In the

Supreme Court of the United States

THERMTRON PRODUCTS, INC. AND LARRY DEAN NEWHARD,

Petitioners,

v. No. 74-206

H. DAVID HERMANSDORFER, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY,

Respondents.

Washington, D.C.
October 7, 1975

Pages 1 thru 38

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Washington, D. C.

Tuesday, October 7, 1975

The above-entitled matter came on for argument at 2:02 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:

FRANK G. DICKEY, JR., ESQ., Landrum, Patterson and Dickey, 201 Security Trust Building, Lexington, Kentucky 40507
For Petitioners

C. KILMER COMBS., ESQ., Kelsey E. Friend Law Firm, Pauley Building, Pikeville, Kentucky 41501
For Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Thermatron Products against H. David Hermansdorfer.

Mr. Dickey, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF FRANK G. DICKEY, JR., ESQ.

ON BEHALF OF PETITIONERS

MR. DICKEY: Mr. Chief Justice and may it Please the Court:

I am Frank G. Dickey, Jr. and I am with the law firm of Landrum, Patterson and Dickey of Lexington, Kentucky. We represent the Petitioners, Thermtron Products and Larry Dean Newhard.

It is indeed remarkable that for more than 175 years the district courts and circuit courts have substantially followed and complied with the statutory provisions concerning removal and remand.

However, this matter is before the Court for the review of an erroneous order of remand and it is before the Court upon petition for a writ of certiorari to the Circuit Court of Appeals to the Sixth Circuit and for a determination of this Court to exercise its inherent authority to intercede and direct the Sixth Circuit to review this matter and for issuance of a writ to the Respondent herein to prohibit the Respondent from divesting the United States District Court

for the Eastern District of Kentucky of jurisdiction of this case and to compel the Respondent to retain jurisdiction over this matter.

QUESTION: Where do we get any authority at all in view of 1447D that says,"An order remanding a case to a state court pursuant to -- removed section 1443 shall not be reviewable by appeal or otherwise?"

QUESTION: And in connection with that, I think you did not cite 1447D at all, so --

MR. DICKEY: Well, if your Honor please, 1447D says exactly that, that an order of remand is not reviewable by appeal, mandamus, prohibition or any writ whatsoever.

What 1447 contemplates, obviously, is that there would not be any order to remand where a case was removed properly where the district court had jurisdiction of the case, assumed jurisdiction of the case and then turned around and wrongfully remanded it on some arbitrary and discretionary basis.

QUESTION: Why isn't it just as possible to say that what 1447D contemplates is that Congress rather deliberately chose to avoid the danger of delay that would come from appealing an order of remand even though that order was erroneous rather than to make sure that an erroneous order of remand was straightened out by the Court of Appeals every time?

MR. DICKEY: Mr. Justice Rehnquist, I would agree that Congress did intend not to burden the circuit courts of appeals with review of every order of remand that came along. 1441 provides that any civil action brought in a state court of which the states have original jurisdiction may be removed by that defendant from the state court to federal court.

Section 1447C provides, "If, at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, then it shall be remanded. In any case that is removed from the state court to the United States District Court, if it is removed and on the face of the petition for removal it is apparent that there is no jurisdiction, then it is mandatory that that case shall be remanded and there is no review of that order because the Petitioner has not complied with the statutory provisions.

"However, if a case is removed properly or providently and if the District Court has jurisdiction, then the District Court must assume jurisdiction and cannot remand that case." Otherwise, if it were not so, the District Court could enter an order of remand in any case it saw fit and the Petitioners, whether there was jurisdiction or not, would be sent back to state court without any remedy, without any review of any discretionary or arbitrary decision.

And I submit that would constitute a denial of

due process of law.

QUESTION: Wouldn't that come up on the appeal from the final judgment?

MR. DICKEY: Mr. Justice Blackmun, if my memory serves me correctly, there are cases which say that even if the order of remand in a case where there is no jurisdiction and the case goes back to state court and is tried and comes to the -- in this case to the Court of Appeals for the Commonwealth of Kentucky, that this Court, I believe, would state and has stated -- or at least, the Sixth Circuit has stated that that order of remand is not reviewable under Section 1447D for the simple reason that that order of remand in that particular case was made because the court obviously did not have jurisdiction and to hold otherwise would create a volume of appeals in every single case where a defendant thinks that he would be wrongfully denied access to the federal courts under his statutory rights which Congress has granted since 1797 -- 89 --that that statutory right would be denied, that there would be a volume of appeals.

QUESTION: Well, Congress certainly chose, then, unfortunate language in 1447D, didn't it?

MR. DICKEY: In this particular instance and in these facts, yes, sir, they did because in this case the facts in the record herein are decisive.

In this case, the Petitioners removed this action

from the Pike Circuit Court in Pikeville, Kentucky. That action was removed in strict compliance with the removal statutes, was properly removed and the Respondent has conceded that it was properly removed. In this case, the Respondent assumed jurisdiction over this matter.

The Respondent recognized that he had jurisdiction over it and the case stayed in the United States District Court for some nine months after which the Respondent took it upon himself to remand the case to the Pike Circuit Court and in this situation where an order of remand was wrongfully entered, the Petitioners must have some remedy inasmuch as the order of remand was based upon purely discretionary considerations and based upon considerations that have no foundation whatsoever in the legal scheme or the statutory scheme as far as removal and remand are concerned.

And until this Court granted certiorari, the Petitioners had been denied any remedy whatsoever in the order of remand.

QUESTION: Do you know what has happened to the other some 28 actions which this judge remanded, similar to this diversity action? Are they just sitting there in the state court or what has happened to them?

MR. DICKEY: Well, Mr. Justice Blackmun, I believe that reference is made in the Petitioners' petition for a writ of mandamus to the Sixth Circuit.

QUESTION: That's right, page 26 of the Appendix. I was just curious.

MR. DICKEY: That reference was made upon information to counsel for the Petitioners and even though it is not in the record, I would have to advise the Court that I have subsequently been advised that 14 cases, I believe is the correct number, which consist of all of those cases which were removed during the year 1973 from the Pike Circuit Court to the United States District Court, that 14 cases, there were orders entered to show cause why the cases should not be remanded.

In all but two of those cases, orders of remand were entered. In the two cases which the District Court arbitrarily and discretionarily decided to retain jurisdiction, those two cases, of course, are still in the United States District Court.

However, the other 12 I cannot answer you definitely as to what action has been taken.

As far as this case is concerned, the Pike Circuit Court judge, Judge Venters, has held a pretrial conference in the matter. He has been advised and has considered the fact that this case was in the Sixth Circuit Court of Appeals and subsequent to that, no action has been taken by the Pike Circuit Court.

If it please the Court, the Constitution

specifically provides for controversies being litigated in federal courts between citizens from different states.

That provision --

QUESTION: It has long been recognized, hasn't it, that that Constitutional provision is subject to the terms and conditions for diversity jurisdiction that Congress might specify?

MR. DICKEY: Yes, your Honor, it has, since 1789.

QUESTION: That Congress has specified, you say, that a case such as yours is clearly removable by your client to the District Court and Congress has further specified that an order of a district judge remanding a case that is sought to be removed is unreviewable by any court.

Now, aren't those the terms and conditions that Congress has specified, both of them?

MR. DICKEY: Those are the terms and conditions to the extent that it contemplates that an order of remand will not be entered unless a case is removed improvidently and without jurisdiction.

QUESTION: Well, a district judge is told that, let's assume you are quite right, that the district judge was acting quite erroneously when he remanded this but Congress has simply said that one of the terms and conditions of diversity jurisdiction is that the action of a district judge, however erroneous it may be, is unreviewable.

MR. DICKEY: If your Honor please, I think that is what the language of section 1447D --

QUESTION: I say, seems to say.

MR. DICKEY: Exactly.

However, I would submit to the Court, and this has been one of the arguments of the Respondent, that at page 8 of the Respondent's brief, this particular argument is even made, that even if an erroneous order is entered, there is no remedy, there is no review of that order.

QUESTION: That is what seems to be said.

MR. DICKEY: And I would submit --

QUESTION: That is what Congress seems to have said, isn't it? And that is one of the limitations under diversity jurisdiction, isn't it?

MR. DICKEY: If that is what that says, and if that is what Congress intended, which I submit that it is not, singularly, any district court judge in this entire country could arbitrarily, discretionarily, upon mere whim, say to any removing defendant, I don't like your case. I am too busy. I don't like this party. And even though that party has a statutory right of removal granted by Congress, he would have no remedy whatsoever from action on behalf of the district court judge.

QUESTION: Well, that is what the statute does say, isn't it?

QUESTION: For the first hundred years in this country that there were trials in the federal courts for criminal offenses, there was no appeal whatever beyond the district court until 1989 if a district judge or a circuit judge sitting all by himself sentenced you to 100 years in prison, there was simply no appeal from that and nobody ever suggested that even though it was very arbitrary, the particular action taken by the court, that the Supreme Court had some inherent right of review over the sentence because Congress had not granted it.

And I would think that you would have something of an uphill argument on bringing your case, the appealability of it under this 1447D, conceded there was flagrant error, what Judge Hermansdorfer did, how do you get beyond his court with it?

MR. DICKEY: Mr. Justice Rehnquist, I would submit to this Court that this Court does have inherent authority over all lower federal courts, over all district court judges, in fact, where there is such a flagrant denial of a defendant's rights of removal and denial of a statutory right, that there must be some extraordinary remedy and this Court does have the inherent jurisdiction or the inherent authority to discipline lower court judges.

QUESTION: Doesn't that read the not-reviewable language right out of the statute?

MR. DICKEY: As I pointed out before, Mr. Chief Justice, it does read exactly that way but, obviously, it wasn't contemplated by Congress to mean that; although this Court is not bound by the circuit court decision, the decision of the Fourth Circuit in 1934 in Traveler's Protective Association against Smith clearly states, "We do not think it was the intention of Congress that a party entitled to invoke the federal jurisdiction should be without remedy if the court without a finding expressed or implied of improper removal should remand the case to the state court on a ground arising after removal and not affecting jurisdiction."

Certainly, we do not find in the statutes any evidence of such intention and the Petitioners likewise do not find any.

QUESTION: Didn't the statute read differently then than it does now?

MR. DICKEY: Now, if your Honor please, that was under Section 28 of the Judicial Code and at that particular time, there was also the same language as in Section 1447D forbidding review of an order of remand in a case such as the one that was taken to the Fourth Circuit and in that case the Fourth Circuit stated that leave would be granted to the defendant in that case to file a petition for writ of mandamus requiring the court below to hear and determine the case and the court further stated that it will probably not

be necessary for the defendant to file such petition as the learned judge may, of his own motion, vacate the order remanding the case and proceed to hear and decide it.

I would submit that this is exactly the same situation as in that case to the extent that Judge Hermansdorfer never made any finding whatsoever that this case was removed improvidently and without jurisdiction. To the contrary, Judge Hermansdorfer admitted that the case was properly removed.

He has conceded that the district court had jurisdiction and in that case, I think that the language in the Fourth Circuit's opinion is applicable to this case, that the Petitioners in this case are entitled to some remedy, some review of judicial discretion.

Otherwise, I think every --

QUESTION: As has been suggested to you, every reviewability is a creature of Congress, is a result of Congress defining it, so you have to point to a specific statute, do you not, that gives jurisdiction to review?

You claim inherent power, but isn't that contrary to all the law we have had for 180 years?

MR. DICKEY: If your Honor please, I think that to deny a review of a decision such as this would squarely fall within the concept of the Constitution and deny the Petitioners due process of law.

As far as the statute is concerned, there are no cases which specifically interpret section 1447D because there has been, with the exception of two or three cases, no decision or no case where a district judge has flagrantly disregarded the clear and precise language of the statute.

Only in cases where a matter is removed improvidently and without jurisdiction shall a case be remanded.

QUESTION: I suppose what you are saying is is that this decision below opens the way for the federal judiciary countrywide to do away independently with diversity jurisdiction.

MR. DICKEY: Mr. Justice Blackmun, if I had to look into the mind of Judge Hermansdorfer, which I obviously cannot do, I would say that this was the intent of his order of remand.

QUESTION: Well, this is a possibility, is it not, for every federal judge to follow his example and just clear their calendars of diversity cases.

MR. DICKEY: It would certainly be, unless this Court --

QUESTION: No, he removed diversity cases.

MR. DICKEY: If your Honor please, I think if the order of remand in this particular case is permitted to stand, this Court is going to have to legislate judicially,

which is in an area which is completely within the realm of Congress and this Court would also have to eliminate original diversity jurisdiction as well as removal.

I think that not only would the order of remand in this particular case apply to removal diversity jurisdiction, but it would as far as original jurisdiction goes because this was a case which could have been brought in the district court under the provisions of original diversity jurisdiction.

QUESTION: Mr. Dickey, Congress could have stopped that with just one stroke of the pen.

MR. DICKEY: Well, if your Honor please --

QUESTION: Just take the word "mandamus" out of that provision.

MR. DICKEY: Well, I think that what Congress --

QUESTION: Right?

MR. DICKEY: Right, yes, sir. Yes, sir, Congress could do that.

QUESTION: That's right.

MR. DICKEY: I think also that Congress intended that this matter should never arise by reason of the language in 1447C.

QUESTION: It is the substance of your argument that we ought not construe 1447D as literally written but as limited in application to cases irregularly sent back under 1447C, that is, some reason that may be error that isn't

as you say happened here, the court, because it had a crowded calendar, sending it back and say, "Go try it in the state court. Don't bother me with it."

MR. DICKEY: That is entirely correct, your Honor.

QUESTION: Well, that is kind of odd, to say that it is not reviewable, even though erroneous, unless the error is serious. What sort of a doctrine is that?

MR. DICKEY: If your Honor please, the 1447D says that an order remanding a case is not reviewable on appeal or otherwise.

QUESTION: Yes, I know that.

MR. DICKEY: Otherwise, under the cases which have been interpreted before, means by any remedy.

QUESTION: Correct.

MR. DICKEY: Or by any means. However, when section 1447D is read with 1447C, unless a case was removed improvidently and without jurisdiction, then the order of remand is not even a proper order of remand. Therefore, what I am saying is that the order of Judge Hermansdorfer in this case was a void order to begin with.

QUESTION: Well, that is what you always say on appeal or on mandamus. That is your substance of your case but we are dealing with a procedural statute that Congress enacted saying that it is not reviewable, no matter how

erroneous, by appeal or otherwise and it is no answer to say to that statute, to say yes, but this was erroneous.

MR. DICKEY: What I am saying is, Mr. Justice Stewart, that this Court has the inherent authority to discipline district court judges as far as administrative matters are concerned and this is an administrative matter.

QUESTION: Where do we get that? This Court has the jurisdiction that was conferred upon it by the United States Constitution plus the additional jurisdiction that has been conferred upon it by the Congress under the authorizing provisions of this United States Constitution.

QUESTION: And that's it.

QUESTION: And that's it.

MR. DICKEY: This Court has the authority to control the docket and where an attempt is made to deny the petitioner his statutory right of removal.

QUESTION: You might be on sounder ground if you argued that Section 332 of Title 18 gives the counsel of the circuit that kind of authority but where do you find the counterpart statute to section 332 vesting this Court with such authority?

MR. DICKEY: I feel that this Court could probably order, under that particular statute the implementation of the relief sought by the Petitioners in this case.

QUESTION: Well, we are not the judicial council.

The judicial council consists of the judges of the Sixth Circuit.

MR. DICKEY: Well, that particular judicial council has been notified of this as indicated in the memorandum opinion of the --

QUESTION: I gather the Sixth Circuit was concerned about what the judge had done and had tried to, perhaps, set him straight informally. That doesn't help you, though.

MR. DICKEY: That doesn't help me a bit. I would assume that is correct. Apparently Judge Hermansdorfer is the first district court judge to confer discretionary powers in remanding this particular case and I would submit that the discretion that was exercised by Judge Hermansdorfer is in direct contravention of the statutes provided by Congress.

His decision is certainly not founded upon any legal or jurisdictional basis, particularly where he has admitted that he should actually have the case and I am as concerned as well as the judiciary with the problems which confront our lower courts today.

However, I am reminded of the situation that existed in the 1880's when we had the same crowded docket that we have today and a lawyer by the name of William Meigs from Philadelphia submitted an article to the American Law Reporter and in an effort to determine whether more

federal judges should be appointed or whether the federal courts should restrain themselves from participating in diversity matters, Meigs suggested that the federal courts eliminate -- or the diversity jurisdiction be eliminated from the federal courts and the reply that he got to that suggestion in the Washington Law Reporter was, "The fault of this proposal is the same which has marked many other suggestions. It is the proposal how not to do professional business, not how to do it."

And I would submit to you that Judge Hermansdorfer's order is an example likewise of how not to, rather than how to.

QUESTION: Mr. Dickey, looking through this Fourth Circuit case that you cited a moment ago, the Traveler's Protective Association case in 1934, the statute then apparently read that an order of remand shall be carried into execution and no appeal or writ of error from the decision of the District Court so remanding the cause shall be allowed, and in that case, the Fourth Circuit held yes, although you can't have an appeal, you can have mandamus.

But now your 1447D reads differently. It says, "By appeal or otherwise."

Now, I am surprised, frankly, that you answered my question that the statute was the same because it seems to me that is quite an important difference.

MR. DICKEY: Well, the way I had read that, Mr. Justice Rehnquist was that it did read the same.

QUESTION: But it doesn't, does it?

MR. DICKEY: It doesn't read exactly the same. My interpretation of that is that where it said "Writ of error," that that included all other writs such as mandamus, prohibition, all writ statutes.

QUESTION: But the Fourth Circuit says -- said differently, certainly. I would think that the present proscription is broader than the one that was obtained in the '34 case.

MR. DICKEY: But without being facetious, maybe "otherwise" doesn't include mandamus. I don't know.

MR. CHIEF JUSTICE BURGER: Mr. Combs.

ORAL ARGUMENT OF C. KILMER COMBS, ESQ.

ON BEHALF OF RESPONDENT

MR. COMBS: Mr. Chief Justice and may it Please the Court,

I represent, as the Respondent real parties and interest, an elderly couple who was injured on the mountain road in Pike County, Kentucky but I do not hesitate one moment to support Judge Hermansdorfer in what he did in this case.

At the outset, I want to disabuse this Court's mind of any notion that Judge Hermansdorfer, through pressure,

caseload or whatever, rashly or otherwise dismissed or rather remanded these cases that are referred to in the record.

To the contrary, his response in the Sixth Circuit points out that when he realized that there had been very few, practically none of the several cases in the Eastern District of Kentucky tried since 1968. When he realized that there could be no trial dates in the forseeable future, he realized that something had to be done, so he went through his entire docket and he concentrated on the diversity removal cases and he looked at those cases with the idea of determining whether, in his discretion, he might some way remand those cases to the state courts where there was an impartial tribunal --

QUESTION: May I ask, Mr Combs --

MR. COMBS: Yes, sir.

QUESTION: -- whether, then, on his docket any Federal Employer's Liability Act cases or Jones Act cases had been brought into Kentucky courts?

MR. COMBS: That had been brought in the Kentucky courts?

QUESTION: Yes, and not moved, or moved to his court?

MR. COMBS: I cannot answer that question, your Honor.

QUESTION: Because I gather the federal question cases such as those pending in the state courts which were also removable might have been included in the remand, might they not?

MR. COMBS: They could have, your Honor, I am not aware.

QUESTION: Even though they are federal question cases.

MR. COMBS: Yes. Now, as I --

QUESTION: I guess there are other types of federal question cases besides Federal Employers Liability and Jones Act cases, aren't there, that might also be removed?

MR. COMBS: I would think there are. I don't know of any on his docket.

QUESTION: Yes.

MR. COMBS: But in any event --

QUESTION: Don't you have in the Sixth Circuit, pressures, as other circuits have, to get old cases tried and off the docket and given priority? Don't you bring in visiting judges from other places to help clear up these old cases?

MR. COMBS: We have those pressures, your Honor. We have those pressures particularly in the criminal field. We have those pressures particularly in the social security

field. I believe Judge Hermansdorfer mentioned that in his response in the Sixth Circuit.

We have that in the Federal blacklung field which is, again, the social security, which the Sixth Circuit has given priority to, leaving cases such as this dormant on the docket. Those are the pressures we have and as a matter of fact, other judges have been sent in. I have tried cases before other judges.

QUESTION: I am just suggesting that there are other ways to clear a calendar than to put them stateside.

MR. COMBS: There are. This is simply one thing that Judge Hermansdorfer looked at and what he did, he looked at these cases and he realized that these were state cases, state issues. In this particular case, an automobile accident, the kind that we find in the Pike Circuit Court every day.

QUESTION: By state issues, you mean issues of state law?

MR. COMBS: Issues of state law involving state occurrences, your Honor.

QUESTION: Didn't you say that he exercises discretion?

MR. COMBS: Yes, I did.

QUESTION: Where does he get the discretion?

MR. COMBS: He gets --

QUESTION: Isn't it really the point here as to whether he did have any discretion? Isn't that the point?

MR. COMBS: This is the real issue. The --

QUESTION: You assume he had it.

MR. COMBS: Well, I hope I can demonstrate it, your Honor and if I may, I'll try to do it right now.

QUESTION: I'd appreciate it.

MR. COMBS: Now, it has been suggested here that once a case is removed, that then it cannot be remanded other than for want of jurisdiction.

I think all of us would concede that if it is removed on a diversity basis and it later develops that there is no diversity, then most certainly under those circumstances it would would be remanded automatically.

Now, section 1447C provides for remand if the case is removed improvidently and without jurisdiction.

Now, the question which entered Judge Hermansdorfer's mind, and I think really is the basic question here is whether removed improvidently and without jurisdiction should be construed in the conjunctive sense or in the disjunctive sense.

Now, Judge Hermansdorfer --

QUESTION: You mean you say it was improvidently removed?

MR. COMBS: Improvidently removed.

QUESTION: Why? What's with the "improvidently?"

MR. COMBS: "Improvident," as I understand the word --

QUESTION: If he had, as I understand this case, if he had less cases on his docket, it wouldn't have been remanded. Am I right?

MR. COMBS: No, your Honor.

QUESTION: What is the reason?

MR. COMBS: Your Honor, the point --

QUESTION: The point is that he had too many cases.

MR. COMBS: Well, that is not -- that has nothing to do with the improvident removal, as I understand it and as I conceive it.

I conceive improvident removal -- a removal which was not providently made in order to secure a more impartial tribunal which is the sole purpose, really, of the diversity removal statute, as I understand it.

QUESTION: You lost me.

QUESTION: But the right to remove, is that qualified in some way or is it an absolute right on the part of the litigants -- the litigant claiming diversity?

MR. COMBS: In my view, and as I hopefully correctly understand the intent of the Congress, it is a qualified right. You have a right to remove but the Congress

provided expressly that if the district court finds that the removal was improvident, that is, if it was improvident in the sense that it was not necessary in order to secure a more impartial tribunal, then the district court can remand.

QUESTION: I could understand that better if the statute said "improvidently or without jurisdiction."

MR. COMBS: I had the same problem, your Honor, but then --

QUESTION: Would that apply to all diversity cases in the country?

MR. COMBS: All removal diversity. There is no -- of course, there is no remand to --

QUESTION: That would interfere with quite a few lawsuits.

MR. COMBS: Well, just the --

QUESTION: Just to accommodate one court.

MR. COMBS: It has already.

QUESTION: I know you'll get some judges to agree with you, but, can we do it?

MR. COMBS: Well, now --

QUESTION: I understood that once the case is remanded that is it and the only way you can do it is on jurisdiction. I understand that has been ruled. At least, every case I have read that is what it said.

MR. COMBS: Now, getting back to the --

QUESTION: May I just maintain the interruption here. Had you venued this case originally in the federal court, it could not be remanded? Is this correct?

MR. COMBS: No, your Honor, it could not be dismissed.

QUESTION: Even though the same considerations might enter into Judge Hermansdorfer's mind?

MR. COMBS: Yes, your Honor.

Getting back, hopefully, to answering both and/or questions at once, the and or or -- now, this Court pointed out in DiSylva against Ballantine 351 U.S. 570 to 573 that and/or that and and or are often used interchangeably and when, in the context of the intent of the statute, the intent of the Congress, it is necessary to construe one as the other, this Court will do so.

Concededly, Mr. Chief Justice, it says "and" and it ought to be first tested that way but when we test it, we find that, as Judge Hermansdorfer calls it,"a logical non sequitur."

In other words, what he is saying is, that construed that way, it doesn't make sense, it doesn't logically follow. Because if you use "and" in the conjunctive sense, then in order to remand the case, you couldn't remand it for lack of jurisdiction alone.

QUESTION: Well, I don't need the "and." I can

take "or" and come out the same way.

MR. COMBS: Then if you had --

QUESTION: What case do you have on the "improvident?" What removal case do you have that interpreted "improvident?"

MR. COMBS: I have no case, your Honor.

QUESTION: I didn't think you did.

MR. COMBS: I -- but in all --

QUESTION: This is brand new.

MR. COMBS: To my knowledge, it is, but I say that it is sound, at least in my mind it is. Here in -- now, in one case where I believe it was a jurisdictional question in this Court, this Court construed "or" to mean "and" to give a circuit court jurisdiction and that is the case of Union Insurance Company against the United States, 6 Wallace 879 881.

So when we look at it in that sense, the word "improvident" has a different and a distinct meaning than "improper." Now, "improper removal" denotes some error in removing. "Improvidence" has a deeper meaning, a meaning where the parties intend to provide for the future.

That is, to provide a more impartial tribunal and bear in mind, I say a "more impartial tribunal." So in my view, what the Congress was saying, using the disjunctive "or", is that whenever the district court finds that the

removal was improvident in that it was not done for the purpose of securing a more impartial tribunal, then and under those circumstances the court could remand. Because, after all, that was the intent and the purpose of the removal statute in the first instance.

QUESTION: Of course, there was no hearing on that here, was there?

MR. COMBS: Yes, there was, your Honor, and I want to defend Judge Hermansdorfer on that. He entered a show cause order in all of those some 28 cases or whatever and in each case the parties were given ten days to respond and show why they would be prejudiced -- why the cause should not be remanded.

Now, I don't know that Judge Hermansdorfer gave too much or too little time. I don't know that he could have suggested, whether he should or should not have suggested a hearing, but in any event, the parties were given an opportunity to respond, to request a hearing, to request an evidentiary hearing if they desired and they did not.

QUESTION: But I suppose in Kentucky your federal jury is chosen from a larger geographical area than your state court jury, is it not?

MR. COMBS: Yes, your Honor and it is -- the Eastern District is divided up into divisions -- not

statutory, but divisions nevertheless and they do come from oh, say, five or six or seven counties instead of just the one.

QUESTION: He sits in seven different places, doesn't he?

MR. COMBS: Yes, your Honor, and in each of those divisions, of course, the jury is ordinarily selected from within the division. Other than that the jury selection is substantially the same.

Now, Judge Hermansdorfer commented and I think maybe Mr. Dickey will agree that in the Pike Circuit Court and especially the judge to whom this case was assigned, there is no problem about prejudice, there is no serious objection on the grounds of prejudice in this case.

Judge Venters --

QUESTION: If it is not really at issue here, how can we evaluate an issue like that on this record?

MR. COMBS: I would say you couldn't, your Honor. I would say you couldn't. But, certainly, there was no sufficient suggestion of prejudice in order for Judge -- to deter Judge Hermansdorfer from remanding and he indicated in his response to the Sixth Circuit that had there been such a suggestion, seriously, he would not have remanded.

So that, we say, is important from the standpoint that there was no local prejudice, at least as disclosed by

the record.

QUESTION: Of course, the defendant's right to remove isn't conditioned on a showing of prejudice in an individual case, is it?

MR. COMBS: No, it is not but I suggest it arises, your Honor, on remand for improvident removal.

My construction is correct if the Congress intended for the District Court to have a discretion in remanding removal cases where removal is improvident, then it does have a play because, after all, the whole purpose of removal is in order to provide a more impartial tribunal.

If there is just as impartial a tribunal in the state court, then, certainly, it is improvident and there it becomes important.

QUESTION: The statute doesn't say "impartial tribunal" does it?

MR. COMBS: No, it says "improvident."

QUESTION: The statute doesn't say you have to get an impartial tribunal, that is why you remove. It doesn't say a word about that. It says "removal."

MR. COMBS: But if I recall correctly, your Honor, this Court has construed that as being the purpose of the removal statute.

QUESTION: Assuming that was the purpose when it was passed, it has been there a little while. You are

talking about thousands of cases in the Second Circuit. You are going to throw out I don't know -- I don't even know how many there are. That is what you want to throw out.

MR. COMBS: I don't want to throw them out.

QUESTION: But you do, unless you want to make an exception for your district.

MR. COMBS: I want to give a --

QUESTION: And we can't do that.

MR. COMBS: I want to give the district judge in every district the discretion, and I would agree that it must be carefully, wisely and soundly exercised to remand where there is improvident removal --

QUESTION: In each case.

MR. COMBS: In each case upon his suggestion or upon the suggestion of the parties.

QUESTION: And that would cut down on the amount of the judicial time expended -- if you had a hearing on each case that would cut down judicial time. Is that what you are saying?

MR. COMBS: No, I am not suggesting it as an administrative matter at all, your Honor.

QUESTION: Well, this basis is, if this judge is overloaded.

MR. COMBS: His response in the Sixth Circuit indicates that it is on the same basis that I am arguing

now; that is, that the district judge has a discretion where there is improvident removal.

QUESTION: Well, really, Mr. Combs, this isn't the issue that is before us at all, is it? The issue before us is whether or not the judge's order of remand was reviewable at all by mandamous in the Court of Appeals.

That is the only issue, isn't it? Not whether or not it was correct or incorrect.

MR. COMBS: Well, certainly, as I see it, that is at issue just as well as the reviewability.

QUESTION: Well, I don't see why.

MR. COMBS: Certainly if it is appropriate, then that is a major factor in the decision in the case.

QUESTION: That wasn't at all the basis of the Court of Appeals' decision, was it?

MR. COMBS: No, it wasn't, your Honor, but as noted by counsel, they handled the thing as administrative matter. Of course, I have argued in the brief and I maintain, of course, that this Court has no jurisdiction, agreeing with the Sixth Circuit. But I still nevertheless maintain that the district court has a discretion.

QUESTION: Well, you have not a single -- that is not what the statute says and that is not what any case has ever held. Is it?

MR. COMBS: No, it is not, sir.

QUESTION: But that is not the issue before this Court. The issue is whether or not it was -- even assuming it was a grossly erroneous remand order -- whether or not it was reviewable.

MR. COMBS: Well, by the same token, I have no authority that says it is reviewable. I have cited --

QUESTION: Well, you have a very strong authority that says it isn't, and that is an Act of Congress.

MR. COMBS: Yes, I do, your Honor.

QUESTION: And that is what is before us, whether or not that Act of Congress means what it seems to say.

QUESTION: You could conceive that Judge Hermansdorfer's action was, in itself, improvident, imprudent and unauthorized and yet stand on the statute that Justice Stewart has just referred to, which says that even if that is true, no court can review it. Isn't that the heart of this case, as has been suggested to you several times?

MR. COMBS: Well, certainly, that is the heart of it. But if that be true, then that is the end of the case.

QUESTION: Maybe you feel that we are more likely to decide that it is reviewable if we fell that it is grossly wrong and if we feel less that it is grossly wrong, we are less likely to find it reviewable.

QUESTION: Well, you just don't want to say that

your client committed a lawless action if there is no remedy against him.

MR. COMBS: [Laughs.]

QUESTION: You could / say affirmatively that Congress has permitted a district judge to engage in such an act without trying to characterize it. The statute seems to say to some of us --

MR. COMBS: Well, the statute seems to say that he can remand for any reason. I could argue that but I want to suggest very strongly that that is not this case because I think it was carefully done. I think Judge Hermansdorfer construed this section 1447C in the disjunctive and felt that improvidently -- something improvidently done is a word that this Court uses all the time and that if it was removed improvidently, it was his duty to remand but even so, I will agree that this Court has no jurisdiction. I will agree that the Sixth Circuit has no jurisdiction under all of the authorities and under the history of the statute as I understand it from the cases.

I think this case and the reason that I have, perhaps belabored 1447C is important from an administrative standpoint. If that is what the Congress intended, if the Congress intended the district judge to have a discretion to remand where a case was improvidently removed to secure a more impartial tribunal when it wasn't necessary to do so,

then, I think it should be said -- I don't think I wouldn't suggest to this Court for a moment that that should be the basis for a wholesale remand throughout the United States.

I wouldn't suggest to this Court for a moment that it be done other than on a forward-looking, clear and impartial basis with a view of limiting and restricting diversity removal jurisdiction so that cases such as this, where you have state issues, state occurrences, state law, can be tried in the state courts where I think they belong.

QUESTION: Well, you can say the same thing of your case had it been venued in the federal courts in the first place.

MR. COMBS: Yes, I could, your Honor. Unfortunately, I represent an elderly couple who would like to see this rule applied, not only because I think it is a sound rule but because they need to get their case tried in some court some day.

QUESTION: I suppose a plaintiff in a case like yours has a good deal more incentive to get into an uncrowded court and get to trial than a defendant does.

MR. COMBS: Certainly, your Honor. In this case Judge Venters has assigned it. We have had it pretried. We have assigned it for trial one time and finally it came here. I report to him periodically.

The other 14 cases, incidentally, counsel involved

tell me that most of them, virtually all of them, have been disposed of, the ones that have been remanded. So this is important to me and to these two people.

MR. CHIEF JUSTICE BURGER: Mr. Dickey, you have about three minutes left. Do you have anything further?

REBUTTAL ARGUMENT OF

FRANK G. DICKEY, JR., ESQ.

MR. DICKEY: Mr. Chief Justice, May it Please the Court:

The Petitioners in this case do have an absolute statutory right of removal. What happens if this Court permits this case to stand as it is now? And what happens if all the district court judges are granted unbridled discretion to remand any case involving diversity jurisdiction that they see fit?

QUESTION: Why do you limit it to diversity?

MR. DICKEY: Because those would be the only cases which would appear in the United States district courts as a result of diverse citizenship.

QUESTION: Well, I know, but the rule -- it might just as well apply to any removable case, including federal question cases.

MR. DICKEY: Oh, I agree wholeheartedly, your Honor.

QUESTION: Those do not have to be diversity

cases.

MR. DICKEY: That is true.

If this Court sees fit to grant the relief sought by the Petitioners, I would submit that we would still have orderly process in the district courts until Congress sees fit to act, which I realize that Congress has not been totally responsive to the needs of this Court and other federal courts but until such time as Congress acts, there would be orderly process and without sounding trite, I would submit to this Court that for every wrong there must be a remedy and I would certainly hope that this Court granted certiorari to review this case and to grant the relief sought by the Petitioners.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:57 o'clock p.m., the case was submitted.]