceed.

It is a question of the procedure by which you reach this ultimate objective. You see, in the prior Rule 23, there was no way by which, in a spurious class action, for example, the court could ever force that decree off on someone else. It just could not be done. Therefore, it was not correct to say

that the amount in controversy was the amount -- that is, the total rights of the class, because the rights of the class were not to be affected. Only the rights of the actual parties litigated.

Q Certainly, Rule 23 in the form that it has, has to be consistent with the statutory limit of $10,000, doesn't it?

A Yes,sir; it does. And it is, in my judgment, sir.

Q And yet the $10,000 limitation has been changed, the amount has been changed, but the requirement of an amount against the background of these older cases has been reenacted time and again, I suppose.

A Well, it has, Mr. Justice, but this Court has answered that question in a companion matter, which is the consideration of the amendment of Rule 19 in the Provident National Bank and Trust Company versus Patterson. That decision came down in January.

I think the situation that Mr. Justice Harlan described there, in the argument that he rejected, is really the argument of the petitioner here, and the respondent in the prior case. What they are really saying is that this whole concept of aggregation in common property suits was all right, but in other suits was wrong, not permissible; that that establishes a common law which is inflexible, a substantive right, and no matter how we change the rule, we can't get rid of these pigeonholes of true, hybrid, and spurious.

That is not really so, and it ought not to be so. Those cases were somewhat similar to the cases that Mr. Justice Harlan described as the 19th Century joinder cases Really, it is some of the same cases. They don't establish --

Q Mr. Martin, let's get back to the language of 28 U.S.C. 1332, and the first paragraph of it, referring to the $10,000 jurisdictional requirement refers to the matter in controversy, that is to say, the matter in controversy has to exceed $10,000. That is 1332(a); is that right?

A Yes, sir.

Q I suppose your argument is that taking the amended Rule 23(a), assuming that this case comes within 23(a), then it follows that the amount in controversy is the amount to which all of the persons in the class would be entitled if they were successful.

A Yes,sir.

Q And that is the matter in controversy, and, therefore, you say it satisfies 1332(a); is that right?

A Yes sir; that is what I say.

Q Now, one of the problems, if we go back to the source and get underneath the gloss of the ages on this statute, one of the problems comes in subsection (b). In subsection (b) there is reference to the denial of cost to the plaintiff where he is finally adjudged, where the plaintiff who files the case originally -- the plaintiff who files the case originally in

the Federal Courts originally is finally adjudged to be entitled to recover less than the sum of $10,000.

Now, if that is to be taken as bearing upon the meaning of the term "matter in controversy," then you have a real problem, haven't you?

A Yes, sir; if you would say, Mr. Justice, that subsection (b) really limits the general statement of the earlier proposition that the District Courts have original jurisdiction when the amount in controversy is $10,000.

Q The question is whether it is the general amount in controversy, or the amount in controversy measured solely by the claim of the plaintiff who originally files a case in the Federal Court. That is right, isn't it?

A That is really right, and subsection (b) that you just read is the only thing in the rule or the statute that gives any hint that it is the claim of a plaintiff. The best answer that I can give you -- and I have considered this -- the best answer that I can give you is that aggregation in some circumstances, the ones I described, was allowed when that statute was passed.

Q Exactly. In other words, historically, despite the language of subsection (b), aggregation has been permitted in certain instances under the rules, and your argument is that since 23(a) eliminates the distinction between true, spurious, and hybrid class actions, and since, in your submission, all

class actions under 23(a) are now to be considered as true class actions, therefore the line of cases permitting aggregation in the case of true class actions should control here. Is that it?

Q Your Honor has made my submission on the second point. That is exactly what I intend to say. I think that should be the rule. I believe that is the rule.

I want to fortify the proposition with the statement that originally, a century ago -- more than a century ago; starting, I think, in 1843, when we first began to have these questions -- the circumstances where aggregation was allowed were really comparable in terms of commerce then and in terms of the lack of complexity of litigation then as compared to now, they were allowing aggregation where it should be allowed, where the matter in controversy was $10,000 -- or at that time $500 -- or more.

All I am saying is that procedures, like suits of clothes, wear out and no longer fit the necessities of commerce and human relations. That is what has happened with the old concept true, hybrid, and spurious, and that is what happened with Rule 23 originally. It wore out in 25 years.

I think that the present rule that we have now, the amended rule, is splendid, will solve the problem, and directs itself to the problem.

There is no reason why, to get back to one of Mr. Justice Marshall's questions yesterday, if the Court adopts the

view urged by the petitioner here, we are going to have a situation where the only people who can represent the class are those who have $10,000 or more. The other people -- there might be another man who has $10,000 even, that is his claim, a stockholder -- and we are saying to him, "You can't come in. You can't start the action. You can't represent the class."

But to Mr. B, who has $10,000.01, "You can, the door of the court house is open to you."

The arbitrary limit is fine in private litigation. It must be made to limit litigation in Federal Courts. But when, in reality, when the man comes into court and he presents, and there is adjudicated not only his claim but a whole class of claims, it doesn't make any sense. It isn't logical and it doesn't afford the procedure that is necessary.

Q Well, I assume that when the Judge holds this investigation of the people who opt out, and all, if he finds it is less than $10,000, then he will throw the case out, preliminarily.

A Yes, sir. I believe that is quite correct. One of the things that he would find out when he makes the determinations which must be made before the action can be maintained, one of the things, of course, that he would find out is whether we are dealing with a small class action, a piece of petty litigation where really the class --

Q That is the point that really worries me. If

you go on the matter in controversy and the matter in controversy is $100,000, but only $10,000 worth comes in and the rest opt out, you get back to the point where the actual matter in controversy is the actual amount that is being claimed, not the amount that is in controversy. That is my trouble.

A I believe the answer to your question, Mr. Justice, is that if you had that situation, a possible $100,000 class, the action is started by someone who has a smaller claim than $10,000, and all of the members of the class, or a sufficient number of members of the class to bring the claims down below $10,000 opt out, then I think the court has lost jurisdiction.

The court should dismiss the case for many reasons, one of them being --

Q That is the trouble. What is the amount in controversy -- the amount that the corporation has, or the amount that people claim?

A The amount in controversy, Mr. Justice, is really what Mr. Justice Frankfurter said it was in 1942. He said that in diversity actions, and he wasn't talking about class actions, but this is my argument: He said that in diversity actions, the amount in controversy is measured not by the monetary result of determining the principle involved, but by the pecuniary consequences to those involved in the litigation.

Now, to answer your question, the pecuniary consequences

to those involved in the litigation in a class action, once it is determined that it is a class action, consists of everybody who is bound by it. The defendant has --

Q At least your claim is no worse than the average diversity claim which claims $100,000 and then it two years later settles it for $500.

A My claim, I think, Your Honor, is a good deal better than that, and it should be.

Q Mr. Martin, we have been talking about the jurisdictional amount ingredient of Federal diversity jurisdiction. How about the diversity ingredient, the diversity of citizenship ingredient of diversity jurisdiction?

What if some members of the class are citizens of the same State as the defendant and they don't opt out. Does that defeat the diversity jurisdiction?

A No, sir; in my view it does not affect the diversity jurisdiction. Of course, this was one of the anomalies under old Rule 23. We were saying that spurious class actions were not really class actions, and yet we were allowing people to come in who couldn't show diversity. In hybrid actions, we were binding people who had no diversity. They were bound and they couldn't litigate. They couldn't really bring the action and they couldn't really litigate.

Q What do you say the situation is now, under new Rule 23.

A I would say that the situation now is that if the original plaintiffs show diversity of citizenship, then anyone who doesn't opt out can benefit himself from the decree and is bound by it regardless of his citizenship.

Q And the existence of those people doesn't defeat diversity, in your submission.

A No, sir. In my view, it does not, and it really didn't under old Rule 23.

Q There are decisions to that effect, are there?

A Yes, sir.

Thank you.

(Whereupon, at 11:00 a.m. the argument in the above-entitled matter was concluded.)