Supreme Court of the United States

October Term, 1968

In the Matter of:

CLAYTON S. KRAMER

Petitioner

vs

CARIBBEAN MILLS, INC.,

Respondent

Docket No. 156

Place Washington, D. C.

Date January 23, 1969

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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CLAYTON S. KRAMER,

Petitioner,

v. No. 156

CARIBBEAN MILLS, INC.,

Respondent.

Washington, D. C.
Thursday, January 23, 1969

The above-entitled matter came on for 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:

EUGENE GRESSMAN, Esq.
1730 K Street, N. W.
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Counsel for Petitioner

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Washington, D. C.
Counsel for Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 156, Clayton S. Kramer, Petitioner, versus Caribbean Mills, Inc., Respondent.

Mr. Gressman.

ORAL ARGUMENT OF EUGENE GRESSMAN, ESQ.

ON BEHALF OF PETITIONER

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

This case is here on a Writ of Certiorari to the Court of Appeals for the 5th Circuit. It raises the general question of whether Federal diversity jurisdiction can be created by a lawful assignment of a contract or a money claim to a plaintiff.

More specifically, the question is whether the assignment of a contract or a money claim is improper or collusive. Within the meaning of Section 1359 of the Judicial Code where the assingment, itself, is legal under State law where one motive for the assignment is to gain access to the Federal Court by claiming diversity of citizenship as specified in Section 1332, A-2, and, thirdly, where part of the consideration for the transaction was a percentage of the recover obtained on the assigned claim.

Q Ultimately, this is a Federal question.

A Yes, Your Honor, it is solely a Federal question as to whether the Court itself has jurisdiction, or whether

it has lost jurisdiction.

Q Well, is the meaning of the Federal statute to be judged by Federal standards.

A Yes, Your Honor.

Now, counsel has candidly conceded in the Court below and we repeat it to this Court, while it is not a matter of the record but one of the major motives in the establishment of this transaction was a desire or to create the basis for invoking the diversity jurisdiction of the Federal District Court.

Now, that motivation, however, has to be viewed in light of the realities of the situation that was confronting the various parties in this case. Well, the brief for the respondent has sought to paint a rather bleak and sinister picture of the events in this case, that I suggest are not justified by the record and certainly not by the facts, as we know them.

There were no sinister or secret efforts made to defraud any party or to secrete any documents from the Court or from anyone else.

What happened in this case, of course, as we see it, is a classic illustration of a desire to avoid what one of these parties, the Panama and Venezuela Finance Company, viewed as prejudice in the State Courts; to avoid that prejudice, or possibility of prejudice,is really the constitutional

res adiratae of Federal diversity jurisdiction.

The major, indeed, the sole justification that has ever been suggested for diversity jurisdiction is to permit State causes of action to be tried and heard in the Federal Courts where the parties, having a choice in the matter, for one reason or another, may fear, or, some degree or some element of prejudice, may follow them if they invoke the jurisdiction of the State Court rather than the Federal Court.

Q Your client is a citizen and resident of Texas.

A That is right, Your Honor.

Q The defendant is a corporation of Haiti?

A Right. It is an alien corporation.

Q Why would there be more prejudice in the Federal Courts than in the State Court vis-a-vis the parties of that derivation?

A Well, I think, first, you have to look back to the original situation out of which this arose. The original situation, you will recall, was essentially a contract entered into in 1959 between two alien corporations, in effect, whereby the Carribean Mills, the respondent here, agreed to pay over a period of years $165,000 to Panama and Venezuela Finance Company, which was also an alien corporation, having been incorporated in Panama.

Now, when, several years later, Carribean Mills

defaulted on that contract and, indeed, repudiated the contract. Panama Finance Company was faced with the situation out of which this whole transaction arose, to wit, Panama could not have sued Carribean Mills in the Federal Court by virtue of the fact that both were aliens.

Now, the only recourse Panama had to accord action was to sue presumably in Haiti or in the Texas State Court.

Q I suppose, well, apparently, the defendant is personally present in Texas to a sufficient extent to get personal service.

A That is right. It is more than that, Your Honor. It is actively doing business in the State of Texas and they raised this point and,it was decided against them, that they had adequate contacts with the State to permit service in a suit in the jurisdiction of the Federal Court in Texas.

Q In the light of what you said, I should, perhaps, change my question a little bit. I still would have a question as to why would the Texas State Courts be more prejudiced against two foreign corporations than would the Federal Court?

A Well, Your Honor, this was the practical situation facing them, as I say. The defendant corporation, the Carribean Mills corporation, while it was technically and legally a citizen of Haiti, an alien, was also owned and dominated by a family in Dallas, Texas.

Most of the officers of the company resided in

Dallas, and actively did corporate business there. Cliff Bircheson(?) was one of the witnesses in this case, testified, and, frankly, they feared that this was more than simply an alien defendant; this was one of the classic instances of where they feare that it would have been impossible to overcome the local kind of prejudice that does ensue in the situations where you have a dominant local interest involved on the defendant's side, plus the fact that they were a finance company.

Finance companies, in additional to being an alien here, are notoriously poor risks as a plaintiff tempting to secure money judgments.

Q Well, are they any poorer risks in the State Courts than in the Federal Courts?

A I think they feared that, yes.

Q This is going to be a jury case, I guess.

A Yes, it was ---

Q The jury will be citizens of Texas, whichever Court it is in.

A Right, but you have a broader selection in the Federal Court, I suppose, and 17 counties are involved, I think, in the Federal Court,whereas, the State Court would have been the local precinct or the city, anyway.

In any event, they tried -- they realized that in their own hands this claim wasn't worth very much, and they were actively seeking to sell this claim to various numbers of

persons at a discount.

I think at one time they tried to sell it for $25,000 and nobody would take it. They eventually came to Mr. Banner, an attorney in Texas, and asked him if he would be interested in purchasing this, and he said, no; looking into it, he then contacted another attorney, Mr. Kramer, the plaintiff in this case, and asked if he would be interested in arranging to take over this claim.

Now, the respondent claims that,somehow, Mr. Banner was sort of a double agent here acting as an attorney for Panama as well as for Mr. Kramer.

Far from that. He has never acted,at any time, as the attorney for Panama, has never received a cent from it, and has treated them at arm's length at all times, so that whatever connection or concern Mr. Banner had with the case does not reflect upon Panama's interest or lack of interest in this situation.

In any event, when Mr. Kramer became interested in this, and purely for profit motives, frankly, the problem arose as to how they could arrange a transaction that would be lawful and that would permit adequate consideration and what-have-you to be arranged.

Now, the testimony that Mr. Kramer gave at the trial -- he very frankly said he didn't have $165,000. He didn't have $100,000 to pay for this claim, nor did he have the facilities

to obtain a bank loan for this.

So after discussing this, at some length, with his then attorney, Mr. Banner, they came to a conclusion that maybe we can have some sort of a deferred type of consideration, let's call it a bonus, let's call it anything else, to be payable out of whatever you may be able to get from a lawsuit recovered as a result of an assignment of the claim to Mr. Kramer, and that is exactly what happened.

It was then arranged to have ---

Q Was it a lawyer's fee?

A Well, that was part of it but that was not ---

Q He got five percent of the recovery.

A That was not -- Mr. Kramer was not receiving that as a lawyer. He, in fact, is a lawyer but he was not acting as a lawyer in this case.

Mr. Banner was the lawyer at all times. But they did arrange this through, first of all, an assignment, a piece of paper, which, in unequivocal terms, stated: Panama Finance Company hereby assigns, conveys, transfers all of its interest, including causes of actions and claims, under this 1959 contract to Mr. Clayton S. Kramer for $1.00 and other adequate or valuable consideration, receipt, whereof, is hereby acknowledged.

Now, that, by concession and by all applicable law, universally recognized, was a complete, bona fide, and

unexceptional transfer of all of Panama's interest in this contract.

Standing by itself it was adequate under State law to permit the cause of action to be brought by Mr. Kramer, as the complete and full assignee of this contract and of this cause of action.

It was unnecessary to have anything else proved or shown or executed in order to create a complete and lawful assignment.

But to arrange for,what he considered to be, this deferred consideration, if you will, that entered into simultaneously, without any secret, without any collusion or devious motivations or actions, into this so-called collateral agreement, wasn't pleaded in the case.

It didn't have to be. All he had to plead in the complaint was that he was an assignee under this first and original document of assignment. The assignment -- the collateral agreement completely reaffirmed the assignment and made plain what was already implicit, that Panama had given up complete control over the lawsuit or any lawsuit that Kramer might bring.

Kramer had complete control and management of that suit, and it also provided for this provision for the so-called bonus or the consideration of 95 percent of the net recovery which would then go back out of any recovery Mr.

Kramer might receive ---

Q Did I understand you to say that the same lawyer represented Caribbean and Kramer?

A No, Your Honor. No. There is no identity of lawyers among any of these parties.

Q I thought you said there was one lawyer who persuaded Mr. Kramer to do this.

A That was Mr. Banner, who ---

Q Did he represent Caribbean?

A No, only as represented Mr. Kramer.

Q Who represented Caribbean at the trial?

A Mr. Harold, I believe, who was counsel for the Caribbean Mills, yes.

Q How can you say that Kramer had full control of the case when he had Caribbean's lawyer?

A He did not have Caribbean's lawyer. He did not have Panama's lawyer. He had his own lawyer.

Q I misunderstood you.

A Yes, the suggestion has been made by the respondent, but is completely aside from the facts and not accurate to say that Mr. Banner, who is Mr. Kramer's attorney was, somehow, acting on behalf of Panama and all this.

That is not true. Panama had a firm in New York City at all times. They never got into this litigation, of course. But they had their separate lawyers and Mr. Banner

dealt at arm's length with that law firm in the execution of these documents.

Now, it seems to me that it becomes crystal clear that the critical factor in this case is that the assignment, itself, was absolute, complete and bona fide, and, indeed, there is no dispute about that, as I see it, that all of Panama's interests were, thereby, transfered, and as a result of the assignment instrument Panama had no claim, no right under that contract, no cause of action, no control over the lawsuit that ensued.

Concededly, this was proper under the applicable law of Texas and under the law of any other State in the United States, to effectuate a complete transfer of all of Panama's interests.

Now, the Court of Appeals read, however, the collateral agreement provision of the 95 percent bonus as indicating that, somehow, Panama retained some sort of a beneficial in this cause of action or in the contract claim.

This was conceived of by the parties as a legitimate form of deferred consideration. It is, I suppose, possible to read this as some sort of a beneficial interest of one sort or another or, perhaps, an assignment for collection on behalf of Panama.

The least that can be said about this transaction with respect to the 95 percent interest which was to be

returned to Panama was that this was an assignment for collection, which is one of the most transactions, lawful transactions that is performed almost every day in the business world, which gives the assignee complete control, complete domination, complete title of whatever is assigned to him for collection and makes the assignee the real party in interest to bring the suit and despite the fact that he is supposed to return part of that recovery, or all of the recovery even, in some cases, back to the assignor, it does not make the assignment, itself, any less complete, any less lawful, and it certainly does not make the transaction, itself, collusive under any recognized meaning of those phrases.

It is well established in the law, that an assignment of a show action, constitutes the assignee the proper party in interest to sue even though the instrument of assignment recites, which this one did not, that the transfer is merely for purposes of suit and obligates the assignee to account for the proceeds to another person.

Indeed, this Court's decision in Titus versus Wallack in 306th Volume of the United States reports that 282 is the leading authority on the validity of this kind of an arrangement, and the Court there said, that under the -- there happened to be a New York transaction there -- that under repeated decisions of New York, and it could be said of any of er State, it has long been settled that an assignment

which purports to assign or transfer a shows of action confers upon the transferee such title and ownership as will enable him to sue upon it.

This is true, even though the assignment is for the purposes of suit only. The transferee is obligated to account for the proceeds of the suit to his assignor.

More importantly, and this was an opinion written by Justice Stone, it is evident that through this kind of a transaction no fraud was perpetrated upon the other party or upon the New York Courts.

The assignment of the claim operated to vest in the assignee such ownership or interest in the claim as would enable him to maintain the suit upon it there.

Q Was this a diversity case, Mr. Gressman?

A No, that -- well, not truly a diversity case in that sense, but it was a full faith and credit. They had made -- the assignee had obtained a judgment in New York, which was subsequently attacked in Ohio as being fraudulently obtained. This Court said, not at all, that there had been no fraud perpetrated by virtue of making an assignment for collection only.

This was a perfectly legitimate and lawful transaction. Now, we have to, therefore, apply the language of 1359 to this arrangement which I have described.

I think it is ver instructive to note that 1359, of

course, was created as a part of the 1948 revision of Judicial Code. Prior to 1948 we had on the books from the beginning of our statutes, 1789, the so-called anti-assignment statute which was very simple in its concept.

That was that if the original parties to a transaction did not have adequate diversity or were unable to bring suit in a Federal Court, you could not, by assignment, create a different result.

In other words, the assignee was absolutely bound by the jurisdictional situation created by the original parties, and you could not change that. That became encrusted with a lot of exceptions and legislative jargon and also barred the good assignments and the bad assignments, as long as the original party couldn't sue, the assignee could never bring an action.

So they decided to eliminate that provision completely and to adopt rather the concept developed under the 1875 statute abeying any kind of a transfer or device which would collusively or improperly make as a party plaintiff any individual where the intent was to create or invoke Federal Court jurisdiction.

The revisers of the Judicial Code made it very plain that they were cutting down on the assignment, the scope of, what you might call the anti-assignment statute, by confining its application to cases wherein the assignment is improperly

or collusively made to invoke jurisdiction.

They made it clear, there is no dispute about this, that the revisers meant to apply the long-established principles of the 1875 statute to assignments.

What are those principles? Well, in the first place it is clear, that not all assignments, not all transfers design to evoke diversity jurisdiction are outlawed nor do they divest the Federal Court of jurisdiction.

Only those that result from a collusive or improper action in establishing the party plaintiff, many people, including many commentators seem to think that 1359 bars all assignments that create diversity jurisdiction. That, simply, is not the way the statute reads.

Q Mr. Gressman, could I look at this as being an assignment of five percent of this?

A That is one way it could be, as an absolute assignment of five percent to Mr. Kramer.

Q Well, wouldn't that be "improper" for the purpose of getting Federal jurisdiction, for all, for 100 percent?

A No, I don't know that there is any -- that you define impropriety or collusiveness in terms of the percent of what is absolutely conveyed or what is beneficially conveyed. If it is conceded once that you can sign simply for collection only, which is done all the time ---

Q And get Federal jurisdiction on that?

A Yes, Your Honor.

Q It is done for the whole 100 percent.

A If it is done for collection only. As I understand it, that has consistently been held to make the assignee for collection only as distinguished from an agent for collection only ---

Q Do you have any of those cases cited?

A Well, I think the leading case that is cited continuously, is the Titus v Wallack, which is not a 1359 case.

Q Well, that is all I am talking about.

A I don't think there is any leading authority that mentions this in terms of 1359, although there are some, Your Honor, the lower courts, having made the point that this makes the assignee for collection only, a proper party of interest also says it is not collusive under 1359.

There are some. Now, those are not cited. I would be glad to submit those to Your Honor.

They all lower court opinions. I am simply saying there is no leading authority. Certainly, this Court, in fact, has never had occasion to deal with the problem of assignments under 1359 since it was revised in 1948.

I would be glad to submit that, just a list of the cases, to Your Honor where that has been held by lower courts.

Now, the basic doctrine that was established and created by these pre-revision cases in other types of transfers than assignments was that a transfer was not improper or collusive if it was real and, in fact, operated to transfer all the transfer order's interest and we submit that by concession and that by law and by fact that requirement has here been satisfied by the absolute character of the assignment to Mr. Kramer regardless of whether you conceive of that assignment as one for collection of all or some or an absolute assignment, period.

If the transfer was lawful and complete, as it was here, then we submit that the cases in this Court make it absolutely clear that the fact that the transaction was motivated and designed by a desire to create or to utilize Federal diversity jurisdiction becomes completely irrelevant.

This Court has said time and again in these pre-revision cases that motive per se cannot invalidate or make collusive or improper a transaction that is lawful and bona fide and results in a complete transfer of legal title to whatever is being transferred.

Q What do you suppose collusive means in this statute? Generally speaking, I thought that collusive imparts an idea of collusion between the adverse parties,between the plaintiff and the defendant to make a ---

A That idea has been expressed by Chief Judge

Bigs in the Corabi decision in the 3rd Circuit which is cited in the brief.

It has been criticized by others that it may not necessarily have to be between the plaintiff and defendant. It may be, many people claim, and this is what the Court of this circuit held, that it was a collusion, I assume, between the assignor and the assignee in order to permit the assignee to bring the suit.

Q Does it imply that it is a sham assignment because, as you ---

A Well, that is it, Your Honor; it seems to me that you have to give some content and meaningful content to the words collusion or impropriety.

Congress didn't use these words inadvisedly. They didn't mean to say every time there is a motive to create Federal jurisdiction, you have a collusive arrangement.

Those are not the equivalents. It seems to me that Chief Judge Bigs, in seeking to define, and he has done the major work judicially in trying to give definition to this, in terms of some kind of a fraud or a deceit,this Court,in some of the earlier cases,said,in speaking of the term collusion, it means a fraud upon the Court and nothing more.

Now that implies something bad, something deceitful. There are cases, Your Honor, where people have come into Court and said,I am here by an assignment, and of this cause of action,

and the question has been put, where is the assignment, and he refused to produce it, and the Court said, this must be a sham because you refuse to produce the assignment; we don't think there ever was one.

There are many cases where the people have deliberately lied to the Court, have brought in a false set of facts. By assignment, we might have said, that, between the citizens of different States, that the assignment was here made to a citizen of Oklahoma, when, in fact, the assignee was not a citizen of the State of Oklahoma.

I think that is pure fraud, pure collusion and many cases approach ---

Q That is perjury. That is not collusion.

A Not in this case, certainly not. This is ---

Q Collusion, to me, accurately or inaccurately, implies the idea of purported adverse parties actually being cooperating parties. Is that what it generally means in the law?

A That is the way Chief Judge Bigs defined it and that is generally the way many people conceive of collusion. There are cases where there may be collusion -- there is collusion between plaintiff and defendant. So in order to have a Federal Court determine their case, their controversy ---

Q Or any court.

A Any court can do it.

Q This is generally a ---

A And if that is found out, it usually ---

Q Sham law suit.

A is thrown out. If I may borrow one of Your Honor's prior remarks it may be somewhat difficult to define the concept of collusion, but I know collusion when I see it and I don't think this is it in this case.

MR. CHIEF JUSTICE WARREN: You may speak, Mr. Lyons.

ORAL ARGUMENT OF DENNIS G. LYONS, ESQ.

ON BEHALF OF RESPONDENT

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

To restate the facts at somewhat greater length, in the summer of 1964 there were two lawyers in Wichita Falls, Texas, one was Mr. Jack Banner, one was Mr. Clayton Kramer.

Mr. Banner, according to the record, was briefing a legal point in connection with a contract. That contract was the contract between Panama and Venezuela Finance Company and Caribbean Mills, Inc. Both of those are alien corporations. Neither of them could have sued the other in Federal Court.

The contract,under Panama's view of it,was already two years in default. There were annual installment payments and under Panama's view three annual installment payments had already gone by without payment having been made.

One day Mr. Kramer and Mr. Banner met as they had

many times in the past and Mr. Banner said to Mr. Kramer that there was a claim which might be acquired. Obviously, Mr. Banner must have gotten the claim from somewhere.

That conversation, which is in the record, evidently indicates an authority on Mr. Banner's part to offer the claim to Mr. Kramer. Well, one thing led to another, Mr. Kramer, by the way, knew nothing about the claim. He was a perfect stranger to the transaction, didn't know any of the parties involved.

Somewhere in the shuffle Mr. Banner became Mr. Kramer's lawyer and the parties sat down and they prepared, not one, but two, legal documents.

One of them was an assignment of the claim, which assignment did not refer to the second document. The assignment reflected that the consideration was $1.00 and other good and valuable considerations.

The record is clear that the only money that changed hands was the $1.00. The other agreement is the agreement which the petitioner calls the collateral agreement but which we call the side agreement, actually the two words meaning the same thing.

In that agreement, which, unlike the first agreement, referred to the other document. In that agreement there was a covenant on the part of Mr. Kramer to prosecute the claim to final judgment and there was a promise on Mr. Kramer's part to

pay 95 percent of the net recovery on the claim back to the assignor, Panama.

Now, even though Mr. Kramer, in his somewhat difficult testimony, in the transcript never admitted that the motive for this transaction was to create Federal jurisdiction.

Counsel has admitted at various times that the motive and other times a motive was to create Federal jurisdiction and the record suggests no other motive but that.

The parties, then, Mr. Kramer and Mr. Banner, entered into a contingent fee agreement, the side agreement that Mr. Kramer and Panama had entered into, permitted Mr. Kramer to enter into contingency fee agreements up to 33-1/3 percent, and that sort of arrangement was, in fact, entered into with Mr. Banner's firm and six weeks later there was a suit filed in Mr. Kramer's name in the Federal Court.

Q Is that 33-1/3 percent of the total recovery?

A Yes, that comes off top and then the five percent slice comes out for Mr. Kramer and then the other 95 goes back to Panama.

Q Is the five percent of 100 percent or is it of the 66-2/3?

A It is of the 66-2/3.

Q After that time was there any impropriety in this arrangement?

A I would think no impropriety had occurred at this time up to the time that the complaint was filed.

Now, when you take a single unitary transaction, and put it in two pieces of paper, rather than one, that, in and of itself, fraudulent or improper, but it certainly gives you the means to commit an impropriety or to commit a fraud.

Q Gives what?

A Gives you the means to commit an impropriety or to commit a fraud, because it creates a situation in which you can refer to one document and keep the other document in your desk drawer.

Q Is that impropriety under Federal law or under State?

A I would say that was. It is our position that it is, Your Honor. Indeed, it is our position that if this was openly done and,of course, once the discovery procedures started working the facts came out in the open.

Even if this was openly done that this amounts to, under the teachings of the cases in this Court, to an improper and collusive assignment.

The complaint was then filed in the Federal Court. The complaint alleged that Panama had assigned, sold and delivered its interest and rights in the agreement to Clayton S. Kramer. It didn't say a word about the fact that Panama had beneficial interest in 95 percent of the net recovery.

Not unexpectedly, the defense of the lawsuit wondered somewhat as to how this claim turned up in the hands of a lawyer from Wichita Falls, and Mr. Kramer's deposition was taken and he was asked on deposition a series of questions which are in the record as to how he came to be the owner of the claim and he declined to answer all those questions, he declined to answer questions as to the existence of agreements between him and Panama apart from the face of the assignment and finally an order of court was obtained and the collateral agreement was produced in response to the order of court.

The central question in this case is whether Section 1359 of the Judicial Code bars the manufacturer-- manufacturer simply is the petitioner's word, not ours -- bars the manufacturer of diversity jurisdiction in a case like this.

The District Court held no, that the only relevant consideration was to look to the face of the assignment and not to look to the other factors.

The Court of Appeals said yes; the essentials, as we see it, of the arrangement or scheme that was employed here are four in number.

You, of course, start with two parties who could not sue each other in the Federal Court, sometimes two aliens, sometimes two citizens of the same State. The four factors as we see them are, first, you have a voluntary assignment

of the claim. This is not a case involving an executor or a guardian where you have to have a fiduciary in order to prosecute a claim.

This is a voluntary assignment of the claim. It is an assignment made after the dispute arose. Here there were three annual which, allegedly, under the plaintiff's theory, allegedly, were in default.

The third factor is that a motive is to create or manufacture diversity jurisdiction and the fourth factor is that the assignor retains a beneficial ownership in the claim.

Now, in 1875 when the diversity of citizenship jurisdiction of the Federal Courts was enlarged, there was enacted by Congress a protective statute which provided in substantially the substantially the same language as present Section 1359 that the Federal Courts would not have jurisdiction where a party was made or added,through assignment or otherwise, improperly or collusively in order to create Federal jurisdiction.

In the 35 years after that statute was passed, there was a whole string of cases which came before this Court which involved these four elements. They involved the assignment, the assignment made after the dispute arose, the motive to create Federal jurisdiction, and the retention of the beneficial interests in the claim by the assignor.

That, last, is, of course, is an important factor. There are another line of cases that hold that where the assignment is, in fact, absolute, where a party buys a claim, pays money for it and the assignor has no further interest in the outcome of the litigation, that you may then look to the assignee's citizenship, for the purpose of determining diversity jurisdiction.

This case is not on that side of the line. Mr. Kramer here had been willing to make an evaluation of the claim, pay money for it and, in effect, be quits with Panama, leave Panama with no interest, whatsoever, in this claim.

The cases seem to teach that that sort of assignment is not improper or collusive. But this line of cases which we review at Pages 14 to 18 of our brief which were decided in the years immediately after the passage of this statute hold that where the assignor has retained the beneficial interest in the claim and the beneficial interest in these cases vary; some cases it is 100 percent; other cases, it was less than 100 percent, and the assignee, like Mr. Kramer here, was given a percentage for the use of his name.

But these cases hold that that constitutes an improper or collusive assignment and they use the words improper or collusive and apply this concept of collusion to this arrangement between these two parties, even though these are not two parties on different sides of the lawsuit.

Q In other words, Mr. Kramer did undertake some obligations in connection with the assignment.

A He undertook to prosecute the claim.

Q He promised?

A Yes.

Q He just didn't say, "If I do it" ---

A No, he didn't. He couldn't walk away from this.

Q So he promised, and if he had paid some money for the claim, you suggested it might not have been collusive?

A Well, if he had acquired full title to the claim, there would be no reason for him to ---

Q Well, he did acquire full title except if he was successful.

A Well, that is true. Well, full title to a zero claim is not a ---

Q But, nevertheless, the question is jurisdiction, not how much the claim was worth, and he did acquire full title to the claim based on a promise to do something and if his efforts were unsuccessful he would go on owning the whole claim worth nothing.

A That is right.

Q But if he was successful, he would still own five percent.

A There is no reason to partition an empty pie plate. If it was only pie that appeared on this plate in the

form of a judgment that there would be any reason to cut it up.

Q In any event, no matter what happened, he would have five percent?

A He would have five percent of the net recovery.

Q So at least he should have been able to sue for five percent in a Federal Court.

A If he and the assignor had joined together and sued, there wouldn't have been diversity because the statute does not cover that sort of a suit.

The petitioner seeks to distinguish this line of cases in this Court which construe the statute on the three bases:

First, they point to the effect of the 1948 codification. They suggest, as I believe Mr. Gressman might have this morning, that the assignee clause from the 1789 statute had something to do with this.

Actually, it did not. The statute that is presently on the books is, according to the revisers notes, and according to its language, a codification of bringing forward of the 1875 statute which is the statute under which this line of cases was decided.

The revisers notes, even though they drop certain of the language, the language that was dropped was not the language relied upon by the Court in this old line of cases and the revisers notes indicate that the desire was to carry

forward the 1875 act.

Under those circumstances, we submit that the revision does not change the value of the prior cases. The statute has always said improper or collusive and this has been construed to cover cases where the only collusion is this relationship between the assignor and the assignee in which the assignor still has the interest in the claim.

Then, the cases sought to be distinguished on the grounds that here there was a transfer of title which was good under State law. Well, this is not a State law issue. The question here is not whether Mr. Kramer could have brought this suit in a State court. I assume he couldn't. I sometimes wonder why he didn't.

The question here is whether the Federal standards of improper or collusive, if the gloss that has been put on them by the earlier cases, what that standard means.

In fact, in a number of those cases, the Court seems to have commented or to have assumed that the assignment was good under State law.

Finally, there is a lengthy suggestion in the brief that, somehow, even though this might not be good in the case of an assignment where the real parties in interests are citizens of the same State, that the Court should be more lenient or more tolerant with respect to this matter where the real party in interests are two aliens.

I must confess that I am somewhat unable to follow this.

Q Mr. Lyons, may I just get back for a moment to the colloquy with Justice White.

Did I understand you correctly to say that the test here of collusion should be the retention of an economic interest, in this instance 95 percent of the 66-2/3?

A That certainly is one of the tests, Your Honor.

Q Well, I thought you also suggested to Justice White that if he lost and he had nothing to return, then what?

A Well, if he lost, there was nothing to return. He owned the whole claim if he lost but ---

Q Well, would you concede in those circumstances that there would be jurisdiction?

A No. I say you have to look at the matter as the suit was brought and as the suit was brought he might win, he might lose. The reason he is bringing the suit is with the desire to win.

Q But the point is, do I understand you correctly, that, because under this arrangement, the assignor on paper had a 95 percent interest in 66-2/3 percent of any recovery if there was a recovery?

A That is correct.

Q That that factor, in and of itself, establishes collusion?

A That factor, with the other factors, the motive to create Federal jurisdiction ---

Q That is what I wanted to get.

A --- which, taken with other factors, this Court has held to involve impropriety and collusion.

None of these factors standing alone might give us a case of impropriety and collusion, but I think from the analysis of the other cases, the other cases all have these four factors.

They have the motive, they have the assignment, they have the fact that the assignment is made after the parties have fallen into dispute and it appears that there will be litigation, and they have the retention of the interest by the assignor.

Q Now, what did you say would be the answer if this suit had only been for five percent of the 66-2/3 percent, if that is all that Mr. Kramer ---

A I don't know that it could have been brought for the five percent. I think that probably that would have been barred by the rule against splitting a cause of action. What you have here is a unitary claim. I think the defendant is entitled not to be sued piecemeal by a number of assignees.

Q Why, Mr. Lyons, is that splitting a cause of action. If it is an outright assignment of five percent of something that means that someone else owns 95 percent, but he

owns five percent. Why wouldn't have been able just to bring this lawsuit just for five percent of the ---

A Well, Your Honor, I think there is a rule of law under State law that if you have a unitary obligation to pay money to someone, that that person can't break it up into 100 bits and then face you with 100 plaintiffs and 100 lawsuits. I think this is a unitary cause of action and one party has to sue on it. These papers purport to vest the legal title in him and in a State court he could have brought this suit and Titus v Wallack, if the State permits the suit to be brought under this sort of an assignment and I suppose most sState courts would, though another State has to give full faith and credit to that judgment. That is all that Titus v Wallack holds and it has nothing to do with this proceeding.

Q If he did file for the five percent,couldn't you insist that the other party be joined and then he would lose diversity?

A I think we could either move into the alternative that it be dismissed on the basis that it is a splitting of the cause of action or that a necessary party has not been joined and, of course, once the necessary party has joined, the case is no longer within the diversity statute.

Unless the two of them sued, if you assumed that there was a sum of 45 percent of legal title, you would have to join them both.

Now, in some ways this case is unique. There were a lot of cases in the first 35 years after the passage of the statute in this Court. There was a whole line of cases and there was a development of the law that discouraged this sort of thing.

This is a relatively unique case. There are no cases holding that an assignee for collection may sue only in his own name in the Federal Court and, thereby, create diversity.

This is the first case to reach this Court after the 1948 revision, but the pre-revision cases teach that this is an improper and collusive assignment.

Q You always use the words collusive and impropriety; are those terms interchangeable? Do they mean one and the same thing or do they have different meanings?

A I think they may have different meanings, Your Honor; the Courts have generally used them both. They have held that where you have these factors that the assignment is collusive and improper. The statute uses them in the disjunctive. The statute has an "or" in it.

We would say that this is both collusive in the sense of involving this relationship between the two parties to the assignment whereby the assignor was not ousted of his interest and it is improper in the sense that it is not a proper way to create Federal jurisdiction.

Q It isn't improper in the sense of being criminal

or even unethical. It is a volatile assignment under State laws, as I understand it.

A I suppose so; now, whether making the assertion that the complaint that was filed ---

Q Not any more criminal or unethical or anything else in that sense of improper.

A I suspect, if there hadn't been the effort of concealment here, I would agree. I think the result would have been the same whether or not there would have been the effort of concealment.

Q So, improper,in your submission, means what -- that is in the statute?

A It means a device which is made for the motive of creating Federal jurisdiction, and which does not oust the assignor of his interest in the claim.

Q Where do you get that definition.

A I extracted it, Your Honor, from the prior cases of the Court, which involve assignments where there was a retention of the interest in the assignor.

There has been only one appellate decision,that I know of,that has restricted the meaning of the word collusion to collusion between the two sides of the lawsuit. That was Judge Bigs opinion for the 3rd Circuit in the Corabi case which was later overruled.

Now, if this practice is sanctioned here ---

Q Have there been any to the contrary in this Court or in the Federal system?

A Yes, the whole line of cases from 1875 through 1910.

Q In the context as this case?

A I believe they are, Your Honor. There was no collusion between the two sides of the lawsuit, but the Court held that the practice that the assignor and the assignee got into was collusive.

Q May I ask you if your argument doesn't leave the result, which may be right, that it is just improper -- collusive, violation of the act for any person to transfer a claim in order to give Federal Court jurisdiction?

A I don't believe it does, Your Honor.

Q Why not?

A I think the cases hold,the prior cases of this Court, that if the parties are willing to actually deal in these claims, to sell them from one party to the other, so that the party who acquires it is the master and the owner of the claim and the party who transfers no longer has an interest in that claim, that that is not collusive, that that is an ordinary, economic transaction and the cases draw the line at that point.

The motive,itself, to create Federal jurisdiction isn't conclusive and we admit that.

Q You would say then that a transfer for the

purpose of letting somebody else file an assignment, the purpose of letting somebody else file a claim in Federal Court under diversity is bad.

A No, it is not, Your Honor, if the assignor parts with the interest in the claim.

Q But he couldn't do it for the purpose of collection, only.

A That is correct. By that is meant that he has to remit the proceedings back to the assignor.

If the assignment here created Federal jurisdiction, any cause of action involving $10,000 or more, which is capable of being transferred under State law, and all contract claims are and a lot of non-contract claims are, any such cause of action can be brought in the Federal Courts.

The two pieces of paper that will be in the record in this case will be used as a forum guide. All you have to do is to find an out-of-State assignee, assign the claim and take his covenant back to prosecute the lawsuit ----

Q Indeed, are you with need that there be some clerk in the law office that lived in Oklahoma?

A I would think so, you would probably want someone who is under your thumb and someone whom you knew and you wouldn't have to pay them five percent. I think,if considera-tion is required, you could pay them one percent or half of one percent. There would be competition in this matter, I

suppose, as in all economic matters and what we would have would be a universally available instant diversity jurisdiction.

Anyone could do it. Every lawyer who had a claim between two parties of the same State, I believe, would be duty-bound to consider whether he shouldn't create Federal jurisdiction by dredging up a clerk of out-of-State citizenship and assign the claim to him with a set of papers like that here.

We submit that there may be some fuzziness, perhaps, in the outer limits of what constitutes an improper and collusive assignment. We claim that this assignment falls within the heart of the statute. If any practice is condemned by the statute, this practice must be.

If it is not condemned by the statute the only restriction on the jurisdiction of the Federal Courts in contract matters or in matters of involving assignable tort claims or other assignable claims, the only limitation on the Federal Court jurisdiction will be the jurisdictional amount.

Q What concern do you think the Black and White Taxicab case has on this case?

A Well, I think that is probably is still a law there. You had a case of the assignor having been dissolved and the assignor was no longer in existence and the Court held that since the assignor had been dissolved, that that was conclusive.

There are early cases which the Court distinguished in Black and White which hold if the assignor is not dissolved, where you transfer the claim to a corporation of another State, where the assignor is not dissolved and remains in existence -- there the predecessor of 1359 is violated and there is no Federal Court jurisdiction.

Thank you.

Whereupon, at 11:15a.m. the argument in the above-entitled matter was concluded.)