

In the

Supreme Court of the United States

T. R. GRUBBS, d/b/a T. R.
GRUBBS TIRE & APPLIANCE,

Petitioner,

vs.

GENERAL ELECTRIC CREDIT CORP.,

Respondent.

No. 71-257

Washington, D. C.
March 23, 1972

Pages 1 thru 42

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Petitioner, :
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GENERAL ELECTRIC CREDIT CORP., :
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Respondent. :
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- - - - - X

Washington, D. C.,

Thursday, March 23, 1972.

The above-entitled matter came on for argument at
1:22 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

BILL J. CORNELIUS, ESQ., Cornelius & Cornelius, 123
N. Polk Street, Jefferson, Texas 75657; for the
Petitioner.

HUBERT D. JOHNSON, ESQ., Johnson, McElroy, Cravens &
Boone, 1900 Mercantile Dallas Building, Dallas,
Texas 75201; for the Respondent.

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Bill J. Cornelius, Esq.,
for the Petitioner

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In rebuttal

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Hubert D. Johnson, Esq.,
for the Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 71-257, Grubbs against General Electric Company.

Mr. Cornelius, you may proceed whenever you're ready.

ORAL ARGUMENT OF BILL J. CORNELIUS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. CORNELIUS: Thank you, Your Honor.

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

This case involves a judgment cancelling a note and for \$20,000 damages recovered on the merits by the petitioner T. R. Grubbs in the United States District Court against General Electric Credit Corporation, after the case had been removed from the United States court -- from State court, by the United States Government, which was a party throughout the proceeding.

The Court of Appeals held that the case was improperly removed and ordered that it be remanded to the State court.

We, on certiorari, are asking this honorable Court to reverse the ruling of the Court of Appeals and sustain the jurisdiction of the United States District Court, which rendered judgment on the merits.

The case arose in this manner: It was originally filed by General Electric Credit Corporation in State Court against T. R. Grubbs, who is a small businessman in Jefferson,

Texas.

The case was filed on simple note, to collect a promissory note. When the case was filed in the State Court the petitioner, Grubbs, answered on the merits, claiming the invalidity of the promissory note and also filed a cross-action against General Electric Credit Corporation and the General Electric Company, alleging that these two companies had conspired together in an unlawful attempt, which was successful, to destroy his business by tortious and wrongful conduct in violation of both the State and the Federal anti-trust laws.

The petitioner Grubbs then amended his pleadings and brought in the United States Government, in order to determine the priority of various liens being claimed against the petitioner by the government and other parties.

When the government was brought into the case in the State Court, it filed a petition for removal, and the case was removed without objection or without motion to remand on the part of any party.

In the United States Court, after removal, the United State Government filed an answer claiming that its lien was indeed prior to the other liens being asserted against Mr. Grubbs, and the government also filed a cross-action against General Electric Credit Corporation and the General Electric Company, alleging that they had conspired together to injure

and destroy the petitioner Grubbs' business, and thereby had tortiously interfered not only with the petitioner's business but with the interest of the government; its lien which it had on the assets of Grubbs.

No party objected to removal.

Q Mr. Cornelius, was your pleading against the United States proper under the Texas law of pleading? Was that a permissible type of claim to assert, in the case that General Electric had originally asserted against Grubbs?

MR. CORNELIUS: Yes, Your Honor, we believe it was.

Q May antitrust claims be tried in State Courts?

MR. CORNELIUS: No, Your Honor. But at the time we filed this pleading we had not briefed the question carefully, and we were at the time under the impression that the State Court could not construe the federal antitrust laws but could enforce them concurrently with the federal courts.

We later discovered that that was incorrect.

Q Well, what's your answer to Mr. Justice Rehnquist?

MR. CORNELIUS: That we --

Q Was it proper pleading, or it wasn't?

MR. CORNELIUS: Yes, Your Honor. I understood him to ask if it was proper for us to bring the government in.

Q Oh, oh, oh.

Q You didn't assert an antitrust case here against

the United States, did you?

MR. CORNELIUS: Not against the government; no, Your Honor.

Q I thought you were talking about GE; sorry.
Excuse me.

MR. CORNELIUS: No, sir.

So, when this was -- when the removal was effected, there was no petition, no motion for remand, no objection to jurisdiction, all of the parties answered on the merits. The United States Government asserted affirmative relief in tort against GECC and GE, as we were doing. GE and GECC filed a number of amended pleadings. They consented fully to the jurisdiction of the court, and after being in the federal court for a year and eight months, trial was held on the merits.

Q Mr. Cornelius, straighten me out. This case was possessed of sufficient diversity so it could have been instituted in the federal court originally, could it not?

MR. CORNELIUS: Yes, Your Honor, that's correct.

In the judgment on the merits, the General Electric Company was absolved. The United States Government was denied relief. And the petitioner Grubbs recovered judgment of \$20,000 in damages against General Electric Credit Corporation.

So the appeal has been by General Electric Credit Corporation, in the absence of the other parties.

But I would like to make clear that in the trial on

the merits all of these parties were active participants in the trial, filed amended pleadings, filed motions for continuances, participated in pretrial hearings, signed pre-trial orders, and every one of them made motions to the court for judgment on the merits.

Q Including the United States?

MR. CORNELIUS: Including the United States, yes, Your Honor.

Then, may it please the Court, the General Electric Credit Corporation appealed on the merits to the Court of Appeals.

Q And did you say, Mr. Cornelius, did the United States prevail at the trial?

MR. CORNELIUS: No, Your Honor, they were denied relief, that they --

Q They were denied relief.

MR. CORNELIUS: They did move the court for judgment in their behalf, but it was denied.

Q Denied. And in the case of the General Electric, what happened?

MR. CORNELIUS: The General Electric was absolved of liability.

Q I see.

MR. CORNELIUS: General Electric Credit --

Q On the merits, a finding of no liability?

MR. CORNELIUS: On General Electric Company, yes, Your Honor.

Q Is the United States here at this time?

MR. CORNELIUS: No, Your Honor.

You see, after judgment on the merits in the trial court, there was only left petitioner Grubbs and GECC. GECC appealed to the Court of Appeals on the merits; no question was raised about jurisdiction; and the Court of Appeals raised the issue on its own motion and requested supplemental briefs on the question of jurisdiction.

These were provided, thorough briefs on both sides. And the Court of Appeals found a lack of jurisdiction and ordered remand.

Q Was pendent jurisdiction argued?

MR. CORNELIUS: I beg your pardon?

Q Was pendent jurisdiction argued in those supplemental briefs?

MR. CORNELIUS: Yes, it was, Your Honor; very thoroughly argued in the supplemental briefs, and is also covered in our briefs here in this Court.

We take the position, may it please the Court, that inasmuch as United States District Court in the case at bar had the organic power to hear this controversy, in other words had cognizance of the controversy, for many different reasons, it was error for the Court of Appeals to remand the case to the

State Court, even if we assume that removal was not authorized. And we don't concede that. We believe that removal was authorized.

But we believe the issue is moot, and immaterial, because, whether removal was authorized or not, all parties consented to trial on the merits by the United States Court, and appeal to that court for relief and for a determination of the entire controversy.

Q But that wouldn't necessarily invoke you unless there were jurisdictions placed in the United States District Court. Your position is that it wasn't properly removed, there was, as you say, organic jurisdiction?

MR. CORNELIUS: Yes, Your Honor.

Q But the fact that the parties hadn't contested jurisdiction over it wouldn't help you if there was no jurisdiction?

MR. CORNELIUS: Not if there was a lack of jurisdiction, that is correct, Mr. Justice Rehnquist.

But if there is jurisdiction, then the defects or even the unauthorized removal, we submit, can be waived.

Q And what's the head of federal jurisdiction you say there was?

MR. CORNELIUS: Beg pardon?

Q What was the head of federal jurisdiction that you say there was?

MR. CORNELIUS: What was ahead of federal --?

Q What was the jurisdiction in question?

MR. CORNELIUS: The federal court jurisdiction?

Q Yes.

MR. CORNELIUS: On several grounds, Your Honor, and I'm going to get to those in just a moment.

First of all, because of diversity of citizenship; secondly, because of the presence of the United States anti-trust laws; thirdly, because of the presence of the United States Government as a party.

Q And the presence of the United States as a party would be what? What jurisdiction is that?

MR. CORNELIUS: We take the position, Your Honor, that the presence of the United States as a party gives the court original --

Q Without Moore?

MR. CORNELIUS: Without Moore?

Q Without Moore.

MR. CORNELIUS: Yes, sir.

And also, then, the government had a lien on all of the assets of petitioner Grubbs, including his accounts receivable. And these were in dispute in the lawsuit and were being dissipated and converted by General Electric Credit Corporation. So the government actually stated its grounds of removal as being Section 2410 and 1414; and we are

of the opinion that they had the right of removal under those sections.

Q Mr. Cornelius, did anyone at any time make a motion to remand?

MR. CORNELIUS: No, Your Honor, never.

Q Any objection ever made to federal court jurisdiction?

MR. CORNELIUS: None whatsoever, Your Honor. In fact, all of the parties actively appealed to the United States District Court for a determination of the controversy. For example, General Electric Credit Corporation waived, by written letter, the removal bond. They answered on the merits in the United States court. They filed a motion for a more definite statement. They filed a memorandum brief. They filed a motion for continuance. They filed a motion to add new parties.

They answered the government's cross-action on the merits. They filed amended answers. They answered interrogatories. They participated in the preliminary and final pretrial conferences, signed the pretrial order, participated in the trial, and then moved the U. S. District Court for judgment on the merits.

Q Was this entirely sua sponte?

MR. CORNELIUS: Yes, Your Honor; entirely.

Q Nobody at the argument suggested it?

MR. CORNELIUS: It was never even mentioned in the argument before the Court of Appeals, Mr. Justice Douglas.

We take the position, may it please the Court, that the cases by this honorable Court, of Baggs vs. Martin, McKay vs. Uinta Development Company, In re Albert Moore, Kreigh vs. Westinghouse, Church, Kerr & Company, as well as many other cases, sustain our point.

Q Mr. Cornelius, on the face of the opinion of the Court of Appeals, at the outset is a statement that they find a complete absence of federal jurisdiction. In the argument to the Court of Appeals, was there any reference to the first paragraph of General Electric's complaint, which recites diversity facts, even though they are not directed at a diversity claim?

MR. CORNELIUS: No, Your Honor, it was never mentioned. It was never anticipated, by any of the parties, until we received a letter from the Court of Appeals raising the question sua sponte.

Q Now, assuming that there was no diversity, either alleged, as there was in paragraph one, or no diversity of citizenship in fact, as soon as the United States was brought into the case, didn't that give a basis for federal jurisdiction? Did the court discuss that in the oral argument at all?

MR. CORNELIUS: It certainly does. In our opinion,

Mr. Chief Justice, --

Q Was it argued to the court?

MR. CORNELIUS: It was argued in the supplemental briefs, vociferously and enthusiastically. The Court of Appeals, in its opinion --

Q Well, how could you go by the argument, the main argument, without some reference to this diversity and some reference to the fact that the United States had become a party?

MR. CORNELIUS: I think it was touched on, Your Honor, in the argument before the Court of Appeals. But most of the time was spent on a discussion of the merits.

Q But the Court of Appeals said it was a frivolous claim against the United States, sort of a trumped-up claim, or that was its opinion.

MR. CORNELIUS: More or less, Mr. Justice White; yes, sir.

Q And that it was not -- so it was so baseless that it wouldn't independently support removal?

MR. CORNELIUS: Yes, sir. But the Court of Appeals said there was no allegation of diversity or federal question, and we repeatedly called the existence of these matters to the court's attention and briefed them extensively in the supplemental briefs.

Q The federal question here is just in your answer

to the plaintiff's complaint, that that wouldn't afford it independent of the federal jurisdiction, would it?

MR. CORNELIUS: Ordinarily, no, Mr. Justice Rehnquist, but in our case it was a cross-action and therefore a new action against the General Electric Company. And so it was not an answer, it was a plaintiff's complaint as against General Electric Company, and raised a federal question.

Additionally, when the government got in, they cross-actioned against both GE and GECC, raising the same federal questions.

Q And would you defend the jurisdiction over your client as against General Electric Credit Company as being pendent jurisdiction in that situation?

MR. CORNELIUS: We would claim that the court had pendent jurisdiction of the entire controversy, Your Honor, under the circumstances, because very similar situations have been affirmed on that point in some cases cited in our brief.

But, you see, the federal court here had jurisdiction because of diversity, federal question, presence of the government as a party.

Q Well, supposing the government has pleaded on something, an interpleader theory that can't be sustained in the federal interpleader law; that it isn't really a claim to a limited fund, but it's just a question of lien priority.

MR. CORNELIUS: Yes, sir.

Q The federal district judge confronts that as soon as the case is removed and decides there just isn't a colorful claim against the United States. Would that support federal jurisdiction if the whole balance of the action didn't involve the United States?

MR. CORNELIUS: There is some difference of opinion on that point, Your Honor, but in my opinion it would. Because Section 2410 gives parties the right to sue the United States Government in State Court in order to determine the priority of liens, or in actions involving the title to property or the lien of the government.

Q Where the United States claims an interest in the property?

MR. CORNELIUS: Yes, Your Honor, and they did in this case.

Q Mr. Cornelius, I suppose that if one were a purist, the pleading doesn't support diversity jurisdiction, it speaks, as is not uncommon in a State Court case, of residence, not of citizenship.

MR. CORNELIUS: Yes, Your Honor.

Q There certainly are plenty of circuit court opinions that this is insufficient.

MR. CORNELIUS: But, Your Honor, we believe that it is sufficient in our case, and we have cited some cases in our brief to the effect that, since the record shows diversity,

there was no necessity that there be any formal -- the one on diversity pleas -- any formal allegation of it.

Q You responded to someone's question a few minutes ago that there was no objection when it was removed, and there are cases holding that that's an effective waiver, isn't there?

MR. CORNELIUS: Yes, Your Honor. Very definitely.

The cases of Gordon vs. Third National Bank of Chattanooga, Sun Printing Company vs. Edwards, and Killam vs. Maryland Casualty Company, all affirm the proposition that if diversity is shown by the record, anyway, in any form, it is sufficient. And they also hold that, Mr. Justice Blackmun, if residence is referred to, that that at least shifts the burden on the opposite party to show that there is a distinction between residence and citizenship, for the purpose of showing diversity by the record.

Q Well, that isn't true in all circuits, but I think there isn't any great controversy here, anyway.

MR. CORNELIUS: No, Your Honor. In fact, the respondent here concedes diversity, but we feel that the respondent here has confused right of removal with organic jurisdiction. And there doesn't seem to be any question in our minds that because the federal court had the organic power to hear this controversy from several different standpoints, when the parties consented to the removal, then the federal

court had jurisdiction.

We have diversity of citizenship. We have the existence of the antitrust laws. And then, of course, we have an interest of the government, the United States Government here had a lien on the property which was actually being followed.

And had the government not been in the case, there was a distinct possibility that the property on which it had a lien would be dissipated or would go to someone else, and the government would lose its lien.

Q You say a lien on the property was being followed, Mr. Cornelius. Actually, the plaintiff's claim in the State Court was simply a contract claim, it wasn't a claim that would have addressed itself specifically to property, was it?

MR. CORNELIUS: That's right, Your Honor. The plaintiff's claim was on the promissory note. But when the cross-action was filed by the petitioner, there was brought into dispute a question of whether GECC had the right to collect certain accounts receivable on which the United States Government had a lien, and whether or not GECC was entitled to foreclose and take title to property on which it and the government were both claiming a lien.

So these developed after the original petition had been filed.

Q I have a little problem with liens.

The lien doesn't come up until you get judgment, does it?

MR. CORNELIUS: Yes, Your Honor, --

Q Or is Texas law different? I don't know Texas law.

MR. CORNELIUS: Mr. Justice Marshall, under Texas law you have a lien which can be created by the chattel mortgage, and then if you recover judgment on the debt, you get a judgment lien. But it's different from the chattel mortgage lien, which both the government and GECC were claiming on the property involved here.

Then we say, may it please the Court, that the fact that the United States Government was a party here, itself, certainly gave the federal court cognizance of the controversy. And it is our opinion that it gave the federal government the right to remove, whether it brought itself under 2410 or not.

Because the Constitution says that the judicial power of the United States shall extend to cases in which the government is a party. We submit that the decisions hold that this is true, whether the government is a plaintiff or a defendant.

And in this case, and the case of Hood vs. United States, which is cited in our brief, holds that even if the federal court had been completely without jurisdiction, when

the government came in and sought affirmative relief in the federal court, jurisdiction was conclusively established.

Q Is it your contention that if the United States removes a claim against it to the federal court, that even though that claim might be separable in the terms of the _____ case, the whole controversy is automatically removed to the federal court?

MR. CORNELIUS: Not automatically removed, Your Honor, but if there is no objection and all parties proceed to trial voluntarily in the U. S. Court on the merits, it would have pendent jurisdiction of the entire controversy. Even if it later found against some or even all of the federal grounds. And we have cited cases in our brief which sustain this proposition.

I believe, may it please the Court, I'll reserve the remaining time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Cornelius.
Mr. Johnson.

ORAL ARGUMENT OF HUBERT D. JOHNSON, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I don't have any particular quarrel with the factual statements that were made by Mr. Cornelius in the case. I'll certainly be the first to agree that when we received the

letter from the Clerk of the Court, which I've attached as an appendix to my brief for the respondent, was the first time it had occurred to any of us that we were in the position of having perhaps foisted on the federal court jurisdiction that it didn't have.

In the trial court I worked closely with GE counsel, who is a Dallas counsel, as I am from Dallas, and when the government was made a party, it was rather puzzling and enigmatic to me, because GECC did not have a judgment at that time, it was not involved in the competition as to whose lien if any was at stake; it was not even a party in that one involving the stakeholder phase.

I couldn't really quite understand what it was about, it was just an offshoot of the case. They got worried and they removed.

Q Mr. Johnson, let me ask you this: Let's assume that the complaint, however inartfully, asserted something like diversity jurisdiction, but failed, as Justice Blackmun said, to state it as it should be stated. And then let's assume that the claim against the United States is a spurious claim, and that there is no bona fide basis for their being made a party. But after that, when the case was removed, with no objection from anyone, and that is against the background of the complaint which alleges facts which would support the diversity determination, how did the courts say that there --

how did they arrive --

MR. JOHNSON: Well, I direct your attention to the question that the court asked, and the court asked us, and we answered it, and we tried to go on into the rest of it.

Q What page are you on?

MR. JOHNSON: I'm talking about Appendix B to my brief.

The reason I put it in there is I don't believe it appears at any place in the record.

The court says: "It has come to the Court's attention that the District Court's removal jurisdiction has been predicated on 28 U.S.C.A. 2410 and 1444", which is kind of a procedural reference to 2410. "Having considered the record and the pleadings, the Court has serious questions concerning the applicability of these statutes." And it "may consider it sua sponte", which I needed to look up at the moment, but I soon found out that it meant we had to engage in a new field.

"If the case was improperly removed to the federal court under 2410 and 1444, could it have been removed under any other federal statute?"

And I think the answer to that question had to be no. General Electric Credit Corporation made the decision as to what forum it would enter when it filed its lawsuit. It sued a Texas resident in the Texas court, where the Texas resident

lives. It could have elected to go in and file a federal court suit. It did not; it filed a simple suit on a simple matter in a little town down near Marshall, Texas, with a Marshall attorney. I was not the attorney when it was initially filed. I was not the attorney until this antitrust thing got into it.

Q And that suit was not removable by that particular defendant?

MR. JOHNSON: Not by that particular defendant. That was a resident defendant, and the right of removal is given to the non-resident. You can check the right of removal under that statute, and if there's anything to it, if we had a choice to go to the federal court, we didn't make it. And not having made it, there's really not anything we can do to ever get back in that posture again.

Q But neither could the defendant at this time.

MR. JOHNSON: Well, the defendant was a resident.

Q That's what I mean.

MR. JOHNSON: He had no right of removal, and the Court of Appeals focused its attention on the status of it as of the time it was removed. And as of the time that it was removed, and there are a lot of cases that emphasize that that is the point at which you determine removability jurisdiction. As of that time, 2410 was the only thing you could hang your hat on. And if 2410 didn't fit, then it was spurious, and

they thought that they had had it foisted on them, and that it could not be done.

Q Well, they thought -- the United States was a party by then?

MR. JOHNSON: Yes. But I think one of the reasons you have to keep in mind, and maybe I -- I've tried to figure out why the court, why Judge Goldberg went off on this. The United States was nowhere in sight when it was argued at the circuit court level. There was no -- it was not much in sight in the record.

Q The United States is the one that removed it to the federal court.

MR. JOHNSON: They brought it there and then they sort of abandoned it.

Q They thought they were in it -- well, they thought they were in it enough to file a complaint against GE.

MR. JOHNSON: But when they were denied relief, they didn't go to the --

Q In connection with this very transaction.

MR. JOHNSON: Yes, but I do believe that --

Q You can't really say, can you, that the United States abandoned it? I gather they litigated on the merits of their claim --

MR. JOHNSON: Well, --

Q -- and they lost and decided not to appeal.

MR. JOHNSON: Not to appeal. But if the bench felt that the Circuit Court of Appeals was looking at it, the government had been denied even the right as to its lien claim, and yet the district court said they couldn't pass on that. And that was what it was brought there for.

Q Well, at the time the United States removed it, wasn't it a proper move?

MR. JOHNSON: Not enough to fit 2410. Because there was no assertion by a lien on any specific property. There was no assertion on the basis of it being in the nature of an interpleader. There was no interpleader aspect to it.

The amended answer, a cross-action, and they brought in a third-party defendant, the U. S. Government; admitted that it owned all the judgments. There was no case of multiple -- single liability among multiple claims. And the interpleader's statement was not, was completely demolished in the pleading itself, it would appear.

I must confess we assume that -- I assumed then, and I did not know until I got into it later, that it was that the government could always remove. Just because they were a party.

Well, I don't think I found any support for that in the subsequent decisions.

I saw a case that came all the way up to this Court, where both parties filed briefs saying that the federal court

had removal jurisdiction, and this Court saying: You can't get there this way.

Q How about 2410? Do you say that the action brought in the State Court against the United States did not meet the standards of Section 2410?

MR. JOHNSON: I don't think it did.

Q Why not?

MR. JOHNSON: Well, I think if you will note the portion of 2410 that the government is brought in there is for interpleader. This is not an action by the government, but this was by determination of rights on a failure of protection of what's multiple liability. That was the whole concept of 2410(a)(5), and --

Q You say (1), (2), (3), and (4) are out of it, and you only argue on (5).

MR. JOHNSON: I don't think they have any -- I think the interpleader concept is the only thing that was involved in it. The federal government was brought into this case -- my pleading, our pleading was a simple suit to recover a judgment, never was recovered, lone judgment, abstracted judgment was filed, no ancillary process, no -- if they ever had a lien on anything we would have abandoned it by a simple debt suit. All we could have gotten was a judgment.

And then we would have had a right to go see if we could collect it.

And that's all that we were seeking in the suit.

Now, the rest of this got sort of tangled up. Like Judge Goldberg said, "A funny thing happened on the way to the travelers' case, it wound up in the wrong court."

Well, we started out in the right court. We started in a court that we had the right to be in. The government is the one that got us lifted out of our strata, I guess.

Q Of course, Mr. Johnson, you've got to deal with the argument, too, don't you, that even though it was improperly removed, if the federal court, at the time of removal, had what your opposing counsel called organic jurisdiction, even though it was not removable, if it was then tried on the merits, it --

MR. JOHNSON: I'm aware of those cases, and I've attempted to read those cases, and I have great difficulty with them, and they were cited in their supplemental brief. I think maybe it would help to clarify it, or throw it out, that the Court of Appeals did not hear oral argument controlling to the jurisdiction point. And they wrote the letter, they called for supplemental briefs directed to the question, and then the next thing we get the opinion saying that: Too bad, you're in the wrong court.

And we're not accurate in second-guessing, we don't know yet what the circuit court would have done with our

(inaudible) - they're based on a State statute of

limitations and brings in other aspects of State law, Texas law, almost entirely.

That perhaps might have been one of the reasons that the court felt that we were trying to maybe conspire or collude to bring to them a question that they shouldn't have. But that was the furthest thing from our minds and from my mind, but being asked the question, was it properly removed, was there other grounds of removal; I recall couldn't find other grounds of removal.

As you found out a while ago, you can't add removability to a case by what the answer says.

You could plead a constitutional question on the answer, and you did not get federal question jurisdiction. The answer just doesn't figure in determining removability. And that's for sure.

Now, this --

Q Mr. Johnson, I suppose if you had started in federal courts, you wouldn't be here today at all?

MR. JOHNSON: There's no question that it came up completely by reason of -- if we had started in federal court, we, as a New York corporation -- we don't deny that we're a New York corporation -- we're suing a Texas resident, and it was a suit for over \$10,000. So we could have brought it in the federal court. We didn't.

Q Your concept today, as perhaps it was originally,

is that you wanted your lawsuit tried in the State court?

MR. JOHNSON: Well, I'm in the position where I don't believe that I have the right to say that I'll roll over and play dead, and you can just confer on them jurisdiction. I don't -- the way I read your cases, I don't think I have the right to consent to jurisdiction.

Q Well, don't we have to talk about another lawsuit, too, namely, Grubbs' suit against General Electric? Grubbs may not have been able to get this promissory note case into the federal court, but the judgment against you is on an antitrust claim, isn't that right?

MR. JOHNSON: No, not at all.

Q What is that for?

MR. JOHNSON: It's for a tortious interference in the business, and defamation.

It's business damage from -- in connection with the way they terminated their dealership.

The argument was that this was a plain partnership action.

Q Well, in any event, with that lawsuit, he could have filed in the federal court?

MR. JOHNSON: He could have? No, I don't think he could have filed it in the federal court, because he was the resident. We could have -- oh, I guess he could have, on a diversity concept; that's true. But he simply filed it as a

cross-action.

Q That's the lawsuit in which there's a judgment?

MR. JOHNSON: That's correct; that's correct.

But that is a lawsuit in which --

Q That's the lawsuit that could have been --

MR. JOHNSON: That's the lawsuit that he filed himself, and they brought him here, didn't they?

Q Well, I understand that. But it ended up in federal court, and he could have filed it there originally?

MR. JOHNSON: Possibly so. I think he might have had a slightly different question --

Q And that now --

MR. JOHNSON: -- a different point, a distant point he had to go, I think he might have to go to New York.

Q Should that judgment of -- well, not if you were in Texas.

MR. JOHNSON: GECC doesn't operate except in a sales position down there. Maybe under a long arm we might have been able to get it there, but I think that --

Q Well, I know, but you were already in the State court as a party --

MR. JOHNSON: But --

Q -- and he filed this cross-action --

MR. JOHNSON: Cross-action.

Q -- in which he named the United States and

General Electric; isn't that right?

MR. JOHNSON: Filed it in the State court.

Q Yes. Filed it in the State court, and then after that was filed, that was what was pending in the State court when the United States removed, isn't it?

MR. JOHNSON: That's correct. That's correct.

Q All right. So it was pending, actually, a suit by the Texas resident against the New York resident, and that's the action and the cross-action that was removed, isn't it?

MR. JOHNSON: Well, I think you have to -- in arriving at that --

Q No, but that's --

MR. JOHNSON: The word I'm using is to the effect that the law about not changing the nature of the case by a cross-action, you're going to have to change some of that law. If you arrive at that conclusion.

Because this was a responsive cross-action in the State court, and it does not change the -- it did not make the case removable, as such. Mr. Grubbs could not have removed himself, he did not attempt to remove.

Q There's one thing he could have done, though, and that would be to dismiss this State action and start all over again in federal court.

MR. JOHNSON: Well, he didn't have to bring -- if he

wanted to bring his tortious claim, his defamation suit, he was not required to bring it, he's not a compulsory counter-claim, he could have brought it -- we're sort of on a debt, and he could have brought it in whatever form he wished. But he did not so do.

Q One of his claims was an antitrust claim.

MR. JOHNSON: That's correct.

Q Under the antitrust law, but --

MR. JOHNSON: But it's a little bit mixed up with State and federal, but I think --

Q Explicit jurisdiction in the federal courts.

MR. JOHNSON: I think that's right.

Q So here's a case in which he has judgment, it's been tried out in the federal court, and the suggestion is that you start all over and try it out again in the same court?

MR. JOHNSON: I don't know what the GE's position is in the matter. I -- there having been no appeal by the government or by them or by anybody else with respect to that, they may have some judgment that is --

Q Well, I know, but --

MR. JOHNSON: -- that defeats them and can't be sustained --

Q -- Grubbs has a judgment.

MR. JOHNSON: -- as a collateral attack. Hunh?

Q Grubbs has a judgment, doesn't he?

MR. JOHNSON: Grubbs what?

Q Grubbs had a judgment award.

MR. JOHNSON: Against who?

Q GE.

MR. JOHNSON: No. Denied.

Q Well, he has --

MR. JOHNSON: GECC.

Q Yes.

MR. JOHNSON: Against General Electric Credit.

Not on antitrust.

No antitrust judgment at all.

Q What kind of a judgment did Grubbs get in that?

MR. JOHNSON: It's a plain money judgment, the --

Q For how much:

MR. JOHNSON: \$20,000. Based on the injury to his business from defamation.

Q Against whom?

MR. JOHNSON: Against General Electric Credit Corporation, that furnished the credit from which he operated an appliance -- as an appliance dealer for General Electric.

And this was just an outgrowth of some accounts that had been purchased, some installment notes had been purchased, they defaulted, and then had been put in the form of a note. But the problem --

Q But you have to agree this result makes law look like an ass, doesn't it?

MR. JOHNSON: There's no question that it brings back memories of Charles Dickens' writings, there's no question about that. There's no question that we -- I'm trying to point out that I think the Court of Appeals was viewing it, I think, from what we gave them to view it with, and I -- there was no -- I did not expect this question to be developed in the case; when it came up, I couldn't find a suitable answer.

Perhaps the answer -- the question that was put, of Grounds of removal, made it -- twisted me off a little bit. But even as I get into it, I do find that some of the cases are highly confusing, because all of them seem to have -- for instance, we did not -- we went to trial on the pleading that we filed in the State Court. It's true we did some actions in the federal court, but we never amended our petition -- we -- the first original petition was the only petition. That's what I suggested in the State court for it. That's why it doesn't attempt to set any jurisdictional bars in the federal court. It was just never amended.

Now, we did file responsive pleas to each cross-action against us. We had some in the State Court and in the federal court, where, for the first time, the United States Government took interest. We answered that.

And shortly before trial, as I recall, those answers

were amended to bring them down to date, because a more definite statement was subsequently filed.

They -- but it was in the State Court until the government got into it. Now, it's just as simple as that. The government thought it could remove, did remove, we thought they could remove and didn't object.

I think that the -- it's true that the Court of Appeals did not discuss that Baines case, and those cases that are cited -- the Uinta case. But in each and every one of those cases, that I could see, there were considerable elements of an amended pleading, or sort of a new ballgame starting over in the federal court. I don't know why the Court of Appeals didn't answer that.

I saw Judge Goldberg at lunch that day, and I wanted to ask him, but I figured maybe I better not. I may have to ask him about the rest of this case some day.

Thank you very much.

MR. CHIEF JUSTICE BURGER: You have a few minutes left, Mr. Cornelius.

REBUTTAL ARGUMENT OF BILL J. CORNELIUS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. CORNELIUS: Thank you, Your Honor. May it please the Court:

In connection with the holdings of this honorable Court in Baggs vs. Martin, and the other cases we've cited on

waiver of removal, actually in our case, may it please the Court, there are many more recognitions of the jurisdiction of the U. S. Court that are to be found in Baggs vs. Martin, or McKay vs. Uinta Development Company, or any of these other cases.

And the Appendix in this case contains in the Clerk's docket entries a list of all of the things that were done, as I said previously. They moved for judgment on the merits. They did amend their pleadings twice, or three times, as I recall. Their responses to the cross-actions on the merits.

Now, about the judgments which petitioner Grubbs has obtained. It is against General Electric Credit Corporation for Malicious and deliberate injuries to his business which resulted in the destruction of his business. We take the position that these acts are prohibited by the United States antitrust laws. The cross-action was brought under those laws. And while the court did not conclude that we had proven our conspiracy between GE and GECC, the court did find and filed an extensive findings of fact and conclusions of law indicating that there was suspicious circumstances, and indications of a conspiracy between GE and GECC.

Q The cross-action you refer to was brought in State Court, wasn't it?

MR. CORNELIUS: Yes, Your Honor.

Q And you say that the State Court could have

tried that on an antitrust theory?

MR. CORNELIUS: No, Your Honor. At the time we were under the impression that the courts would have had concurrent jurisdiction of it; but after briefing it more thoroughly we are of the opinion now that the United States court had exclusive jurisdiction of federal antitrust.

Q Well, did you think here your \$20,000 judgment was for violation of the antitrust laws?

MR. CORNELIUS: They are for the commission -- it is for the commission of acts which are prohibited by the antitrust laws, as we see it, Your Honor.

Q Well, was your cross-claim under State law as well as under federal law?

MR. CORNELIUS: Yes, Your Honor. Under both the --

Q For malicious injury to your business, is that what it was?

MR. CORNELIUS: Yes, sir. Yes, sir.

Q Under State law?

MR. CORNELIUS: Under State law and acting in concert with General Electric Company, under federal law also.

Q And what the federal district court gave you judgment, but said that it wasn't an antitrust claim, didn't they?

MR. CORNELIUS: No, Your Honor, it didn't say that. It just said that --

Q Well, it said there wasn't any conspiracy.

MR. CORNELIUS: It said that under the evidence he could not find a conspiracy between GE and GECC.

Q If there wasn't, then could it have been an antitrust action?

MR. CORNELIUS: I'm of the opinion that it could be, Your Honor, under the deliberate and malicious acts of the single parties.

But I may be wrong on that. But --

Q Incidentally, what happened to the action on the note? No cause of action on that, or what?

MR. CORNELIUS: The action on the note, Your Honor, was tried, and the note was cancelled by the trial court, because of the failure of consideration. You see, the note had been given by petitioner Grubbs to General Electric Credit Corporation on the condition of, and in response to, certain agreements made by GECC.

The evidence showed, and the court concluded, that these agreements had been breached and that therefore the consideration for the note had failed and it was void and it was cancelled by the judgment.

Then, may it please the Court, we would like to discuss this point: Mr. Johnson says that the case was not removable because the antitrust claims were brought forward in a responsive pleading. Of course, at the outset we're faced

with this distinction, that there is a difference between removability and jurisdiction. Removability can be waived, jurisdiction cannot.

But, additionally, our pleading was responsive as to GECC, but it was not responsive as to General Electric Company. It was a new action instituted against the General Electric Company, and so could not be considered a responsive pleading in that context.

General Electric Company could have removed. My brother, a moment ago, was asked the question: Could the case have been filed in the United States Court by a certain party?

It is our contention that the case could have been filed in the United States Court by any party. General Electric, because of diversity and antitrust. GECC, because of diversity. The United States Government, because of 2410, the interest and property of the federal government, its lien, and the fact that it was a party defendant and a cross-plaintiff. And Grubbs could have filed the cross-action in the federal court.

Q Do you see any difference in what result ought to be here? You've got two different judgments; all in one judgment, but two different recoveries --

MR. CORNELIUS: Recoveries.

Q -- one, the note that declared void and

unenforcible, that \$56,000 on the void note.

MR. CORNELIUS: Yes, Your Honor. Yes, sir.

Q Secondly, you've got an impairment judgment of \$20,000.

MR. CORNELIUS: Correct.

Q Now, you may have been able to get into federal court for that \$20,000, either on diversity or by joining it with another claim, but if GE got started first in the State Court there was no way ^{to} get that suit on the note out of the State Court, if you ignored the claim of the United States?

MR. CORNELIUS: That is exactly right, Your Honor. Because we were a resident.

However, we take the position, and we think the cases sustain this, that our residence within the State is merely a venue restriction and is waivable. In fact, I believe it was just that kind of a resident situation that's involved in some of these other cases.

Q Well, it's a restriction on removability now, however?

MR. CORNELIUS: Yes, it is.

Q A resident defendant cannot remove.

MR. CORNELIUS: Yes, sir.

But we believe that that restriction is clearly waivable.

Q And your other cases say in effect that even

though improperly removed in a situation like that, if it goes to trial on the merits, the court doesn't give waivable action on jurisdiction.

MR. CORNELIUS: Right. And we say we're certainly not completely lacking in jurisdiction, but had jurisdiction or the organic power to hear the controversy for five or six different reasons.

Of course, may it please the Court, we also say that the action was removable under 2410. We did not file an interpleader bill against the government. We filed an action under 2410 to determine the priority of the government's lien.

This was not a strict interpleader case. 2410 is not an interpleader statute alone, it involves several causes of action which can affect the existence or the priority of the government's lien.

Q What specific items of property were involved in this?

MR. CORNELIUS: Furniture, fixtures, and equipment in Mr. Grubbs' business, and multi-thousands of dollars worth of accounts receivable, all of which had been charged -- had been assigned to the government as security for its note, that it had from Mr. Grubbs.

Q Well, an assignment without Moore doesn't confer a lien on the government?

MR. CORNELIUS: An assignment of accounts receivable?

Q Yes.

Q That's what it is.

MR. CORNELIUS: Under these instruments, we believe so, yes, Your Honor.

Q Under Texas law, that would confer a lien on the property which was the subject of the accounts receivable?

MR. CORNELIUS: Yes, Your Honor. You see, they had a chattel mortgage, to begin with, which created a lien upon all of his property. And then this was further secured by an assignment of the accounts receivable.

Q It's a pledge, it has all the earmarks of a pledge,

MR. CORNELIUS: A pledge, yes.

And then GECC comes in, though, and is collecting without any authority whatsoever --

Q Was there a delivery of possession in connection with this place?

MR. CORNELIUS: No, not of the property itself.

Q Well, then, it's certainly not a pledge in the traditional sense of a pledge, is it?

MR. CORNELIUS: Well, no, possibly not. But it would be a lien under Texas law. It's our contention.

Q Was it just chattel mortgage, or --

MR. CORNELIUS: Chattel mortgage, yes. And further

secured by an assignment of accounts receivable, which were actually being claimed in an adverse proceeding between GECC and the government.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Cornelius.
Thank you, Mr. Johnson.

MR. CORNELIUS: Thank you very much, Your Honor.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 2:13 o'clock, p.m., the case was submitted.]

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