

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1240

TITLE LAKE COAL COMPANY, INC., Petitioner V.  
ROBERTS & SCHAEFER COMPANY

PLACE Washington, D. C.

DATE October 15, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

LAKE COAL COMPANY, INC.,

Petitioner

V.

ROBERTS & SCHAEFER COMPANY

No. 84-1240

Washington, D.C.

Tuesday, October 15, 1985

The above-entitled matter came on for oral argument  
before the Supreme Court of the United States at  
10:59 a.m.

APPEARANCES:

RONALD GLEN POLLY, ESQ., Whitesburg, Kentucky;  
on behalf of the Petitioner.

CLEON KILMER COMBS, ESQ., Lexington, Kentucky;  
on behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Polly?

ORAL ARGUMENT OF RONALD GLEN POLLY, ESQ.

ON BEHALF OF THE PETITIONER

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

The issue in this matter is whether exceptional  
circumstances exist to justify the stay, referring to the current  
state action in this pure diversity action.

In the San Carlos Apache case, the dismissal was  
upheld because the state's suits were adequate to quantify  
the rights, water rights of the Indians.

Number two, they were carrying amendment policies  
irrelevant; number three, the state expertise and administra-  
tive machinery is adequate and set up.

The infancy of the federal suits, particularly the  
judicial bias against piecemeal litigation and convenience  
to the parties involving duplication of issues and effort.  
The reasoning mentioned there to some great extent was that  
the concurrent federal proceedings as duplicative and wasteful,  
generating additional litigation through inconsistent disposition  
of property.

And, number two, the concurrent proceedings creates  
a serious potential for spawning an unseemly and destructive  
waste to see which forum can resolve the same issues first



1 prejudicial to the possibility of recent decision-making by  
2 either forum.

3 In the Moses Cone Hospital case, the stay reversal  
4 was affirmed because the piecemeal litigation was not avoided  
5 as to the architect in the state court. The priority measured  
6 by progress in the suits was not in favor of stay. The federal  
7 law was the rule of decision on the merits and the state court  
8 action was inadequate to protect the rights.

9 The Court --

10 QUESTION: Mr. Polly, what has happened to the state  
11 court action now. It proceeded as I understood.

12 MR. POLLY: The state court action is set for trial  
13 November 4.

14 QUESTION: I see.

15 MR. POLLY: The court was guided in the Moses Cone  
16 case by the federal policy and law to not delay arbitration  
17 under the Federal Arbitration Act.

18 The court noted specifically that vexatious or  
19 reactive nature of suits may influence the decision as to whether  
20 to defer to the concurrent state action.

21 This occurred not only in the Moses Cone case in  
22 the Court of Appeals, but also in the Calvert case and was  
23 mentioned by this Court as having considerable merit.

24 In the Colorado River case, the dismissal was upheld  
25 because the McCarran Amendment federal policy to avoid piecemeal

1 litigation of water rights in a river system.

2 Number two, the absence of proceedings beyond the  
3 complaint; number three, particularly the extensive involvement  
4 of state water rights involving numerous defendants and the  
5 distance between state court and Denver and the Division Seven  
6 location of the size of the water right; and number five, the  
7 existing participation of U.S. in other similar state proceed-  
8 ings. There, the particular language relating to the basis  
9 for justifying the stay derives.

10 The court said the issue must be decided on the basis  
11 of wise judicial administration, giving regard to conservation  
12 of judicial resources and comprehensive disposition of litiga-  
13 tion.

14 The court noted the virtual unflagging obligation  
15 to exercise jurisdiction. The court also noted that the reasons  
16 of wise judicial administration are more limited and exceptional  
17 and the court indicated that there must be a weighing of factors  
18 with only the clearest of justifications. The scales were  
19 described as consider the obligation to exercise as opposed  
20 to factors counseling against exercise.

21 The factors in this case are, number one, the priority  
22 of assuming jurisdiction of property, the question of in rem  
23 application.

24 This question has never been specifically an issue.  
25 Roberts & Schaefer says the state action is in personam and

1 I simply point out that that was deliberately so by Roberts  
2 & Schaefer.

3 QUESTION: What do you think the federal court should  
4 have done if Roberts had to come to federal court first? It  
5 started the suit, started the litigation, and Lake Coal counter-  
6 claimed in the federal court and then Lake Coal went to the  
7 state court and started this suit?

8 MR. POLLY: Justice White, I believe that the cases  
9 indicate that it would not matter if the same circumstances  
10 exist.

11 QUESTION: After the suit starts in the federal court?

12 MR. POLLY: Right.

13 QUESTION: Lake Coal starts a case of its own in  
14 a state court and then moves to federal court to dismiss.  
15 Should the federal court grant that?

16 MR. POLLY: The existence of the state action --  
17 It is assumed that Lake would file the state action as well  
18 after the federal action.

19 So, the order in which the two were filed does not  
20 determine --

21 QUESTION: So, in my example you would be arguing  
22 for the same result, mainly the federal court should dismiss  
23 the action.

24 MR. POLLY: So long as -- Yes, Mr. Justice White.

25 QUESTION: All right

1 MR. POLLY: So long as the piecemeal litigation  
2 situation exists in the state court where the subcontractors  
3 are parties and they are not parties in the federal court  
4 action.

5 I pointed out that the in rem question --

6 QUESTION: Well, what if there weren't subcontractors  
7 who were parties to the state action and the federal court  
8 is filed first?

9 MR. POLLY: I think in that event we do not have  
10 piecemeal litigation questions and in all likelihood the state  
11 action -- the federal action would stand.

12 QUESTION: Even though only state issues were involved?

13 MR. POLLY: Yes.

14 QUESTION: So, in this case, except for the other  
15 parties that were in the state suit, if they hadn't been made  
16 parties in the state suit, but the federal court case was started  
17 later, you would think the federal court case could go ahead,  
18 is that right?

19 MR. POLLY: Well, I think there is argument under  
20 the cases for the position that the federal court under the  
21 test, because state law applies in all the other factors  
22 indicate in favor of stay. I think that it could be decided  
23 in that manner in the discretion of the court. But --

24 QUESTION: Do you think the removal power is a factor  
25 to be considered whether or not an action in a state court



1 could be removed to the federal court?

2 MR. POLLY: I think yes. I think one of the cases  
3 indicated that lower court cases -- In fact, where removal  
4 was possible it was more indicated that the federal action  
5 should be stayed, because there, instead of filing a separate  
6 suit, removal could have been achieved.

7 QUESTION: Where the subcontractors are parties in  
8 a state court action in this case no removal is possible under  
9 the federal removal statute, is that right?

10 MR. POLLY: That is correct, Justice O'Connor.

11 The point is the R&S attempted removal and the federal  
12 court remanded the case to the state court and then six months  
13 after the state court action was stopped the second federal  
14 court action was filed by Roberts & Schaefer.

15 There is indication here of defensive tactical  
16 maneuvers on the part of Roberts & Schaefer. Occupy Lake with  
17 the removal, then when the removal fails, attempt a second  
18 action.

19 I started to point out before the questions were  
20 asked that with respect to in rem Roberts & Schaefer deliberately  
21 did not file its lien in its counterclaim in the state court  
22 and did not amend that counterclaim until after the district  
23 judge had ruled.

24 QUESTION: Mr. Polly, I take it from one of your  
25 answers to one of Justice White's questions -- tell me if I

1 am wrong in saying I take it that you would agree that there  
2 is a fair amount of discretion in the district court. That  
3 he might decide to stay the federal action, he might not decide  
4 to stay the federal action and conceivably he could be affirmed  
5 by the court of appeals, whichever thing he did.

6 MR. POLLY: I think that is the case, Justice Rehnquist.  
7 Yes, I think that is the case.

8 The indication --

9 QUESTION: Well, if the district court had refused  
10 to dismiss the case -- He dismissed, didn't he?

11 MR. POLLY: Yes, he stayed.

12 QUESTION: Yes, he stayed. He didn't dismiss.

13 MR. POLLY: No.

14 QUESTION: He stayed.

15 MR. POLLY: He stayed.

16 QUESTION: What if he had refused to stay?

17 MR. POLLY: I think that would have been subject  
18 to appeal as well.

19 QUESTION: Well, I know, but I thought you -- You  
20 mean, he would not have had the discretion to entertain the  
21 suit.

22 MR. POLLY: No.

23 QUESTION: He would have had to stay.

24 MR. POLLY: In my opinion, yes, he had to stay,  
25 because of the circumstances of the piecemeal litigation in

1 the state court.

2 QUESTION: So, his discretion would not have extended  
3 so far as to -- as not to stay in this case.

4 MR. POLLY: No, no. I mean, that is very clear under  
5 these cases.

6 The question, as I understood from Justice Rehnquist,  
7 was setting aside the piecemeal litigation question did the  
8 federal court have discretion without piecemeal litigation.  
9 That is the question I thought was being asked.

10 QUESTION: Right.

11 MR. POLLY: Now, when you say what indication is  
12 there of vexation and react to tactical defense of maneuvers,  
13 it is quite obvious that when the in rem part of this case  
14 was deliberately avoided, although that question never was  
15 specifically in point in this case, because the counterclaim  
16 in the state court did not incorporate the lien that was  
17 incorporated in the federal action. But, certainly as soon  
18 as the district judge made his decision, the counterclaim was  
19 amended by Roberts & Schaefer to include the lien. The judge  
20 made the decision in July and immediately after he made the  
21 decision in July the amended counterclaim was filed. I don't  
22 think my opposition will deny that.

23 But, nevertheless, that is not the basis for the  
24 district judge's decision.

25 The second issue is whether there was any inconvenience

1 of the federal forum and we don't indicate any inconvenience  
2 in this case. The federal forum is in the adjoining county,  
3 a similar mountain county. In fact, where the Hatfield and  
4 McCoy feud that Mr. Combs speaks about in his brief occurred.

5 QUESTION: Where is the site of the nearest federal  
6 courthouse?

7 MR. POLLY: Pikeville, Pikeville, Kentucky. Pike  
8 County which is just adjacent and in as deep of the mountains  
9 as Letcher County is.

10 What Roberts & Schaefer expected to achieve in its  
11 claim of -- late claim of saying, well, we have the basis here  
12 of imagined prejudice in the local court. The trial in the  
13 federal court would be the same with respect to the jury.

14 QUESTION: I talked to one of your colleagues in  
15 Kentucky who had argued Thermtron here and asked him, after  
16 Thermtron was decided, why he was interested in getting into  
17 a federal court rather than the Kentucky state court and he  
18 said in a federal court you can draw your jurors from a large  
19 part of the state, whereas if you are a state court, it is  
20 just the particular county you are in.

21 MR. POLLY: Well, yes, particular county in state  
22 court but in a large part of the same locale in federal court,  
23 in other words, come from other counties.

24 As I understood it, Roberts & Schaefer's comments  
25 about the Hatfield and McCoy feud was almost as if he is going



1 to get a different make up in his jury down at federal court  
2 and that is not true.

3 The third question is the priority of the progress  
4 of the suits and, of course, that is not at issue in this case  
5 at the time the decision was made by the district court, but  
6 we do know now that the progress of the state suit is relevant  
7 in terms of practical application in this case.

8 QUESTION: When is that suit set for trial?

9 MR. POLLY: November 4th of this year.

10 The primary -- As I have indicated, the primary basis  
11 for upholding the stay in this case is the avoidance of  
12 piecemeal litigation. Clearly the subcontractors are defendants  
13 in the state action and not the federal action. There are  
14 issues that require the same proof as would be in the federal  
15 action. The federal action would in no wise dispose of that  
16 question with respect to the subcontractors and the same proof  
17 would have to be introduced again by the same parties and cause  
18 obviously piecemeal litigation.

19 QUESTION: Mr. Polly, suppose you proceed with the  
20 state litigation next month and it goes to judgment. Does  
21 this case become moot?

22 MR. POLLY: Justice Blackmun, in my opinion it does.  
23 The state action would be res judicata so long as -- if this  
24 case were affirmed, if the Roberts & Schaefer attorney could  
25 not obtain quick action by the district judge and attempt to

1 get an adjudication there on a summary judgment motion, if  
2 summary judgment was rendered before November 4, then the state  
3 action would be moot.

4 QUESTION: But, certainly there is an appeal from  
5 the Circuit Court of Letcher County within the Kentucky judicial  
6 system.

7 MR. POLLY: Oh, yes. Oh, yes, in the sense of res  
8 judicata assuming that the state court action is upheld in  
9 the appeal. I mean, we were discussing this. As I understood  
10 it, Justice Rehnquist, that the state court action is decided.  
11 To me, that mean final -- If it is finally decided, it is res  
12 judicata.

13 Of course, if the trial verdict was appealed and  
14 reversed, then I think certainly there is no question but the  
15 decision of this Court is very relevant and in no wise moot.

16 QUESTION: Which would be res judicata, if the Kentucky  
17 trial proceedings ended first, but the federal court went ahead --  
18 say they vacated the stay or something -- and the federal that  
19 upheld the process ran its course first. Would the federal  
20 case be res judicata? I don't know how fast your Kentucky  
21 appellate process works, but assume it is slower than the federal.

22 MR. POLLY: Right. In my opinion, Justice Stevens,  
23 once a verdict is rendered in the state court, that judgment  
24 becomes res judicata with respect to the federal proceedings  
25 and would change the federal proceedings.

1 QUESTION: Even though it is on appeal?

2 MR. POLLY: The federal proceedings would not even  
3 be subject to appeal at that --

4 QUESTION: No, no, no. Even if the state court judg-  
5 ment is not final in the sense that there is review pending  
6 in the appellate court of Kentucky.

7 MR. POLLY: I think, yes. The res judicata effect  
8 of the state court judgment coming first would affect the federal  
9 proceedings in terms of a stay at that point based on the decision  
10 there.

11 The Court of Appeals in this case held that piecemeal  
12 litigation is not involved because Lake has shown no arguably  
13 valid claim against the non-signatory subcontractors.

14 I point out to you that that is not the issue. That  
15 issue was never argued in any of the briefs, was never presented,  
16 no cases were cited by either side, and the Court of Appeals  
17 simply got the wrong issue. The point is that the case exists  
18 in state court against the subcontractors in the first place.

19 It is not a question of whether you have an arguably  
20 valid claim against the subcontractors, but whether or not  
21 that claim exists in state court.

22 And, in the second place, in our petition for recon-  
23 sideration, we pointed out to the Court that certainly under  
24 state law we have an arguably valid claim against the  
25 subcontractors based on third-party beneficiary law and the

1 alternative cause of action in the state court of negligence  
2 of the subcontractors.

3 My point was how -- when the judge asked me the question  
4 about the arguably valid claim, my statement was how can you  
5 imagine that a subcontractor can come in and make a mess of  
6 a wash plant, construct it defectively, and not have liability  
7 to the people that own the wash plant and is having the work  
8 done. And, that is the cause of action. But, that is not  
9 the point.

10 That question was raised on the removal action and  
11 was turned down by the district judge, exhaustively briefed.  
12 The point in the removal action was an issue but not on the  
13 issue of whether or not there were exceptional circumstances  
14 to justify the stay.

15 The Court of Appeals further says that piecemeal  
16 litigation will not be avoided because R&S could file separate  
17 actions against the subcontractors. And, R&S adds that Lake  
18 can file third-party complaint in federal action against the  
19 subcontractors.

20 I point out to you that these are imaginary cases  
21 as opposed to the reality of the present circumstances. It  
22 is not in this case which cases may be filed, but rather what  
23 cases have been filed.

24 And, on the basis of the cases that exist, this Court  
25 should make a decision with respect to piecemeal litigation



1 whether it satisfactorily justifies the stay in view of all  
2 the other circumstances.

3 QUESTION: Well, you lost on the piecemeal factor  
4 in the Court of Appeals.

5 MR. POLLY: That is correct.

6 QUESTION: They said they didn't think there would  
7 be piecemeal litigation.

8 MR. POLLY: No.

9 QUESTION: Do we have to second guess that?

10 MR. POLLY: No, Justice White. I don't think that  
11 is what the Court of Appeals said. The Court of Appeals said,  
12 number one, that piecemeal litigation is not involved because  
13 Lake does not have an arguably valid claim in state court against  
14 the subcontractors. If we have an arguably valid claim or  
15 if the arguably valid claim is not relevant, then piecemeal  
16 litigation -- that is the basis for the Court of Appeals.  
17 They didn't say piecemeal litigation didn't occur under the  
18 present circumstances if we have an arguably valid claim.

19 QUESTION: Well, I know, but they said you didn't.

20 MR. POLLY: Have an arguably valid claim?

21 QUESTION: Yes. Do we have to second guess that?

22 MR. POLLY: No. My point is that that is not the  
23 issue. The issue is that we do have a case in state court;  
24 and, number two --

25 QUESTION: I know. The issue is -- One of the factors

1 you consider is whether piecemeal litigation will be created.

2 MR. POLLY: Exactly. And, we have a case --

3 QUESTION: And, the Court of Appeals concluded that,  
4 no, it would not.

5 MR. POLLY: The Court of Appeals concluded that we  
6 did not have an arguably valid case.

7 QUESTION: And, therefore, there is no piecemeal  
8 litigation.

9 MR. POLLY: Exactly. And, my statement to you is  
10 that that ruling by the Court of Appeals was not the issue.  
11 The issue is whether or not the case exists, not whether we  
12 have an arguably valid claim. The case does exist.

13 QUESTION: I don't -- If the Court of Appeals had  
14 thought piecemeal litigation would occur, they might have stayed  
15 the case.

16 MR. POLLY: Yes.

17 QUESTION: But, they didn't.

18 MR. POLLY: They didn't. But, the reasoning they  
19 gave as to saying that piecemeal litigation did not occur were  
20 not at issue.

21 QUESTION: Well, Mr. Polly, can a plaintiff in a  
22 state court action just name anyone who is a resident of the  
23 state, however fraudulently and thereby defeat the right of  
24 someone to remove to federal court?

25 MR. POLLY: No, Justice O'Connor. That is not the

1 point. The point is that we have the case in state court in  
2 the first place and it is not --

3 QUESTION: Why can't the district court look at  
4 whether there is a fraudulent joinder of someone in the state  
5 court action?

6 MR. POLLY: I pointed out, Justice O'Connor, that  
7 the district judge did do that on removal. But, the question  
8 was not raised in the issue of stay. And, the Court of Appeals  
9 sidetracked to that issue when it was not even in the case  
10 and there was no briefing on it. To just come out of the blue  
11 and say you don't have a valid cause of action --

12 QUESTION: Are you saying that the Court of Appeals  
13 took a contrary view to the district court when the district  
14 court remanded or what were the arguments made at the district  
15 court as to the grounds for removal and remanding? Was the  
16 fraudulent joinder point argued there?

17 MR. POLLY: Yes, the fraudulent joinder, that we  
18 had no valid cause of action.

19 QUESTION: The district court remanded.

20 MR. POLLY: Absolutely. Said that we did have an  
21 arguably valid claim and that that was for decision by the  
22 state court.

23 And, my point has been that that is not an issue  
24 in the Court of Appeals on the stay.

25 The rule of decision on the merits, federal law as

1 opposed to state law, obviously state law is strictly involved.  
2 And, the adequacy of the state action to protect the rights,  
3 there is no specific indication of prejudice here. Certainly  
4 the state action under all the cases is adequate to protect  
5 the rights and that matter was not at issue.

6 The district court's findings for the stay were that  
7 in fairness to the parties and to avoid multiplicity of judicial  
8 time and effort and piecemeal litigation the stay was entered.

9 The district court also found that there was no good  
10 cause shown to litigate in both courts, simply saying, as in  
11 all these cases, that there were no countervailing reasons  
12 to outweigh proceeding, adjudicating, as opposed to the stay.  
13 In other words, that there were no countervailing reasons such  
14 as federal question involved such as in the Moses Cone case  
15 where the Arbitration Act demonstrated a federal policy that  
16 guided the decision.

17 Mr. Chief Justice, with your permission, I reserve  
18 my remaining time for rebuttal.

19 CHIEF JUSTICE BURGER: Very well.

20 Mr. Combs?

21 ORAL ARGUMENT OF CLEON KILMER COMBS, ESQ.

22 ON BEHALF OF THE RESPONDENT

23 MR. COMBS: Mr. Chief Justice, and may it please  
24 the Court:

25 At the outset, I would like to make it clear that



1 Roberts & Schaefer initially perceived its right to a federal  
2 forum when this action was first initiated in the state court.  
3 We have pursued that view diligently right up to this Court.

4 We sought to remove for the very reason Mr. Polly  
5 mentioned. We certainly did not want to leave any stone unturned  
6 and weigh that right and we did not. Upon remand we immediately  
7 followed this Court's admonition in Colorado River. Moses  
8 H. Cone instituted a separate federal action to exercise our  
9 right to a federal forum which we conceived was granted to  
10 us by the Congress.

11 QUESTION: Mr. Combs, aren't the concerns that are  
12 reflected by diversity jurisdiction satisfied fully by the  
13 option of removing a case that has been filed in a state court  
14 to a federal court under the removal power of the statute,  
15 and if it turns out that removal is not possible because of  
16 the absence of diversity, complete diversity in the state case,  
17 do you think Congress still intended that the defendant who  
18 can't remove should be able to exercise diversity jurisdiction  
19 in the federal court?

20 MR. COMBS: I certainly do, Your Honor, and I think  
21 this Court has so held in a number of cases. I don't know  
22 that the factual situation is true, but --

23 QUESTION: I am not sure that this Court has ruled  
24 on that actually.

25 MR. COMBS: I don't know of any instance where that

1 particular factual situation has existed, but the rule of con-  
2 current jurisdiction, the pending of parallel suits in state  
3 and federal court, has been in existence for further back than  
4 I would like to concede.

5 QUESTION: But, shouldn't we look at what Congress  
6 has addressed in the framework of the removal power and the  
7 diversity jurisdiction statute, look at them together, because  
8 Congress has spoken to both issues and don't they relate to  
9 each other?

10 MR. COMBS: I don't think so, Your Honor, because,  
11 as we pointed out a moment ago, lawyers are a rather ingenious  
12 group and many procedural situations can be developed to defeat  
13 diversity jurisdiction as was true in this case.

14 And, the mere defeat of removal jurisdiction does  
15 not mean that the Congress did not intend for that participant,  
16 that party, that citizens of another state, not to have a right  
17 to a federal forum.

18 QUESTION: Well, what if removal had been possible  
19 under the circumstances of the case? Suppose no subcontractors  
20 had been named, but instead of removing the action to the nearest  
21 federal court in Kentucky, you had instead instituted a new  
22 diversity action in the federal court in Illinois to be closer  
23 to your corporate headquarters. Would that have been all right  
24 in your view?

25 MR. COMBS: There we have the Microsoft case I believe

1 it is and certainly -- I think the action in Illinois would  
2 be permissible as concurrent federal jurisdiction, but we have  
3 a tool to deal with that and that is the right to transfer  
4 that case to the most convenient forum which I think it would  
5 be its return to Pikeville.

6 I would see no reason to dismiss or even stay that  
7 case, but just simply transfer it to Pikeville. At least that  
8 would be my thinking on it, Your Honor.

9 Now, the problem that I am having, the initial problem,  
10 and it is a problem that bothers the Court of Appeals, was  
11 the shifting of the burden. The district court imposed upon  
12 Roberts & Schaefer the burden of showing good cause for exercising  
13 a right to a federal forum granted by the Congress.

14 And, in our view, a right to a federal forum granted  
15 by the Congress, federal jurisdiction, is not subject to any  
16 presumption which must be overcome.

17 The Court of Appeals so held and we suggest that  
18 that is the proper rule.

19 QUESTION: Mr. Combs, can I ask you a question that  
20 related to what Justice O'Connor was asking you? You contend,  
21 as I understand, and you persuaded the Court of Appeals, that  
22 there was no arguably valid claim involving the subcontractors.

23 MR. COMBS: Yes, we do, Your Honor.

24 QUESTION: Now, if you had been successful in per-  
25 suading the district court of that effect at the time of your

1 effort to remove, would you not have been successful in removing?

2 MR. COMBS: We think so, Your Honor. That is why  
3 we asserted it.

4 QUESTION: Then, does it not appear that the effect  
5 of what you have done is to get appellate review of the district  
6 court's -- as you would say -- erroneous decision on removal?

7 MR. COMBS: I suggest not, Your Honor, because if  
8 there is parallel federal jurisdiction, concurrent jurisdiction --  
9 This case is a case which was instituted in the federal court  
10 under a statute granting us a federal forum and the appeal  
11 is from that corner and not from the other.

12 QUESTION: But, is it not true that -- not probable  
13 at least that if the Court of Appeals had agreed with the district  
14 court's remand order and thought that these parties were  
15 genuine -- there was a genuine separate lawsuit against the  
16 two subcontractors it would have decided the appeal differently?  
17 It seems to me the whole question of where you litigate turns  
18 on the bona fides of the claims against the subcontractors.

19 MR. COMBS: I don't really think it does, Your Honor,  
20 because certainly the question of the subcontractors is --  
21 The main thrust of this case and this claim really is this  
22 contract --

23 QUESTION: Right.

24 MR. COMBS: -- between these two parties that we  
25 have before us here today. And, the question is Roberts &



1 Schaefer's right to a federal forum by virtue of diversity  
2 to determine that controversy.

3 And, I don't think that -- What you are referring  
4 to, I take it, is whether that is sufficient exceptional circum-  
5 stances. I submit that it is not.

6 QUESTION: Well, what is troubling me -- It seems  
7 to me that Congress is giving us conflicting signals. On one  
8 hand, they say you have got a right to a federal forum in a  
9 diversity case, on the other hand, they say if you try to remove  
10 and you fail you don't get any appeal from an order denying  
11 removal or remanding the case.

12 MR. COMBS: That would be the effect. Actually,  
13 if that were held, then we would be denied on both ends of  
14 the spectrum. We would be denied relief both ways and it would  
15 have been ridiculous for me to attempt to remove. I should  
16 have just gone ahead and immediately filed.

17 QUESTION: Well, it wouldn't have been ridiculous,  
18 but it would, in effect, say that a decision on a question  
19 like this is lodged in the district court and not normally  
20 going to be reviewable and if you happen to lose maybe a different  
21 district judge would have decided it otherwise. In other words,  
22 I think there is a close question on your removal. It it not  
23 perfectly clear he was right in denying you removal.

24 MR. COMBS: I think that is true, Your Honor, and  
25 I would like to point out that the heavy burden was on Lake

1 Coal Company. If they wanted a stay, a heavy burden was to  
2 come in and establish in the record that this would cause  
3 multiplicity of litigation. And, the record is virtually silent  
4 on that. As a matter of fact, it is silent. That burden was  
5 not carried.

6 And, the Court of Appeals recognized that and spoke  
7 to it and held expressly that it was not met. And, we think  
8 the Court of Appeals put that to rest at that point.

9 There is no claim of abstention here. We don't have  
10 any Berford claim, we don't have any Younger claim. We do  
11 have an exceptional circumstances claim. The in personam was  
12 addressed, but actually what was addressed is merely left,  
13 and as we know, the point where a federal court draws the line  
14 and refuses to act in a race case is where the race -- the  
15 property is in the actual possession of a state court and is  
16 being administered by the state court. Certainly, under those  
17 circumstances, a federal court should and will abstain.

18 QUESTION: What if the stay in the federal court  
19 had not been granted? I take it your position would be that  
20 the two suits should go on simultaneously.

21 MR. COMBS: Yes, Your Honor.

22 QUESTION: Litigating the same issue in each court  
23 and whoever -- whichever arrived at judgment first would then  
24 conclude the other.

25 MR. COMBS: You would have the proverbial race to

1 the judgment. We had a race to the courthouse and I lost.

2 I guess we would have a race to the judgment.

3 QUESTION: Well, does that seem to you like a sensible  
4 way to run a judicial system?

5 MR. COMBS: No, Your Honor, but we do have a federal  
6 system and --

7 QUESTION: If you say no, it is not a sensible way  
8 to run a judicial system, then there must be something wrong  
9 with the doctrines you are -- and say that is what should have  
10 happened.

11 MR. COMBS: I think the compelling issue is whether  
12 a litigant is entitled to a federal forum.

13 QUESTION: You say he is entitled to a federal forum  
14 come hell or high water regardless of totally duplicative  
15 litigation in the state court.

16 MR. COMBS: I suggest, Your Honor, that is a political  
17 argument as most of these things are and really addresses itself  
18 to the Congress.

19 QUESTION: And, you think Congress would have been  
20 deeply pleased with this spectacle of litigation, identical  
21 litigation, running its course both in the Kentucky state court  
22 and in the federal district court.

23 MR. COMBS: I would hope the Congress would not be  
24 pleased, Your Honor, but then my remedy -- the only remedy  
25 I know is to write my congressman because the jurisdiction

1 of the federal courts is vested exclusively in the Congress.  
2 I would like to speak to that later.

3 QUESTION: Don't you think the congressman might  
4 respond and tell you we have spoken and we have written the  
5 removal statute and it is linked to the diversity statute and  
6 we have denied the right of appeal from an order under the  
7 removal power and that is it, we have spoken? Now, you courts  
8 have to implement these statutes together and make them work.

9 MR. COMBS: Your Honor, I don't read the diversity --  
10 The original diversity statute and the removal of diversity  
11 statute as being -- You can choose one or the other --

12 QUESTION: Well, read them together. I mean, is  
13 there anything wrong with that and with the argument that,  
14 indeed, Congress has a right to speak and it did speak.

15 MR. COMBS: I am sorry, Your Honor, I am having trouble  
16 following your last question.

17 QUESTION: Well, it was more a comment than a  
18 question. Thank you.

19 MR. COMBS: I am suggesting that the Congress has  
20 said you may remove if it is removable. If it is not, and  
21 you have diversity jurisdiction otherwise, you may institute  
22 a separate parallel proceeding. That is what we have done.

23 And, we suggest that once the Congress determines  
24 that jurisdiction does exist, that there is the often spoken,  
25 unflagging obligation to proceed and we think that is what



1 should have happened in this case.

2 Now, I would like to address for a moment, if I may,  
3 the exceptional circumstances situation. And, I am troubled  
4 by exceptional circumstances because they are in the eye of  
5 the beholder. It all depends on whose circumstances they are  
6 and it becomes entangled and enmeshed with discretion.  
7 And, I recognize for a lawyer to address a court and suggest  
8 that there is no discretion is hazardous at best.

9 But, I suggest that constitutionally there is no  
10 discretion with regard to jurisdiction. Discretion is an innate  
11 part of jurisdiction.

12 Jurisdiction, in my view, is a mandate to a court  
13 to act and adjudicate an adjudicable controversy. That is  
14 what we have here.

15 QUESTION: Mr. Combs, you said you thought constitu-  
16 tionally there could be no discretion. Do you mean that Congress  
17 could not have said when it passed the statutes for the purpose  
18 of conferring jurisdiction on the district court that the district  
19 court should have jurisdiction to stay the case where there  
20 would be duplicative litigation?

21 MR. COMBS: I think they could very well have done  
22 so, Your Honor, and maybe that is the answer. But, there again,  
23 that is a political decision.

24 QUESTION: But, at any rate, it is not any constitutional  
25 doctrine that you -- Congress couldn't have achieved this --

1 MR. COMBS: No. What I am saying is that there is  
2 presently a constitutional prohibition against exercising a  
3 discretion.

4 QUESTION: Where do we find that in the Constitution?

5 MR. COMBS: You find it in the area where matters  
6 of jurisdiction are withheld and granted to the Congress.  
7 And, when the Congress determines jurisdiction, the Congress  
8 determines whether jurisdiction shall exist in this case, whether  
9 jurisdiction shall not exist in the next case, whether it shall  
10 exist with discretion to stay in the third case.

11 In other words, the entire spectrum of jurisdiction  
12 power rests with the Congress and not with any court.

13 QUESTION: So, in your view, cases from this Court  
14 like the Younger or Pullman abstention cases are all erroneously  
15 decided?

16 MR. COMBS: No, Your Honor, but --

17 QUESTION: And the Colorado River factors case as  
18 well.

19 MR. COMBS: Addressing that specifically, I view --  
20 Of course, Younger, Berford and the other abstention cases  
21 are bottomed on the concept of the separation of the federal  
22 government and state government and the operation of the state  
23 government, the non-interference, the non-intrusion of the  
24 federal government into the vital affairs of the state. And,  
25 I agree with those cases.

1 Now, when I start having a little trouble is with  
2 Colorado River and Arizona, because in Colorado River and in  
3 Arizona the Court used the exceptional circumstances test.  
4 In my mind, exceptional circumstances is almost tantamount  
5 to discretion. It may be discretion, although the Court very  
6 pointedly says that it is the narrowest of discretion.

7 And, again, I am back to the constitutional problem,  
8 the jurisdictional problem, of discretion. Certainly in the  
9 Declaratory Judgment Act, the Brillhart case, the Congress  
10 granted the discretion and the court exercised it and this  
11 Court upheld it.

12 So, I would suggest that Colorado River and Arizona  
13 maybe are closer akin, or what we in Kentucky call kissing  
14 cousins, of Berford and some of the civil counterparts of  
15 Younger where the state has a vital interest, because having  
16 practiced for a short time in Arizona, I know what water rights  
17 mean.

18 And, as this Court pointed out in Arizona, that is  
19 a very -- I forget the terminology, but it is unique. And,  
20 here, Colorado and Arizona were attempting to establish through  
21 the state court system a pattern of water rights which this  
22 Court held provided exceptional circumstances. I would suggest  
23 that maybe more appropriate it should have been intrusion into  
24 areas that should be reserved for the states.

25 And, I would suggest that if -- I don't think it

1 is a discretion, but I think the federal courts, when they  
2 come into an area of that sort, they should look into it and  
3 make a determination, a finding of fact, if you please, not  
4 a discretion, but a finding of fact as to whether there will  
5 be an intrusion into the vital functions of the state which  
6 might well be contrary to the comity between the federal  
7 government and the states.

8 Now, the state law issue, I think, should be put  
9 to rest and I think can be put to rest very quickly. That  
10 is what Erie is all about. That is what the diversity statute  
11 is all about. If we were to stay every case because it is  
12 based on state law, we would repeal the diversity statute and  
13 we all know that is an area reserved for the Congress.

14 Conservation of judicial time: That is extremely  
15 interesting to me because ten years ago this very month I was  
16 standing here in the same spot defending Judge Hermensdorfer  
17 and Judge Hermensdorfer didn't have time and he was serious  
18 and he meant it.

19 But, this Court wisely determined that the Congress  
20 had spoken, that the conferring of jurisdictions in diversity  
21 of removal cases was a mandate of the Congress which he should  
22 have heeded and ordered him to heed it.

23 Certainly, these things are sometimes wasteful, waste  
24 of time, waste of money. Maybe there should be better ways,  
25 but again that addresses itself to the Congress and not to



1 us.

2 Another thing that bothers me is -- Of course, the  
3 Microsoft case I mentioned a moment ago, I misnamed it.  
4 Another matter I would like to cover briefly is diversity  
5 jurisdiction and its relationship to federal questions, civil  
6 rights, whatever.

7 I mention in my brief and I would like to emphasize  
8 now that I know of no jurisdictional pecking order, I know  
9 of no jurisdictional statute that says diversity shall be tried  
10 first, second, or third, whether it should be number one or  
11 number ten on the list of one to ten.

12 And, I think in the absence of a congressional expres-  
13 sion, we must treat each jurisdictional -- each conferring  
14 in jurisdiction as a congressional mandate of at least equal  
15 equality.

16 The jurisdiction that I advocate today happens to  
17 be a senior citizen, the most senior of all, I suppose, but  
18 certainly the mere factor that it may have here and may not  
19 even be in great favor in a lot of places, doesn't mean that  
20 it is to be condemned or moved to the back of the bus.

21 Certainly, as a senior citizens, it is entitled to  
22 as much consideration and is entitled to go forward with at  
23 least the same deliberate speed to adjudication as any other  
24 jurisdiction unless the Congress mandates otherwise as it has  
25 in a few instances.

1           It distresses me to see judgments made by the  
2 individual districts or even the circuits as to which should  
3 take precedence, which should be first, which should be second,  
4 which should ninth, which should be tenth. I think that is  
5 a political decision for the Congress and not for the courts.  
6 I would suggest that all jurisdictional mandates move forward  
7 equally unless and until the Congress dictates otherwise.

8           I notice the Colorado District in Local Rule 200  
9 says that diversity actions will be given the lowest priority  
10 and will be heard and tried when, as, and if time permits.

11           Again, I suggest that is a judgment for the Congress  
12 and not for the courts.

13           I am suggesting that the Sixth Circuit has decided  
14 the case correctly, has decided that the congressional mandate  
15 of the Congress should be enforced and has properly reversed  
16 the district court with directions to exercise jurisdiction.

17           If the Court has nothing further, may I be excused?

18           CHIEF JUSTICE BURGER: Do you have anything further,  
19 Mr. Polly?

20           ORAL ARGUMENT OF RONALD GLEN POLLY, ESQ.

21           ON BEHALF OF THE PETITIONER -- REBUTTAL

22           MR. POLLY: I wish first to say again with respect  
23 to the piecemeal litigation issue and the finding by the Court  
24 of Appeals that Lake did not have an arguably valid claim  
25 against the subcontractors, and, therefore, there was no

1     piecemeal litigation.

2             Let me point out to this Court that the district  
3     judge in this case found that piecemeal litigation exists.  
4     Not only did the Court of Appeals find that it did not exist  
5     but the district judge found that it did exist specifically  
6     in his stay order.

7             The question is not whether the Court of Appeals  
8     made that finding and could make that finding. The question  
9     is whether or not the Court of Appeals was correct.

10            The issue is whether or not the district judge abused  
11    his discretion in finding that piecemeal litigation occurred.  
12    And, yes, this Court must determine whether or not the Court  
13    of Appeals was correct in ruling that the district judge abused  
14    his discretion in finding that piecemeal litigation exists.

15            The district judge, it must be realized, impliedly  
16    found in the stay request that Lake had an arguably valid claim  
17    just to subcontractors as he had --

18            CHIEF JUSTICE BURGER: Your time has expired,  
19    counselor.

20            MR. POLLY: Thank you.

21            CHIEF JUSTICE BURGER: Thank you, gentlemen.

22            The case is submitted.

23            (Whereupon, at 11:57 a.m., the case in the above-  
24    entitled matter was submitted.)  
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

# 84-1240 - LAKE COAL COMPANY, INC., Petitioner V.

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ROBERTS & SCHAEFER COMPANY

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)



