

In the
Supreme Court of the United States

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SUPREME COURT, U. S.

ALLENBERG COTTON COMPANY, INC.,

Appellant

v

BEN E. PITTMAN

No. 73-628

Washington , D.C.
Thursday, October 17, 1974

Pages 1 thru 43

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ALLENBERG COTTON COMPANY, INC., :
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 Appellant :
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 v. :
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BEN E. PITTMAN :
:
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No. 73-628

Washington, D. C.

Thursday, October 17, 1974

The above-entitled matter came on for argument at
1:02 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:

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For the Petitioner

GEORGE C. COCHRAN, ESQ., School of Law, University of
Mississippi, University, Mississippi
For the Respondent

C O N T E N T SORAL ARGUMENT OF:PAGE:

John McQuiston, II, Esq.,
For the Petitioner

3

George C. Cochran, Esq.,
For the Respondent

29

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Allenberg Cotton Company against Pittman.

Mr. McQuiston, you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN McQUISTON, ESQ.,

ON BEHALF OF THE PETITIONER

MR. McQUISTON: Thank you, your Honor.

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

What this case involves is whether, in the State of Mississippi, you can require foreign corporations to obtain a license to buy cotton in Mississippi and ship it from the state.

My client, the Allenberg Cotton Company, buys cotton in the State of Mississippi without having any employees in the state, without an office in the state, without owning any warehouses in the state and without even paying for the cotton in the state and it buys that cotton for the purpose of shipping every bale of cotton that it buys out of the State of Mississippi.

Allenberg made the contract that is involved here following an industry pattern which has been established over the last 100 or more years.

Like almost every other cotton merchant in the south, Allenberg bids for the cotton over the telephone.

In a prior year they did this over the telegraph and it submits those bids to local cotton brokers all over the south and makes contracts in that manner without qualification to do business in the various states where bids are submitted and contracts are made.

This pattern of activity follows a pattern which has been protected under the commerce clause, particularly in the agriculture-merchandising industry as shown in the decisions of Dahnke-Walker Milling Company, Lemke versus Farmers Grain Company and Shafer versus Farmers Grain Company, all of which established the rule that making purchases to buy commodities for shipment out of state is an activity which is ^{an} exempted state licensing and qualification requirement by the commerce clause.

This principle was articulated recently by this Court in the Eli Lilly decision. In that decision, all nine of the justices recognized the principle that the commerce clause guarantees free access to all markets in the United States and that as long as a foreign corporation limits its activities in a state to those essential activities which are necessary to transact business in interstate commerce, that corporation should be free from local licensing or qualification requirements.

Q What decision was that?

MR. McQUISTON: The Eli Lilly decision,

Mr. Justice Douglas.

Q Eli Lewis?

MR. McQUISTON: Lilly.

Q Lilly.

MR. McQUISTON: I'm sorry. I have a very bad cold.

Q Did you cite it in your brief?

MR. McQUISTON: Yes, I do. The principle we cited it for is the principle that --

Q I see it. Thank you.

MR. McQUISTON: Thank you.

What Allenberg did in this case fits into a very well-established industry pattern and into the pattern of existing law. In January, 1971, Pitman, a substantial Mississippi cotton planter, went to a local cotton broker and asked him to get a certain price for his cotton. The local cotton broker picked up the phone and telephoned the Allenberg Cotton Company in Memphis and, after some negotiations over the telephone, a contract was entered into.

As is the custom in the trade, Allenberg immediately made offsetting sales of cotton on the New York Cotton Exchange and to its meal customers outside the State of Mississippi.

Q Whose agent, if anybody's, is the broker?

MR. McQUISTON: The broker is really a joint agent.

The broker has a clientele, like all of these brokers across the south that are the local cotton producers. They come to him or he may go to them and the broker puts the buyer and seller together and he is paid a per-bale commission which is added to the price of the cotton.

Sometimes it comes out of the farmer's pockets. Sometimes the commission comes out of the buyer's pocket, but in all cases it is added to the price of the cotton.

Q And title is never in the broker's name, is it?

MR. McQUISTON: Title is never in the broker's name.

Q This broker acted for others also?

MR. McQUISTON: Yes, he did, in prior years. In the particular year involved in this case, he did not buy any cotton for any other company. But we didn't restrict him. It was his own choice. He actually acted as a merchant himself. His was buying cotton for his own account during that year and acting -- running his own little small cotton merchandising business and on the side he was contracting cotton for Allenberg.

Q But he acted for several producers? Farmers?

MR. McQUISTON: He acted for a number of different farmers in that year.

Q But only for you as the buyer.

MR. McQUISTON: Only for us.

Q In that year.

MR. McQUISTON: But that was his own choice. It was just a coincidence.

Q He wasn't -- you didn't have any --

MR. McQUISTON: We had no control over whether he did or he did not.

Q Who paid the commission here?

MR. McQUISTON: The commission here was added to the invoice price of the cotton and Allenberg paid the full price of the cotton, including the broker's commission.

Q You indicated that sometimes it was either divided or the farmer paid it.

MR. McQUISTON: Yes, your Honor. In some cases where the farmer invoices his cotton directly to the merchant himself by attaching his negotiable warehouse receipts to a draft and forwarding it directly to the buyer's bank, he may receive the cash and then have to go to the broker and pay him his commission.

In this case, the transaction was handled through the broker's office and so what the broker did was, he advanced his own money to the farmer and then attached the negotiable warehouse receipts to the draft and drew on Allenberg's bank in Memphis and that draft included his commission.

Under this contract that Pittman and Allenberg

made, Pittman was obligated to follow the normal industry practice of warehousing his cotton after it was harvested.

Q Mr. McQuiston, before you get to the harvest point, what control did the contract give Allenberg over Pittman's course of cotton cultivation?

MR. McQUISTON: The contract specifies that he would follow normal good farming methods. It is a contractual promise that if he didn't live up to, he would be subject to breach of contract suit.

The only actual control that Allenberg had over -- well, it had no control over his farming methods except insofar as he was obligated to use normal good farming methods. As to ginning process, some farmers, from time to time, have taken wet cotton and ginned it at a too high a temperature and ruined the cotton and so the contract specifies that the buyer will have the option to control the ginning temperatures.

Q Would Allenberg, either by contract or by Mississippi law, have a lien at any point on Pittman's land or on the cotton?

MR. McQUISTON: On the growing crop? No, your Honor.

Q When was the contract made?

MR. McQUISTON: The contract was made in January before Pittman ever planted a single seed.

Q And what is the cotton season in that part of Mississippi?

MR. McQUISTON: The planting was in the spring, April.

Q April.

MR. McQUISTON: And then the harvest would be September or October, anywhere from -- it begins at that point depending on the weather and ends as late as March -- I mean, I'm sorry, as late as December, January. If the weather is wet, last year we didn't get cotton out of the fields until March.

Q And the contract was for what? So many bales or the entire product?

MR. McQUISTON: It was on the 700 acres of land.

Q Whatever was produced on the 700 acres.

MR. McQUISTON: Whatever was produced.

Q At so much a bale. Was that it?

MR. McQUISTON: At so much, depending on the quality of the cotton, at so much a bale.

Q There are several grades, are there not?

MR. McQUISTON: There are several grades. Now, the -- when the -- after the cotton is put in the warehouse, a sample is cut from the cotton and sent to the Department of Agriculture. The U. S. Department of Agriculture grades the cotton and since they are independent, that is

used to determine how much the farmer is paid for his cotton.

Another sample is cut from the cotton and is mailed by the farmer to Memphis and once the cotton merchant has the sample in Memphis and the negotiable warehouse receipt, he uses those samples to make up shipping lots.

Now, the ultimate consumer of cotton is cotton mills and they use it in, traditionally, 100-bale lots. Each bale in a 100-bale lot has to match the other 99 bales in grade, staple and color. Otherwise, it is just not usable.

Now, the cotton does not come out of the field in 100-bale even-running lots. One of the primary functions that the merchant performs is grouping the cotton together into even-running lots.

Q You speak of the merchant now who --?

MR. McQUISTON: The cotton merchant in Memphis, Allenberg.

Q Yes.

MR. McQUISTON: It receives the samples and it uses them to make up 100-bale shipping lots of even-running cotton, cotton that is all the same. And at that point, and not before then, is anybody in the industry able to determine where that cotton is to be going.

It can't be taken from the fields and put on a

railroad car. It has to go into the warehouse. A sample has to be cut, grouped with other like bales and then shipping order is issued.

The shipping orders are issued from Memphis and they are long lists of the bales by number. Each bale is treated individually and the warehouseman takes the list and mechanically pulls the bales out and puts them on a railroad car bound for North Carolina or the Port of New Orleans or wherever.

The point of that is that the cotton cannot move out of the State of Mississippi until it has been warehoused and classified in the manner that Allenberg does in this case.

Now, under existing law, the activities that Allenberg performed in this case in making this contract as a commodities merchant are recognized as essential and integral parts of the national commodities merchandising system and of interstate commerce.

The Commodities Exchange Act, 7 USC Section 3, states that, "A transaction in respect to cotton shall be considered to be an interstate commerce if the transaction is a part of the current of commerce usual in the commodities trade, including all cases where the purchase is for shipment out of the state."

The Commodities Exchange Act follows the

definition of commerce, interstate commerce, which was established in the leading agricultural marketing cases of Dahnke-Walker Milling Company, Shafer versus Farmers Grain, Lemke versus Farmers Grain.

This case that is before the Court today is stronger than those cases. In Shafer and Lemke, the Supreme Court held that purchases to buy wheat were made in interstate commerce and not subject to local licensing and qualification requirements, even though the buyers in those cases were located in the state, had employees in the state, offices in the state, paid for the wheat in the state, received delivery of the wheat in the state and even owned local grain elevators in the state.

And in the Dahnke case, the contract between the selling farmer and the wheat purchaser in that case was held to be in interstate commerce, even though the farmer did not know he was making a contract with an out-of-state company.

And in here, Mr. Pittman knew from the beginning that he was making a contract with the Allenberg Cotton Company, a Tennessee corporation.

Q In Dahnke, the sale was FOB, wasn't it?

MR. McQUISTION: The sale was FOB cars in Dahnke. But the sale in the Shafer and Lemke cases was delivery at the grain elevators, which serve the same function in the

wheat industry that the cotton warehouses do in our industry.

Allenberg's purchase -- well, the facts of this case are also stronger than these wheat cases because in the wheat cases, they said that approximately 90 percent of the wheat left the State of South Dakota. Ten percent was used locally.

In Mississippi, every bale of cotton, or virtually every bale that is produced in the state is shipped from the state. There is just no significant amount of milling in the State of Mississippi.

Cotton is one of the nation's most important exports. In 1973 there were 7 million bales of cotton exported by companies just like my client out of a total U. S. cotton crop of 12 million bales. That 12 million bales, in 1973 -- of that 12 million bales, 1.8 million bales were raised in Mississippi alone and in 1973, at the time this decision was rendered by the Supreme Court of Mississippi, 1 million bales of cotton in the State of Mississippi were under forward contracts identical to the one put forward in this case.

For this reason, the decision of the Mississippi Supreme Court in this case hit our industry like a bombshell. In 1973, the United States Department of Agriculture had mounted an intensive campaign to convince everybody in the

cotton industry to enter into forward contracts. That is, contracts that are made in the early part of the year before the farmer produces or plants his cotton.

This campaign was so successful in 1973 that three out of every four bales of cotton raised in the country were subject to contract like this one in this case.

The decision in this case which held in the middle of the year that a foreign cotton buyer could not enforce its contract in a Mississippi court literally threatened to ruin our entire industry. If this decision had stood, in just Mississippi alone -- which it did not, thanks to the intervention of the Federal District Courts there -- a large part of our industry would have been destroyed and I believe the entire nation would have suffered.

Q Why would you not have gone ahead and qualified if the Supreme Court of Mississippi decision had stood?

MR. McQUISTON: We did qualify immediately thereafter, but under the decision below, subsequent qualification does not cure the defect. You can never sue on a contract made in Mississippi --

Q But your contract -- I would think you could sue on contracts made after your qualification.

MR. McQUISTON: Yes, we could, but these in 1973 were made before this decision was announced.

Q But I mean, as to the future, I don't see why it would have any great impact. Your contracts are annual ones, aren't they?

MR. McQUISTON: Well, it has an impact in this manner, Mr. Justice Rehnquist. Under present Mississippi law, with this no-cure statute, there is a market barrier raised around the borders of the state. A cotton company that is not qualified to do business in the State of Mississippi cannot now even submit a bid to buy cotton there.

Q But you have qualified.

MR. McQUISTON: We have, yes. And companies that are large companies, of course, will qualify and establish themselves in the markets. But there won't be the free competition -- a farmer in Mr. Pittman's position today can't pick up the phone and shop his cotton with any cotton merchant in the country. He is limited to those who have previously qualified to do business in Mississippi.

Q Well, the burden of qualifying is not great, is it?

MR. McQUISTON: The burden is -- these are small companies, Mr. Justice White, and there are 500 to 1,000 of them and the administrative costs in our industry are a very significant factor in determining what areas of competition we operate in. The central tools of a cotton

merchant are a desk and a telephone and a good bankline of credit and we --

Q And not a lawyer? I mean --

MR. McQUISTON: And not a lawyer. No, I wouldn't say that because the Allenberg Cotton Company, as a matter of fact, is headed by a Yale lawyer. These companies are not --

Q A free trader.

MR. McQUISTON: A free trader, absolutely, under the decisions of this Court in the Dahnke-Walker case and Lemke and Shafer.

These administrative costs, I know -- after this decision, we had to qualify Allenberg in every state.

Q I wondered if what you really worried about was, not just a qualification but other burdens that this might portend that might threaten, like taxation.

MR. McQUISTON: We are not worried about it at all. As a matter of fact, I'd be happy to pay, well, whatever Mississippi taxes were due because there are none due.

Q Yes, but what if Mississippi decided to tax, put an excise tax on cotton stored in Mississippi, warehoused in Mississippi? Even if it is owned by Allenberg.

MR. McQUISTON: That would be all right with us.

Q You think they have jurisdiction to do it?

MR. McQUISTON: Yes.

Q So you think the tax cases and the qualification cases aren't really --

MR. McQUISTON: They have to be separated and they always have been, for this reason.

Q I suppose the economic basis for your response is that Mississippi must remain competitive with the other states on the cotton market?

MR. McQUISTON: Yes, sir. We are supposedly a common market in this country and --

Q And you don't think storing cotton in the state is an intrastate business?

MR. McQUISTON: We don't store the cotton there, your Honor. The farmer --

Q Well, when you take title to it, it is in a warehouse in Mississippi.

MR. McQUISTON: That is exactly right.

Q And you get the warehouse receipts. And are you saying there is no substantial period of time that elapses between giving the warehouse receipts to you and the shipment out of the state?

MR. McQUISTON: Not in relation to the industry practice.

Q How long is the cotton stored in Mississippi?

MR. McQUISTON: The cotton crop begins to come in

in September and October and as soon as those receipts are begun to be received by the cotton merchant, it is moved out. If the --

Q What is the average length of time? What is the average length of time the cotton is stored?

MR. McQUISTON: There is nothing in the record indicating that.

Q Well, for all we know, then, the cotton is stored there in your name for quite awhile.

MR. McQUISTON: Well, for all you know, I might reply, the cotton moves immediately.

Q Well, I know, but what do we do, invalidate a state statute on some assumption like that?

MR. McQUISTON: Well, I don't think this case turns on how long the cotton stays there.

Q Well, that is what I really want to get to. So your answer to my question awhile ago is, it wouldn't make any difference if you stored, warehoused cotton in Mississippi for a long time?

MR. McQUISTON: No, it would not, your Honor. Because the purchase contract, the making of the purchase contract is the protected activity here. It is entering into this contract --

Q You mean, even though it was contemplated that Allenberg would not take the cotton out of the state for a

long time? But only when its futures contracts matured?

Even if you were planning -

MR. McQUISTON: Even if you made that assumption, I would say that this contract was in interstate commerce when it was --

Q Well, what if you are wrong on that?

How about this case?

MR. McQUISTON: In this case, the cotton was never delivered, so there is no evidence in the record as to how long it would have stayed. Now, the industry practice is that --

Q Well, who gets the benefit of that not knowing, the state or you?

MR. McQUISTON: I believe that we would. We know, from the industry practice that is described in this record, that the cotton moves out of the state all during the succeeding weeks after it is harvested. It moves out just like the wheat crop did in the Shafer case and Lemke case.

Q Well, in those cases, when the farmers saw that it was put on a common carrier headed out of the state.

MR. McQUISTON: No, the farmer sold the wheat in Shafer and Lemke to a grain elevator operator who stored it there and then when he made a carload lot --

Q I see, yes.

MR. McQUISTON: -- and shipped it out afterwards.

In 1973, the price of cotton, by unhappy coincidence, rose to the highest levels since the Civil War and at the very same time the decision in this case below was announced, which cut across all the existing contracts in our industry and literally faced our industry with bankruptcy. Disaster was avoided because of the honesty of most cotton farmers in the south and also because of the decisive action of the Federal District Court in Mississippi and Alabama which held, in the middle of the delivery season, that these contracts were made in interstate commerce and they maintain the free flow of cotton out of those states under court order and under injunction.

Despite the fact that this case is typical of the industry practice and despite the fact that the Dahnke-Walker Milling Company case rejects the title "passage analysis," Pittman seizes on one aspect of this case and builds his entire argument around it and that is the fact that title passes to Allenberg and for a short period of time, as Mr. Justice White pointed out, we have title to cotton which is located in a compress and warehouse.

Q And which you think might be subject to local taxation.

MR. McQUISTON: Which I -- I think that is an open question. I think if this Court gets into deciding

qualification cases on the basis of whether or not the goods are taxable, you have really opened up a Pandora's Box.

Q Or in accordance with whether it might be subject to service or process in the state.

MR. McQUISTON: Yes, sir. That, too.

Cotton, as I have tried to point out, is not fungible and the warehousing step is absolutely essential in buying cotton in the State of Mississippi and shipping it from the state.

Cotton cannot leave the State of Mississippi until it has gone through this process. This case raises the question that was posed in the Robbins versus Shelby County Taxing District case and that is, if the commerce clause guarantees a buyer of cotton access to the Mississippi market to make its contracts to buy cotton and remove it from the state, then how is the Allenberg Cotton Company to go into the Mississippi market and buy cotton and move it out of the state without qualifying to do business?

Another answer to this argument of Appellee is that it proves too much. The Appellee's argument would mean that cotton buyers and buyers of wheat and other farm products that are stored for which negotiable warehouse receipts are now freely transferable could not just buy or make a contract to buy any negotiable warehouse

receipt in the country. They would now have to look behind the receipt to determine whether they were qualified to do business in the state where the goods were stored, which would mean that negotiable warehouse receipts would no longer be freely negotiable.

Under the decision below, a very substantial trade barrier has been erected around the State of Mississippi. No buyer who is not qualified to do business in the State of Mississippi could now submit a bid to buy cotton there because if he submitted a bid and made a contract, a one-way contract would be created, which could be enforced against the buyer but yet the farmer's option -- but the buyer could not enforce it against the farmer.

Q What is involved in registering to do business in Mississippi?

MR. McQUISTON: Filing a number of informational papers about the corporation's activities and the basic corporate information and some fees and renewing that each year.

Q It is annually renewed?

MR. McQUISTON: It is annually renewed and this is the thing that gets to be such a burden. For example, when we qualified Allenberg after the decision in this case, in the 17 different states where it shops for cotton, it took us about two months and we had to employ an accountant--

it didn't take us two months working every day, but I mean, the period spread out over that long a time and we had the CT Corporation sending us forms and we had to get an accountant coming in and fill out the forms for us and we have got to do that every year.

Now, as the result, as a practical matter, Allenberg is just going to quit doing business in a couple of states where it has a very minor interest because it is just administratively too expensive to compete in those states if it has to qualify.

Q Is the annual qualification fee in Mississippi a flat fee, or is it graduated in accordance with business or capital stock?

MR. McQUISTON: I am not sure, Mr. Justice Powell. I'm sorry, I can't answer that.

Of course, in the various states, there are graded fees.

Q Yes.

MR. McQUISTON: And, of course, we are talking here, not just about qualifying in Mississippi but in every state in the country, in other industries that have to qualify, that would have to qualify if this decision were made the law of the land, we'd have every variation in the 50 states.

Q This same technique of doing business obtains in

all 17 of these states with forward contracts and warehousing in the states?

MR. McQUISTON: Yes, your Honor. It is identical for the entire industry.

Q Not every state, however --

MR. McQUISTON: Not every state has this "no-cure" statute.

Q Has this "no cure of sanction."

MR. McQUISTON: "No cure of sanction" is what has got our industry on the edge because what has happened is, when these contracts were made in 1973, they were immediately hedged by offsetting sales in the New York Cotton Exchange. Those hedges are maintained with margin accounts on the New York Cotton Exchange that are bank-financed.

Everything in this industry is financed on about a 90 percent basis. Now, the whole principle of the national agricultural marketing system is that the hedge will be valid, the sale on the Cotton Exchange and the purchase in the field from the farmer. And the Mississippi Supreme Court all of a sudden told us the purchase contracts were no longer valid and we are looking a huge losses on the New York Cotton Exchange, losses that would have destroyed the industry, a large part of it, and caused substantial losses to the banks that financed these purchases and --

Q Excuse me, I just am a little untutored and unsophisticated in this business. I am curious. Maybe I won't be able to understand it at all, even after you explain it. But as soon as Allenberg signed this contract to purchase cotton from Pittman --

MR. McQUISTON: Yes.

Q -- and did so in January, long before any seed had even been planted, it made an offsetting sale on the New York Cotton Exchange.

MR. McQUISTON: Yes, sir.

Q Of what? What did it sell? Cotton futures?

MR. McQUISTON: Cotton futures to be delivered in October or December of the following year, when it expected the --

Q Of the same year, right?

MR. McQUISTON: Of the same year.

Q And of the same amount of cotton?

MR. McQUISTON: Yes, sir.

Q Or what, a certain number of bales of cotton, I guess?

MR. McQUISTON: The contracts on the New York Cotton Exchange are in 100-bale lots. So Allenberg made this contract and others in Mississippi, decided about how much cotton it estimated it had bought --

Q Estimated the yield.

MR. McQUISTON: It made an estimated sale on the New York Cotton Exchange at the identical same time.

Q And at what price, compared to the price -- compared to the agreed purchase price?

MR. McQUISTON: There is usually about what we call a 400-point spread. A point is a penny, so about a \$4 or \$5 spread between the price that -- and that spread covers the expected cost of borrowing the money to maintain the hedge for the year, shipping the cotton, paying the railroad freight and so on to get it to a point of delivery the following year when it is delivered.

So if we bought cotton in 1973 at 30 cents a pound, the hedge would be at 34 or 35 cent a pound.

Q You'd sell it.

MR. McQUISTON: Yes, sir.

Q You'd sell the futures for 34 cents.

MR. McQUISTON: For 34 or 35 cents a pound.

Q 34 or 35.

MR. McQUISTON: And, of course, if the price of cotton went up, as it did in 1973, to almost \$1 a pound for the first time since the Civil War, we are looking at losses that far exceeded the capital of the entire industry.

Q And then when the cotton -- let's -- I just want to know about industry practice, not about this case.

MR. McQUISTON: Yes, sir.

Q When the cotton was delivered by Mr. Pittman or somebody else to the warehouse, he gins it, he does the ginning?

MR. McQUISTON: He takes it to the local gin. That is all his business. He gins it. Then he brings it to a --

Q A warehouse.

MR. McQUISTON: A compress and warehouse company. The compress takes the loose cotton which he delivers to them, which is not shippable because it is all so loose, and compresses it into a bale and cuts the sample from the bale.

Q And you told us about cutting the samples, sending one to the Department of Agriculture and another one to your client and your client has the job of having running -- what is it called?

MR. McQUISTON: Making even-running lots.

Q Making even-running lots.

MR. McQUISTON: Out of these hundreds of bales.

Q Hundred-bale lots. And then what happens when the time comes due on the New York Cotton Exchange?

MR. McQUISTON: The hedge is taken out by an offsetting contraption and if the market has gone up, there is a loss account on the New York Cotton Exchange. And if

the market has gone down, there is a gain in the New York Cotton Exchange which, hopefully, offsets the loss on the purchase with the farmer.

Q And you say the way to go into this business is with a desk and a telephone and a banker who will extend you credit?

MR. McQUISTON: Well, this is true not only in the cotton industry, but wheat, soybeans --

Q A lot of businesses.

MR. McQUISTON: The commodities merchandising industry works exactly like the cotton industry does.

Q Mr. McQuiston, before you sit down, let me ask a question or two about tactics. This case strikes me as a very precisely-issued case, fairly simple, and our Rule of 40 reads, "That there shall be in the brief a concise statement of the case containing all that is material to the consideration of the questions presented."

Looking at your brief, there are some 30 pages in the statement of the case. Do you think that complies with our rule?

MR. McQUISTON: Your Honor, we felt that there was no way for this Court to consider this case without considering the industry context and the 30 pages that you refer to are pages drawn from well-established cotton industry textbooks to guide the Court in seeing the context

of this particular contract -- and from Department of Agriculture publications.

Q There are some members of the Court that think we have enough to do. You have a 106-page brief and the 44-page reply brief and your friend, Professor Blumstein, has a 100-page brief. That makes 250 pages on a single issue.

I wonder whether the temptation is not to have your brief forego reading when it is at that great length.

MR. McQUISTON: Well, I hope that has not happened, Mr. Justice Blackmun, and I apologize for burdening the Court with the extra pages.

The case is so important to our industry that, perhaps, we are overdoing it, but we didn't want to leave any stone unturned.

We are fighting for our lives.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Cochran.

ORAL ARGUMENT OF GEORGE C. COCHRAN, ESQ.,

ON BEHALF OF RESPONDENT

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

The reply brief referred to in part of the presentation here gives rise to at least one issue which is nonconstitutional but I think it has to be covered, especially in light of the reliance placed by Appellant on

the Curt Flood case [Flood v. Kuhn]. The argument is that this company has relied upon this Court's precedent, Dahnke-Walker, Shafer and whatnot.

If you'll turn to page 92 of the record in this case, the secretary-treasurer of the corporation was asked if they had sought advice of counsel as to whether or not they should qualify and the answer was no and the reliance by this company on this Court's precedent is again pointed to by the fact that the Dahnke-Walker case wasn't spotted until a petition for rehearing was filed after the Mississippi Supreme Court decided against Allenberg Cotton Company.

Which brings up the question on jurisdiction. You have a December the 17th certificate outstanding right now requesting that a full certificate be secured from the Mississippi Supreme Court that a federal question was raised. Inadequate state ground doesn't exist. The certificate is there. They have not taken any steps to comply with the December 17th order.

Q Wasn't the certificate signed by the chief justice?

MR. COCHRAN: Yes, sir, it was.

Q Doesn't that comply?

MR. COCHRAN: Not under Alderson, footnote four in Alderson indicates that a single judge certificate is not sufficient and your order -- sir?

Q Did Alderson refer to a state supreme court?

I've forgotten.

MR. COCHRAN: Yes, sir, it did.

And footnote four in Alderson, which this Court cites, on December the 17th and sends back to the Mississippi Supreme Court for a full court certificate.

Q And that was our order of December 17th last?

MR. COCHRAN: December 17th.

Q And it was never complied with?

MR. COCHRAN: It was never complied with so I -- this jurisdictional problem is lurking there and my position is that until that December 17th order is complied with, that is, getting a certificate for the Mississippi Supreme Court, this Court lacks jurisdiction.

But there is a serious jurisdictional problem.

Q When did we note that?

MR. COCHRAN: Two and a half months later, you noted probable jurisdiction, pending a determination of whether or not there was--

Q But there was a response of some kind from counsel, wasn't there?

MR. COCHRAN: Yes, a filing was made reprinting the opinion of the United States District Court case, Cone Mills and then after that case arrived here, probable jurisdiction was noted.

Now, Dahnke-Walker is the major case relied upon by opposing counsel. Well, Dahnke-Walker was a case where delivery was made on board a railroad car. Here we have delivery to warehouses with the record showing the warehouses served as cotton concentration points, with cotton, at least 25,000 bales by this company being stored in Mississippi for an indeterminate period.

The fact situation is running on all fours with Coe versus Town of Errol and the decision last term in Cocidar.

There are two cases, Chassinol and Federal Compress, relating to the type of business that Allenberg is engaged in, one, allowing taxes on the warehousing business and the other, a license tax for buyers of cotton, which Allenberg Cotton Company is.

The last decision by this Court, the Eli Lilly case, uses taxing cases for determination of whether or not qualification is necessary. The analogy follows that if a company is engaged in taxable activities, then it can be required to qualify.

Are there any questions?

Q Do you make any distinction between engaging in taxable activities and a tax levied on the property itself?

MR. COCHRAN: Are you talking about actual tax being levied?

Q Yes.

MR. COCHRAN: Or a potential tax?

Q Either.

MR. COCHRAN: Well, with respect to Allenberg, there are cases showing that an ad veloram property tax can be applied as well as a tax for engaging in the business, your license tax.

Q Which kind of a tax were you talking about?

MR. COCHRAN: Well, under Eli Lilly, it would have to be licensing. Eli Lilly breaks the point at licensing because then you get into --

Q So an ad veloram tax, then, would not create that problem, then. Is that your position?

MR. COCHRAN: No, sir. No.

Q Well, what about Shafer and Lemke?

MR. COCHRAN: Shafer and Lemke, well, Shafer, to begin with. You have language in that opinion that buying for interstate shipment is interstate commerce and that is the case relied upon by Appellants.

The case has been distinguished and distinguished since it was handed down and written by Mr. Justice Vandenberg. To me, it is a preemption case, Shafer is. Today it would be a preemption case. Shafer has not been followed by this Court.

Chassinol, involving cotton-buying --

Q Well, Lemke wasn't a preemption case.

MR. COCHRAN: No, no, your Honor, it wasn't.

Q No trace of it.

MR. COCHRAN: All right. But in Shafer, now, Shafer, when this Court came down with the decision in Chassinol relating to whether or not you can license cotton buying, petition for rehearing was filed on the basis of Shafer.

Shafer was distinguished away in Parker versus Brown purely on the basis that immediate shipment was involved in Shafer while in this case we don't have immediate shipment.

Q Are you relying on that here, that no immediate shipment? Let's assume that --

MR. COCHRAN: No, I'm pointing -- the record says that --

Q Let's assume Allenberg -- let's assume Allenberg took delivery from the farmer by way of an interstate courier.

MR. COCHRAN: That would do it.

Q That would do what?

MR. COCHRAN: They would not have to qualify. They would be interstate commerce.

Q So you say it is just their way of taking delivery at the warehouse and then having it loaded on a

carrier at the warehouse that makes a difference?

MR. COCHRAN: That was the Coe versus Town of Errol.

Q So you think it does make the difference?

MR. COCHRAN: Sure. Well, the Cocidar opinion points out the mechanical test is the test which this Court feels is determinative and here we have a delay prior to transit.

Q Of course, the export clause doesn't necessarily follow the same guidelines as the interstate commerce.

MR. COCHRAN: Well, you have got Richfield Oil and the County of Merced case that both indicate the same test will be used for import-export and commerce clause definition in the Coe versus Errol situation.

Of course, Coe versus Errol was interstate commerce and import-export.

Q Well, I would think you would argue also that Allenberg has an agent in the state that is --

MR. COCHRAN: I don't --

Q -- that is supervising the execution of its contract.

MR. COCHRAN: The -- having an agent in the state may not be a critical fact. The record is replete with evidence that Mr. Covington, who is doing the buying, was acting on a commission basis for Allenberg. But having

an agent, to me, is not as critical as the fact that this company owns cotton --

Q Located in Mississippi.

MR. COCHRAN: Located in Mississippi and stored there.

Q And not on its way yet.

MR. COCHRAN: They are just like a local company. There is no difference between Allenberg Cotton Company --

Q Lemke and Shafer say that that stoppage in transit is still part of interstate commerce.

MR. COCHRAN: That would stand alone. And you can't reconcile Lemke and Shafer with Coe versus Errol or this Court's decision last term in Cocidar.

Q Well, that is under another clause.

Q Well, do you think the time lag in Cocidar has any implications with reference to this?

MR. COCHRAN: Reference -- the opinion is written in such a way that the time lag is not critically important. The County of Merced case, where you have got this concrete factory being undone, the breaking -- there wasn't time -- some had already been shipped there but it was just the fact that the goods were at rest, prior to insertion into foreign commerce like prior to insertion into interstate commerce here, once that delay is there, then the full power of the state to regulate tax comes into play and that is what we

have here.

Q As my brother Rehnquist indicated a moment ago, the export-import clause is not the interstate commerce clause. It is a separate clause of the Constitution. It has a separate gloss on it by the decided cases of this Court.

As I remember in Cocidar, no cases were cited or relied on that didn't --

MR. COCHRAN: Involving interstate commerce.

Q Involving the commerce clause.

MR. COCHRAN: But Richfield Oil says the same test will be applied, Mr. Justice Douglas.

When you have the schematic situation in this sense, where goods are sitting and prior to insertion in the same test.

Q Well, what do you have to say about the impact of the Supreme Court -- the Mississippi Supreme Court's decision?

MR. COCHRAN: There is nothing in the record. There is nothing in the record.

Q Well, what are the realities of which we might take judicial notice?

What do you think the realities are?

MR. COCHRAN: The realities of the industry?

Q Yes, on interstate commerce.

MR. COCHRAN: Well, the reality --

Q Is it consistent with the history of the commerce clause itself?

MR. COCHRAN: To penalize companies who do not qualify by not giving them access to court systems?

Q Yes.

MR. COCHRAN: We don't have interstate commerce here. It is intrastate.

Q Oh, I see.

MR. COCHRAN: These are all activities --

Q Well, if you start with that premise, of course, I would --

MR. COCHRAN: You'd go down the garden path.

Q I'd have to take your conclusion.

MR. COCHRAN: Oh, but this is intrastate commerce. This is a contract between a Mississippi farmer for delivery to a Mississippi warehouse, activities before interstate commerce begins. It is a purely intrastate sequence of events. It can be regulated and taxed by the state, obviously.

Q On your theory, then, the only way to escape this situation would be to get those bales and --

MR. COCHRAN: Put them on the railroad.

Q -- put them on a railroad car. How long could they be there, 24 hours?

MR. COCHRAN: On the railraod cars?

Q No, no. The railroad cars aren't always available right away.

MR. COCHRAN: Oh.

Q Sometimes you have got to put them on a loading platform.

MR. COCHRAN: Well, then you have got cases which I have cited in my brief. If they aren't loaded directly on the car, then there is going to be problems. It is going to be taxable and it is going to be intrastate commerce.

Q On a shipping platform?

MR. COCHRAN: I would say it would have to go directly to the railroad carrier, with no storage facility between the time that it leaves the field to the time it is placed on the interstate carrier.

Q But it would have to go on a truck or some vehicle from the field right alongside the tracks and then be put on the cars.

MR. COCHRAN: Yes. Yes, I'd take it. I'd put it on a common carrier, say a truck from the field and deliver it to another common carrier and then it is a straight-through schematic and you are out of the Coe versus Errol problem, not taxable. It cannot be regulated by the state and is purely interstate commerce.

Q What if the carrier doesn't have the cars

and holds it for a week? What does that do to it?

Q Well, you can parallel that situation with the situation where you have goods in interstate transit and there is a stop and the continuity of transit test is that for business purpose -- and in Coe versus Errol, again, you have got the logs that were placed, that were there because the water was down, not taxable.

So taking Coe versus Errol to your analysis, if it is just because it is not enough trucks or something, Coe versus Errol, not taxable.

Q I am not giving you an analysis. I am just asking a question.

MR. COCHRAN: That is the only analysis. I could parallel your facts situation.

Q Well, of course, you could make provisions from any of the hypotheses that the Chief Justice has proposed to you by simply providing that the title passes or risk of loss passes FOB the railroad car. I mean, the cotton, this particular cotton, has been in the State of Mississippi for months. It is just a question of when Allenberg takes title to it, isn't it?

MR. COCHRAN: They take title immediately upon placement in the warehouse, right at that point.

Q Well, I think when the warehouse certificates are delivered to them.

MR. COCHRAN: Yes, the farmer has to get those certificates and --

Q Well, he gets them and gives them to Allenberg, I take it.

MR. COCHRAN: But then, I am into a part of the case I -- I, along with Mr. Justice Stewart, I am not exactly sure what happens after the purchase is made. There is nothing in the record.

Q I think that then the bill of lading goes to the bank in Memphis for collection.

MR. COCHRAN: There is nothing in the record on that.

Q Warehouse receipt, I meant to say.

Q Mr. Cochran?

MR. COCHRAN: Yes.

Q In your view, what state interest is served by having a no-cure sanction for failure to qualify?

MR. COCHRAN: What state interest?

Q Yes.

MR. COCHRAN: It is a brutal penalty, but it provides immediate leverage to companies to ensure that they will qualify and there is a high state interest in qualification.

Q Right.

MR. COCHRAN: You can parallel the no-cure thing

as to 60 years for smoking marijuana. Does the penalty have anything to do with the malfeasance at issue. It is a strong penalty but there is no constitutional issue raised.

Q But here one private party, in effect, achieves a windfall and the other party, a very severe penalty. It is hard for me to see precisely what the state interest is.

MR. COCHRAN: Well, the state interest is, they are qualified now.

Q Yes, but that could be achieved, couldn't it, with somewhat less penalty or allowing qualification and the payment of fees before suit could be brought?

MR. COCHRAN: Politically -- but it is not of constitutional proportions. That is the point I am trying to make. This is a strong penalty, but it doesn't give rise to a constitutional issue that I can see. Plus it was not raised in the court below. The only point raised was that this interstate commerce -- no issue with respect to the penalty provision. It wasn't argued. And in the petition for rehearing it wasn't mentioned. Now it is mentioned in the reply brief, for the first time.

Q Mr. Cochran?

MR. COCHRAN: Yes.

Q In a situation like this, it is kind of like a one-bite type of thing, isn't it? The company can go along without qualifying for years until finally it has to bring a

suit and then it can qualify so that it really never has to qualify for practical purposes until it is actually involved in litigation.

Q If you have a retroactive penalty, what happens -- say that there is a cure provision, that you can sue on antecedent debts. Well, then, what you do is you negotiate with the defendant and say, look, I -- no, the defendant can't raise the defense because as soon as the company complies, the defense is lost so the state interest in requiring qualification is out the window but without the type of provision Mississippi has. So it is a powerful weapon and it has been used here and -- but still, there is nothing in the record as to what the industry situation is with respect to cotton brokers.

This is just part of the ongoing war. When the price of cotton goes down, other things occur.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

I think you have used all your time,

Mr. McQuiston.

Thank you, gentlemen, the case is submitted.

[Whereupon, at 1:51 o'clock p.m., the case was submitted.]