

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEROY LOGAN, et al., )  
 )  
 Plaintiffs, ) Civil No. 74-C-297  
 )  
 v. )  
 )  
 ROGERS C.B. MORTON, Secretary ) ORDER  
 of the Interior, et al., )  
 )  
 Defendants. )  
 )

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**E I L E D**  
MAR 31 1975  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

The above matter having come before this Court on  
this 31st day of March, 1975, upon plaintiff  
Osage Nation Organization's motion to withdraw from this  
cause as a named party plaintiff, and for good cause shown  
it is hereby:

ORDERED that the Osage Nation Organization is hereby  
permitted to withdraw from this action.

H. DALE COOK  
JUDGE, UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

RICHARD MORALES, )  
 )  
 Plaintiff, )  
 vs. )  
 )  
 READING & BATES OFFSHORE )  
 DRILLING CO. and J. W. )  
 BATES, SR., )  
 Defendants. )

No. 74-C-310

**FILED**

MAR 31 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

J U D G M E N T

Based upon the Memorandum Opinion filed herein on the 13th day of March, 1975,

IT IS ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment of defendant, J. W. Bates, Sr., be granted and Judgment be entered herein in favor of defendants, at the cost of the plaintiff, and that plaintiff Morales' Motion for Summary Judgment be denied.

Dated this 27<sup>th</sup> day of March, 1975.

Luther Bohannon  
UNITED STATES DISTRICT JUDGE



This cause comes before the Court as a derivative action initiated by a shareholder of the nominal defendant Reading & Bates Offshore Drilling Co. (Reading and Bates). The action was brought pursuant to the provisions of Section 16(b) of the Securities Exchange Act of 1934, 15 USCA Sec. 78p (1964). The relief sought is the recovery of "short swing" profits made by the speculations of a corporate "insider," an insider being a director, officer, or principal shareholder. The gravamen of the transactions prohibited by 16(b) is that an insider may not take advantage of his corporate knowledge or relationship to speculate by buying or selling the corporation's stock where either of two such transactions would fall within less than six months of the other.

Pursuant to Rule 56, Federal Rules of Civil Procedure, both plaintiff and defendant filed Motions for Summary Judgment, wherein each declared an intent to rest upon the facts in the record. The Court has determined that, aside from counsels' statements of resting on the record, the cause is properly one for summary judgment as the issues have been reduced to the material facts upon which there is no dispute. The Court has carefully and cautiously evaluated each Motion separately and is convinced of propriety of rendering such a judgment for the following reasons: cf. Napco Oil and Gas Inc. v. Appleman, 380 F.2d 323 (C.A. 10, 1967).

1. The parties expressly declared an intent to rest entirely on the record.
2. The material issues of fact are stipulated, with defendant stipulating that he has no evidence to controvert issues which normally constitute fact questions to be found at trial, See H. B. Zachary Company v. O'Brien, 378 F.2d 423 (C.A. 10, 1967).
3. The plaintiff's allegations, particularly in reference to an October 13 purchase date are purely conclusionary, do not perpetuate an issue of fact, H. B. Zachary Company v. O'Brien, supra, nor do

they raise inferences of fact, cf. American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272, 279 (C.A. 2, 1967).

4. It is a matter of construction as to whether the exercise of an option, equating with a purchase generally, is a purchase within the meaning of 15 USC Sec. 78c(a)(13), SEC v. National Securities, Inc., 393 U.S. 453 (1969).

The following facts have given rise to the legal issues.

The defendant J. W. Bates, Sr., was at the time relevant to this suit an officer and director of defendant Reading and Bates. On April 17, 1972, Mr. Bates sold shares of Reading and Bates. Plaintiff alleged that thereafter Mr. Bates purchased, through the exercise of a stock option he held, Reading and Bates shares on October 13, 1972, whereas defendant contended he purchased said shares on October 16. While at first glance such allegation and denial would seem to raise a factual issue, such is not the case for the second and third reasons enumerated above; i.e. plaintiff offered a conclusionary allegation of exercise of the option on October 13 and subsequently stipulated that there would be no evidence to refute Bates' denial of non-exercise on that date.

On October 13, Bates discussed the exercise of his option, which expired October 19, with Mr. Kemper, the corporate official responsible for administering the Reading and Bates stock option plan. Kemper thereafter initiated the paperwork necessary to bring about the purchase and sale, with the instructions to the transfer agent requesting issuance of shares in accordance with the plan and the defendant's stock option. It was stipulated by the parties through incorporation of the stock option plan and defendant's option agreement, that the terms of the option plan required payment in full at the time of exercising the option. Further, it was stipulated that on October 16 Mr. Bates prepared his check in

payment of the purchase price and then delivered the check on October 16 or 17, the exact one of these two dates being unnecessary to the Court's decision. The check, bearing the notation "to exercise option, Oct. 19, 1972," was thereafter deposited, the transfer agent delivering the stock certificate for the shares on October 18, with defendant receiving the certificate no sooner than October 18.

Plaintiff attempted to support his allegations through the further stipulated facts that on October 13, 1972, Kemper had prepared, as is required by 15 USCA Sec. 78p, a report to the Securities Exchange Commission on Form 4 reporting an exercise of Bates' option as of October 13. An amended Form 4 was subsequently filed on November 14, 1973, setting forth October 16, 1972, as the date of option exercise. The original Form 4 was signed by Bates on October 13, it being stipulated by defendant that no evidence other than the Form 4 would refute Bates' testimony.

Plaintiff contends that the foregoing, as a matter of law, constitutes an exercise on October 13 and that the contemporaneously executed Form 4 is an admission of such.

The activities of Bates and Kemper on October 13 did not constitute an exercise of the option, as the stipulations and conclusionary allegations afford plaintiff no basis in fact upon which to complain. Zamos v. U.S. Smelting, Ref. & Mining Co., 206 F.2d 171 (C.A. 10, 1953); Wright & Miller, Federal Practice and Procedure: Civil Sec. 2711. The execution of Form 4 is not an admission. See Marquette Cement Manufacturing Co. v. Andreas, 239 F.Supp. 962 (S.D. N.Y., 1965); cf. Chemical Fund, Inc. v. Xerox Corporation, 377 F.2d 107 (C.A. 2, 1967).

While the Courts look through the form of an option to the economic realities, Abrams v. Occidental Petroleum Corporation, 450 F.2d 157 (C.A. 2, 1971), the facts do not give rise to any inferences positing in truth and fact a purchase earlier than

October 16. Nor is there as a practical matter the significant factor of whether Bates could have reaped a speculative profit as between an exercise date of Friday, October 13 and Monday, October 16, Newmark v. RKO General, Inc., 425 F.2d 348 (C.A. 2, 1970), cert. denied, 400 U.S. 854 (1970). What a sale, exercise or purchase, or contract is construed to mean and encompass is a matter of federal law, and whether a purchase has occurred requires a construction of that term in order to effectuate 16(b)'s prophylactic purpose of preventing speculation, and not a construction solely according to contract or commercial law. The rationale is that passage of title does not control, nor does the executed or executory option agreement, nor a date selected by parties as being the date of exercise. Bershad v. McDonough, 428 F.2d 693 (C.A. 7, 1970). Rather, the controlling factor in determining whether a purchase has occurred is the date when rights and liabilities become so irrevocable as to offer an opportunity for speculation. What acts constitute an exercise constitute a purchase, and what constitutes a purchase requires a construction of that statutory term in reference to irrevocable liability. There can be no irrevocable liability from proceeding in a plan to exercise an option and taking a collateral step therein, unless the end result is a sale and purchase made within a period of less than six months. The step which may give rise to liability is that step which constitutes a "purchase," a purchase occurring when the insider's rights become fixed and there is an "irrevocable liability to pay for the stock," Blau v. Ogsbury, 210 F.2d 426 (C.A. 2, 1954) cert. denied 352 U.S. 831 (1956); Stella v. Graham-Paige Motors Corp., 232 F.2d 299 (C.A. 2, 1956).

Plaintiff Morales' second contention is that, as a matter of law, by virtue of construction of the statute, even the October 16 date argued for by defendant as the exercise date is within any period of less than six months. The Court finds the method of computation enunciated in Stella v. Graham-Paige Motors

Corp., supra, to be persuasive and dispositive. A "period of less than six months" is, since the law does not take account of fractions of days, a period commencing at 0001 hours on one day and ending at midnight on the day two days prior to the corresponding date in the sixth succeeding month; this formula takes account of "within" by excluding one day and "less than" by excluding an additional one day, Jennings & Marsh, Securities Regulations Cs, 3d edit. 1972. Hence a sale on April 17 would have to be followed by a purchase on October 15 for liability to ensue. Plaintiff's argument, by analogy to filing dates wherein the first day is excluded from the computation, does not constitute authority upon which to render judgment, nor is it persuasive reasoning since filing dates are particularly within the domain of the legal profession whereas stock purchase dates have significance to a large segment of the public.

IT IS, THEREFORE, THE JUDGMENT OF THE COURT that Motion for Summary Judgment of defendant, J. W. Bates, Sr., be granted and Judgment be entered herein in favor of defendants, at the cost of the plaintiff, and that plaintiff Morales' Motion for Summary Judgment be denied.

Dated this 13<sup>th</sup> day of March, 1975.

Ruther Robinson  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

KIN-ARK CORPORATION,  
a Delaware corporation,

Plaintiff,

vs.

W. M. (PAT) BOYLES, WALTER M. BOYLES,  
LARRY L. BOYLES, SANDRA J. BOYLES,  
C. HAROLD BROWN, SPROESSER WYNN,  
MARCUS GINSBERG, GEORGE F. CHRISTIE,  
ERNEST E. SANDERS, J. OLCOTT PHILLIPS,  
ROBERT D. MADDOX, ROBERT S. NEWKIRK,  
STANFORD HARRELL, ATWOOD McDONALD and  
FRED A. SANDERS,

Defendants.

No. 74-C-389 ✓

**E I L E D**  
MAR 28 1975  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OVERRULING IN PART  
DEFENDANTS' MOTIONS TO DISMISS  
SUSTAINING IN PART  
DEFENDANTS' MOTIONS TO DISMISS  
AND OVERRULING MOTION TO TRANSFER

The Plaintiff, Kin-Ark Corporation, has brought this action to recover interest due on a promissory note, monies due on an indemnity agreement, and debts incurred in a corporate reorganization scheme. In the First Cause of Action, the Complaint alleges that Defendant W. M. (Pat Boyles) executed a promissory note as security for money borrowed from Boyles Galvanizing Company, a Delaware Corporation, (hereinafter Boyles-Delaware). This note was signed at Tulsa, Oklahoma, on November 14, 1972, and assigned to the Plaintiff on the same day.

The Second Cause of Action alleges that the former shareholders of Boyles Galvanizing Inc., (hereinafter Boyles-Texas) had agreed to indemnify the Plaintiff for the payment of an income tax accrual determined against Boyles-Texas pursuant to a reorganization plan wherein Boyles-Delaware

acquired the assets of Boyles-Texas. The Plaintiff alleges that in the closing agreement dated September 30, 1969, the Defendant shareholders warranted that they would not dispose of Kin-Ark stock in excess of 25% of the Kin-Ark stock which they received in the asset-stock exchange. The Complaint alleges that the shareholders are jointly and severally liable for the tax accrual but that each shareholder is liable only to the extent of the value of the Kin-Ark stock held by each shareholder at the date of closing.

In the Third Cause of Action, the Plaintiff alleges that W. M. (Pat) Boyles, Walter M. Boyles and Larry L. Boyles are jointly and severally liable to the Plaintiff for interest assessed against the Plaintiff as a result of the reorganization of Boyles-Texas into Boyles-Delaware.

#### MOTION TO DISMISS NAMED DEFENDANTS

All of the Defendants have filed various Motions to Dismiss and a Motion to Transfer. In the interest of convenience and ease of disposition, the Court first considers the Motion of Defendants C. Harold Brown, Sproesser Wynn, Marcus Ginsberg, George F. Christie, Ernest E. Sanders, J. Olcott Phillips, Robert D. Maddox, Robert S. Newkirk, Stanford Harrell, Atwood McDonald and Fred A. Sanders to Dismiss on the grounds that the Court lacks jurisdiction of the subject matter. These Defendants assert that the total amount in controversy as to each of these Defendants is less than the \$10,000.00 jurisdictional amount required by 28 U.S.C., §1332. In support of this Motion, these Defendants have attached a copy of the Stock Certificate and a copy of the Stock Assignment.

While the Complaint alleges that these Defendants are jointly and severally liable for the tax accrual assumed by the Plaintiff in the Reorganization Agreement, the Complaint

also alleges that each of these Defendants is liable for the tax accrual assumption only to the extent of the value of each shareholder's Kin-Ark stock at the date of the closing of the reorganization plan. These Defendants by means of their brief argue that the interests of multiple parties may be aggregated to achieve the jurisdiction amount only when the interests are "joint and common." Snyder v. Harris, 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed 2d 319 (1969). Since the claim against these Defendants is several, the jurisdictional amount must be exceeded as to each Defendant. Aggregation cannot be employed to achieve the jurisdictional amount. Aetna Ins. Co. v. Chicago, Rock Island & Pacific R. Co., 229 F. 2d 584 (10th Cir. 1956).

These Defendants argue that aggregation principles applied to pendant party jurisdiction are not applicable in this case because this is an attempt to join parties against whom only a claim arising under state law can be maintained and said claim is for less than the jurisdictional amount. As authority these Defendants refer to the cases of United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966); Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969) and Barrow v. Faulkner, 327 F. Supp. 1190 (N.D. Okla. 1971).

The Plaintiff appears to agree with these contentions and authorities. On page nine of the Brief in Response to Brief of Defendants In Reference to Defendants' Motions to Dismiss and Motion to Transfer the Plaintiff states that

"(T)he Defendant's Proposition VI is correct in reference to the second cause of action because the jurisdictional amount of \$10,000.00 is not present as to the following defendants: C. Harold Brown, Sproesser Wynn, Marcus Ginsberg, George F. Christie, Ernest E. Sanders, J. Olcott Phillips, Robert D. Maddox, Robert S. Newkirk, Stanford Harrell, Atwood McDonald and Fred Sanders."

It is the finding of the Court that by agreement of the parties the above named Defendants should be and are hereby dismissed from this action.

MOTION TO DISMISS SECOND CAUSE OF ACTION  
AS TO DEFENDANT SANDRA J. BOYLES

The Court next considers the Motion of Defendant Sandra J. Boyles to Dismiss Second Cause of Action on the ground that the Court lacks jurisdiction over the subject matter because the amount in controversy does not exceed \$10,000.00. The Plaintiff alleges that the tax accrual payable by Boyles-Texas through the date of September 30, 1974 with interest was determined to be \$52,084.00. Of said amount due the Complaint alleges that \$15,000.00 was assumed by the Plaintiff leaving a balance due from the shareholders of \$37,084.00. A question of fact remains as to the amount for which the Defendant Sandra J. Boyles has agreed to indemnify the Plaintiff for debts, obligations, contracts duties and liabilities of Boyles-Texas under Article I, Section 1 of the Indemnity Agreement. Despite the admitted contract exclusion of \$25,000.00 and the offset reduction of \$15,000 on the tax accrual the Plaintiff asserts that the total amount involved is \$37,016.00 and that the Defendant Sandra J. Boyles may be found liable to the extent of the value of the Kin-Ark stock held by her at the date of closing.

Where the amount in controversy may exceed the jurisdictional amount the Court has jurisdiction under 28 U.S.C., §1332. Craig v. Champlin Petroleum Co., 421 F.2d 236 (10th Cir. 1970). The Court, therefore, finds that the Motion to Dismiss Sandra J. Boyles for lack of jurisdiction over the subject matter is overruled with leave to renew the motion at Pre-Trial.

MOTION TO DISMISS  
FOR LACK OF PERSONAL JURISDICTION  
OVER THE REMAINING DEFENDANTS

The Court next considers the Motion of the Defendants W. M. (Pat) Boyles, Walter M. Boyles, Larry L. Boyles and Sandra J. Boyles to Dismiss on the grounds that these Defendants are citizens and residents of the State of Texas and are not subject to service of process in the Northern District of Oklahoma. These Defendants contend that 12 Okla. Stat. §§ 187,<sup>1/</sup> and 12 Okla. Stat. 1701.01 et seq. (Supp. 1974)<sup>2/</sup> require that minimum contacts be shown between them and the State of Oklahoma and that the allegations in the Complaint which assert that the Defendants entered into certain agreements in Tulsa, Oklahoma, on September 30, 1969, and that Defendant W. M. (Pat) Boyles executed a note in Tulsa, Oklahoma, on November 14, 1972, are insufficient to establish minimum contacts to form the basis for asserting personal jurisdiction over these Defendants.

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1/ §187 reads in pertinent part:

"In personam jurisdiction over certain nonresidents . . . Service of process . . . Venue.

(a) Any person, firm or corporation other than a foreign insurer licensed to do business in the State of Oklahoma whether or not such party is a citizen or resident of this State and who does, or has done, any of the acts hereinafter enumerated, whether in person or through another, submits himself, or shall have submitted himself, and if an individual his personal representative, to the jurisdiction of the Courts of this State as to any cause of action arising, or which shall have arisen, from the doings of any of said acts:

- (1) The transaction of any business within this State;
- (2) The commission of any act within this State."

2/ §1701.03 Basis of jurisdiction

"(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's:

- (1) transacting any business in this State;
- (2) contracting to supply services or things in this State."

A finding of contacts sufficient to grant the State of Oklahoma jurisdiction over these Defendants is tantamount to a finding of jurisdiction in this Court. That a State may exercise jurisdiction over non-residents when a non-resident has established minimum contacts with the forum state is a well established principle of law.

The Court must look to all of the circumstances surrounding each case to determine if such minimum contacts have been established. International Shoe Co. v. State of Washington, 326 U.S. 310 (1945). The State has an interest in providing redress for its residents and may assert jurisdiction within the traditional notions of fair play and substantial justice. McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

In the case before the Court the record shows the Defendant W. M. (Pat) Boyles has had numerous contacts with the State of Oklahoma while acting individually, as the representative of other stockholders of Boyles-Texas including his two sons and wife, and as the chief operating officer of Boyles-Texas. The affidavit of G. Douglas Fox, Counsel in the negotiations and preparation of the documents relating to the reorganization of Boyles-Texas into Boyles-Delaware, states that W. M. (Pat) Boyles signed the agreement and plan of reorganization in Tulsa, Oklahoma, in August of 1969; that W. M. (Pat) Boyles signed the Closing Memorandum in Tulsa on September 30, 1969, after making other trips to Tulsa, Oklahoma, to finalize the agreement; that during these transactions W. M. (Pat) Boyles was acting as the agent and representative of the stockholders. The affiant also states that W. M. (Pat) Boyles was personally present in Oklahoma on November 14, 1972, to sign the Promissory Note (Exhibit B of the Complaint) and Agreement (Exhibit C) while also acting as a corporate director of Boyles-Delaware and Kin-Ark. The affiant states that the Defendants W. M. (Pat) Boyles, Walter M. Boyles and Larry L.

Boyles have come to Oklahoma on several occasions as shareholders of Kin-Ark and directors of Boyles-Delaware to attend meetings and conduct business related to the reorganization plan.

Exhibit I of the Complaint bears the signatures of W. M. (Pat) Boyles, Walter M. Boyles and Larry L. Boyles and was executed in Oklahoma.

It is clear from the affidavit of G. Douglas Fox in conjunction with the Exhibits attached to the Complaint that W. M. (Pat) Boyles has engaged in sufficient contacts with the State of Oklahoma to satisfy the "transaction of any business" clause of 12 Okla. Stat. §187(a)(1). Marathon Battery Co. V. Kilpatrick, 418 P.2d 900 (Okla. 1965). The Plaintiff maintains its principal place of business in Tulsa, Oklahoma. Where questions of jurisdiction arise the Court may consider the interest "that a state has in providing redress in its own courts against persons who inflict injuries upon, or otherwise incur obligations to, those within the ambit of the state's legitimate protective policy,..." Simms v. Hobbs, 411 P.2d 503 (Okla. 1966). The State of Oklahoma has a legitimate interest in providing its resident corporations with access to its courts for the purpose of enforcing obligations which were entered into within the State of Oklahoma. In Crescent v. Martin, 443 P.2d 111 (Okla. 1968), the Oklahoma Supreme Court found that the defendant corporation did not transact business in Oklahoma sufficient to satisfy the "minimum contacts" requirement and thus grant jurisdiction to the Oklahoma courts. The facts of Martin are quite different from the instant case. Where in Martin an Oklahoma resident had entered into an employment contract with a foreign corporation which was neither doing business nor licensed to do business in Oklahoma the Defendant W. M. (Pat) Boyles has come to Tulsa, Oklahoma, on numerous occasions to negotiate a contract of reorganization which was of benefit to both himself and to the stockholders of Boyles-Texas.

The Defendants Walter M. Boyles and Larry L. Boyles have engaged in similar business transactions with the State of Oklahoma either through personal contacts or by means of their agent W. M. (Pat) Boyles. They have actively participated in the transfer of assets and have, therefore, subjected themselves to the jurisdiction of the Oklahoma Courts. Vacu-Maid, Inc., v. Covington, O.B.A. Jr. Vol. 45, No. 18, page 1144. (Okla. Ct. App., May 4, 1974); Yankee Metal Products Co. v. District Court of Oklahoma County, 528 P.2d 311 (Okla. 1974).

In regard to the Defendant Sandra J. Boyles, 12 Okla. Stat. §1701.03 empowers the courts to exercise jurisdiction "over a person who acts directly or by an agent" when such person is transacting any business in the State of Oklahoma. The affidavit and exhibits mentioned herein clearly show that W. M. (Pat) Boyles was acting as agent for all of the stockholders when he transacted the business related to the reorganization of Boyles-Texas. By designating W. M. (Pat) Boyles as her agent Sandra J. Boyles has engaged in minimum contacts with the State of Oklahoma sufficient to subject her to the jurisdiction of its courts.

The Court finds that the traditional notions of fair play and substantial justice as required by due process will not be violated by exercising jurisdiction over the Defendants W. M. (Pat) Boyles, Walter M. Boyles, Larry L. Boyles and Sandra J. Boyles and therefore the Motion to Dismiss these Defendants should be overruled.

#### MOTION TO DISMISS FOR FAILURE TO JOIN AN INDISPENSABLE PARTY

The Defendants have moved to dismiss the Second Cause of Action for failure to join an indispensable party. This Motion asserts that Edward E. Tomlins, Jr., is a citizen of the State of Oklahoma and therefore his joinder would deprive the Court of jurisdiction. The affidavit attached in support of the Motion states that Edward E. Tomlins, Jr., is a shareholder of

Boyles Galvanizing, Inc., a Texas Corporation and that he was a signator of the Indemnity Agreement. The Indemnity Agreement in Article IV, Section 4, states that "the obligations of Texas and the undersigned Stockholders shall be joint and several..." (Exhibit F of Plaintiff's Complaint, page 5) Where the obligation is joint and several the Plaintiff may bring his action against any or all of the obligors. 12 Okla. Stat. § 234 (1951); Thompson v. Grider Implement Co., 36 Okla. 165, 128 P.266 (1912); Prentice v. First National Bank, 101 Okla. 232, 224 P. 963 (1924).

Here the shareholders stand in the position of obligors under the indemnity agreement. 3A J. Moore, Federal Practice, ¶19.10 (2nd ed. 1974); Jett v. Phillips & Associates, 439 F.2d 987 (10th Cir. 1971). The Court finds that Edward E. Tomlins, Jr., is not an indispensable party and therefore the Motion to Dismiss for failure to join an indispensable party should be and is hereby overruled.

#### MOTION TO DISMISS FIRST CAUSE OF ACTION FOR LACK OF JURISDICTION

The Court next considers the Motion to Dismiss the First Cause of Action for lack of jurisdiction of subject matter on the ground that the Plaintiff is a party which has been improperly or collusively created to invoke this Court's jurisdiction. The affidavit of G. Douglas Fox states that the transfer of the Promissory Note from Boyles-Delaware to Kin-Ark for valuable consideration was done with the knowledge and consent of the Defendant W. M. (Pat) Boyles for the business purposes of Boyles-Delaware and Kin-Ark. There is no basis in the record to support a claim that the Plaintiff was improperly or collusively created for the purpose of creating jurisdiction in this Court nor does the record show any support for the allegations that this transfer was effected for reasons other than the business purposes of the corporations.

The assignment of the obligation makes the Plaintiff the

proper party to bring this action in federal court. Bradbury v. Dennis, 310 F.2d 73 (10th Cir. 1962) 28 U.S.C. 1359. It is the finding of the Court that under the record the assignment was for legitimate business purposes supported by adequate consideration and that the Motion to Dismiss for lack of jurisdiction on the grounds that the Plaintiff was improperly or collusively created should be and is hereby overruled.

#### MOTION TO DISMISS FOR FAILURE TO JOIN INDISPENSABLE PARTY

Next the Court considers the Motion to Dismiss for failure to join Boyles-Delaware as an indispensable party. The Defendants argue that the indemnity agreement sets out both the Plaintiff and Boyles-Delaware as obligees for debts incurred in the reorganization and, therefore, that all joint obligees are indispensable parties. The Complaint alleges that the Plaintiff paid the tax accrual and is thus entitled to indemnification. Since the Plaintiff alleges that it has paid the amount sought by its cause of action no loss has been suffered by Boyles-Delaware. Until such loss occurred, Boyles-Delaware could not seek indemnification from these Defendants. Rock Island & Pac. Ry. Co. v. Davila, 489 P.2d 760 (Okla. 1971); Beights v. W. R. Grace & Co., 62 F.R.D. 546 (W.D. Okla. 1974); 15 Okla. Stat. §427 (1)(2). The Court finds that Boyles-Delaware is not an indispensable party for the reason that it has suffered no loss in this Cause of Action. The Motion to Dismiss for failure to join an indispensable, Boyles-Delaware, is overruled.

#### MOTION TO TRANSFER

The Court next considers the Defendant's Motion to Transfer the above-entitled action from this Court to the District Court for the Northern District of Texas, Ft. Worth Division, on the ground that the Defendants live in Texas and that the Plaintiff could better finance the expense and inconvenience of this litigation.

This action has been properly brought in the District Court for the Northern District of Oklahoma. The Plaintiff maintains its principal place of business in Tulsa, Oklahoma. The contracts involved in this litigation were signed in Tulsa, Oklahoma, and all of the witnesses which will be called by the Plaintiff reside in Tulsa, Oklahoma. To transfer this case to the Northern District of Texas would merely shift the inconvenience of one party to the other. The Plaintiff's choice of the forum should not be disturbed where the balance of inconvenience is not strongly in favor of the moving party. Houston Fearless Corp. v. Teter, 318 F. 2d 822 (10th Cir. 1963). The Defendants have failed to show that the inconvenience to them greatly outweighs the inconvenience to the Plaintiff. The Court finds that this action should not be transferred on the basis of forum non conveniens and therefore the Motion to Transfer should be and is hereby overruled.

The Court has carefully considered the arguments submitted by the parties on all of the Motions presented. All parties have been provided with ample opportunity to brief and present arguments to the Court. Having perused the entire file and being fully advised in the premises, for the reasons stated herein,

IT IS HEREBY ORDERED ADJUDGED AND DECREED that the Motion of Defendants C. Harold Brown, Sproesser Wynn, Marcus Ginsberg, George F. Christie, Ernest E. Sanders, J. Olcott Phillips, Robert D. Maddox, Robert S. Newkirk, Stanford Harrell, Atwood McDonald and Fred A. Sanders to Dismiss for lack of jurisdiction of the subject matter is sustained for the reason that by agreement of the parties the jurisdictional amount required by 28 U.S.C. §1332 has not been established.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the Motion to Dismiss Sandra J. Boyles for lack of jurisdiction of the subject matter is overruled for the reason that the liability of this Defendant may be found to exceed the jurisdictional requirement of 28 U.S.C. §1332.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the Motion of Defendants W. M. (Pat) Boyles, Walter M. Boyles, Larry L. Boyles and Sandra J. Boyles to Dismiss for lack of personal jurisdiction is overruled for the reason that these Defendants have established minimum contacts with the State of Oklahoma sufficient to confer jurisdiction in this Court.

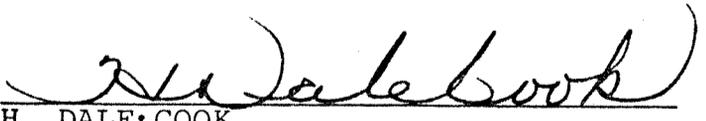
IT IS FURTHER ORDERED ADJUDGED AND DECREED that the Motion to Dismiss for failure to join an indispensable party in the name of Edward E. Tomlins, Jr., is overruled for the reason that said individual is not an indispensable party.

~~IT IS FURTHER ORDERED ADJUDGED AND DECREED~~ that the Motion to Dismiss the First Cause of Action for lack of jurisdiction of the subject matter is overruled for the reason that the Plaintiff has shown that the transfer was for a legitimate business purpose and for valuable consideration.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the Motion to Dismiss for failure to join an indispensable party in the name of Boyles-Delaware is overruled for the reason that said Corporation is not an indispensable party.

IT IS FINALLY ORDERED ADJUDGED AND DECREED that the Motion to Transfer is overruled for the reason that this Complaint has been properly brought to this Court and the inconvenience of the Defendants does not greatly outweigh that of the Plaintiff. The Defendants are hereby granted ten days from the date of this Order to file an answer to the Complaint.

It is so Ordered this 28<sup>th</sup> day of March, 1975.

  
H. DALE COOK  
United States District Judge

MAR 28 1975

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

SOLOMON D. WALLACE,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

NO. 74-C-453

Jack C. Silver, Clerk  
U. S. DISTRICT COURTO R D E R

The Court has for consideration a petition for writ of habeas corpus pursuant to the provisions of 28 U.S.C. § 2254 filed pro se, in forma pauperis by a State prisoner confined in the Oklahoma State Penitentiary at McAlester, Oklahoma. Petitioner attacks the validity of the judgment and sentence imposed on October 28, 1970, in Case No. CRF-70-708 in the District Court in and for Tulsa County, Oklahoma. After a plea of not guilty, the petitioner was tried for murder and found guilty by a jury of the crime of first degree manslaughter and sentenced to a term of imprisonment of not less than 30 years nor more than 90 years.

On direct appeal to the Court of Criminal Appeals of the State of Oklahoma, the judgment and sentence was affirmed. Wallace v. State, Okl. Cr., 492 P.2d 332 (1972). His application for Post-Conviction Relief was denied by the District Court of Tulsa County on August 8, 1974, and said denial affirmed, Case No. PC-74-640, by the Oklahoma Court of Criminal Appeals on October 7, 1974. Petitioner has exhausted the remedies available to him in the Courts of the State of Oklahoma.

Petitioner contends that the judgment and sentence should be vacated for the following reasons:

1. The trial Court erred in overruling petitioner's motion to suppress the testimony of Betty Joyce Bruner whose testimony should have been excluded under spousal privilege as she was the commonlaw wife of petitioner.
2. Petitioner was denied effective assistance of counsel by way of the trial Court's limiting defense cross-examination.
3. The Court erred in giving instruction on the degree of the crime.

Petitioner's first allegation is not sustained by the record and it is without merit. This matter was raised on motion to suppress to the trial Court, an evidentiary hearing was held outside the jury's presence,

and the trial Judge overruled the motion and held that the prosecution witness, Betty Joyce Bruner, and Defendant were not commonlaw man and wife under Oklahoma law and she was called as a prosecution witness and testified at trial. Said ruling was affirmed on appeal. Upon review of the State law and transcripts of the proceedings, the Court finds that there was factual and legal support for such State adjudication and the ruling was not so totally devoid of evidentiary support as to deny due process of law. Crowe v. Eyman, 459 F.2d 24 (9th Cir. 1972) cert. den. 409 U. S. 867, reh. den. 409 U. S. 1029; Lewis v. Cardwell, 354 F.Supp. 26 (D.C. E.D. Ohio 1972) affirmed 476 F.2d 467 (6th Cir. 1972).

Petitioner's second allegation is without merit and not sustained by the record. From careful review of the State trial transcript, the Court finds that the discretionary rulings of the trial Court did not deprive Petitioner of a fair trial. The trial was not a farce or mockery of justice, the petitioner's representation by counsel was not perfunctory, in bad faith, a sham, a pretense, or lacking in adequate opportunity for conference and preparation, and the trial in no way shocks the conscience of the Court. Ellis v. State of Oklahoma, 430 F.2d 1352 (10th Cir. 1970) cert. den. 401 U. S. 1010; Johnson v. United States, 485 F.2d 240 (10th Cir. 1973).

The third allegation of Petitioner is also without merit. This Court's review of the trial record shows that the evidence was sufficient to warrant the instruction on the crime of murder, and there was no denial to Petitioner of a fair trial in a constitutional sense. Linebarger v. State of Oklahoma, 404 F.2d 1092 (10th Cir. 1968) cert. den. 394 U. S. 938; Young v. State of Alabama, 443 F.2d 854 (5th Cir. 1971) cert. den. 405 U. S. 976.

The Court finds that there is no necessity for an evidentiary hearing. The State transcripts and record conclusively show that Petitioner is not entitled to the requested relief and his petition should be denied.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Solomon D. Wallace be and it is hereby denied and the cause dismissed.

Dated this 28th day of March, 1975, at Tulsa, Oklahoma.

  
CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA



IN THE UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ELMER GENE MANUEL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

70-CR-40  
Civil No. 74-C-354

**FILED**

MAR 27 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

MEMORANDUM AND ORDER

Petitioner has filed with the court a motion to vacate, set aside or correct a sentence brought pursuant to 28 U.S.C. §2255. The Court previously issued an Order to Show Cause requiring response to petitioner's allegation that he had been improperly denied presentence jail credit. Respondent has now filed its answer and return and petitioner has submitted his traverse, but does not contest the factual allegations in respondent's answer and return. The action is therefore ripe for disposition. After a review of the pleadings and record, the Court makes the following findings and orders.

Petitioner is presently incarcerated at the United States Penitentiary at Leavenworth, Kansas, where he is serving a sentence imposed by this Court. He contends that respondent has refused to credit him with approximately 165 days of presentence custody, which occurred in connection with the offense for which he was sentenced by this Court.

At the time the federal indictment was returned against petitioner, in February, 1970, petitioner was serving a state sentence at the Oklahoma State Penitentiary. His appearance in the United States District Court for the District of

Oklahoma was obtained by a writ of habeas corpus ad prosequendum. He was received by the federal authorities on March 13, 1970, and was held by the United States Marshal until after his federal trial and conviction. On August 24, 1970, he was returned to the Oklahoma State Penitentiary.

At the time of sentencing, it was the Court's understanding that the defendant would not receive credit on his state sentence for the period he was held by the United States Marshal for purposes of the federal trial. For that reason, the order of Judgment and Commitment stated:

"Defendant shall also be given credit on his federal sentence for any time he has been in federal custody awaiting trial, other than that at the Oklahoma State Penitentiary at McAlester."

The Court is now informed that petitioner did receive credit on his state sentence for the time he was held in federal custody. When a defendant who is serving a state sentence is released by the state to federal authorities for purposes of a federal trial and the defendant is convicted of the federal charges, the defendant's federal sentence does not begin to run until such time as the prisoner is first received at the federal penal institution for service of his federal sentence. See *McIntosh v. Looney*, 249 F.2d 62 (10th Cir. 1957); *Howard v. United States*, 420 F.2d 478 (5th Cir. 1970). Petitioner is therefore not entitled to such credit on his federal sentence.

Although the Judgment and Commitment stated that petitioner was to receive credit for jail time spent awaiting his federal trial, it also provides that his sentence was to start at the expiration of his state sentence. This apparent inconsistency is due to the misunderstanding with regard to petitioner's right to receive credit on his state sentence for the time he was held by federal authorities. The Court did not intend that petitioner's federal sentence run concurrently with

his state sentence, or with any part of his state sentence.

In order to reflect the Court's intention at the time of sentencing, and in order to eliminate the inconsistency and ambiguity, the Judgment and Commitment Order must be corrected.

IT IS THEREFORE ORDERED that the motion to vacate, set aside or correct the sentence be, and the same is hereby, denied.

IT IS FURTHER ORDERED that the Judgment and Commitment Order be corrected by deleting those portions of the Order which indicate that petitioner is to receive credit on his federal sentence for the period of time he was held by the United States Marshal for purposes of his federal trial.

At Wichita, Kansas, this 25th day of March, 1975.

  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED  
MAR 27 1975  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

THOMAS H. FLEEGER, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 GENERAL INSURANCE COMPANY )  
 OF AMERICA, a corporation, )  
 )  
 Defendant. )

NO. 68-C-72 ✓

MEMORANDUM OPINION

This matter comes on for consideration of plaintiff's motion for partial summary judgment on the issue of liability and defendant's motion for summary judgment. The court has jurisdiction of this civil action based on the diversity of citizenship of the parties. 28 U.S.C.A. § 1332.

The plaintiff's claims against the defendant insurance company are grounded upon two separate theories:

(1) That the defendant attached and garnished the plaintiff's partial interest in a spendthrift trust located in Oklahoma contrary to the statutory exemption from the claims of creditors under the provisions of the Oklahoma Trust Act, 60 Okl. St. Ann. § 175.25; and

(2) That the defendant, being charged with notice of the acts of its agents, did wrongfully attach and garnish plaintiff's partial interest in a spendthrift trust in an amount in excess of any rightful claim that the insurance company had against the plaintiff.

This case arises from previous litigation between these two parties relating to losses incurred by the defendant on

construction and payment bonds it had written through its local agent for several Texas contractors. The plaintiff had executed indemnity agreements on each of these bonds. In actions brought in the United States District Court for the Northern District of Texas and in the Oklahoma District Court for Tulsa County, the insurance company sought to recover \$362,589.74 from Fleeger on the indemnity agreements he had signed. The suit was filed in the Oklahoma state court so that the insurance company could initiate garnishment proceedings against a trust fund of which Fleeger was one of the beneficiaries.

The spendthrift trust referred to is a testamentary trust of Fleeger's mother. Principal in the trust attributable to Fleeger as one of the beneficiaries was approximately \$300,000. On April 30, 1965, that being Fleeger's 40th birthday, one-third of the principal of the spendthrift trust attributable to Fleeger became distributable to him free of the trust.

The defendant insurance company filed its suit in the Oklahoma state court on April 27, 1965, and caused to be issued a temporary restraining order on that date against distributing principal of the trust to Fleeger. On May 11, 1965, the insurance company commenced garnishment proceedings and a summons was issued by the court clerk against the trustees.<sup>1</sup> While these proceedings were in progress,

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<sup>1</sup>The garnishment summons sought to tie up Fleeger's interest in the trust in the hands of the trustees "which had accrued to the said Thomas H. Fleeger or in which he is now entitled to an interest or to distribution, including but not limited to, annual income from the said trust accrued or owing to the said Thomas H. Fleeger in excess of \$5,000.00 per year, and a one-third (1/3) of the principal of the trust created for the said Thomas H. Fleeger which accrued to him or which he was entitled to demand upon attaining the age of 40 years."

on December 12, 1966, the case pending in the United States District Court in Texas was tried to a jury and upon answers to special interrogatories the court denied recovery to the insurance company on two of the indemnity contracts with Fleeger but awarded judgment on the third contract in the amount of \$50,596.61. Both Fleeger and the insurance company appealed this decision to the United States Court of Appeals for the Fifth Circuit.

During the pendency of this appeal, Fleeger filed a motion to dismiss the garnishment in the Oklahoma court. Following hearing on the matter this motion was denied on November 22, 1967. On February 6, 1968, the Fifth Circuit affirmed the judgment of the district court in all respects. Fleeger paid the judgment rendered against him together with costs in the total sum of \$54,363.74. Thereafter, by agreement of counsel, the garnishment was ordered discharged on April 4, 1968.

I.

The plaintiff's first claim is that the defendant has wrongfully garnished his interest in a spendthrift trust contrary to the Oklahoma Trust Act. The testamentary trust created by Fleeger's mother was unmistakably a spendthrift trust.<sup>2</sup> From the income of the trust Fleeger was to be paid at least \$6,000 per year; and, if the amount of annual income of the trust permitted, Fleeger was to be paid a total sum

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<sup>2</sup>Para. 8 of the will provided as follows:

Each beneficiary hereunder is hereby prohibited from anticipating, encumbering, assigning, or in any other manner alienating his or her interest in either principal or income, and is without power so to do; nor shall such interest be subject to his or her liabilities or obligations, nor to attachment, execution or other legal process, bankruptcy proceedings or claims of creditors or others.

not to exceed \$10,000 per year. Upon attaining the age of 40 years, Fleeger was to be paid one-third of the principal of the trust attributable to him.

60 Okl. Stat. Ann. § 175.25 in pertinent part provides as follows:

Any instrument creating a trust may provide by specific words that the interest of any beneficiary in the income of the trust shall not be subject to voluntary or involuntary alienation by such beneficiary. Subject to the following provisions of this section, a direction to this effect shall be valid and enforceable.

A. Notwithstanding a provision in the terms of a trust restraining the alienation of the interest of a beneficiary, such interest shall be entitled to be reached in the satisfaction of claims to the following extent:

. . .

2. . . . [A]ll income due or to accrue in the future to the beneficiary in excess of five thousand dollars (\$5,000.00) per annum based upon calendar year of the trust, shall be subject to garnishment by creditors of the beneficiary and shall be fully alienable by the beneficiary.

. . .

D. The right of any beneficiary of a trust to receive the principal of the trust or any part of it, presently or in the future, shall not be alienable and shall not be subject to the claims of his creditors.

Enacted in 1941, § 175.25 is similar to a provision in the Louisiana Trust Estates Act, 9 La. St. Ann § 1923 (now repealed), and is in part based on a model statute first suggested by Dean Griswold. Griswold, Spendthrift Trusts Under the New York Statutes, and Elsewhere — Including Insurance Proceeds § 565 (2 ed. 1947). Under § 175.25 spendthrift trusts are expressly authorized, but all income of the trust in excess of \$5,000 per year is made subject to the claims of creditors. Accordingly, defendant's garnishment of income of Fleeger's trust due or to accrue in the future, in excess of \$5,000 per year was permissible under subsection A 2.

The principle contention between the parties is over the garnishment of the amount of the trust principal that was to have been paid Fleeger on his 40th birthday. Subsection D read literally prohibits the garnishment of the principal of a spendthrift trust due to a beneficiary "presently or in the future." The garnishment of the principal followed Fleeger's 40th birthday and thus was an attempt to subject to the claims of the defendant principal presently due Fleeger. If the defendant had waited to attach the sum until the trustees had paid to Fleeger the principal due him, it would not have run afoul of subsection D. The defendant argues that a rule which subjects the principal to creditor's claims after it is paid to the beneficiary but not while it still remains in the hands of the trustee even though it is due and payable permits a beneficiary to create a spendthrift trust for his own benefit contrary to § 175.25 G. However, this is not the case on these facts because the terms of the trust required the trustee to pay the principal to Fleeger upon his 40th birthday; the principal could not remain in the hands of the trustees until the beneficiary demanded it. In any case, defendant's argument is in essence that the Oklahoma legislature could not have meant what it said when it enacted subsection D. As Dean Griswold points out the subsection is to be read literally:

The Oklahoma section . . . differs from the model statute in that it provides expressly that the right of a beneficiary to receive principal shall not be alienable nor subject to the claims of creditors.

Griswold, supra, § 214. See also Id., § 78.1. The section of his model act that Dean Griswold contrasts with subsection D reads as follows:

Sec. 4. The right of any beneficiary of a trust to receive the principal of the trust or any part of it, presently or in the future, shall be freely alienable and subject to the claims of his

creditors, notwithstanding any provision to the contrary in the terms of the trust.

Id., § 565. With Dean Griswold's model statute before them the Oklahoma legislature chose to enact a provision that had just the opposite effect. The court cannot now ignore that choice. Accordingly, the defendant insurance company did wrongfully garnish that portion of the principal due Fleeger on his 40th birthday for which the defendant is liable for actual damages.

The plaintiff's second claim is that the garnishment was in an amount in excess of any rightful claim the insurance company had against the plaintiff on the three indemnity agreements. This states a claim for actual damages. Beggs Oil Co. v. Deardorf, 97 Okl. 33, 222 P. 535, 536-37 (1924). The value of the property attached was approximately \$100,000. The insurance company's claim against Fleeger on the indemnity agreements was for \$362,589.74; however, the jury verdict resulted in a judgment of only \$50,596.61. Fleeger maintains that the insurance company is charged with notice of the acts of its agent, one Mayo, done within his authority in the transactions between Mayo and Fleeger. With notice of these facts the insurance company at the time of the garnishment should have known it did not have a claim against Fleeger in excess of \$50,596.61. The conduct of Mayo in his dealings with Fleeger were found by the jury upon special interrogatories of the United States District Court in Texas. These findings have collateral estoppel effect in this action. The jury's answers are set forth in the Fifth Circuit's opinion and are quoted in the margin.<sup>3</sup> With these special

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<sup>3</sup>First, the jury found separately with reference to Wooten, Masterson and Lanham, that at or prior to the time of the signing of each indemnity agreement, Mayo

findings of the jury, which must be taken as facts binding on the parties in this cause, it is concluded that the insurance company is liable to the plaintiff for actual damages which were a result of the excessive garnishment.

As to both of plaintiff's theories of recovery he seeks punitive damages in addition to actual damages. Where punitive damages are sought the plaintiff must prove both malice and want of probable cause. Stumpf v. Pederson, 180 Okl. 408, 70 P.2d 101 (1937); Jones Leather Co. v. Woody, 67 Okl. 184, 169 P. 878 (1917); Realiable Mut. Hail Ins. Co. v. Rodgers, 61 Okl. 226, 160 P. 914 (1916). Lack of probable cause and malice remain as questions of fact to be determined at trial. Again, however, the collateral estoppel effect of the jury's answers to the special interrogatories makes them probative as to both of these two elements.

## II.

The defendant insurance company raises three defenses which merit some discussion. First, the defendant maintains

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represented to Fleeger that each contractor has been checked and found to be competent; that such representation was false; that Fleeger relied on such representation; and that such representation operated as a material inducement to Fleeger; that in making such representations, Mayo was acting in the course of his authority from the insurance company. Secondly, Fleeger alleged and secured jury findings that as to each of these three contractors, General Insurance received notice of defaults by such contractors; that notwithstanding such notice, General Insurance continued thereafter to issue bonds for such contractors; that in so doing General Insurance Company increased the risk or prejudiced the rights of Fleeger under the indemnity agreements, and that in so doing, General Insurance did not act in good faith.

General Ins. Co. of Am. v. Fleeger, 389 F.2d 159, 161 (5th Cir. 1968) (footnote omitted). The court's special interrogatories and the jury's responses are fully set out in the record on appeal, pages 426-38.

that the plaintiff fails to state a claim for punitive damages in an action for wrongful garnishment where it received judgment in the amount of \$50,596.61 in the original action. This argument has already been answered in Reliable Mut. Hail Ins. Co. v. Rogers, supra, 160 P. at 915 (quoting McLaughlin v. Davis, 14 Kan. 168): "'A party may have a just cause of action, but no right to an attachment; nor can he justify a wrongful attachment by a valid action.'" Thus a garnishment of property exempt by statute from the claims of creditors can be malicious and without probable cause even though one of the underlying claims is valid.

It would not be just to hold that the defendants must be absolved from liability simply because a small part of their suit might end in judgment for them, when the far larger part, the equivalent of a separate claim, has been decided against them, and where there is reason to believe that his separate claim was prosecuted with malice and without probable cause.

March v. Cacioppo, 37 Ill. App. 2d 235, 185 N.E. 2d 397, 402(1962). Moreover, this defense has no bearing on plaintiff's second claim which is for garnishment in excess of the \$50,596.61 judgment, and not the fact of garnishment.

The defendant's second defense is that Fleeger's actual damages are based on speculation. The thrust of this argument is that Fleeger cannot prove that the trust principal would have produced any more income in his possession than it did in the hands of the trustees. But this is an issue for the jury at trial. Furthermore, the defendant overlooks that there may be other elements to plaintiff's actual damages claim, for example, attorney's fees in defending against the wrongful or excessive garnishment action in the Oklahoma state court can be recovered. Stumpf v. Pederson, supra; Leasure v. Hughes, 72 Okl. 75, 178 P. 696 (1919).

Finally, the defendant maintains that the plaintiff cannot show malice or want of probable cause because when it caused the garnishment summons to be issued it was acting upon the advice of legal counsel. This fact is admissible on the issues of malice and probable cause including whether the defendant chose a competent adviser and in good faith fully apprised him of all the facts and circumstances which were in the insurance company's knowledge or notice, but it is not a complete defense warranting summary judgment. Stumpf v. Pederson, supra; First Nat. Bank of Taloga v. Salisbury, 146 Okl. 6, 292 P. 1113 (1930); Jones Leather Co. v. Woody, supra.

III.

An order will be entered granting the plaintiff's motion for summary judgment on the issue of liability and denying defendant's motion for summary judgment. This cause shall come on for trial before a jury on the issues of actual and exemplary damages in accordance with the views expressed herein.



Howard Bratton  
U. S. District Judge for the  
District of New Mexico assigned  
to the Northern District of  
Oklahoma

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED.

MAR 27 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

THOMAS H. FLEEGER, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 GENERAL INSURANCE COMPANY )  
 OF AMERICA, a corporation, )  
 )  
 Defendant. )

NO. 68-C-72 ✓

ORDER

This matter comes on for consideration of plaintiff's motion for partial summary judgment on the issue of liability and the defendant's motion for summary judgment, and the court concluding that the plaintiff's motion is well taken and that the defendant's motion should be denied for the reasons set forth in the court's memorandum opinion filed this same date; Now, Therefore,

IT IS BY THE COURT ORDERED that the plaintiff's motion for partial summary judgment on the issue of liability is granted and the defendant's motion for summary judgment is denied. This cause shall come on for trial before a jury on the issues of actual and exemplary damages in accordance with the views expressed in the court's memorandum opinion.

  
Howard Bratton, U. S. District Judge  
for the District of New Mexico  
Assigned to the Northern District of  
Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF OKLAHOMA

NATIONAL BANK OF TULSA, a )  
National Banking Association, )  
Plaintiff, )  
vs. )  
KINCAID INDUSTRIES, INC., )  
a Pennsylvania corporation, et al. )  
Defendants )  
and )  
KINCAID INDUSTRIES, INC., et al. )  
Defendants- )  
Third Party Plaintiffs) )  
and )  
THOMAS HELTON, LORNA F. HELTON, )  
et al. )  
Third Party Defendants) )  
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**FILED**

MAR 27 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

Case No. 74-C-325 ✓

ORDER OF DISMISSAL

The Court having examined and reviewed the Stipulation for Dismissal filed in this cause, finds that said stipulation should be approved.

IT IS THEREFORE ORDERED that pursuant to said stipulation the complaint <sup>and cause of action</sup> of the plaintiff, National Bank of Tulsa, is hereby dismissed against the defendants Kincaid Industries, Inc., and Bollinger Corporation, without prejudice to the filing of another action.

IT IS FURTHER ORDERED that the complaint <sup>and cause of action</sup> of plaintiff National Bank of Tulsa be and the same is hereby dismissed with prejudice as against the individual defendants Morton J. Greene, Thomas R. Allen, Jr. and Anne S. Greene.

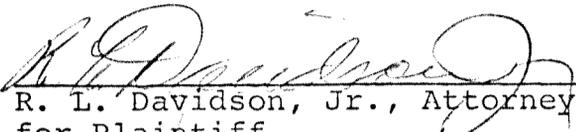
IT IS FURTHER ORDERED that the Third Party Complaint <sup>and cause of action</sup> of the defendants Kincaid Industries, Inc. Bollinger Corporation, Morton J. Greene, Anne S. Greene and Thomas R. Allen, Jr. be and the same is hereby dismissed with prejudice as to the Third Party Defendants F. E. Brady, Ronald L. Foshee and Virginia L. Foshee.

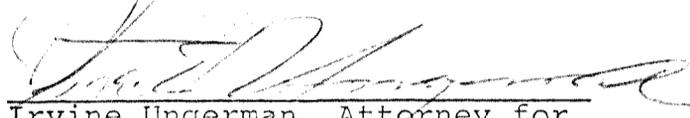
IT IS FURTHER ORDERED that the cross-complaint <sup>and cause of action</sup> of the Third Party Defendants F. E. Brady, Ronald L. Foshee and Virginia L. Foshee be and the same is hereby dismissed against third party plaintiffs, with prejudice.

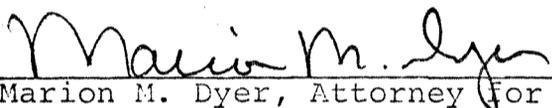
IT IS FURTHER ORDERED that each of the parties bear their own respective costs, including attorneys fees.

  
H. DALE COOK  
UNITED STATES DISTRICT JUDGE

APPROVED:

  
R. L. Davidson, Jr., Attorney  
for Plaintiff

  
Irvine Ungerman, Attorney for  
Defendants and Third  
Party Plaintiffs

  
Marion M. Dyer, Attorney for  
Third-Party Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**MAR 27 1975**

**Jack C. Silver, Clerk  
U. S. DISTRICT COURT**

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
UNIVERSAL LANGUAGE SERVICES, ) CIVIL ACTION NO. 75-C-63  
INC., )  
 )  
Defendant. )

DEFAULT JUDGMENT

NOW, on this 27<sup>th</sup> day of March, 1975, this matter coming on for consideration, the plaintiff, United States of America, appearing by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the defendant, Universal Language Services, Inc., appearing not, and it appearing that on March 8, 1973, the defendant, Universal Language Services, Inc., for a good and valuable consideration, made, executed, and delivered its certain Note to Guaranty National Bank, Tulsa, Oklahoma, which Note was transferred to the Small Business Administration, an Agency and Instrumentality of the United States Government, and

It further appearing that due and legal process of service of Summons and Complaint was made on the defendant, Universal Language Services, Inc., on February 25, 1975, requiring said defendant to answer the Complaint herein not more than 20 days after date of service of Summons and Complaint, and it appearing that said defendant has failed to file an answer or otherwise plead herein and default has been entered by the Clerk of this Court.

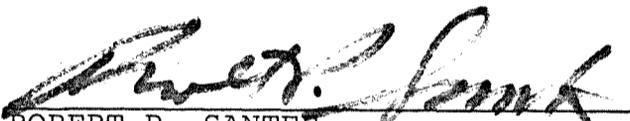
The Court being fully advised finds that the allegations and averments in the Complaint filed herein are true and correct and that there is due and owing to the plaintiff, United States of America, from the defendant, Universal Language Services, Inc., the sum of \$13,985.64, together with interest accrued thereon in

the sum of \$902.52 through November 12, 1974, and interest accruing thereafter at the rate of \$2.5251 per day, plus the cost of this action.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED THAT the plaintiff, United States of America, do have and recover from the defendant, Universal Language Services, Inc., a judgment in personam, in the amount of \$13,985.64, together with interest accrued thereon in the sum of \$902.52 through November 12, 1974, and interest accruing thereafter at the rate of \$2.5251 per day, plus the cost of this action.

  
UNITED STATES DISTRICT JUDGE

APPROVED:

  
ROBERT P. SANTEE  
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF OKLAHOMA

KENNEDY MOBILE HOMES, INC., )  
 )  
 Plaintiff, )  
 )  
 -vs- )  
 )  
 LANCER HOMES, INC., )  
 )  
 Defendant. )

No. 72-C-430

FILED

MAR 27 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

The parties hereto having compromised and settled the dispute  
which is the subject matter of this action and having jointly moved the  
Court for an order of dismissal with prejudice, it is therefore

ORDERED, by the Court, that the complaint and the within <sup>cause of</sup> action  
be, and the same is hereby dismissed with prejudice to the bringing of  
another action upon the same cause or causes of action sued upon herein.

Entered this 27 day of March, 1975.

  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

DAVID SNOW,

Plaintiff,

-vs-

YELLOW FREIGHT SYSTEM, INC.,  
An Indiana Corporation, INTER-  
NATIONAL BROTHERHOOD OF TEAMSTERS,  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS  
LOCAL 523, R. N. LANE, R. M. CLIFTON,  
CHARLES HARSHFIELD, JOE ALGOOD,  
HOWARD JONES and C. A. LUNSFORD,

Defendants.

Case No. 73-C-43

FILED

MAR 26 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL AS TO SEVERAL DEFENDANTS

Now on this 26<sup>th</sup> day of March, 1975, this matter came on for hearing before me, upon the application of Robert M. Butler and John M. Keefer, co-counsel of record for David Snow, the plaintiff herein, and the court, upon consideration thereof, finds that such application should be granted.

IT IS THEREFORE ORDERED that the following defendants be and they are hereby dismissed as parties to this action: International Brotherhood of Teamsters, International Brotherhood of Teamsters Local 523, R. B. Lane, R. M. Clifton, Charles Harshfield, Joe Algood, Howard Jones and O. A. Lunsford.

  
\_\_\_\_\_  
JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 26 1975

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 UNIVERSAL LANGUAGE SERVICES, )  
 INC., ROGELIO A. SALAZAR and )  
 MARGARET SALAZAR, his wife, )  
 )  
 Defendants. )

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

CIVIL ACTION NO. 75-C-63

NOTICE OF DISMISSAL

COMES NOW the Plaintiff, United States of America, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and hereby gives notice of dismissal of the Complaint filed herein on February 13, 1975, only as to defendants, Rogelio A. Salazar and Margaret Salazar, his wife.

Dated this 26th day of March, 1975.

UNITED STATES OF AMERICA

NATHAN G. GRAHAM  
United States Attorney



ROBERT P. SANTEE  
Assistant United States Attorney  
460 U. S. Courthouse  
Tulsa, Oklahoma 74103



IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Jack J. Spell be and it is hereby denied and the cause dismissed, without prejudice, for failure to exhaust adequate, effective, and available State remedies.

Dated this 26<sup>th</sup> day of March, 1975, at Tulsa, Oklahoma.

*Allen E. Barrow*

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CHIEF JUDGE, UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF  
OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 25 1975 *JS*

CHRYSLER CREDIT CORPORATION, )  
a corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
RALLY DODGE CO., a )  
corporation, )  
 )  
Defendant. )

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 74-C-168 ✓

ORDER CONFIRMING SALES AND  
GRANTING DEFICIENCY JUDGMENT

THIS action was instituted by verified Complaint of the plaintiff filed April 15, 1974, seeking an order from the Court to replevin and foreclose its lien on automobiles and equipment as specified in the Complaint and further reserving its right to seek a deficiency judgment against the defendant or any guarantors. The Court held a hearing in open Court on April 30, 1974, whereupon the Court found jurisdiction existed in this matter by reason of the diversity between the parties and that the claim in controversy exceeded \$10,000, exclusive of attorney fees and costs. The defendant appeared by counsel and admitted to the Court that it had no known defenses to the claims of plaintiff and knew of no reason why the order for delivery should not be granted forthwith. Therefore, the Court entered an order April 30, 1974, authorizing representatives of the plaintiff to foreclose liens on the items specified in exhibits attached to the order and pursuant thereto plaintiff posted a surety bond in the amount of \$100,000 approved by the Court.

On June 4, 1974, the plaintiff filed a verified Partial Return of Sale setting forth in particular, the date of sale, automobile make and model, buyer, balance due, and gain or loss

realized from each sale. Further, on September 16, 1974, the plaintiff filed a verified Final Return of Sale, again setting forth the details and particulars of each sale. The plaintiff also prayed that a reasonable attorney fee be taxed as costs of the case. In its Final Return of Sale the plaintiff prayed for a deficiency judgment and set forth its net principal loss in the amount of \$62,714 plus interest through June 30, 1974, in the amount of \$37,123 for a total due of \$99,837 plus interest accruing from that date until paid.

On December 10, 1974, the Court held a hearing on the confirmation of sales and plaintiff's application for deficiency judgment. Pursuant to authorization, the defendant subsequently filed a Response to the Returns of Sale setting forth primarily that the sales were not conducted in a reasonably commercial manner and that secondly, the plaintiff was not entitled to a deficiency judgment. The plaintiff replied to this Response on January 14, 1975, setting forth the reasonably commercial manner in which such sales were conducted and further that under Oklahoma law a party may seek replevin and a deficiency judgment in the same action. Pursuant to these hearings, pleadings and briefs filed, the Court does hereby find that the plaintiff's foreclosure actions were made pursuant to notice and hearing before the Court, that the sales were conducted in a reasonably commercial manner and were made for wholly adequate consideration, and that the plaintiff properly reserved its right to seek a deficiency judgment, which amount would not be known until after the foreclosure sales were conducted. Finally, the defendant objects on another ground that one buyer, Lynn Hickey Dodge of Oklahoma City, was owned substantially by the plaintiff. The plaintiff has met this allegation head-on by filing a Response attaching Affidavits thereto which specifically deny that the plaintiff owned any part of Lynn Hickey Dodge of Oklahoma City during the course of the

proceedings before this Court and the Affidavits further set forth the details and particulars which overcome this allegation.

WHEREFORE, the Court does hereby ORDER, ADJUDGE AND DECREE that the sales be and are hereby confirmed, that the Court does hereby grant judgment for the plaintiff and against the defendant in the amount of \$99,837 for the liquidated amount as of June 30, 1974, and grants interest to the plaintiff of 6% on the unpaid amount from June 30, 1974, to date of this Order of judgment and 10% thereafter. The Court further orders that the plaintiff is entitled to a reasonable attorney fee in the amount of \$10,000 to be taxed as costs of the case. The Court further orders that the surety bond posted by the plaintiff be and is hereby discharged.

SO ORDERED this 25<sup>th</sup> day of March, 1975.

  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE <sup>MAR 25 1975</sup>  
 NORTHERN DISTRICT OF OKLAHOMA

Jack C. Silver, Clerk  
 U. S. DISTRICT COURT

LLOYD STEVENSON BOND, )  
 )  
 vs. ) Petitioner, )  
 )  
 STATE OF OKLAHOMA, )  
 )  
 ) Respondent. )

NO. 74-C-134

O R D E R

This is a proceeding pursuant to the provisions of 28 U.S.C. § 2254 brought by a state prisoner confined in the Oklahoma State Penitentiary at McAlester, Oklahoma. Petitioner attacks the validity of the judgment and sentence imposed June 7, 1972, in Case No. CRF-72-8 in the District Court in and for Tulsa County, Oklahoma. In trial by jury, petitioner was found guilty of the crime of kidnapping as defined in 21 O.S.A. § 741, and his punishment was fixed at confinement in the State Penitentiary for a period of 15 years. The judgment and sentence was affirmed on direct appeal. Jenkins v. State, Okl. Cr., 508 P.2d 660 (1973).

Petitioner raised the issues presented to this Court in his direct appeal of the judgment and sentence to the Court of Criminal Appeals of the State of Oklahoma. Therefore, he is not required to represent the same issues to the State Court in post-conviction proceedings, Sandoval v. Rodriguez, 461 F.2d 1097 (10th Cir. 1972), and his State remedies have been exhausted.

Petitioner contends that the judgment and sentence should be vacated and asserts that he was denied in his trial and conviction his constitutional rights in the following particulars:

1. Petitioner was improperly tried and convicted for the crime of kidnapping which was so concurrent and incidental to other acts of the defendant as to cause an unnatural elevation of the true crime to be charged.
2. The trial Court erred in allowing hearsay testimony against Petitioner, made by a co-defendant who did not testify at trial, which precluded petitioner of his rights under the confrontation clause.
3. The Court erred in overruling Petitioner's motion for severance.
4. The Court erred in allowing the prosecutor to make prejudicial statements and admitting evidence of violence which was immaterial and unrelated to the elements of the crime as charged.

Each of these allegations was determined against Petitioner on direct appeal by the high Court of the State of Oklahoma, and this Court has thoroughly reviewed the transcripts of the State proceedings. There are no material issues of fact unresolved and a hearing is not here required. This Court's responsibility is to review the file and make an independent determination whether due process was observed in the factual and legal support for State adjudications. Hasty v. Crouse, 308 F.Supp. 590 (D.C. Kan. 1968) aff'd. 420 F.2d 1384 (10th Cir. 1970).

The State-created crime, 21 O.S.A. § 741, under which Petitioner was tried and found guilty provides in pertinent part:

"Every person who, without lawful authority, forcibly seizes and confines another, or inveigles or kidnaps another, with intent, either: First. To cause such person to be secretly confined or imprisoned in this State against his will; . . ."

This Court finds no constitutional infirmity in the State law. The prosecution has discretion to select the offense to be prosecuted when more than one law is broken in a criminal spree, and a review of the transcript shows that a proper showing of probable cause was made and found in the State preliminary hearing, affirmed by the Oklahoma Court of Criminal Appeals. The accused was properly bound over and prosecuted for the offense charged. The defendant has no right, constitutional or otherwise, to select the statutory crime under which he will be prosecuted. Further, upon review of the transcripts of the State Court proceedings, the Court finds the evidence sufficient to support the jury's finding that Petitioner, in the State of Oklahoma, without lawful authority, forcibly seized and confined the victim with intent to cause such victim to be secretly confined or imprisoned against her will. Therefore, Petitioner's first allegation is without merit.

Petitioner's second allegation concerns the introduction into evidence, over Petitioner's objection, of a confession by his co-defendant Jenkins which strongly implicated Petitioner. There is no question that this confession, which was related at trial by the police officer to whom it was made, was made out of the presence of the Petitioner, was hearsay as to

the Petitioner, and it deprived Petitioner of his right of cross-examination secured by the Confrontation Clause of the Sixth Amendment of the Constitution of the United States. Bruton v. U. S., 391 U. S. 123 (1968). This error has given this Court a great deal of concern, and has resulted in a too-long delayed decision herein. It has been of particular concern that the Bruton decision has been the law since 1968, and the present trial was held in 1972. Further, this Court has been disturbed by the fact that the confession was not reduced to writing and affirmed as accurate by the co-defendant, but rather was related from memory by the police officer.

However, bearing in mind the teaching of Schneble v. Florida, 405 U. S. 427 (1972), wherein it was held that reversal is not required in Bruton error when properly admitted evidence of guilt is so overwhelming that the prejudicial effect of the co-defendant's admission is so insignificant by comparison that it is clear beyond a reasonable doubt that the improper use of the admission was harmless beyond a reasonable doubt, this Court has repeatedly reviewed the transcript of the State trial and finds:

The victim made clear and uncontroverted in-Court identification of the defendant and co-defendant. A Collinsville police officer, upon investigation of the crime, broadcast to his dispatcher that three young white male assailants had fled the scene in a blue Karmann Ghia. An Oklahoma Highway Patrol Trooper, from the dispatcher's broadcast, spotted the vehicle and followed it to the roadblock where the Petitioner in the front passenger seat and his co-defendant in the rear seat were arrested. In-Court identifications were made by three Police Officers. The sequence of events from the commission of the crime to arrest took place in a period of approximately one hour. Such evidence was substantial, overwhelming, and conclusive, without more, to establish Petitioner's guilt beyond a reasonable doubt.

In Petitioner's own statement, he admitted being with his co-defendant and another from the evening of January 1, 1972, the day prior to the crime, to the time of arrest. He stated they had been drinking heavily and he was so intoxicated that he remembered very little, but he did remember

being with them in Collinsville, Oklahoma, and being chased by the Highway Patrol, and the crash before he was arrested. The co-defendant's statement, with more detail, corroborated the Defendant's statement. The trial Court admonished the jury to consider each statement only against the one making it and no other.

This Court therefore finds that the error complained of was harmless beyond a reasonable doubt, and that due process was observed in the factual and legal support for the State adjudications, and the conviction should not be reversed.

This Court finds no error of constitutional magnitude in the State Court's denial of severance. As to Petitioner's final allegation, it is a well established general rule that the prosecution can introduce evidence of other crimes that "tends to establish a common scheme, plan, system or design, and where it is so related to the crime charged that it serves to establish the crime charged or to establish a motive, intent or absence of mistake or accident as to the crime charged." Loux v. United States, 389 F.2d 911, 918-919 (10th Cir. 1968) cert. denied 393 U. S. 867 and 869. Therefore, Petitioner's third and last allegations are without merit.

Based on the foregoing, the Court finds that the Petition for Writ of Habeas Corpus of Lloyd Stevenson Bond should be denied and dismissed.

IT IS, THEREFORE, ORDERED that the Petition for Writ of Habeas Corpus of Lloyd Stevenson Bond be and it is hereby denied and the cause dismissed.

Dated this 25<sup>th</sup> day of March, 1975, at Tulsa, Oklahoma.

  
CHIEF JUDGE, UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF  
OKLAHOMA

FILED <sup>MM</sup>

IN THE UNITED STATES DISTRICT COURT FOR THE ~~NORTHERN~~ DISTRICT OF OKLAHOMA  
MAR 25 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JOE M. REED, SR.,  
Plaintiff,  
vs.  
SEARS, ROEBUCK & COMPANY,  
Defendant.

No. 74-C-313 ✓

FILED

MAR 26 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

APPLICATION

Come now the parties, Joe M. Reed, plaintiff, and Sears, Roebuck & Company, defendant, and jointly move and apply to this court to enter its order of dismissal of the cause pending herein for the reason that the parties have amicably settled the case without the necessity of trial.

WHEREFORE, the parties hereto ask this Court to enter its order as prayed.

ORDER

NOW on this \_\_\_ day of \_\_\_\_\_, 1975, upon the joint application of the plaintiff Joe M. Reed and the Defendant Sears, Roebuck & Company for an order of dismissal, the Court herein finds:

1. That the parties hereto have settled the case pending herein and it should therefore be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff's cause of action <sup>is not complete</sup> should be and the same is hereby dismissed upon joint application of the parties.

Alan E. Baran  
JUDGE

APPROVED AS TO FORM:  
Thomas A. Walla  
Attorney for Plaintiff

[Signature]  
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

A. L. CAPPS,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent

)  
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)  
)  
)  
)

No. 75-C-70 ✓

**FILED**

MAR 24 1975 *hm*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

This is a proceeding brought pursuant to the provisions of Title 28 U.S.C. §2254 by a state prisoner confined in the Oklahoma State Penitentiary at McAlester, Oklahoma. Petitioner attacks the validity of the judgment and sentence rendered and imposed by the District Court in and for Tulsa County, Oklahoma, wherein after waiving trial by jury, the petitioner was found guilty by the court of the crime of armed robbery and sentenced to a term of imprisonment in the Oklahoma State Penitentiary for a period of 7 to 21 years.

Petitioner demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of his constitutional rights under the Fourth Amendment to the Constitution of the United States of America. In particular, petitioner claims:

- 1) That illegally obtained evidence was used to secure his conviction;
- 2) He was deprived of his rights to trial by jury because of ineffective counsel;
- 3) He was denied the right of period of observation prior to trial;
- 4) The sentence imposed by the court was improper; and
- 5) He was denied a fair hearing on application for post-conviction relief in the District Court in and for Tulsa County, Oklahoma.

Petitioner alleges that he has exhausted all those remedies available to him in the courts of the State of Oklahoma with respect to the claims herein asserted.

Petitioner was granted leave to proceed herein without prepayment of costs by Order made and entered by this court on the 14th day of February, 1975.

Petitioner's allegations are unsupported by allegations of fact sufficient to entitle him to an evidentiary hearing. In a collateral attack on a criminal judgment, the petitioner must state some factual basis for relief. Here we have nothing but generalities and conclusions which are insufficient to entitle petitioner to an evidentiary hearing. See Martinez vs. United States, 344 F.2d 325 (10th Cir. 1965); and Stephens vs. United States, 246 F.2d 607 (10th Cir. 1957).

In Stephens vs. United States, supra, the court stated:

"It is immediately apparent that appellant's motion alleges but bald conclusions unsupported by allegations of fact and is therefore legally insufficient. The trial court may properly deny the motion without a hearing, United States vs. Sturm, 7th Cir. 180 F.2d 413, Cert. Den. 399 U.S. 986, 70 S.Ct. 1008, 94 L.Ed. 1388, or require the movant to amend his motion to substantiate with designation of fact the broad assertions of the motion before determining whether or not possible grounds for relief exist under Section 2255. If the motion is denied without hearing because of insufficiency of pleading, a further motion, if legally sufficient, should not be considered repetitious."

IT IS, THEREFORE, ORDERED that the petition herein be denied and the case dismissed.

IT IS FURTHER ORDERED if a legally sufficient motion is subsequently filed, it shall not be considered repetitious.

Dated this 24<sup>th</sup> day of March, 1975.

  
H. DALE COOK  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**MAR 24 1975**

JOHN L. JOHNSON and  
TROY L. NEWTON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

Civil Actions

No. 74-C-318

No. 74-C-319

MEMORANDUM AND ORDER

Petitioners have lodged motions under 18 U.S.C. §2255 to vacate, set aside, or correct judgments and sentences imposed by Judge Frank G. Theis, of Wichita, Kansas, sitting by assignment in the United States District Court for the Northern District of Oklahoma. Petitioners each request leave to proceed without prepayment of fees or costs, with affidavits of poverty accompanying their requests. Because all issues, underlying facts, and arguments are identical, the motions will be consolidated for disposition herein.

Petitioners are presently in custody at the Federal Correctional Institution, Texarkana, Texas, as a result of convictions for violations of 21 U.S.C. §174 and 26 U.S.C. §4705(a). They seek an adjudication that proceedings leading to conviction and sentencing were violative of federal statutory and constitutional rights. Specific grounds upon which petitioners seek relief are: (1) failure of the Court on voir dire to question jurors as to racial prejudice; and (2) use of illegal wiretap evidence before the Grand Jury.

In considering the first contention, the Court notes that petitioners and their co-defendants at trial were all black,

while all jury members were white. As authorized by Rule 24(a), Federal Rules of Criminal Procedure, voir dire was conducted exclusively by the Court. Under those circumstances, refusal by the Court to propound questions probing for racial bias may have been error if defendants had requested such inquiry. *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973). A review of the transcript discloses that the Court invited counsel to submit proposed questions and no specific requests for judicial inquiry about racial prejudice or bias were forthcoming. Mr. Malloy, counsel for N. J. Johnson, did ask that one prospective juror be questioned as to political affiliation. In response to this request, and after consultation between the Court and counsel, the following question was asked of prospective jurors:

"One other general question of all jurors, in the area of cause: Is there anybody in the jury box that would have any possible prejudice against any defendant because of his race or economic status . . . ?

"Everyone is equal in this country. I mean regardless of race, creed, religion, national origin, economics or anything of that nature. You all understand that as citizens, I am quite sure." (Tr. Vol. 1 at p. 102.)

No response was forthcoming from any prospective juror, and thereafter all parties passed the jury for cause.

Obviously, the record belies petitioners' contention that the jury was not questioned on racial prejudice. It seems clear that the Court's question and comments fulfilled the requirement of the *Ham* case of focusing prospective jurors' attention on any racial prejudice they might entertain. *Ham v. South Carolina*, supra, at 851. Lacking any factual basis, petitioners' first allegation must be dismissed.

Petitioners next allege that illegally obtained wiretap evidence was presented to the Grand Jury. Because of this alleged use of tainted wiretap information, petitioners contend

that the indictment returned by the Grand Jury was faulty. They assert that the only remedy is dismissal.

Before considering the merits of this claim, the Court notes that in a prior §2255 action, petitioners unsuccessfully attacked the Grand Jury indictment. The substance of the earlier action was that the Grand Jury did not have sufficient evidence before it to support the indictment. In ruling against the petitioners, the Tenth Circuit Court observed:

"As a practical matter, in the instant case, no recording was made of the grand jury proceedings to the end that the Government had no transcribed testimony of witnesses appearing before the grand jury. In any event, in *Costello*, the United States Supreme Court declined to establish a rule which would permit a defendant in a criminal case to challenge the indictment on the ground that it was not supported by adequate or competent evidence." *United States v. Birmingham*, 454 F.2d 706 (10th Cir. 1971).

In this action, petitioners state that the ninth overt act listed in both counts of the indictment involved a telephone conversation between Elizabeth Francis and Roy Birmingham. Subject of the conversation was a narcotics delivery by Luther Vernon Francis to Roy Birmingham. The indictment does not suggest that petitioners were mentioned in this particular conversation; neither do petitioners so allege. Certainly they did not suffer ultimate prejudice by its presentation to the Grand Jury. Evidence supporting the other alleged overt acts set forth in both counts of the indictment is not herein challenged by petitioners. It provides ample basis for the Grand Jury's finding of probable cause.

Under the law it is clear that petitioners have not stated a claim for which relief would be proper under 28 U.S.C. §2255. An indictment returned by a legally constituted and unbiased Grand Jury, if valid on its face, is enough to call for trial of the charges on their merits. *Costello v. United States*,

350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956); *United States v. Addington*, 471 F.2d 560 (10th Cir. 1973). The usual exclusionary rule for illegally obtained evidence does not apply to quash indictments where probable cause is based on tainted evidence. As stated in *United States v. Blue*, 384 U.S. 251, 86 S. Ct. 1416, 16 L.Ed.2d 510 (1966):

"In any event, this [presentation of tainted evidence to a grand jury] would not be a basis for abating the prosecution pending a new indictment, let alone barring it altogether."

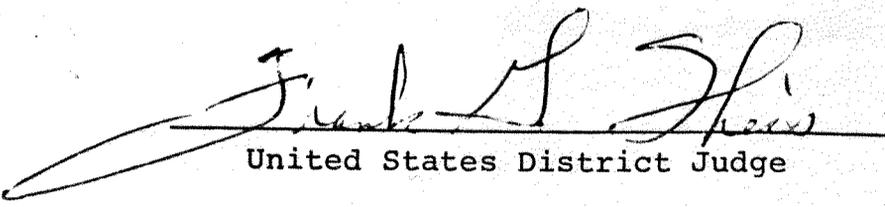
*Laughlin v. United States*, 474 F.2d 444 (D.C. 1972), is also instructive on this issue. There, the Court held that dismissal of an indictment was properly denied, despite defendant's claim that it should have been dismissed because recordings of inadmissible telephone conversations were played for the Grand Jury and thus tainted the indictment. Determinative factors in *Laughlin* were the presumptive validity of indictments, support by ample evidence before the Grand Jury, substantiation by ample valid evidence at trial, and no ultimate prejudice to defendants.

IT IS THEREFORE ORDERED that petitioners' requests to proceed in forma pauperis be, and the same are hereby, granted. The Clerk shall file the pleadings currently lodged.

IT IS FURTHER ORDERED that the motions so filed be, and the same are hereby, overruled and denied.

IT IS FURTHER ORDERED that the Clerk transmit copies of this Memorandum and Order to the parties named herein and to the office of the United States Attorney for the Northern District of Oklahoma.

At Wichita, Kansas, this 20th day of March, 1975.

  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

LONNIE L. ELDER, )  
)  
Petitioner, )  
)  
vs. )  
)  
RICHARD A. CRISP, WARDEN OF )  
PRISON, STATE OF OKLAHOMA, )  
ET AL., )  
)  
Respondents. )

75-C-85

**FILED**

MAR 24 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

This is a proceeding brought pursuant to the provisions of Title 28, U.S.C, §2254 by a state prisoner confined in the Oklahoma State Penitentiary at McAlester, Oklahoma. Petitioner attacks the validity of the judgment and sentence rendered and imposed by the District Court in and for Tulsa County, Oklahoma on the 1st day of March, 1968. Upon petitioner's plea of guilty, the trial court made a finding of guilty in Case No. 23011 in the District Court in and for Tulsa County, Oklahoma, of first degree rape. Petitioner's punishment was fixed at confinement in the Oklahoma State Penitentiary for a term of 99 years.

Petitioner's application to proceed in forma pauperis is supported by papers satisfying the requirements of Title 28, U.S.C., §1915(a) and was allowed by the Order of this Court made and entered on the 3rd day of March, 1975.

The file reflects that petitioner has exhausted those remedies available to him in the courts of the State of Oklahoma.

Petitioner demands his release from custody and as grounds therefor alleges that he is being deprived of his liberty in violation of his rights under the First, Fourth, Fifth, Sixth, Thirteenth and Fourteenth Amendments to the Constitution of the United States of America. In particular, petitioner claims:

- 1) That his plea of guilty was involuntary and induced by ignorance of the law, fear and force;
- 2) That he was not advised of his constitutional rights in an understandable and intelligent manner at the time his plea was entered;
- 3) That he was not shown a valid warrant at the time of his arrest;
- 4) That he was without counsel at lineup which he states was illegal for the reason that it was composed of only four men;
- 5) That he was not confronted by witnesses against him and was not permitted to summon witnesses in his behalf;
- 6) That he was not given a fair preliminary hearing;
- 7) That he did not have effective assistance of counsel throughout all proceedings;
- 8) That he was not indicted by a Grand Jury; and
- 9) That he was deprived of the right of a trial by jury.

Petitioner's first allegation is without merit and is not supported by the record. The transcript of the proceedings in State of Oklahoma vs. Lonnie Lewis Elder in the District Court in and for Tulsa County, State of Oklahoma, Case No. 23011 conclusively shows that petitioner's plea was a valid voluntary plea while represented by counsel. It has been repeatedly held that such a plea waives all non-jurisdictional defects in the proceedings preliminary thereto. Moore vs. Rodriguez, 376 F.2d 817 (10th Cir. 1967); Corn vs. State of Oklahoma, 394 F.2d 478 (10th Cir. 1968) Cert. Den. 393 U. S. 917, 89 S. Ct. 245, 21 L. Ed. 2d 203; Smith vs. Beto, 453 F.2d 403 (5th Cir. 1972).

At the proceedings in which the petitioner entered his plea of guilty, the Court asked the petitioner the following questions and he gave the following answers:

THE COURT: Lonnie Lewis Elder, you are charged by Information in this case with the crime of first degree rape after former conviction of a felony and your attorney has informed the Court you desire to waive your right of trial by jury and enter a plea of guilty to this charge, is that correct?

MR. ELDER: Yes, Your Honor.

THE COURT: Now, Mr. Elder, do you understand that your case is set for trial by jury, I believe, Tuesday next?

MR. PEARCE: It is Monday next, Your Honor, the 4th.

THE COURT: Monday next, March 4th. Do you understand that?

MR. ELDER: Yes, Your Honor.

THE COURT: Do you fully understand that come Monday next you have the right to have your case presented to a jury of 12 people who would pass upon the question of your guilt or innocence? Do you understand that?

MR. ELDER: Yes, Your Honor.

THE COURT: Do you further understand that in the trial of a case such as this in the event the jury returns a verdict of guilty you have the right to have the jury fix and assess the punishment in your case? Do you understand this?

MR. ELDER: Yes, Sir.

THE COURT: Do you tell me that you desire to waive your right of trial by a jury and submit your case to the Court without the benefit of a jury?

MR. ELDER: Yes, Sir.

THE COURT: Do you do this voluntarily?

MR. ELDER: Yes, Sir.

THE COURT: Have there been any promises made to you to get you to waive this right?

MR. ELDER: No, Sir.

THE COURT: Has anyone threatened you or coerced you in any way to get you to waive this right?

MR. ELDER: No, Sir.

THE COURT: You again tell me that you voluntarily waive your right of trial by jury and you are willing to submit your case to this Court without benefit of a jury?

MR. ELDER: Yes, Sir.

\* \* \* \* \*

THE COURT: All right, you will have to sign a jury waiver form.

MR. PEARCE: Let the record reflect counsel for defense signed the jury waiver at the request of the defendant and after he had previously signed it.

Petitioner's second allegation is without merit and should be denied. That portion of the record hereinabove recited conclusively shows that petitioner's allegation is frivolous and without merit. The record in this case does not disclose any infringement of any constitutional right of the petitioner. On habeas corpus petition by a state prisoner, federal court is concerned only with basic constitutional questions. Sallazar vs. Rodriguez, 371 F.2d 726 (10th Cir. 1967).

Petitioner's third allegation does not allege a violation of constitutional right and should be denied. See Sallazar vs. Rodriguez, supra.

The deficiency alleged by petitioner does not constitute a denial of a constitutional right. The district court's rule in federal habeas corpus proceeding is to determine alleged constitutional deprivations, not to supervise an investigatory search for irregularities in state proceedings. Long vs. Beto, 247 F. Supp. 590 (D.C. Tex. 1966).

Petitioner's fourth allegation does not constitute a violation of his federally protected rights and should be denied. See Sallazar vs. Rodriguez, supra and Moore vs. Rodriguez, supra.

Petitioner's fifth allegation does not disclose error of constitutional proportions and should be denied. In habeas corpus proceedings only errors reaching a constitutional dimension can be considered. Giamo vs. Purdy, 346 F. Supp. 1 (D.C. Fla. 1972), affirmed 465 F.2d 994 (5th Cir. 1972).

Petitioner's sixth allegation is without merit and should be denied. At page 4 of transcript, the Court inquired of petitioner if he had been afforded the right of a preliminary hearing and received an affirmative answer. (P. 4, lines 2 through 4). The federal constitution does not secure to a state court defendant a right to a preliminary hearing. Ramirez vs. State of Arizona, 437 F.2d 119 (9th Cir. 1971).

Petitioner's seventh allegation is without merit. At time of plea in the trial court, the Court asked petitioner the following questions and the answers are as follows:

THE COURT: Have you been represented by an attorney throughout all the proceedings in this case?

MR. ELDER: Yes, Sir.

THE COURT: Are you completely satisfied with the representation you have had?

MR. ELDER: Yes, Sir.

THE COURT: Has any one promised you anything whatsoever to get you to plead guilty to this charge?

MR. ELDER: No, Sir.

THE COURT: Has anyone threatened you or coerced you in any way to get you to plead guilty?

MR. ELDER: No, Sir.

THE COURT: Do you understand that any recommendation the District Attorney might make in this case is not, as a matter of law, binding upon this Court? Do you understand that?

MR. ELDER: Yes, Sir.

(P. 4, line 25 through P. 5, line 15)

Requirement that guilty plea be intelligently made does not contemplate that all advice by counsel must withstand scrutiny of hindsight in post-conviction proceedings. Redus vs. Swenson, 468 F.2d 606 (8th Cir. 1972), Cert. Den. 411 U.S. 933, 93 S. Ct 1906, 36 L. Ed.2d 393.

Petitioner's eighth allegation is without merit. The allegation is not such error as reaches constitutional dimensions. See Giamo vs. Purdy, supra.

Petitioner's final allegation is not supported by the record and should be denied. The transcript of proceedings in state court at time of plea by petitioner, the following questions were asked and answers given:

THE COURT: Do you tell me that you desire to waive your right of trial by jury and submit your case to the court without the benefit of jury?

MR. ELDER: Yes, Sir.

THE COURT: Do you do this voluntarily?

MR. ELDER: Yes, Sir.

THE COURT: Have there been any promises made to you to get you to waive this right?

MR. ELDER: No, Sir.

THE COURT: Has anyone threatened you or coerced you in any way to get you to waive this right?

MR. ELDER: No, Sir.

THE COURT: You again tell me that you voluntarily waive your right of trial by jury and you are willing to submit your case to this Court without the benefit of a jury?

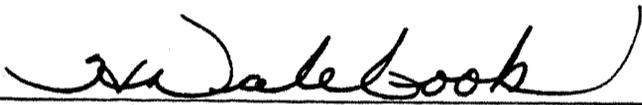
MR. ELDER: Yes, Sir.

T. Line 9, Page 3 through Line 1, Page 4)

The transcript and record in Case No. 23011 in the District Court in and for Tulsa County, Oklahoma, conclusively shows that the petitioner is not entitled to relief. Therefore, there is no necessity for this Court to hold an evidentiary hearing. Semet vs. United States, 369 F.2d 90 (10th Cir. 1966).

IT IS, THEREFORE, ORDERED that the petition filed herein be denied and the case dismissed.

Dated this 24<sup>th</sup> day of March, 1975.

  
\_\_\_\_\_  
H. DALE COOK  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA

HERITAGE ACCEPTANCE CORPORATION,  
a corporation,

Plaintiff,

vs.

TULSA WHISENHUNT FUNERAL HOME, INC.,  
a corporation, COLLEEN BELFORD, HAZEL  
J. GRADY, and GEORGE R. TRAMMELL,

Defendants.

No. 74-C-276

**E I L E D**

MAR 20 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL AND  
DISCHARGE OF RECEIVER

Pursuant to the Application of discharge and Final Report filed by the Receiver in the above captioned action, and after review of the file, pleadings and reports of the Receiver and the Court further being advised that on February 24, 1975, the parties litigant herein filed a Stipulation of Dismissal subject to the final order of the Court dismissing the Receiver, the Court does hereby approve the Final Report of the Receiver.

The Court is advised and further finds that the fee awarded by Order of this Court entered February 13, 1975, has been fully paid in accordance with said Order.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this action is dismissed with prejudice, the Receiver's report is approved, the Receiver is discharged and the Receiver's bond is exonerated.

SO ORDERED this 20<sup>th</sup> day of March, 1975.

H. DALE JOOK

United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PETER J. BRENNAN, Secretary of Labor,)  
United States Department of Labor,)

)  
Plaintiff)

v. )

LOCAL UNION 514, TRANSPORT WORKERS )  
UNION OF AMERICA, AFL-CIO, )

)  
Defendant)

Civil Action

No. 73-C-392 ✓

**FILED**  
MAR 20 1975 5

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

DECREE

On December 6, 1973, plaintiff, Secretary of Labor, United States Department of Labor, filed a complaint averring a violation of Title IV of the Labor-Management Reporting and Disclosure Act of 1959, as amended (29 U.S.C. §§ 401-531), hereinafter referred to as the Act, in the May 29 to June 16, 1973, election of officers conducted by defendant Local Union 514, Transport Workers Union of America, AFL-CIO. Plaintiff sought to have the election declared null and void and to have defendant directed to conduct a new election for all officers under the supervision of plaintiff. On January 2, 1974, defendant filed an answer. Thereafter, plaintiff and defendant reached an agreement in this matter, and it appearing to the court that plaintiff and defendant are in agreement that this decree should be entered, it is therefore:

ORDERED, ADJUDGED and DECREED that defendant will conduct its next regularly scheduled election of officers under the supervision of plaintiff, in accordance with the provisions of Title IV of the Act, and, insofar as lawful and practicable, in accordance with the constitution and by-laws of defendant; and it is further

ORDERED, ADJUDGED and DECREED that, after the election, plaintiff will promptly certify to the court the names of the persons elected to office and that the election was conducted in accordance with the provisions of Title IV of the Act, and, insofar as lawful and practicable, in accordance with the constitution and by-laws of defendant; and it is further

ORDERED, ADJUDGED and DECREED that, upon approval of such certification, the court will enter an order declaring such persons to be the duly elected and certified officers of defendant; and it is further

ORDERED, ADJUDGED and DECREED that defendant will pay the costs of this action.

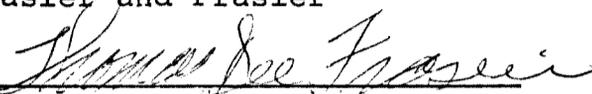
DATED this 20<sup>th</sup> day of March, 1975.

  
UNITED STATES DISTRICT JUDGE

We hereby agree and consent to the entry of  
the foregoing decreed:

Frasier and Frasier

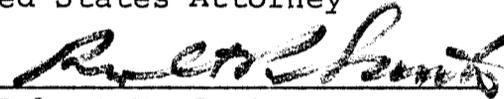
By



Thomas Dee Frasier  
Attorneys for Defendant

Nathan G. Graham  
United States Attorney

By



Robert P. Santee  
Assistant United States Attorney  
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HENRY A. RUTTER )  
c/o Hydro Hoist Company )  
820 West 10th Street )  
Claremore, Oklahoma 74017, )

Plaintiff, )

vs. )

BARNEY V. WILLIAMS )  
Route 2 )  
Grove, Oklahoma 74344, )

Defendant. )

Civil Action No. 72-C-347

**FILED**

MAR 20 1975 *mm*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT AND ORDER

This cause having come on to be heard, and the Court having entered its Memorandum Opinion on March 3, 1975, it is hereby ordered and adjudged:

1. This Court has jurisdiction of the subject matter of this suit and the parties hereto.

2. The Plaintiff, Henry A. Rutter, is the owner of the entire right, title and interest in and to United States Letters Patent No. Re 27, 090.

3. Claims 1 and 2 of United States Letters Patent No. Re 27, 090 are valid and infringed by the Defendant.

4. An injunction shall issue against the Defendant, his agents, servants and employees, for the remainder of the term of the life of United States Letters Patent No. Re 27, 090, jointly and severally enjoining them from any infringement of said Letters Patent.

5. The Judgments of validity, infringement and injunction entered herein are final judgments pursuant to the provisions of 28 U. S. C. Section 1292(a)(4).

6. The question of damages and attorney's fees are reserved for consideration by the Court.

7. Costs will be taxed to the Defendant.

8. All writs necessary for the enforcement of this Judgment and Order shall issue.

Signed and entered this 20 day of March, 1975.

Fred Daugherty  
Fred Daugherty  
United States District Judge

APPROVED AS TO FORM:

William S. Sloman  
Attorney for Plaintiff

Paul H. Jones  
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HENRY A. RUTTER )  
c/o Hydro Hoist Company )  
820 West 10th Street )  
Claremore, Oklahoma 74017, )

Plaintiff, )

vs. )

BARNEY V. WILLIAMS )  
Route 2 )  
Grove, Oklahoma 74344, )

Defendant. )

Civil Action No. 72-C-347

**FILED**

MAR 20 1975 *nm*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

WRIT OF INJUNCTION

The President of the United States of America to Barney V. Williams,  
an individual, His Agents, Servants and Employees,

Greetings:

Whereas, a Judgment and Order having been entered for an injunction:

Now, therefore, we do strictly command and enjoin you, the said  
Barney V. Williams, an individual, your agents, servants and employees, for  
the remainder of the term of the life of United States Letters Patent No.  
Re 27,090 from further infringing the same, from directly or indirectly  
making or causing to be made, using or causing to be used, vending or  
causing to be sold in any manner, any articles, or devices containing and  
employing or embodying the said inventions and improvements described in  
said Letters Patent and from infringing upon or violating the said Letters  
Patent in any manner whatsoever or from aiding, abetting or contributing  
to any infringement thereof in any way whatsoever.

Signed and entered this 20 day of March, 1975.

*Fred Daugherty*  
Fred Daugherty  
United States District Judge

APPROVED AS TO FORM:

*William S. Dorman*  
Attorney for Plaintiff

*Paul H. Johnson*

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 ) Plaintiff, )  
vs. ) CIVIL ACTION NO. 75-C-58  
 )  
 )  
CHARLES W. GANN and )  
KAREN A. GANN, )  
 )  
 ) Defendants. )

**FILED**  
MAR 19 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 19th  
day of March, 1975, the Plaintiff appearing by Robert P. Santee,  
Assistant United States Attorney, and the Defendants, Charles W.  
Gann and Karen A. Gann, appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendants, Charles W. Gann and  
Karen A. Gann, were served with Summons and Complaint on  
February 20, 1975, both as appears from the U.S. Marshals Service  
herein.

It appearing that the said Defendants have failed  
to answer herein and that default has been entered by the Clerk  
of this Court.

The Court further finds that this is a suit based  
upon a mortgage note and foreclosure on a real property mortgage  
securing said mortgage note and that the following described  
real property is located in Tulsa County, Oklahoma, within the  
Northern Judicial District of Oklahoma:

Lot Eight (8), in Block Five (5), NORTHGATE  
SECOND ADDITION, to the City of Tulsa, Tulsa  
County, Oklahoma, according to the recorded  
Plat thereof.

THAT the Defendants, Charles W. Gann and Karen A. Gann,  
did, on the 6th day of February, 1974, execute and deliver to  
the Administrator of Veterans Affairs, their mortgage and mortgage  
note in the sum of \$12,200.00 with 6 percent interest per annum,

and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Charles W. Gann and Karen A. Gann, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon for more than seven months last past, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$12,115.04 as unpaid principal with interest thereon at the rate of 6 percent per annum from August 1, 1974, until paid, plus the cost of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Charles W. Gann and Karen A. Gann, in personam, for the sum of \$12,115.04 with interest thereon at the rate of 6 percent per annum from August 1, 1974, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof.

*Walter C. Barrow*  
United States District Judge

APPROVED

*Robert P. Santee*

ROBERT P. SANTEE  
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

GULF STATES MANUFACTURERS, INC., )  
a corporation, )

Plaintiff, )

vs. )

No. 74-C-245

WARREN C. HELM, JO ANN MURPHY, )  
JOE D. MURPHY and JOHN I. BUTTS )  
d/b/a MURPHY BUILDINGS COMPANY, )  
a partnership, MURPHY BUILDINGS )  
COMPANY, INC., a corporation, )  
and CITIZENS SECURITY BANK, a )  
corporation, )

Defendants. )

**FILED**  
MAR 18 1975  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

All the parties to this action having compromised and settled all issues in the action and having stipulated that the Complaint, Counter-Claims and Cross-Claims of every party herein, and this action may be dismissed with prejudice, it is therefore;

ORDERED, that the Complaint, Counter-Claims and Cross-Claims of every party herein, and this action are, by the Court, dismissed with prejudice to the bringing of another action upon the same cause or causes of action.

Entered this 18<sup>th</sup> day of March, 1975.

**DALE COOK**

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

BOARD OF TRUSTEES, PIPELINE )  
INDUSTRY BENEFIT FUND, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
VAN ESS COMPANY )  
 )  
Defendant. ) No. 75-C-55

FILED  
MAR 18 1975  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL

NOW on this 18<sup>th</sup> day of March, 19 75, Plaintiff's Motion  
For Dismissal coming on for consideration and counsel for Plaintiff herein  
representing and stating that all issues, controversies, debts and liabilities  
between the parties have been paid, settled and compromised,

IT IS THE ORDER OF THIS COURT That said action be, and the same  
is, hereby dismissed with prejudice to the bringing of another or future  
action by the Plaintiff herein.

H. DALE COOK

\_\_\_\_\_  
District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 ) Plaintiff, )  
 vs. ) CIVIL ACTION NO. 75-C-59  
 )  
 )  
 KENNETH ROY HUEY and )  
 BRENDA KAY HUEY, )  
 )  
 Defendants. )

**FILED**  
MAR 18 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 18<sup>th</sup>  
day of March, 1975, the Plaintiff appearing by Robert P. Santee,  
Assistant United States Attorney, and the Defendants, Kenneth  
Roy Huey and Brenda Kay Huey, appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendants, Kenneth Roy Huey and  
Brenda Kay Huey, were served with Summons and Complaint on  
February 25, 1975, both as appears from the U.S. Marshals Service  
herein.

It appearing that the said Defendants have failed  
to answer herein and that default has been entered by the Clerk  
of this Court.

The Court further finds that this is a suit based  
upon a mortgage note and foreclosure on a real property mortgage  
securing said mortgage note and that the following described  
real property is located in Tulsa County, Oklahoma, within the  
Northern Judicial District of Oklahoma:

Lot Eight (8), Block Eight (8), SUBURBAN  
ACRES THIRD ADDITION to the City of Tulsa,  
Tulsa County, Oklahoma, according to the  
recorded plat thereof.

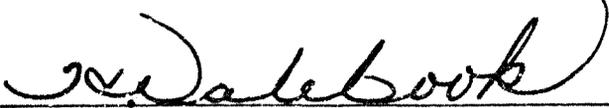
THAT the Defendants, Kenneth Roy Huey and Brenda Kay  
Huey, did, on the 22nd day of March, 1974, execute and deliver  
to the Administrator of Veterans Affairs, their mortgage and  
mortgage note in the sum of \$9,500.00 with 8 1/4 percent interest  
per annum, and further providing for the payment of monthly  
installments of principal and interest.

The Court further finds that Defendants, Kenneth Roy Huey and Brenda Kay Huey, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon for more than 11 months last past, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$9,540.00 as unpaid principal with interest thereon at the rate of 8 1/4 percent per annum from April 1, 1974, until paid, plus the cost of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Kenneth Roy Huey and Brenda Kay Huey, in personam, for the sum of \$9,540.00 with interest thereon at the rate of 8 1/4 percent per annum from April 1, 1974, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof.

  
United States District Judge

APPROVED

A handwritten signature in cursive script, appearing to read "Robert P. Santee".

ROBERT P. SANTEE  
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED  
MAR 17 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

AGRICO CHEMICAL COMPANY, )  
a Delaware corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
ZURN INDUSTRIES, INC., )  
a Pennsylvania corporation, )  
 )  
Defendant. )

No. 75-C-72

O R D E R

On the plaintiff's motion and the Court being advised,  
*of action & Complaint are*  
this cause ~~is~~ hereby dismissed without prejudice.

Done this 17<sup>th</sup> day of March, 1975.

s/ Allen E. Barrow  
U. S. DISTRICT JUDGE  
NORTHERN DISTRICT OF OKLAHOMA

Stephen R. Clark  
Hall, Estill, Hardwick, Gable,  
Collingsworth & Nelson  
805 National Bank of Tulsa Bldg.  
Tulsa, Oklahoma 74103  
(918) 585-9161

Attorney for Plaintiff

*Cover*

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 vs. )  
 )  
 JAMES KEITH HARPER, ETHEL )  
 EVELYN HARPER, DAVID SCRIVNER, )  
 VALERIE E. WILLIAMS now LEACH, )  
 HUNTER B. LEACH, COUNTY )  
 TREASURER, Tulsa County, and )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, )  
 )  
 Defendants. )

CIVIL ACTION NO. 74-C-405

**FILED**  
**MAR 17 1975**  
**Jack C. Silver, Clerk**  
**U. S. DISTRICT COURT**

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 17<sup>th</sup>  
day of March, 1975, the Plaintiff appearing by Robert P. Santee,  
Assistant United States Attorney; the Defendants, County Treasurer,  
Tulsa County, and Board of County Commissioners, Tulsa County,  
appearing by Gary J. Summerfield, Assistant District Attorney;  
and the Defendants, James Keith Harper, Ethel Evelyn Harper,  
David Scrivner, Valerie E. Williams now Leach, and Hunter B. Leach,  
appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendants, James Keith Harper and  
Ethel Evelyn Harper, were served with Summons and Complaint on  
October 22, 1974; that Defendants, County Treasurer, Tulsa County,  
and Board of County Commissioners, Tulsa County, were served with  
Summons and Complaint on October 17, 1974, all as appears from  
the U.S. Marshals Service herein; and that Defendants, David  
Scrivner, Valerie E. Williams now Leach, and Hunter B. Leach,  
were served by publication, as appears from the Proof of Publication  
filed herein.

It appearing that Defendants, County Treasurer, Tulsa  
County, and Board of County Commissioners, Tulsa County, have duly  
filed their Answers herein on October 29, 1974, and that Defendants,  
James Keith Harper, Ethel Evelyn Harper, David Scrivner, Valerie E.

Williams now Leach, and Hunter B. Leach, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note and that the following described real property is located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Eight (8), Block Fifty-two (52), VALLEY VIEW ACRES THIRD ADDITION to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded plat thereof.

THAT the Defendants, James Keith Harper and Ethel Evelyn Harper, did, on the 20th day of December, 1967, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$11,500.00 with 6 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, James Keith Harper and Ethel Evelyn Harper, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon for more than 12 months last past, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$10,530.36 as unpaid principal with interest thereon at the rate of 6 percent per annum from February 1, 1974, until paid, plus the cost of this action accrued and accruing.

The Court further finds that there is nothing due and owing to the County of Tulsa, State of Oklahoma, from Defendants, James Keith Harper and Ethel Evelyn Harper, for personal property taxes for the years 1974 and preceding.

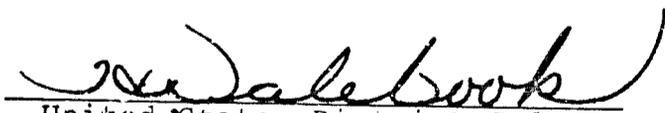
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants,

James Keith Harper and Ethel Evelyn Harper, in personam, for the sum of \$10,530.36 with interest thereon at the rate of 6 percent per annum from February 1, 1974, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendants, David Scrivner, Valerie E. Williams now Leach, and Hunter B. Leach.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

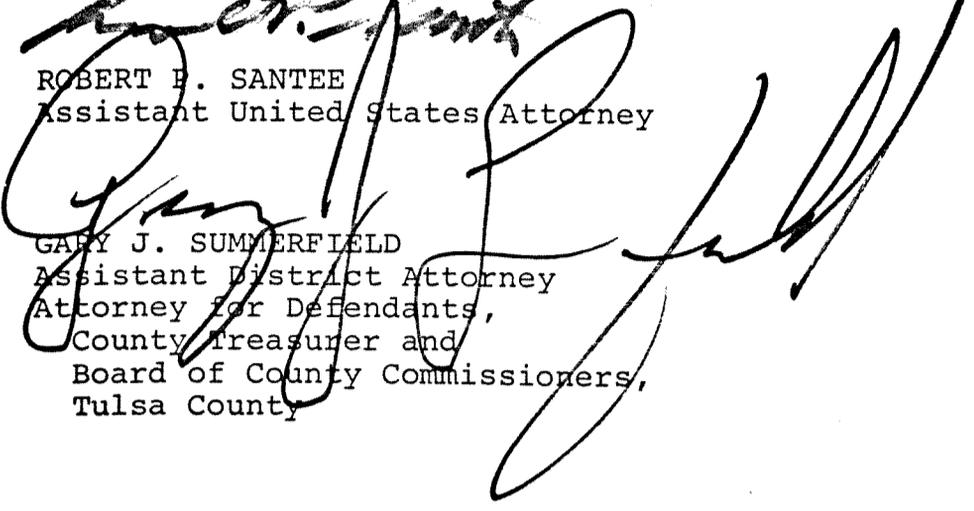
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof.

  
United States District Judge

APPROVED



ROBERT E. SANTEE  
Assistant United States Attorney



GARY J. SUMMERFIELD  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

AKZONA, INC., d/b/a )  
AMERICAN ENKA CO., )

Plaintiff, )

vs. )

No. 74-C-369 ✓

OZARK INDUSTRIES, INC., )  
SECURITY BANK AND TRUST COMPANY, )  
Miami, Oklahoma, FIRST NATIONAL )  
BANK, Miami, Oklahoma, and SLT )  
WAREHOUSE CO., )

Defendants. )

**FILED**

MAR 17 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

SUMMARY JUDGMENT FOR SLT WAREHOUSE CO.

This cause came on before me on the motion of SLT Warehouse Co., one of the defendants herein, for summary judgment. The Court finds that this defendant does not and did not have possession of any property subject of this action and acted only pursuant to certain Inventory Certification Agreements (two party) and (three party) between said defendant, SLT Warehouse Co., and certain other defendants herein, and requests no affirmative relief. Counsel for the plaintiff does not oppose the entry of summary judgment on behalf of this defendant, SLT Warehouse Co. It is therefore

ORDERED, ADJUDGED AND DECREED that the plaintiff, Akzona, Inc., d/b/a American Enka Co., take nothing by its suit against the defendant, SLT Warehouse Co., and go hence without day.

Done and Ordered at Tulsa, Oklahoma, this 17<sup>th</sup> day of March, 1975.

*Clean E. Pearson*  
\_\_\_\_\_  
U. S. DISTRICT JUDGE

MOREHEAD, SAVAGE, O'DONNELL,  
McNULTY & CLEVERDON  
ATTORNEYS & COUNSELORS  
1107 PETROLEUM CLUB BUILDING  
TULSA, OKLAHOMA 74119  
918 - 584-4716

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF OKLAHOMA

AMERICAN CASUALTY CO. )  
 )  
 Plaintiff )  
 )  
 VS. )  
 )  
 CITY OF BRISTOW, ET AL )  
 )  
 Defendants )

FILED

MAR 14 1975

NO. 72-C-106

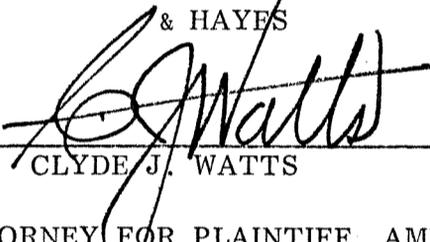
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

MOTION TO DISMISS

Plaintiff, AMERICAN CASUALTY CO., respectfully requests the Court to dismiss the above cause with prejudice to a future action for the reason that said cause has been settled by agreement of the respective parties.

WATTS, LOONEY, NICHOLS, JOHNSON  
& HAYES

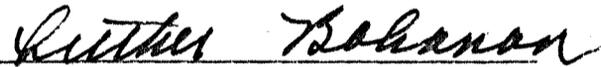
BY:

  
CLYDE J. WATTS

ATTORNEY FOR PLAINTIFF, AMERICAN  
CASUALTY CO.

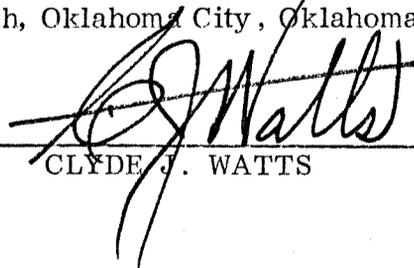
ORDER OF DISMISSAL

NOW, on this 11<sup>th</sup> day of March, 1975, the above cause came on to be heard upon application of the Plaintiff, AMERICAN CASUALTY COMPANY to dismiss, and the Court hereby dismisses the above cause with prejudice to a future action.

  
LUTHER BOHANON, U. S. DISTRICT JUDGE

CERTIFICATE OF SERVICE

On the 13<sup>th</sup> day of March, 1975, a true and correct copy of the above Motion to Dismiss was deposited in the United State Mails, with postage pre-paid, to Mr. Robert Blackstock, 200 N. Main Street, Bristow, Oklahoma 74100. and to Manville T. Buford, 3501 N.W. 36th, Oklahoma City, Oklahoma 73112.

  
CLYDE J. WATTS





IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALLENDALE MUTUAL INSURANCE CO., )

Plaintiff, )

vs. )

CHEPOKEE NITROGEN COMPANY )

Defendant. )

No. 73-C-319

FILED  
MAR 14 1975  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 14<sup>th</sup> day of March, 1975, there comes before the Court the Stipulation for Dismissal with Prejudice made and filed in the above captioned civil action by the plaintiffs and the defendant, pursuant to Rule 41(a).

It appearing to the Court that the parties have fully compromised and settled the claims alleged in the pleadings filed herein;

NOW, THEREFORE, it is the order of the Court that the above captioned civil action is hereby dismissed with prejudice, with each party to bear its own costs herein incurred.

H. DALE COOK

United States District Judge

APPROVED AS TO FORM AND CONTENT:

Richard T. Sonbey  
Attorney for Plaintiffs

Dale Cook  
Attorney for Defendant



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA:

NATIONAL GYPSUM COMPANY, a  
Delaware corporation,

Plaintiff,

vs.

CHEROKEE NITROGEN COMPANY, an  
Oklahoma corporation,

Defendant.

No. 74-C-279

FILED  
MAR 14 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 14<sup>th</sup> day of March, 1975, there comes before the Court the Stipulation for Dismissal with Prejudice made and filed in the above captioned civil action by the plaintiffs and the defendant, pursuant to Rule 41(a).

It appearing to the Court that the parties have fully compromised and settled the claims alleged in the pleadings filed herein;

NOW, THEREFORE, it is the order of the Court that the above captioned civil action is hereby dismissed with prejudice, with each party to bear its own costs herein incurred.

H. DALE

United States District Judge

APPROVED AS TO FORM AND CONTENT:

Richard T. Sonberg  
Attorney for Plaintiffs

Gale Lamm  
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CERTAIN-TEED PRODUCTS CORPORA-  
TION, a Maryland corporation,

Plaintiff,

vs.

CHEPOKEE NITROGEN COMPANY, an  
Oklahoma corporation,

Defendant.

No. 74-C-304

FILED  
MAR 14 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 14<sup>th</sup> day of March, 1975, there comes before the Court the Stipulation for Dismissal with Prejudice made and filed in the above captioned civil action by the plaintiffs and the defendant, pursuant to Rule 41(a).

It appearing to the Court that the parties have fully compromised and settled the claims alleged in the pleadings filed herein;

NOW, THEREFORE, it is the order of the Court that the above captioned civil action is hereby dismissed with prejudice, with each party to bear its own costs herein incurred.

H. DALE COOK

United States District Judge

APPROVED AS TO FORM AND CONTENT:

Richard T. Sonbey  
Attorney for Plaintiffs

Dale Samm  
Attorney for Defendant

FILED

MAR 14 1975

IN THE UNITED STATES DISTRICT COURT WITHIN  
AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

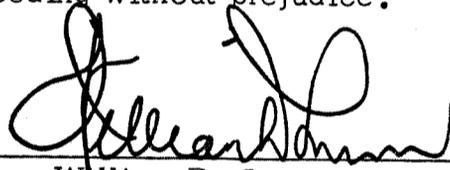
Jack C. Silver, Clerk,  
U. S. DISTRICT COURT

DOROTHY J. BUCK, )  
 )  
 Plaintiff, )  
 )  
 -vs- )  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Defendant. )

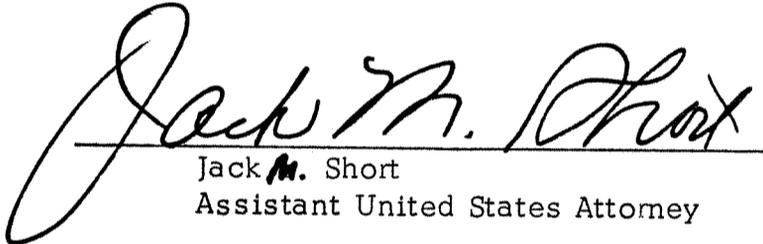
Case No. 74-C-443

NOTICE OF DISMISSAL

COMES NOW the plaintiff, Dorothy J. Buck, for and in consideration of the representations contained in a letter of March 6, 1975 from Clyde L. Bickerstaff, District Director, Internal Revenue Service to Mr. Jack M. Short, Assistant United States Attorney, Northern District, State of Oklahoma, the plaintiff hereby dismisses this proceeding without prejudice.



William D. Lunn  
Attorney for Plaintiff



Jack M. Short  
Assistant United States Attorney

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that case the Court states:

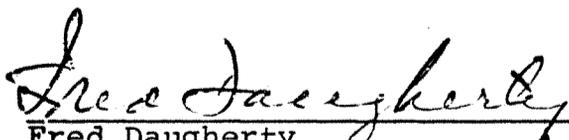
"The Social Security Act is to be liberally construed as an aid to the achievement of its Congressional purposes and objectives. Narrow technicalities which proscribe or thwart its policies and purposes are not to be adopted."

This language is quoted with approval in Blanscet v. Ribcoff, 201 F. Supp. 257 (W.D. Ark. 1962) and Martin v. Richardson, 325 F. Supp. 686 (W.D. Va. 1971), which cases further state:

"In these circumstances, courts must not require such a technical and cogent showing of good cause as would justify the vacation of a judgment or the granting of a new trial, where no party will be prejudiced by the acceptance of additional evidence and the evidence offered bears directly and substantially on the matter in dispute."

The evidence which Plaintiff wants included in the record appears to be relevant to the merits of Plaintiff's claim and non-prejudicial to the Defendant. It is not cumulative. Plaintiff's Motion is, in fact, not opposed by the Defendant. Therefore, Plaintiff's Motion for Remand should be granted and the Secretary should consider the letter from Dr. Stowell which is attached to Plaintiff's Motion. The Clerk will take appropriate action to remand the case.

It is so ordered this 14<sup>th</sup> day of March, 1975.

  
Fred Daugherty  
United States District Judge



IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 ) Plaintiff, )  
vs. ) CIVIL ACTION NO. 74-C-459  
 )  
 )  
WINDON U. HARGRAVE, )  
 )  
 ) Defendant. )

**FILED**  
MAR 10 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 7th  
day of March, 1975, the Plaintiff appearing by Robert P. Santee,  
Assistant United States Attorney, and the Defendant, Windon U.  
Hargrave, appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendant, Windon U. Hargrave, was  
served by publication, as appears from the Proof of Publication  
filed herein.

It appearing that the said Defendant has failed to  
answer herein and that default has been entered by the Clerk  
of this Court.

The Court further finds that this is a suit based  
upon a mortgage note and foreclosure on a real property mortgage  
securing said mortgage note and that the following described  
real property is located in Tulsa County, Oklahoma, within the  
Northern Judicial District of Oklahoma:

Lot Thirteen (13), Block Fifty (50), VALLEY  
VIEW ACRES THIRD ADDITION to the City of  
Tulsa, Tulsa County, Oklahoma, according  
to the recorded plat thereof.

THAT the Defendant, Windon U. Hargrave, did, on the  
18th day of May, 1973, execute and deliver to the Administrator  
of Veterans Affairs, his mortgage and mortgage note in the sum  
of \$11,250.00 with 4 1/2 percent interest per annum, and further  
providing for the payment of monthly installments of principal  
and interest.

The Court further finds that Defendant, Windon U. Hargrave, made default under the terms of the aforesaid mortgage note by reason of his failure to make monthly installments due thereon for more than ten months last past, which default has continued and that by reason thereof the above-named Defendant is now indebted to the Plaintiff in the sum of \$11,254.34 as unpaid principal with interest thereon at the rate of 4 1/2 percent per annum from May 1, 1974, until paid, plus the cost of this action accrued and accruing.

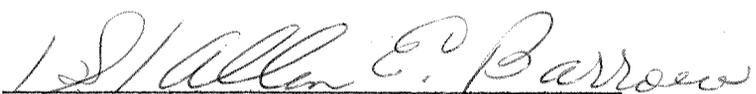
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendant, Windon U. Hargrave, in rem, for the sum of \$11,254.34 with interest thereon at the rate of 4 1/2 percent per annum from May 1, 1974, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said Defendant to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisal the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof.

APPROVED

  
ROBERT P. SANTEE  
Assistant United States

  
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF OKLAHOMA

DAVID B. ALDERMAN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 )  
 JAMES ROBERT KELLY )  
 and CLARKSON SAIN, )  
 )  
 Defendants. )

NO. 74-C-269

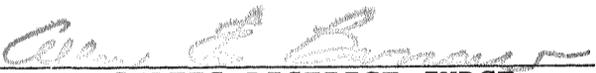
FILED

MAR 4 - 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL

Upon the application of the plaintiff and for good cause shown, this cause of action and Complaint is dismissed with prejudice.

  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 4 - 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
RICHARD E. VAUGHN; MARSHA A. )  
VAUGHN; COUNTY TREASURER, )  
Tulsa County, Oklahoma; and )  
THE BOARD OF COUNTY COM- )  
MISSIONERS, Tulsa County, )  
Oklahoma, )  
Defendants. )

CIVIL ACTION NO. 74-C-393 ✓

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 4<sup>th</sup> day  
of March , 1975, the plaintiff appearing by Robert P. Santee,  
Assistant United States Attorney for the Northern District of  
Oklahoma; the defendants, Board of County Commissioners and the  
County Treasurer, Tulsa County, Oklahoma, appearing by and through  
their attorney, Gary J. Summerfield, Assistant District Attorney,  
and the defendants, Richard E. Vaughn and Marsha A. Vaughn, appear-  
ing not.

The Court being fully advised and having examined  
the file herein finds that due and legal process of service was  
made on the defendants, Board of County Commissioners and the County  
Treasurer, Tulsa County, Oklahoma, on October 4, 1974, as appears  
from the U. S. Marshal's Returns of Service herein, and that these  
defendants filed their Answers herein on October 23, 1974; that due  
and legal process of service was made on the defendants, Richard E.  
Vaughn and Marsha A. Vaughn, as appears from the Proof of Publication  
filed herein, and

It appearing that the defendants, Richard E. Vaughn and  
Marsha A. Vaughn, have failed to answer herein and that default  
has been entered by the Clerk of this Court.

The Court further finds that this is a suit based  
upon a mortgage note and foreclosure on a real property mortgage

securing said mortgage note and that the following described real property is located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Seventeen (17), Block Seven (7), NORTHGATE THIRD ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

THAT the defendants, Richard E. Vaughn and Marsha A. Vaughn, did, on the 5th day of May, 1972, execute and deliver to the Diversified Mortgage and Investment Company, their mortgage and mortgage note in the sum of \$15,000.00 with 7 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

THAT by Assignment of Mortgage of Real Estate dated May 25, 1972, Diversified Mortgage and Investment Company assigned said Note and Mortgage to the Government National Mortgage Association; that by Assignment dated October 24, 1972, Government National Mortgage Association assigned said Note and Mortgage to Mortgage Associates, Inc.; that by Assignment dated November 6, 1972, Mortgage Associates, Inc., assigned said Note and Mortgage to Urban Shelter Mortgages, Inc.; that by Assignment of Real Estate Mortgage dated November 6, 1972, Urban Shelter Mortgages, Inc., assigned said Note and Mortgage to Federal National Mortgage Association; and by Assignment dated March 27, 1974, Federal National Mortgage Association assigned said Note and Mortgage to the Secretary of Housing and Urban Development, Washington, D. C., his successors and assigns.

The Court further finds that the defendants, Richard E. Vaughn and Marsha A. Vaughn, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon for more than 12 months last past, which default has continued and that by reason thereof the above-named defendants are now indebted to the plaintiff in the sum of \$14,779.06 as unpaid principal, with interest thereon at the rate of 7 percent interest per annum from November 1, 1973, until paid, plus the cost of this action accrued and accruing.

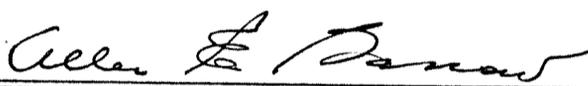
The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from the defendants, Richard E. Vaughn and Marsha A. Vaughn, the sum of \$ 176.00, for real estate taxes for the year 1974, and the sum of \$ 47.62, for personal property taxes for 1973 and 1974, which are due and owing as of October 1, 1974, and that Tulsa County should have judgment against Richard E. Vaughn and Marsha A. Vaughn for said amounts, plus interest and penalties thereon according to law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT the plaintiff have and recover judgment against defendants, Richard E. Vaughn and Marsha A. Vaughn, in rem, for the sum of \$14,779.06, with interest thereon at the rate of 7 percent per annum from November 1, 1973, until paid, plus the cost of this action accrued and accruing, plus any additional sums advanced or expended during this foreclosure action by plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus the cost of this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT the County of Tulsa, State of Oklahoma, have and recover judgment, in rem, against the defendants, Richard E. Vaughn and Marsha Vaughn, in the sum of \$ 176.00 for real estate taxes for the year 1974, and the sum of \$ 47.62 for personal property taxes for the years 1973 and 1974, plus interest and penalties according to law, but that such judgment be and is superior to the first mortgage lien of this plaintiff only insofar as the amount due and owing for unpaid real estate taxes are concerned.

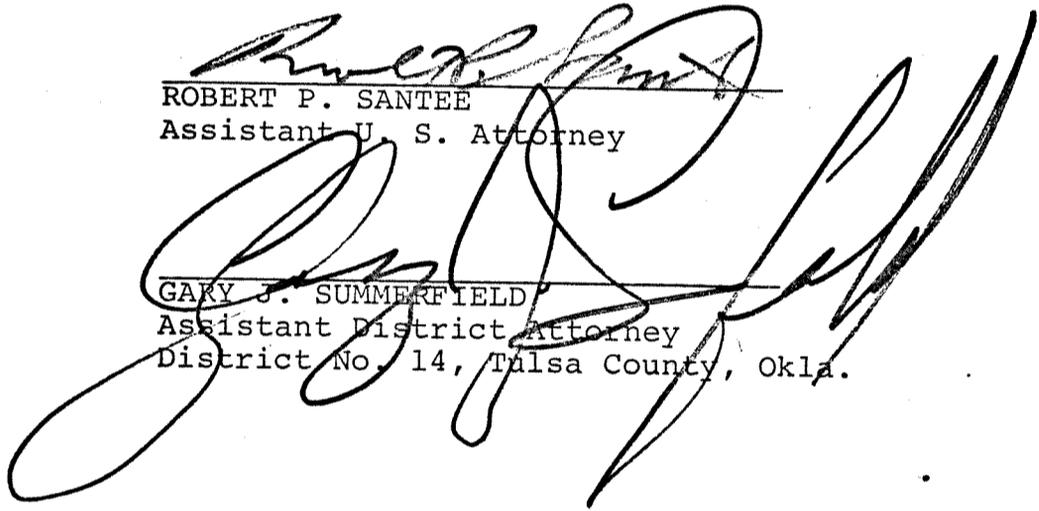
IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT upon the failure of said defendants to satisfy plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of plaintiff's judgment and the judgment of the County of Tulsa, Oklahoma. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT from and after the sale of said property, under and by virtue of this judgment and decree, all of the defendants, and each of them, and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest, or claim in or to the real property being foreclosed herein or any part thereof.

  
UNITED STATES DISTRICT JUDGE

APPROVED:

  
ROBERT P. SANTEE  
Assistant U. S. Attorney

  
GARY J. SUMMERFIELD  
Assistant District Attorney  
District No. 14, Tulsa County, Okla.

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 4 - 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

United States of America, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 216.00 Acres of Land, More or )  
 Less, Situate in Nowata County, )  
 State of Oklahoma, and A. H. )  
 Howell, et al., and Unknown )  
 Owners, )  
 )  
 Defendants. )

CIVIL ACTION NO. 72-C-445

Tract No. 1510M

J U D G M E N T

1.

Now, on this 4<sup>th</sup> day of March, 1975, this matter comes on for disposition on application of the Plaintiff, United States of America, for entry of judgment on the Report of Commissioners filed herein on January 24, 1975, and the Court, after having examined the files in this action and being advised by counsel for the Plaintiff, finds that:

2.

The Court has jurisdiction of the parties and the subject matter of this action.

3.

This judgment applies to the entire estate taken in Tract No. 1510M, as such estate and tract are described in the Complaint filed in this case.

4.

Service of Process has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this cause who are interested in subject tract.

5.

The Acts of Congress set out in paragraph 2 of the Complaint filed herein give the United States of America the right, power and authority to condemn for public use the subject property. Pursuant thereto, on December 4, 1972, the United States of America

filed its Declaration of Taking of a certain estate in such tract of land, and title to such property should be vested in the United States of America, as of the date of filing such instrument.

6.

Simultaneously with filing of the Declaration of Taking, there was deposited in the Registry of this Court as estimated compensation for the taking of the described estate in the subject tract a certain sum of money, and none of this deposit has been disbursed, as set out below in paragraph 12.

7.

The Report of Commissioners filed herein on January 24, 1975, hereby is accepted and adopted as a finding of fact as to subject tract. The amount of just compensation as to the estate taken in subject tract as fixed by the Commission is set out below in paragraph 12.

8.

This judgment will create a deficiency between the amount deposited as estimated just compensation for the estate taken in subject tract and the amount fixed by the Commission and the Court as just compensation, and a sum of money sufficient to cover such deficiency should be deposited by the Government. This deficiency is set out below in paragraph 12.

9.

The defendants named in paragraph 12 as owners of the estate taken in subject tract are the only defendants asserting any interest in such estate. All other defendants having either disclaimed or defaulted, the named defendants were (as of the date of taking) the owners of the estate condemned herein, and, as such, are entitled to receive the just compensation awarded by this judgment.

10.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power and authority to condemn for public use the subject tract, as it is described in the Complaint filed herein, and as such property, to the extent of

the estate described in such Complaint is condemned, and title thereto is vested in the United States of America, as of December 4, 1972, and all defendants herein and all other persons are forever barred from asserting any claim to such estate.

11.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking in this case, the owners of the estate taken herein in subject tract were the defendants whose names appear below in paragraph 12, and the right to receive the just compensation for such estate is vested in the parties so named.

12.

It Is Further ORDERED, ADJUDGED and DECREED that the Report of Commissioners filed herein on January 24, 1975, hereby is confirmed, and the sum therein fixed is adopted as the award of just compensation for the estate taken in subject tract, and such award is allocated among the various interests as shown by the following schedule:

TRACT NO. 1510M

1. Lessor interest:

Owner: A. H. Howell, Trustee for the Elmer Howell Trusts		
Award of just compensation pursuant to Commissioners' Report --	\$1,000.00	\$1,000.00
Deposited as estimated compensation for this interest -----	<u>854.00</u>	
Disbursed to owner -----		<u>None</u>
Balance due to owner -----		\$1,000.00 plus interest
Deposit deficiency as to this interest ---	\$146.00	

2. Working interest:

Owner: Shoaf and Lewis Oil Co., Inc.		
Award of just compensation pursuant to Commissioners' Report --	\$3,000.00	\$3,000.00
Deposited as estimated compensation for this interest -----	<u>2,840.00</u>	
Disbursed to owner -----		<u>None</u>
Balance due to owner -----		\$3,000.00 plus interest
Deposit deficiency as to this interest ---	\$160.00	

3. Oil payment interest:

Owner: E. M. Lane

Award of just compensation pursuant to Commissioners' Report - \$10.00	\$10.00
Deposited as estimated compensation for this interest -----	None
Disbursed to owner -----	<u>None</u>
Balance due to owner -----	\$10.00 Plus interest
Deposit deficiency as to this interest - \$10.00	

---

13.

It Is Further ORDERED, ADJUDGED and DECREED that the United States of America shall pay into the Registry of this Court for the benefit of the owners the deposit deficiency for the subject tract as shown in paragraph 12, in the total amount of \$316.00, together with interest on such deficiency at the rate of 6% per annum from December 4, 1972 until the date of deposit of such deficiency sum; and such sum shall be placed in the deposit for subject tract in this civil action.

Upon receipt of such deficiency deposit the Clerk of this Court shall disburse the deposit for the subject tract as follows:

To each owner of the subject property the amount of his award as shown above in paragraph 12, together with each said owner's proportionate share of all accrued interest on the deposit deficiency created by this judgment.

/s/ Allen E. Barrow

---

UNITED STATES DISTRICT JUDGE

APPROVED:

/s/ Hubert A. Marlow

---

HUBERT A. MARLOW  
Assistant United States Attorney

IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF OKLAHOMA

STEPHEN A. ALDERMAN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 )  
 JAMES ROBERT KELLY )  
 and CLARKSON SAIN, )  
 )  
 Defendants. )

NO. 75-C-14

**FILED**  
**MAR 4 - 1975**  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL

Upon the application of the plaintiff and for good cause shown, this cause of action and Complaint is dismissed with prejudice.

  
UNITED STATES DISTRICT JUDGE

*cont*

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA )  
 )  
 Plaintiff )  
 )  
 V. )  
 )  
 DON F. KELSO, an individual, )  
 doing business as DON F. )  
 KELSO CONSTRUCTION COMPANY )  
 )  
 Defendant )

Civil Action

No. 74-C-478 ✓

**FILED**

MAR 3 1975

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

J U D G M E N T

This matter came duly on for hearing on the plaintiff's motion for default judgment against the defendant, Don F. Kelso, an individual, doing business as Don F. Kelso Construction Company, and it appearing that plaintiff's motion for default judgment is appropriate and well taken, it is, therefore

ORDERED, ADJUDGED AND DECREED that plaintiff have and recover from Don F. Kelso, the amount of \$270, together with interest thereon at 6% per annum from July 16, 1973.

Costs of this action are taxed to defendant.

DATED this 3 day of March, 1975.

*W. Dalebook*  
UNITED STATES DISTRICT JUDGE

*01*

Cook

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED  
MAR 3 1975  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ELBOR E. McCONDICHIE and )  
 LORETTA McCONDICHIE, )  
 )  
 Defendants. )

CIVIL ACTION NO. 74-C-3 ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 3rd  
day of March, 1975, the plaintiff appearing by Robert P.  
Santee, Assistant United States Attorney for the Northern District  
of Oklahoma, and the defendants, Elbor E. McCondichie and Loretta  
McCondichie, appearing by James E. Frazier and Larry A. Gullekson.

The Court being fully advised and having examined the  
file herein finds that personal service of summons and complaint  
were made upon Elbor E. McCondichie and Loretta McCondichie on  
January 15, 1974, as appears from the Marshal's returns of service  
herein and,

It appearing that Elbor E. McCondichie and Loretta  
McCondichie filed their Answers herein on April 1, 1974.

The Court further finds that this is a suit based upon  
a Promissory Note executed on or about April 28, 1972, by the  
defendants, Elbor E. McCondichie and Loretta McCondichie, in favor  
of the Small Business Administration in the amount of \$3,000.00  
with interest at 5 7/8 per cent per annum.

The Court further finds that the defendants, Elbor E.  
McCondichie and Loretta McCondichie, made default under the terms  
of the aforesaid Promissory Note by reason of their failure to  
make monthly installments due thereon, which default has continued  
and that by reason thereof, the above-named defendants are now in

default to the plaintiff in the sum of \$3,000.00, plus accrued interest thereon in the sum of \$122.36 through March 5, 1973, plus interest accruing thereafter at the rate of 5 7/8 per cent per annum until paid.

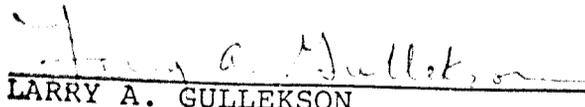
The Court further finds that the plaintiff and the defendants, by and through their respective attorneys, have stipulated that the defendants shall be accorded an equitable setoff in the amount of \$500.00 as a result of the sale of certain personal property which was security for the Promissory Note aforesaid, which sale was by summary foreclosure on August 31, 1972, and was not a part of this action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT the plaintiff have and recover judgment against the defendants, Elbor E. McCondichie and Loretta McCondichie, for the sum of \$3,000.00, plus interest accrued thereon in the sum of \$122.36 through March 5, 1973, and interest accruing thereafter at the rate of 5 7/8 per cent per annum until paid, less a credit of \$500.00 as of the date this judgment is entered.

  
UNITED STATES DISTRICT JUDGE

APPROVED:

  
ROBERT P. SANTEE  
Assistant U. S. Attorney  
Attorney for Plaintiff,  
United States of America

  
LARRY A. GULLEKSON  
FRAZIER & FRAZIER  
Attorneys-at-Law  
Attorneys for defendants,  
Elbor E. McCondichie and  
Loretta McCondichie



There are several exceptions to this general rule. Defendants attempt to bring themselves within the exception recognized in Mills v. Electric Auto-Lite Co., 396 U.S. 375, 24 L.Ed. 2d 593, 90 S.Ct. 616 (1970). This exception is to the effect that attorneys' fees may be recoverable in an action in which a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself. The theory behind this exception is that to allow the others to obtain the full benefit of the plaintiff's efforts without contributing to the litigation expenses would be to unjustly enrich the others at the plaintiff's expense.

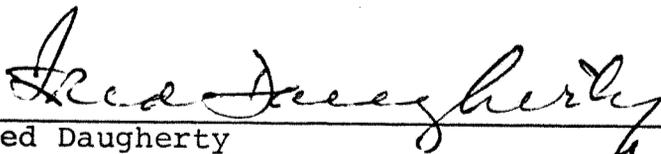
Defendants argue that this rule would have permitted Plaintiff to recover its attorneys' fees if they had been successful, therefore, they should be permitted to recover their attorneys' fees having successfully defended the action. Defendants' reasoning is defective, for in the same opinion, Mills v. Electric Auto-Lite, supra, the Court stated:

"To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited.... ."

Thus, the rationale behind this exception does not apply to Defendants herein. To charge Plaintiff would be to saddle the unsuccessful litigant with the attorneys' fees of the successful party. This is clearly not what the Court contemplated in Mills. This exception allows the charging of attorneys' fees to parties benefitted by a successful litigant's efforts, not the charging of such fees to the defeated parties.

Defendants further argue that they should be allowed to recover their attorneys' fees herein as 15 U.S.C. §78(r) allows the recovery of such fees, in the discretion of the Court, and the proxy statement which gave rise to this litigation was filed with the Securities and Exchange Commission, prior to its distribution, pursuant to the provisions of 15 U.S.C. §78(r). Here again Defendants' reasoning is defective. A violation of 15 U.S.C. §78(r) gives rise to a separate cause of action rather than a violation of 15 U.S.C. §78(n)(a) which is herein involved. The fact that Congress specifically provided for attorneys' fees under 15 U.S.C. §78(r) and did not so provide in 15 U.S.C. §78(n)(a) indicates that Congress did not intend that attorneys' fees be available under 15 U.S.C. §78(n)(a). Furthermore, attorneys' fees are discretionary with the Court under 15 U.S.C. §78(r) and the Court would not, if the same rule applied under both sections, grant Defendants' attorneys' fees in this case in the discretion of the Court. The law pertaining to causation under 15 U.S.C. §78(n)(a) on the basis of which Plaintiff's action was dismissed is complex and developing. There is nothing before the Court which would indicate less than good faith on the part of the Plaintiff. Therefore Defendants' Motion should be overruled.

It is so ordered this 3<sup>d</sup> day of March, 1975.

  
Fred Daugherty  
United States District Judge



for boats which included a frame mounted for pivotal movement on a horizontal axis in a recess in a boat dock; pontoons having open bottoms which were mounted on the frame and water was removed from the pontoons by injecting air therein; water being allowed to return into the pontoons by permitting the air to escape from the inside of the pontoons. The rear end of the frame was also provided with means to engage the sides of the recess to guide the up and down movement of the rear of the frame within the recess. Rutter had a patentability search made, and thereafter filed an application for Letters Patent on March 1, 1965, which application issued as United States Letters Patent No. 3,362,172 on January 9, 1968, and entitled "Individual Dry Dock for Boats". Subsequent to the issuance of the foregoing patent, Rutter discovered that the claims thereof were defective in that they were limited to the introduction of air to the bottom of the pontoons and as a result applied for reissue of his patent on November 6, 1969, and the reissue patent was granted as United States Letters Patent No. Re 27,090 on March 23, 1971.

The claims of the reissue patent involved in this suit are claims 1 and 2 as follows:

1. An individual dry dock for water craft comprising a recess having water therein for receiving the craft therein, a frame disposed within the recess, means secured in the proximity of the recess for pivotally securing the frame therein whereby the frame is vertically movable and pivotal about a horizontal axis, said frame being adapted for being positioned beneath the craft disposed within the recess, pontoon means carried by the frame, said pontoon means having the lower end thereof open for admitting water to the interior thereof, means for directing air under pressure into the pontoon means [through the lower open end] whereby the air will [bubble upwardly through the water and] form an air pocket therein for elevating the frame within the recess whereby the frame will engage the lower portions of the craft for elevation thereof to a position out of the water, and means for discharging the air from the pontoon means whereby the frame may be lowered within the recess for lowering the craft into the water.

2. An individual dry dock for water craft as set forth in claim 1 and including guide means cooperating between the frame and recess for guiding the vertical movement of the frame within the recess.

In reading and interpreting the above claims of the reissue patent, the portions within the bracket are to be disregarded.

Claim 1 of the patent in suit can be broken down into six elements or entities in combination:

- (A) A recess having water therein for receiving the craft therein,
- (B) A frame disposed within the recess,
- (C) Means secured in the proximity of the recess for pivotally securing the frame therein whereby the frame is vertically movable and pivotal about a horizontal axis.
- (D) Pontoon means carried by the frame, said pontoon means having the lower end open for admitting water into the interior thereof,
- (E) Means for directing air under pressure into the pontoon means whereby the air will form an air pocket therein for elevating the frame within the recess whereby the frame will engage the lower portion of the craft for elevation thereof to a position out of the water, and
- (F) Means for discharging the air from the pontoon means whereby the frame may be lowered within the recess for lowering the craft into the water.

Claim 1 also includes an introductory expression "An individual dry dock for water craft comprising" and a functional expression "said frame being adapted for being positioned beneath the craft disposed within the recess".

Claim 2 of the patent in suit is dependent upon claim 1 and includes all of the six elements recited above; in addition, claim 2 includes "guide means cooperating between the frame and the recess for guiding the vertical movement of the frame within the recess."

During the prosecution of the original application which matured into original Patent No. 3,362,172, the Patent Office cited the following references:

Inventor		Patent No.	Issue Date
Dutton	U.S.	615,440	Dec. 6, 1898
Hohorst		1,296,662	March 11, 1919
Hamilton		1,380,141	May 31, 1921
Parks		2,889,795	June 9, 1959
Ward		3,069,892	Dec. 25, 1962
Poe		3,191,389	June 29, 1965
Humphris	Gr.Bt.	976,272	Nov. 25, 1964

During the prosecution of the original application which matured into original Patent No. 3,362,172, Rutter called the following references to the attention of the Patent Office.

Inventor		Patent No.	Issue Date
Dieckhoff		755,854	March 29, 1904
Mehlhorn et al		821,110	May 22, 1906
Templeton		3,001,370	Sept. 26, 1961

As the filing of the reissue application was, in effect, a continuation of the prosecution of the original application, all of the above patents were considered by the Examiner during the prosecution of the reissue application, and the same patents listed at the end of original Patent No. 3,362,172 are also listed at the end of Patent No. Re 27,090.

It is obvious, and it is not disputed, that none of the patents cited by the Patent Office or called to the attention of the Patent Office disclose, separately, all of the six elements recited in claim 1 of the patent in suit or all of the seven elements set forth in claim 2 of the patent in suit.

Additional references, not cited by the Patent Office and not called to the attention of the Patent Office, and presently relied upon by the Defendant are as follows:

Inventor	Patent No.	Issue Date
Engstrand	2,576,928	Dec. 4, 1951
Harris	2,761,409	Sept. 4, 1956
Fort	3,270,698	Sept. 6, 1966

Again, it is obvious, and not disputed, that none of the references listed above, as relied upon by the Defendant, separately disclose all of the six elements of claim 1 of the patent in suit or all of the seven elements of claim 2 of the patent in suit.

Dutton Patent No. 615,440 discloses a dry dock for ships where the dry dock is comprised of a stationary portion and a movable portion, the movable portion being elevated by a float. In Dutton, the float is elevated by introducing air into a chamber to remove water therefrom and is lowered by allowing air to escape from the chamber to permit the return of water to the chamber. Dutton also shows a guide means for maintaining the relatively movable elements in alignment. Dutton does not show a recess in a dock structure, nor does Dutton show a frame which is pivotally connected to the recess.

Hohorst Patent No. 1,296,662 shows a self-contained dock structure similar in some respects to Dutton previously described. Hohorst has a floating section where water is removed or displaced from the float by air under pressure. Hohorst also has a rack and pinion type of guide means. Hohorst, however, does not show a recess in a dock structure nor does he show a frame pivotally connected within the recess.

Hamilton Patent No. 1,380,141 shows a floating dock where water is pumped to or from a submersible pontoon to lower or raise the pontoon. Hamilton also shows various types of automatic controls and guide means. However, Hamilton does not show a

recess in a dock structure and a frame pivotally connected within the recess.

Ward Patent No. 2,069,862 shows what is referred to as a floating transfer bridge. This bridge is pivotally secured at its shore and is provided with a floating pontoon at its seaward end. This bridge is adapted to support wheeled vehicles such as railroad cars. Ward does not disclose a pontoon where the water is removed by pumping air under pressure into the pontoon. Ward does not show a frame which is pivotally mounted within a recess.

Poe Patent No. 3,191,389 shows a boat lift having a frame pivotally mounted within a recess. However, the boat lift in Poe is elevated and lowered by means of cables which are connected to a winch. Poe does not show any pontoon means for lifting or lowering the frame.

Humphris British Patent No. 976,272 shows a floating gangway which is pivotally connected at one end to a dock and which is provided with a buoyant chamber at the other end. Humphris does not show any means for introducing air or water into his buoyant chambers and they appear to be permanently closed. Humphris does not show a frame pivotally mounted within a recess.

Dieckhoff Patent No. 755,854 shows a floating dock structure where water is removed from a floatable compartment by pumping the water out. Dieckhoff does not show the displacement of water from a floatable chamber by introducing air under pressure nor does Dieckhoff show a pivotal frame mounted within a recess.

Mehlhorn et al Patent No. 821,110 shows a floating dock where water is displaced from the floatable chamber by introducing air under pressure from an exterior chamber mounted on the dock. For larger docks, the patent suggests the use of an air compressing plant. This patent does not show a pivotal frame mounted within a recess.

Engstrand Patent No. 2,576,928, which was not cited by the Patent Office and which is now relied upon by the Defendant, shows a floating dry dock which can be pivotally connected at either end to a dock structure. Engstrand pumps water to and from the buoyant chambers. Engstrand does not disclose displacement of water by supplying air under pressure to a buoyant chamber. Engstrand does not show a pivotal frame mounted in a recess. Engstrand does not show anything which is not shown in the patents considered by the Examiner.

Harris Patent No. 2,761,409 which was not cited during the prosecution of the patent in suit and which is now relied upon by the Defendant, shows a water-borne airplane terminal. Harris shows a member which is pivotally connected at one end to a dock and which has pontoons at the opposite end. The pontoons are adapted to accommodate a seaplane and the purpose of the device is to permit passengers to board or leave the seaplane. Water is pumped into and from the pontoons. Harris does not show the displacement of water from the pontoons by introducing air under pressure into the pontoons. Harris also does not show a pivotal frame mounted within a recess. Harris does not show anything not shown in the patents considered by the Examiner. Harris is essentially of the same pertinence as Ward Patent No. 3,069,862, previously discussed, in that both patents provide a

pivotal frame which is connected to a dock; both patents show pontoon means where water is introduced and removed from the pontoon means by a water pump as opposed to displacing the water by introducing air under pressure into the pontoon means; both patents are similar in that they fail to disclose a pivotal frame member pivotally mounted within a recess.

Fort Patent No. 3,270,698, which was uncited during the prosecution of the patent in suit and which is relied upon by the Defendant, shows a floating dry dock which is pivotally connected at one end to a dock structure and which is provided with a pontoon means at the opposite end. Water is pumped into and out of the pontoon means. Fort does not show displacement of water from the pontoon means by introducing air under pressure into the pontoon means nor does Fort show a frame pivotally mounted within a recess. Fort does not disclose anything which is not shown in the prior art considered by the Examiner.

The Defendant suggests that the Examiner did not make a proper search because he failed to look in class 114, which, according to Defendant, contains the most pertinent art. It should be noted, however, that Rutter Patent No. 3,362,172 and 27,090 both issued in Class 61, Subclass 65. It is believed that the original patent and the reissue patent were issued in the right class. As the original patent No. 3,362,1972 and Re 27,090 both issued in Class 61, Subclass 65, it is believed appropriate to look at the definition of Subclass 65; but as Subclass 65 is dependent upon Subclass 64, the definition of Subclass 64 is pertinent. Class 61, Subclass 64 is defined as follows:

"Structures under the class definition for inclosing a ship in order that the water may be removed from about it, including means to support the ship when the water has been withdrawn."

Continuing, Class 61, Subclass 65 is defined as follows:

"Structures under subclass 64 comprising devices attached to a fixed structure upon which a vessel may be floated and lifted clear out of the water."

The presumption of validity that attaches to the issuance of a patent (35 United States Code §282) implicitly includes the presumption that the patent was regularly issued. It is believed that further argument or citation of authority on this point is unnecessary.

Defendant's main defense involves the validity of the patent in suit. However, before proceeding to the issue of validity, a determination should be made on the infringement aspect of the case for if there is no infringement it will be unnecessary to treat with the validity question. The device manufactured and sold by the Defendant when properly installed, includes a recess for receiving a water craft therein, a frame disposed within the recess, means secured in the proximity of the recess for pivotally securing the frame therein whereby the frame is vertically movable and pivotal about a horizontal axis, said frame being adapted for being positioned beneath the craft disposed within the recess, pontoon means carried by the frame, said pontoon means having the lower end thereof open for admitting water to the interior thereof, means for directing air under pressure into the pontoon means whereby the air will form an air pocket therein for elevating the frame within the recess whereby the frame will engage the lower portions of the craft for elevation thereof to a position out of the water,

means for discharging the air from the pontoon means whereby the frame may be lowered within the recess for lowering the craft into the water. The preceding constitutes a "reading" of the Defendant's structure on claim 1 of the patent in suit.

In addition to the six elements recited in Claim 1 of the patent in suit, the accused structure manufactured and sold by the Defendant, when properly installed, includes guide means cooperating between the frame and recess for guiding the vertical movement of the frame within the recess. Plaintiff's expert so testified during the proceedings. The Defendant finally admitted he had such a guide means.

In view of the foregoing, it is believed that claims 1 and 2 of the patent in suit are infringed by the Defendant.

The Plaintiff's patent in suit is presumed to be valid and the burden of establishing invalidity of this patent rests on the Defendant. Title 35, United States Code, Section 282; Eimco Corporation v. Peterson Filters and Engineering Co., 406 F. 2d 431 (Tenth Cir. 1968); Moore v. Shultz, 491 F. 2d 294 (Tenth Cir. 1974). The burden of proof is by clear and convincing evidence; Eimco Corporation v. Peterson Filters and Engineering Co., supra; Moore v. Shultz, supra.

The invention disclosed and claimed in the patent in suit is for a "combination" which involves a plurality of elements individually old but combined together in a new manner. The title of the invention is "Individual Dry Dock for Boats". As set forth in the specification of the patent itself and as further detailed in Plaintiff's testimony, the purpose of the invention is to provide an individual boat lift for the boat owner where

the boat lift can be located in a wet slip or recess dock of the boat owner. The only patent cited by the Patent Office, to the Patent Office, or by the Defendant in this action, which remotely relates to the subject matter of the present invention is Poe Patent No. 3,191,389, Defendant's Exhibit 8. Poe shows an individual dry dock for a boat where the apparatus can be accommodated in a recess. However, the frame in the Poe patent is lifted by cables and a winch which necessitates a superstructure mounted over the recess. Poe does not show or suggest the feature of using a pontoon as in the Plaintiff's construction. The remaining patents relate to various dry docks used for other purposes and various other floatable members.

Each of the six elements of claim 1 is individually old and each of the seven elements in claim 2 is individually old. However, claims 1 and 2 of the patent in suit are combination claims. It is uncontroverted that Plaintiff was the first to put together the six elements of claim 1 and the seven elements of claim 2. In McCullough Tool Company v. Well Surveys, Inc., 343 F. 2d 381 (Tenth Cir. 1965) the court stated:

"Generally, where elements old in the art are united in such a way that a new and useful result is secured or an old result is attained in a more facile, economical and efficient manner, there is a patentable combination."

See also Eimco Corporation v. Peterson Filters and Engineering Co., supra. The Court believes that there is a patentable combination presented by Plaintiff's patent.

The Defendant relies, for purposes of anticipation, principally on Harris Patent No. 2,761,409. The Harris patent was not cited during the prosecution of the patent in suit. However,

Harris has nothing whatever to do with an individual dry dock for boats. Harris does not recognize or deal with the problem solved by the Plaintiff in that Plaintiff has provided boat owners with a boat lift which can be installed in their own wet slips or recesses in the dock structure. Harris is dealing with a water-borne airplane terminal. Harris is deficient in the following respects:

- (a) Harris does not show or suggest a recess as recited in claim 1 in which the frame is pivotally mounted;
- (b) Harris does not show or suggest means for introducing air under pressure into the pontoon for elevating the frame within the recess; and
- (c) Harris does not show means for discharging the air from the pontoon whereby the frame may be lowered within the recess.

With regard to the "recess", the Defendant suggests that this is an unnecessary element of the combination; that the recess could be ten feet wide or a hundred feet wide. Furthermore, that the Harris device could be placed in a recess. However, Harris has nothing whatever to do with the problem solved by the present invention. To place the Harris structure within a recess would be totally foreign to anything which Harris discloses. In the decision in Dewey & Almy Chemical Co. v. Mimex Co., 124 F. 2d 986, 989 (Second Cir. 1942), it is stated:

"No doctrine of the patent law is better established than that a prior patent or other publication to be an anticipation must bear within its four corners adequate directions for the practice of the patent invalidated. If the earlier disclosure offers no more than a starting point for further experiments, if its teaching will sometimes succeed and sometimes fail, if it does not inform the art without more how to practice the new invention, it has not correspondingly enriched the store of common knowledge, and it is not an anticipation."

The Defendant has urged that the teachings of the various references might be combined to make obvious the invention set forth in the claims of the patent in suit. However, nothing in the art suggests the combination here involved. In Application of Imperato, 486 F. 2d 585 (CCPA 1973) the Court of Customs and Patent Appeals stated:

"...However, the mere fact that those disclosures can be combined does not make the combination obvious unless the art also contains something to suggest the desirability of the combination." (Emphasis supplied.)

The primary reference considered by the Patent Office was the Poe Patent No. 3,191,387 because Poe was directed to an individual dry dock for boats where the individual dry dock was mounted in a recess. However, Poe did not show or suggest the pontoon means. Apparently, the Examiner felt that there was no proper combination of references which would anticipate the invention as claimed by Plaintiff. The Defendant suggests that Harris is more pertinent than any patents considered by the Examiner. But as explained above, Harris does not recognize the problem to which the present invention is addressed, nor does Harris suggest the solution to the problem as provided by Plaintiff. The Harris patent No. 2,761,409 is no more pertinent than the Ward Patent No. 3,069,862 considered by the Examiner. Ward was cited by the Examiner as showing a pivotal member attached at one end to a dock structure and having a pontoon means at its seaward end. In Ward, the water is removed from the pontoon means by means of a water pump. Ward is also deficient in failing to show a recess. Finally, Ward does not recognize the problem to which the present invention is addressed. The same considerations hold true for the Harris patent. Harris

merely shows a frame pivotally attached at one end to a dock structure and having a pontoon means at its seaward end. As is the case in Ward, the pontoon means is allowed to float or sink by pumping water from or to the pontoon means by means of a water pump. It is a fundamental proposition of patent law that the presumption of validity is reinforced where the prior art relied upon to attack the validity of the patent is no more in point than the art which had already been considered and rejected by the Patent Office. Schnell v. Allbright-Nell Company, 348 F. 2d 444 (Seventh Cir. 1965); Baker Mfg. Co. v. Whitewater Mfg. Co., 292 F. Supp. 1389 (E. Wis. 1969).

As to a combination of references to disclose a patent it is believed that the disclosure of the patent in suit is the only art suggesting the combination. In Application of Shaffer, 229 F. 2d 476 (CCPA 1956) the Court of Customs and Patent Appeals stated:

"It is too well settled for citation that references may be combined for the purpose of showing that a claim is unpatentable. However, they may not be combined indiscriminately, and to determine whether the combination of references is proper, the following criterion is often used: namely, whether the prior art suggests doing what an applicant has done."

The Plaintiff's invention, as set forth in the claims in suit, is not very complicated. The invention may appear very simple when viewed by hindsight. Simplicity alone, however, does not negate invention. In the case of Strong-Scott Mfg. Co. v. Weller, 112 F. 2d 389 (Eighth Cir. 1940), the Court stated:

"Simplicity alone cannot be relied upon as indicating that an improvement is a result of mechanical skill rather than inventive genius."

In the case of Mayco Co. v. Kennett Cotton Chopper Mfg. Co., 101 F. Supp. 117 (E.D. Mo. 1951), the Court stated:

"Now that we have plaintiff's structure before us its simplicity is striking. Why it was not sooner discovered is amazing. Simplicity of design does not destroy validity of a patent. It may show the 'flash of genius'."

The Court in Patterson-Ballagh Corp. v. Moss, 201 F. 2d 403 (Ninth Cir. 1953) in commenting on the simplicity of an invention, said:

"It is quite apparent that simplicity alone will not preclude invention. Hindsight tends to color the seeming obviousness of that which is in fact is true contribution to prior art. 'Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skilful attention.' Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U.S. 428, 435 (1911)."

There has been some suggestion of possible estoppel with regard to claim 1 of the patent in suit as to the deletion of the phrases "through the lower open end" and "bubble upwardly through the water and". As pointed out in the affidavits accompanying the reissue application, these deleted expressions are unnecessary to distinguish over the art. This was more fully explained in the testimony of Plaintiff's expert. Furthermore, the issue was presented directly and squarely to the Patent Office and this issue was decided favorably with respect to the Plaintiff. Therefore, it is believed that estoppel is not a proper issue in this case.

It is believed that the Plaintiff has adequately demonstrated that the Defendant's accused structure constitutes an infringement of the claims of the patent in suit.

As to validity of Plaintiff's Patent, it is believed that the Defendant has failed to overcome the prima facie presumption of validity. The Defendant has failed to show by clear and convincing evidence that the Examiner was in error in issuing the patent in suit. The Defendant has failed to show by clear and convincing evidence that the subject matter covered by the claims of the patent in suit was anticipated by the prior art. The Defendant has failed to show by clear and convincing evidence that the subject matter of the claims of the patent in suit would have been obvious to a man skilled in the art in view of the prior art.

Plaintiff is entitled to a judgment of the Court that the patent of Plaintiff is valid and is infringed by the Defendant; that Defendant should be permanently enjoined from further infringement of the patent in suit; that Plaintiff is entitled to an accounting to determine the amount of damages to be awarded and whether or not a reasonable attorney's fee should be awarded Plaintiff. The Judgments of validity, infringement and injunction should be final judgments. 28 U.S.C. §1292(a)(4). The Court will reserve jurisdiction of this cause for the foregoing accounting, determination of damages and for consideration of the question as to the allowance to Plaintiff of attorney fees and costs. Mott Corporation v. Sunflower Industries, Inc., 237 F. Supp. 14 (D. Kans. 1964). Counsel for Plaintiff will prepare an appropriate Judgment

and Order based on the foregoing, submit the same to opposing counsel and then to the Court for signature and entry herein.

Dated this 30 day of March, 1975.

*Fred Daugherty*

Fred Daugherty  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

MILTON RIDDLE, )  
 )  
 Plaintiff, )  
 vs. )  
 )  
 PROFESSIONAL INVESTORS LIFE )  
 INSURANCE COMPANY, )  
 )  
 Defendant. )

**FILED**  
MAR 3 1975 *mm*  
No. 72-C-109 Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

Plaintiff brought this action on March 31, 1972, against the defendant, Professional Investors Life Insurance Company, for the sum of \$32,059.75 plus interest and attorneys fees based upon a written agreement between plaintiff and defendant that defendant insurance company would pay the plaintiff a monthly salary plus five percent of the premium income on those policies secured through the auspices of the plaintiff; that the earned and unpaid commissions, after all credits, amount to the sum of \$32,059.75, the amount prayed for.

The defendant filed its Answer on May 1, 1972, stating generally as follows:

(1) that defendant admits the allegations of paragraph one of the Complaint;

(2) that defendant denies each and every allegation in the Complaint;

(3) that defendant has paid the plaintiff all sums which might have been due and owing the plaintiff; if any such sums should exist, they are barred by the Statute of Limitations.

On January 3, 1973, defendant filed its Counterclaim which generally states:

(1) that plaintiff was entitled to receive an overriding royalty interest of five percent of premium income upon a certain type of life insurance policy sold under the supervision of the plaintiff;

(2) that for the years 1968 through 1971, plaintiff was entitled to an overriding royalty interest (5%) in the amount of \$3,854.71;

(3) that defendant advanced the plaintiff the sum of \$17,048.58 against future overriding royalty commissions, which commissions never materialized;

(4) that defendant paid the plaintiff the sum of \$2,000.00 to be used in establishing a company in Arkansas known as American Service Life Company, which company was never established;

(5) that after due credits the plaintiff is indebted to the defendant, Professional Investors Life Insurance Company, in the amount of \$15,193.87.

This cause came on for trial by jury on the 16th day of December, 1974. After all of the evidence had been introduced by plaintiff and defendant and each had rested, the Court instructed the jury, and the case was then submitted to the jury for its decision. Thereafter, the jury returned its verdict in favor of the plaintiff, awarding him the sum of \$2,851.25 and denying the defendant's claim in its entirety.

On December 23, 1974, plaintiff's attorney filed a Motion to Determine and Assess Costs, Including Attorney Fees, which Motion came on for hearing by the Court on January 31, 1975. The Court heard the evidence of plaintiff and defendant as to a reasonable attorney's fee and finds that the prevailing party should be allowed an attorney's fee to be taxed as costs in this action pursuant to Title 12, O.S.A. §936, which provides in part:

"In any civil action to recover on an open account, \* \* \* account stated \* \* \* or contract \* \* \* for labor or services, unless otherwise provided by law or the contract which is the subject to the action, prevailing party shall be allowed a reasonable attorney fee to be set by the Court, to be taxed and collected as costs."

At the hearing relating to the attorney's fees, the plaintiff's expert witness testified that plaintiff's counsel earned a fee for services rendered in this case in excess of \$3,000.00; and the defendant's expert witness testified that a reasonable

attorney's fee would not be more than from \$1,200.00 to \$1,500.00, if allowed at all.

The Court finds that a reasonable attorney's fee of \$2,500.00 should be allowed the plaintiff counsel herein.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that plaintiff, Milton Riddle, have judgment against the defendant, Professional Investors Life Insurance Company in the amount of \$2,500.00 for an attorney's fee in this case to be taxed as costs herein, together with interest thereon from this date until paid at the rate of ten percent (10%) per annum.

Dated this 28<sup>th</sup> day of February, 1975.

*Kurtis Bohannon*  
\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JAMES T. FRICKS; NEVA FRICKS, by )  
GEORGE J. DAVIS, JR., her guardian; )  
RUSSELL G. CATE, RUTH CATE and )  
PHILLIP CATE, Widow and Heirs and )  
next of kin of BRUCE CATE, Deceased, )  
Plaintiff, )  
-vs- )  
LARRY MACK KIFER, )  
Defendant. )

NO. 74-C255 ✓

**FILED**

MAR 3 1975 §

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT

This matter comes on for regular setting on a pre-trial docket; the plaintiffs appear by and through their attorneys, Frasier & Frasier, by Larry A. Gullekson; the defendant appears by his attorney, Richard D. Gibbon; and the court is advised that the parties have reached an agreement between them as to a settlement in the above matter and ask the court to hear statements of counsel and to render a judgment based upon said statements and representations made to the court at this time.

The Court is advised that James T. Fricks was a passenger in the automobile which collided with the automobile being driven by Larry Mack Kifer, and received personal injuries to his body which are numerous and permanent in nature and that James T. Fricks has expended medical expenses in the past and will expend medical expenses in the future; that Neva Fricks, his wife, is in a nursing home and is incapacitated due to the accident; that there has been appointed George J. Davis, Jr., as her guardian; that Neva Fricks has expended large amounts of money in the past and will expend a large amount of monies in the future for her care and further that she has received numerous injuries to her body which are permanent in nature and which have incapacitated her.

That Russell G. Cate was a passenger in the automobile and was residing in the State of Washington and recieved injuries to his body which are serious and permanent in nature.; that he has

expended monies for medical expenses in the past and will have future medical expenses in regard to said injuries;

That Bruce Cate, deceased, was the driver of the automobile which collided with the defendant's automobile and as a result of said collision lost his life; that he had surviving him, Ruth Cate, his widow, and he had one child, Phillip Cate.

That the Court is advised that there has been no appointment of any administrator or other representative of Bruce Cate's estate and the Court further finds that the widow is the proper party to bring the action for the wrongful death of Bruce Cate in her own right and for the use and benefit of Phillip Cate, the deceased's son, for the pecuniary loss suffered by both parties.

That the Court is advised and finds from the statements of counsel that the injuries are of such a nature that the agreed settlement is not based upon the evaluation of the injuries or damages that are as a direct result of the accident in question, but that said agreement has been entered into based upon the factual situation that is involved and the causation of the incident and the results therefrom. That the parties represent to the Court that the negligence, if any, of Larry Mack Kifer was very questionable and the attorney for the plaintiffs announced to the Court that this matter has been discussed with all of the parties involved and it is to their best interests that this settlement be approved by the Court. The Court, after statements of counsel, and inquiry on the part of the Court, finds that the settlement should be approved and therefore makes the following judgment:

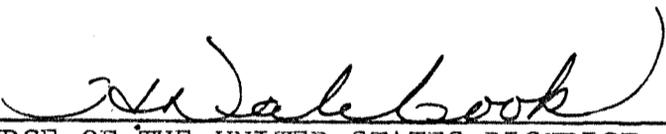
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff, James T. Fricks, have judgment against the defendant herein in the sum of Six Thousand Two Hundred Dollars (\$6200.00).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff, Neva Fricks, by and through her guardian, George J. Davis, Jr., have judgment against the defendant herein in the sum of \$8,000.00, Eight Thousand and no/100 Dollars.

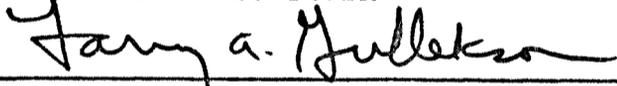
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff, Russell G. Cate, have judgment against the defendant herein in the sum of Ten Thousand Eight Hundred and no/100 Dollars (\$10,800.00).

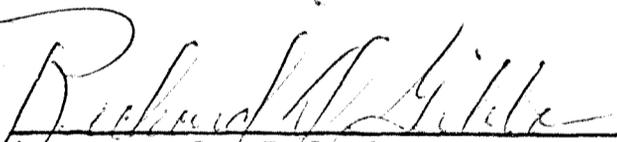
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the surviving widow of Bruce Cate, deceased, which is Ruth Cate, and their son, Phillip Cate, receive judgment as widow and heir of Bruce Cate, deceased, the sum of Eight Thousand Dollars (\$8,000.00) against the defendant, Larry Mack Kifer.

THE COURT FURTHER FINDS that the agreement and judgment herein rendered is a fair and equitable disposition of the cases of action sued for by the plaintiffs herein against the defendant and approves same and enters judgment as herein stated.

  
\_\_\_\_\_  
JUDGE OF THE UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF OKLA.

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Attorney for Plaintiffs

  
\_\_\_\_\_  
Attorney for Defendat