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

FRANK HAROLD KELLERMAN,	)	
Plaintiff,	)	78-C-272-B
vs.	)	
DR. JOE E. TYLER,	)	
Defendant.	)	

FILED

OCT 31 1978

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

ORDER

The Court has for consideration the Notice of Appeal submitted by Frank Harold Kellerman, wherein he states:

> Notice is hereby given that Frank Harold Kellerman, plaintiff above named, hereby appeals to the United States Court of Appeals for the 10th Circuit from the Order Dismissing the Motion for Return of Seized Property and the Suppression of Evidence, and the Order Dismissing the Civil Rights Complaints, all of the above captioned files pursuant to U.S.C. §1983 entered in this action on the 26th day of September, 1978.
>
> Dated: October 2, 1978.

In the caption of said Notice of Appeal, he cites case numbers 77-C-144-B; 77-C-153-B; 78-C-50-B; and 78-C-272-B. The Court notes that the Order dismissing Case Numbers 77-C-144-B; 77-C-153-B; and 78-C-50-B was filed on July 7, 1978, and thus that portion of the Notice of Appeal going to those three cases is not timely filed.

Turning to the Notice of Appeal sought to be filed in case number 78-C-272-B, the case was originally commenced by the plaintiff on June 16, 1978. The Court approved Plaintiff's Pauper's Oath, and in the Order found:

> The movant herein is permitted to file this action without prepayment of fees or costs, however any further proceedings in this matter must be specifically authorized in advance by the court.

On September 26, 1978, the Magistrate filed his Findings and Recommendations, wherein he recommended that Kellerman's Motion for Return of Seized Property and the Suppression of Evidence be denied and the case dismissed.

On October 2, 1978, Plaintiff mailed a letter to the Court Clerk, with attachments, wherein he stated:

> This note will let you know that as soon as I can have the papers notarized, you should receive the 17 page Notice to Appeal. We have a new Superintendent here now and no one can say how he will feel about mailing the papers.
>
> I am enclosing several notes for the Appellate Court, and will depend on you. to put them to my best advantage.

Plaintiff transmitted the above referenced Notice of Appeal with this letter.

Since no final, appealable order had as yet been entered by the Court, the Notice of Appeal was not submitted to this Court for leave for the plaintiff to proceed with his appeal forma pauperis.

On October 10, 1978, this Court entered its Order affirming the Findings and Recommendations of the Magistrate and dismissing the case, denying the motion.

The Clerk has now submitted to this Court the Notice of Appeal above referenced, for a determination by this Court as to whether this plaintiff should be allowed to proceed with this appeal as a pauper. Among the papers submitted by the plaintiff is a notarized Motion to Proceed on Appeal in Forma Pauperis, styled United States of America v. Frank Harold Kellerman, signed and notarized on October 2, 1978, bearing no case number, which the Court deems to be the Pauper's Oath submitted by the plaintiff to prosecute the appeal in Case Number 78-C-272-B, and which will be considered by the Court.

Title 28 U.S.C. §1915(a) provides, in pertinent part:

> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.
>
> An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

The Court finds that the "good faith" requirement of Section 1915 is established by the presentation of any issue that is not plainly frivolous.

Upon an examination of plaintiff's file and in light of plaintiff's claims, this Court finds that the issues presented by plaintiff have

no merit and are "plainly frivolous".

IT IS, THEREFORE, ORDERED that the Notice of Appeal and Pauper's Affidavit and Motion for Leave to Appeal in Forma Pauperis are denied in case numbers 77-C-144-B; 77-C-153-B; and 78-C-59-B as being untimely filed, the final order of dismissal having been filed on July 7, 1978.

IT IS FURTHER ORDERED that the Motion to Appeal in Forma Puaperis filed in 78-C-272-B is denied as having no merit and being frivolous.

ENTERED this 31 day of October, 1978.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

FILED

OCT 31 1978

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

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

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 78-C-210-C
MICKEY G. TETER and WANDA J. TETER, husband and wife, Defendants.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 31st day of October, 1978, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendants, MICKEY G. TETER and WANDA J. TETER, appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, MICKEY G. TETER and WANDA J. TETER, were personally served with Summons and Complaint on May 15, 1978, and that 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 Promissory Note executed and delivered to the Small Business Administration dated September 18, 1974, in the principal amount of $2,400.00.

The Court further finds that the Defendants, MICKEY G. TETER and WANDA J. TETER, made default under the terms of the aforesaid Promissory Note by reason of their failure to make payments thereon and that by reason thereof said Defendants are now indebted to the Plaintiff in the amount of $2,400.00, together with interest accrued thereon in the sum of $433.57 as of April 30, 1978, and interest accruing thereafter at the rate of $.333 per day.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, MICKEY G. TETER and WANDA J. TETER, for the sum of $2,400.00, together with interest accrued thereon in the sum of $433.57 as of April 30, 1978, and interest accruing thereafter at the rate of $.333 per day until paid, plus the costs of this action accrued and accruing.

/S/ H. Dale Cook
UNITED STATES DISTRICT JUDGE

APPROVED:

ROBERT P. SANTEE
Assistant United States Attorney

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

UNITED STATES OF AMERICA, Plaintiff, vs. CHARLES R. DRUMMOND and THOMAS E. DRUMMOND, Defendants.	))))))))))	78-C-375-B FILED OCT 31 1978 Jack C. Silver, Clerk U. S. DISTRICT COURT

ORDER

SUA SPONTE, IT IS ORDERED that this cause of action and complaint are dismissed without prejudice.

ENTERED this 31st day of October, 1978.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

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

HUMBERTO C. MADERO,	)	
Plaintiff,	)	
vs.	)	78-C-310-B
ROCKWELL INTERNATIONAL, a Delaware corporation,	)	
Defendant.	)	

FILED
OCT 31 1978
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

This action was commended by the plaintiff in this Court on July 5, 1978, alleging a violation of Title VII of the Civil Rights Act of 1964 (29 U.S.C.A §2000 et seq.).

Thereafter, and on August 9, 1978, the defendant filed a Motion to Dismiss for lack of subject matter jurisdiction, for failure of the complaint to allege "compliance with the essential jurisdictional requirements of Title VII, Civil Rights Act of 1964, 42 U.S.C. 2003 et seq." On August 31, 1978, plaintiff filed a First Amended Complaint and amended his complaint as follows:

> Comes now the Plaintiff and amends his Complaint, filed herein, and readopts and realleges each and every allegation therein and further alleges that within 180 days of the unlawful employment practice, the Plaintiff filed a charge with the E.E.O.C. pursuant to 42 U.S.C. and 2000e, and further that upon receipt of his 90-day righ(sic) to sue notification, the Plaintiff commenced this action within 90 days.

On October 2, 1978, the defendant filed its Motion to Dismiss the First Amended Complaint. On October 3, 1978, the following Minute Order was entered:

> It is ordered by the Court that the Plaintiff file a responsive brief on or before October 16, 1978, to Defendants Motion to Dismiss the First Amended Complaint.

Plaintiff has not filed a responsive brief within said time [illegible] has plaintiff requested or been granted an extension of [illegible]

Defendant predicates its Motion to Dismiss [illegible]

1. That the plaintiff failed to file [illegible]

within 180 days of the alleged act of discrimination (the plaintiff's lay-off on February 6, 1976, and refusal to recall from said lay-off, as required by Title VII, Civil Rights Act of 1964, 42 U.S.C. §2000-e, et seq.

2. That the plaintiff has failed to allege facts demonstrating compliance with the 90 day limitation period from receipt of the right-to-sue letter for the commencement of a civil suit, as required by 42 U.S.C. §2000-e, et seq.

It appears from Exhibit "A" attached to defendant's Motion to Dismiss First Amended Complaint, that plaintiff filed his charge on October 29, 1977. The alleged discrimination (i.e. the lay-off occurred on February 6, 1976). Exhibit "B" to said Motion is a Determination of the Equal Employment Opportunity Commission, dated March 31, 1978, which states, in pertinent part:

> ....Charging Party was laid off in February 1976 and did not file his complaint until after 180 days had expired. Charges must be filed within 180 days of the alleged unlawful employment practice.
>
> This concludes the Commission's processing of the subject charge. Should the Charging Party wish to pursue the matter further, the Party may do so by filing a private action in federal court within 90 days following receipt of this letter and taking the other procedural steps set out in the attached Notice of Right-to-Sue.

Exhibit "C" to the Motion is a copy of the Notice of Right to Sue dated March 31, 1978.

In his complaint plaintiff alleges that he was employed by the defendant on July 20, 1959 and was laid off on February 6, 1976. Plaintiff further alleges that such "lay-off" was continuing to the date of filing the complaint and that defendant has employed white males to perform the work that plaintiff had performed, but has refused to recall the plaintiff.

In his charge filed with the EEOC plaintiff stated:

> I believe Rockwell International in Tulsa, Ok has discriminated against me because of my National Origin, Hispanic by placing me on layoff and refusing to recall me in order of my seniority in my dept and company wide. I have sixteen years of company service. There have been vacancies since my layoff but I have not been recalled. The company has hired new employees off the street to many jobs I could perform. I have kept the company in-

formed of my change of address. The latest acknowledgment from the company was June 3, 1977, and I have reapplied in person at the company's plant personnel office. Also on Oct, 1977.

Turning now to the defendant's Motion to Dismiss, it is fundamental that "The jurisdiction of this court under §20003-5(f)(3) is limited to claims which have been made the subject of a timely charge before the Equal Employment Opportunity Commission". Loo v. Gerarge, 374 F.Supp. 1338, 1339 (USDC Hawaii 1974)

Plaintiff contends that the discrimination alleged is a continuing one.

In Collins v. United Air Lines, Inc., 514 F.2d 594 (9th Cir. 1975) it was said:

> Section 706(d) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(d) as written at the time the charge was filed, required an aggrieved person not utilizing a state remedy to file a charge with the EEOC within 90 days after the alleged unlawful employment practice occurred. The satisfaction of this statutory requirement is a necessary prerequisite to commencement of a court action under the statute. (citing cases)
>
> Collins contends that here the 90-day filing requirement is satisfied because the alleged violation is a continuing one. See Pacific Maritime Association v. Quinn, 491 F.2d 1294, 1296, n. 6 (9th Cir. 1974). We are not persuaded.
>
> We, cannot accept Collins' argument that her continuing nonemployment as a stewardess resulting from the alleged unlawful practice is itself a violation of the Act. Under the statute, it is the alleged unlawful act or practice---not merely its effects---which must have occurred within the 90 days preceding the filing of charges before the EEOC. Were we to holder otherwise, we would undermine the significance of the Congressionally mandated 90-day limitation period.
>
> Nor can we accept Collins' further argument that United's denial of her request for reinstatement during the 90-day period preceding her filing of charges was a new and separate discriminatory act or somehow rendered the initial violation, if any, a continuing one. In this context, a request for reinstatement is wholly different from a new application for employment---it seeks to redress the original termination. As the Third Circuit aptly stated in a labor context in NLRB v. Textile Machine Works, 214 F.2d 929, 923 (ed Cir. 1954):
>
>> A discharged employee who seeks to be reinstated is really litigating the unfairness of his original discharge because only if the original discharge was discriminatory is he entitled to be reinstated as if he had never ceased working for the employer. The word reinstatement must be employed in this connection as the equivalent of uninterrupted employment.*** The concept of a discriminatory refusal to hire is a different concept. If a person---whether a former employee or not---applies for employment and discriminatorily is refused employment ***, the employer has committed a separate and distinct unfair *** practice.

In Stroud v. Delta Airlines, Inc., 392 F.Supp. 1184, 1189 (USDC ND Ga 1975), affirmed, 544 F.2d 892 (5th CCA 1977) it was said:

> The concept of continuing discrimination is particularly applicable in cases involving discriminatory failure to hire or rehire; for in such circumstances, "it would seem to be a needless futile gesture to require (the) plaintiff to make a formal reapplication for the desired position, simply because the EEOC complaint was not filed within 180 or 210 (or 90 under prior law) days of the initial application." Cisson v. Lockheed-Georgia Co., supra. Conversely, a prior discriminatory act, the existence of a prior discriminatory policy, or the insertion of the word "continuing" in an EEOC complaint, without more, does nor raise a per se claim of continuing discrimination. Id. See Griffin v. Pacific Maritime Assoc., 478 F.2d 1118 (9th Cir. 1973); Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972); Loo v. Gerage, 374 F.Supp. 1338 (D.Hawaii 1974). In order for past acts to give rise to present claims, they must be continuing in the sense that they have a present impact on defendant's emloyment practices. It is the present, continuing, adverse effects flowing from the prior policies and practices that give rise to an action for violation of Title VII, and not the prior acts themselves...

The Court concluded at page 1190:

> In sum, absent a timely filed EEOC complaint, plaintiff is not entitled to relief under Title VII for alleged acts of sexual discrimination occurring in 1965, by reason of her termination from employment, or from 1965 through 1970, by reason of defendant's failure to rehire her....

In Cisson v. Lockheed-Georgia Company, 392 F.Supp. 1176, 1180 (USDC ND Ga, 1975) it was said:

> Although filing a timely EEOC complaint arguably constitutes a jurisdictional prerequisite to suit under Title VII, see 42 U.S.C. §20003-5(e).....there are several recognized exceptions to strict application of this requirement.....Finally, many courts have also recognized the rule that an EEOC complaint raising claims which may be classified as arising from "continuing discrimination" is not subject to strict limitation under the Title VII filing requirements. See Gates v. Georgia-Pacific Corp., 492 F.2d 292 (9th Cir. 1974); Pacific Maritime Assoc. v. Quinn, 491 F.2d 1294 (9th Cir. 1974); Macklin v. Spector Freight Systems, Inc., 156 U.S.App.D.C. 69, 478 F.2d 979 (1973); Belt v. Johnson Motor Lines, Inc., 458 F.2d 443 (5th Cir. 1972); Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969); Kohn v. Royall Koegel & Wells, 59 F.R.D. 515 (S.D.N.Y.1973), app. dismissed, 496 F.2d 1094 (2d Cir. 1974) (order not appealable).
>
> ....As a result, the issue sub judice turns on the question of whether or not plaintiff's EEOC complaint could be construed as raising a claim of continuing discrimination. Review of the relevant cases indicates that claims are most often deemed "continuing" when they complain of discriminatory hiring practices and are asser in behalf of a class. See Macklin v. Spector Freight

Systems, Inc., supra; Kohn v. Royall, Koegel & Wells, supra; Banks v. Lokcheed-Georgia Co., 46 F.R.D. 442, 444 (N.D.Ga.1968). Although the Kohn case ruling was equally applicable to individual as well as class complaints, id. at 523 (on reconsideration), the appropriate factor deemed controlling may have been the class aspect:

> [O]rdinarily, refusal to hire is not a continuing violation. Molybdenum Corp. v. EEOC, 457 F.2d 935 (10th Cir. 1972). However, where, as here, the complaining party alleges that the refusal of employment results from an ongoing pattern and practice of discrimination and seeks to represent the entire class of persons allegedly discriminated against, his or her individual grievance provides merely the springboard from which to investigate the employer's alleged continuing violation with respect to the class as a whole. The refusal to hire, which is isolated as to the individual, forms one item in an ongoing series of violations with respect to the class, the many elements of which are linked by their common source---employer discrimination.

Id. at 518. Similarly, a hiring, transfer, or arguably a layoff decision, albeit isolated incidents when considered alone, may present claims of continuing discrimination if they constitute "single episodes in an alleged conspiracy to deny appellants....jobs because of their race...." Macklin v. Spector Freight Systems, Inc., supra at 987. In fact, when it is obvious that a Title VII plaintiff is complaining of discriminatory hiring, promotion, or transfer practices, it would seem to be a needless, futile gesture to require that plaintiff to make a formal reapplication for the desired position, simply because the EEOC complaint was not filed within 180 or 210 (or 90 under prior law) days of the initial application. One court has indicated that so long as the desired position is unfilled and otherwise available to the named plaintiff, the filing of an EEOC charge raising discriminatory hiring claims outside the period of limitations would be excused. See Gates v. Georgia-Pacific Corp., supra at 294-95.

Of course, every past act of discrimination may have some future impact, and certainly the "sins of the fathers" are often perpetuated to the present date. As a result, a broad extension of the continuing discrimination concept would arguably permit a lawsuit to be commenced irrespective of when the alleged discrimination occurred, thereby completely eliminating any period of limitations under Title VII actions. Cf. King v. Seaboard Coast Line R.R., 8 F.E.P. 339 (M.D.N.C.1974). In Griffin v. Pacific Maritime Assoc., 478 F.2d 1118 (9th Cir. 1973), the plaintiffs actually argued for such an extension. The Griffin plaintiffs sought to apply the continuing discrimination rule to events occurring in 1946, by alleging that a discriminatory layoff in that year has a continuing adverse effect on their pay and seniority up to the present time. The Court recognized the concept of continuing discrimination, as utilized in Cox v. United States Gypsum Co., supra, but concluded that the concept was not applicable. Thus, as the Griffin case indicates, even in those jurisdiction which apply the continuing discrimination rule, the courts have generally concluded that "[a] layoff [or discharge], by itself....is not ....a continuing act [of discrimination]." Id. at 1120; Moore v. Sunbeam Corp., 459 F.2d 811, 827-28 (7th Cir. 197[illegible] Loo v. Gerarge, 374 F.Supp. 1338 (D.Hawaii 1974). See

Molybdenum Corp. v. EEOC, supra; Cox v. United States Gypsum, supra. Cf. Guerra v. Manchester Terminal Corp., supra at 648

In the instant case, plaintiff would have this court in effect adopt a rule which has uniformly been rejected elsewhere that the insertion of the word "continuing" in the EEOC complaint invariably excuses the untimely filing of that complaint. As noted above, a layoff or discharge does not give rise to a per se claim of continuing discrimination. This court recognizes the general rule that a layman should be given wide latitude in his efforts to envoke the processes provided by Title VII; strict, over-technical application of the procedural intricacies of the Act is not consistent with its remedial purposes. Conversely, when over-liberal interpretations of EEOC complaints would actually frustrate the intent of Title VII, such interpretations should be rejected. Thus, this court rejects the argument espoused by plaintiff herein that whenever the term "continuing" is inserted in an EEOC complaint the court and the EEOC should assume that plaintiff actually desires to raise claims of discriminatory failu-e to rehire, repromote, or retransfer, rather than the discharge or demotion claim actually asserted. Such a rule would permit the bypass of orderly EEOC procedures whenever a layoff or discharge occurs and would completely frustrate the purpose of Title VII to foster conciliation by the parties rather than judicial confrontation.

In Wallace v. International Paper Co., 426 F.Supp. 352 (USDC WD La. 1977), the Court said, commenting at page 354:

Plaintiff argues that there was "continuing discrimination" against her after she resigned, as evidenced by defendant's refusal to rehire her. Had plaintiff's application to be rehired been filed promptly after her resignation, her argument of "continuing discrimination" would be more persuasive. However, her effort to reapply one and one-half years (552 days) after resigning does not show a pattern of discrimination sufficiently strong for us to entertain her claims of prior acts of discrimination under the exception to the one hundred eighty day requirement as the "continuing wrong doctrine".

The "continuing wrong doctrine" has been recognized by the United States Supreme Court, many Courts of Appeals, and many District Courts. It allows a plaintiff to file with EEOC charges which originated more than one hundred eighty days prior to filing. In almost every case in which the doctrine was applied, plaintiff-employees were still working for the company at the time of filing, and it was just the origination of thr alleged, on-going acts which extended back beyond the one hundred eighty days.

The Courts have required that the wrong continue to within at least one hundred eighty days of filing with EEOC. A subtle distinction between "layoff" and discharge has been made by some Courts further to refine the doctrine. In a layoff situation, it has been held, there is more of a chance of the employee returning to work, so there is more of a chance of finding "continuing worng". In a discharge situation, normally the employee's relationship with the company is completely terminated. The layoff-discharge distinction possibly is made to consider equities in particular situations.

In discussing the factual situation in the Wallace v. Inter-

national Paper Co. case, supra, the Court said:

> Plaintiff, the alleged class representative, claims that she and other women similalry situated were subjected to harassment, discrimination, unequal treatment, and in her case, emotion, which eventually forced her to resign from work on March 15, 1971. She filed a complaint with the Equal Employment Opportunity Commission (EEOC) on September 26, 1972. On September 2, 1976, plaintiff was notified of her right to sue. She filed suit here on November 29, 1976, within ninety days of notice of her right to sue.
>
> On December 16, 1976, defendant filed a motion to dismiss for plaintiff's failing to file a charge with EEOC within one hundred eighty days after the last alleged discrimination. Ms. Wallce, fearing dismissal of her individual claim and representation for the purported class, was allowed to amend her complaint on January 3, 1977, to reflect that she had reapplied for work with defendant and was rejected on September 3, 1972. She alleged that discrimination against others as well as herself had been on-going, a continuing process even after she had resigned.
>
> We will hear Ms. Wallce's claim that an act of discrimination was committed against her on September 3, 1972, by not rehiring her, and we will allow evidence of alleged prior discriminatory acts to show possible motive for defendants to discriminate; but we will not permit plaintiff to sue for acts which allegedly occurred more than 180 days prior to September 26, 1972, the date Ms. Wallace filed a charge with EEOC. Claims for those earlier alleged acts became stale by a long period of inaction, and we will not allow plaintiff to breathe new life into them merely by reapplying for work as an afterthought.
>
> Congress had a definite purpose in mind in placing a one hundred eighty day limitation upon claims to be filed with EEOC. Plaintiffs were given adequate time to file charges; but employers were not required to defend stale claims covered with gathering dust and put to rest by plainiff's own inaction. (Emphasis supplied)

Based on the foregoing cited cases, the Court finds:

1. Plaintiff does not seek to maintain the instant litigation as a class action;

2. Plaintiff was laid-off on February 6, 1976, and did not file his claim with the EEOC until October 29, 1977;

3. The Determination of the EEOC dated March 31, 1978, found that plaintiff has not timely filed his charge;

4. Ordinarily, refusal to hire is not a continuing violation.

5. The mere insertion of the word "continuing" with nothing more, does not excuse the untimely filing of the charge with the EEOC.

6. Plaintiff's complaint and charge with the EEOC does not come within the exceptions noted by the Court to excuse the untimely filing.

7. Plaintiff, it would appear, had an adequate time to file his charges; but has allowed such claim of discrimination to grow stale by a long period of inaction.

8. The Court, therefore, finds that plaintiff's claim is barred for non-compliance with Title VII, 42 U.S.C. Section 2003 et seq.

In his amended complaint, plaintiff states that "the Plaintiff commenced this action within 90 days". The Notice of Right to Sue letter, which forms the predicate for this litigation, was dated March 31, 1978. This litigation was commenced on July 5, 1978, some 96 days after the date of such notice.

In Logan v. General Fireproofing Company, 309 F.Supp. 1096, 1011 (USDC WD N.Car. 1969), reversed on other grounds, 521 F.2d 881 (4th Cir. 1971) it was said:

> By way of summary, it is clear that the courts have thus far agreed that before an action is properly instituted under Title VII, a plaintiff must have filed a charge of an unlawful employment practice with the Equal Employment Opportunity Commission within ninety (90) days of the alleged violation and must file said action in the proper United States District Court within thirty (30) days of receiving notice of the Commission's failure to achieve voluntary conciliation. (citing cases.) These requirements are jurisdictional and must be specifically alleged in the complaint. The Complaint in the case at bar contains such allegations in sufficient form to defeat the Motion to Dismiss.

In Melendez v. Singer-Friden Corp., 529 F.2d 321, 323 (10th Cir. 1976) it was stated:

> Passing then to the merits of the trial court's order we affirm the judgment. Following routine and statutory authority the EEOC informed plaintiff by letter dated March 12, 1974, and received by plaintiff on March 13, that he had 90 days within which to pursue, if so he chose, his claim by an action in the district court with a complaint filed within 90 days. Such limitation runs from the date of receipt, Plunkett v. Roadway Express, Inc., 10 Cir., 504 F.2d 417, and thus would terminate on June 11, 1974. Plaintiff filed his complaint on June 12. Although Title VII should not be construed so strictly as to deny civil rights relief from over technicalism, this court is not at liberty to indulge in juidical yielding of statutory limitation for purposes peculiar to the Civil Rights Act. Archuleta v. Duffy's Inc., 10 Cir. 471 F.2d 33, 34-35. The filing was thus actually untimely and this the plaintiff concedes. However, plaintiff seeks to bar the impact of the limi[illegible] under two theories.
>
> First, plaintiff contends that the limitatio[illegible]

> be applicable at all, arguing that Singer's discrimination was ongoing in nature. No authority for this contention is cited, no allegation in the complaint supports the position, and the issue is raised for the first time on appeal.....

This Court is aware that the ninety day period begins to run on the date the Notice of Right to Sue is received by the aggrieved employee. Plunkett v. Roadway Express, Inc., 504 F.2d 417 (10th Cir. 1974); Alexander v. Gardner-Denver Co., 415 U.S. 36; McDonnell Douglas Corp. v. Green, 411 U.S. 729.

In this connection the Court notes that after plaintiff initially filed his complaint, the defendant filed a Motion to Dismiss for failure to allege compliance with essential jurisdictional requirements. Thereafter, plaintiff filed a First Amended Complaint, setting up the facts hereinabove quoted on page 1 of this Order. Plaintiff did not allege the date of receipt of said notice. After defendant filed its Motion to Dismiss the First Amended Complaint, the plaintiff was given 10 days to respond, and as hereinabove recited, has totally failed to respond. The Court feels that the plaintiff has been given every opportunity to reveal the jurisdictional requirements, if any, necessary to maintain this action.

For all of the reasons above stated,

IT IS ORDERED that the defendant's Motion to Dismiss the First Amended Complaint be and the same is hereby sustained and plaintiff's complaint and cause of action are hereby dismissed.

ENTERED this 31st day of October, 1978.

CHIEF UNITED STATES DISTRICT JUDGE

FILED

OCT 30 1978

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

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

RETAIL CLERKS UNION, LOCAL NO. 73, Affiliated with RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, CLC,	)	
Plaintiff,	)	77-C-317-B
vs.	)	
SAFEWAY STORES, INCORPORATED, A corporation,	)	
Defendant.	)	

JUDGMENT

Based on the Order, Findings of Fact and Conclusions of Law filed this date,

IT IS ORDERED that Judgment be entered in favor of the plaintiff, Retail Clerks Union, Local No. 73, Affiliated with Retail Clerks International Association, AFL-CIO, CLC, and against the defendant, Safeway Stores, Incorporated.

IT IS FURTHER ORDERED, in accordance with said Order, Findings of Fact and Conclusions of Law that the Employer is ordered to submit the subject grievances to arbitration.

ENTERED this 30th day of October, 1978.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

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

THE LINCOLN ELECTRIC COMPANY, a foreign corporation,	)	
Plaintiff,	)	
vs.	)	77-C-342-B
TRANSPORT INSURANCE COMPANY, an Iowa corporation,	)	
Defendant,	)	
vs.	)	FILED
RILEY SOUTHWEST CORPORATION,	)	OCT 30 1978
Intervenor.	)	Jack C. Silver, Clerk U. S. DISTRICT COURT

JUDGMENT

Based on the Order filed this date,

IT IS ORDERED that Judgment is entered in favor of the defendant, Transport Insurance Company, and against the plaintiff, The Lincoln Electric Company, and the Intervenor, Riley Southwest Corporation.

ENTERED this 30th day of October, 1978.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

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

THE LINCOLN ELECTRIC COMPANY, a foreign corporation,	)	
Plaintiff,	)	
v.	)	No. 77-C-342-B
TRANSPORT INSURANCE COMPANY, an Iowa corporation,	)	
Defendant,	)	
v.	)	
RILEY SOUTHWEST CORPORATION,	)	
Intervenor.	)	

FILED
OCT 30 1978
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has for consideration Plaintiff's Motion for Summary Judgment and Defendant's Motion for Summary Judgment and has reviewed the file, the briefs and all of the recommendations concerning the motions, and being fully advised in the premises, finds:

For the reasons stated herein, the Court finds that the Plaintiff's Motion for Summary Judgment should be overruled, and the Defendant's Motion for Summary Judgment should be sustained.

This is a declaratory judgment action in which the Plaintiff seeks to establish itself as an insured under a policy of insurance issued by Defendant to Jones Truck Line, Inc., which

is not a party to this action. Plaintiff seeks to bring itself under this policy of insurance with regard to liability for personal injuries suffered by one Homer L. Keith on the 5th day of September, 1973, in an incident which occurred during the unloading of a truck and trailer at the premises of Intervenor Riley Southwest Corporation, in this cause. Mr. Keith was injured when a box of welding rods, which had been packed for shipment by Plaintiff, fell off a fork lift being operated by an employee of the Intervenor. Mr. Keith subsequently sued the Plaintiff and Intervenor on the basis of negligence, for the personal injuries he incurred.

Plaintiff then filed this suit for a declaratory judgment of the rights and obligations of the parties herein under the contracts of insurance issued by Transport Insurance Company to Jones Truck Lines. Defendant Transport Insurance Company admits that it issued the contracts of insurance and that they were in effect. It, however, contends that the undisputed facts show that these contracts of insurance provided no coverage to the Plaintiff herein. Plaintiff contended that it was an insured under the policy, and that the incident in question was covered, as being part of the "use" of a vehicle insured by the policy. Intervenor makes the same claim. The second portion of these contentions is not reached, for the reason that it is the finding of this Court that neither Plaintiff nor Intervenor is an insured under the policies of insurance issued by Defendant Transport Insurance Company.

Defendant asserts, and it is not controverted, that the express terms of this insurance policy did not provide coverage to Plaintiff or Intervenor. The policy lists only two categories of "insureds". Those categories, as defined on Page 2 of the policy, are as follows:

"a. NAMED INSURED.
The term 'named insured' shall mean the insured named in the declarations.

b. INSURED.
The unqualified word 'insured' includes the named insured and also includes as respects Coverage Clause 1 (quoted above):

1. If a corporation, any executive officer, managing employee, director or stockholder thereof while acting within the scope of his duties as such or insofar as he is or may be liable by reason of his occupying such position, or, if a partnership or joint venture, each partner or member thereof while acting within the scope of his duties as such partner or member."

The "named insured" named in the declarations of the policy, includes Jones Truck Lines, Inc., and certain of its subsidiaries and affiliates. Neither the Plaintiff nor the Intervenor claim to be any of those entities. Nor did Plaintiff or Intervenor make any allegation, or offer any proof that either is an executive officer, managing employee, director or stockholder of Jones Truck Lines, Inc. or any of its subsidiaries.

The policy in question, as is conceded by Plaintiff in its Supplemental brief, does not contain an omnibus clause. Such a clause typically extends the coverage of the policy to permissive users of the insured vehicles. The only "insureds", under the terms of the policy, therefore, are the two categories previously named. Neither Plaintiff nor Intervenor are covered under the terms of the contract.

Plaintiff, however, asserts that it is covered under the policy of insurance by virtue of omnibus clause language contained in the Oklahoma Financial Responsibility Act. That Act, codified as 47 O.S. §7-324, provides as follows:

> "(a) Certification. A 'motor vehicle liability policy' as said term is used in this chapter shall mean an 'owner's policy' or an 'operator's policy' of liability insurance, certified as provided in Section 7-321 or Section 7-322 as proof of financial responsibility for the future, and issued, except as otherwise provided in Section 7-322, by an insurance carrier duly authorized to transact business in this state, to or for the benefit of the person named therein as insured.
>
> (b) Owner's Policy. Such owner's policy of liability insurance:
>
> 1. Shall designate by explicit description or by appropriate reference all vehicles with respect to which coverage is thereby to be granted; and
>
> 2. Shall insure the person named therein and any other person, as insured, using such vehicle or vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such vehicle or vehicles . . ."

Plaintiff points to this statutory language, and to the fact that the policy of insurance issued by Defendant states as follows:

> "Such insurance as is afforded by this policy shall comply with the provisions of the Motor Vehicle Financial Responsibility Law, or similar law, and Motor Carrier Regulatory Authority, requirements of any state or province which shall be applicable with respect to any such liability arising out of the existence, ownership, maintenance or use of any automobile during the policy period, <u>but only to the extent of coverage and limits of liability required by such law</u>."

The combination of these two, according to the Plaintiff, makes the statutory omnibus clause applicable to the Defendant's policy of insurance. The law of Oklahoma, however, as stated by the Oklahoma Supreme Court in <u>United States Fidelity and Guaranty Company v. Walker</u>, 329 P.2d 852 (Okla. 1958), upholds the ability of an insurer to limit the statutory policy provisions to those situations in which the Financial Responsibility Act actually applies. In <u>Walker</u>, the Plaintiff's decedent had been killed in a collision with

a truck driven by the insured. The truck was hauling a trailer at the time of the accident. Judgment was obtained against the insured driver. Thereafter, a garnishment proceeding against the insurer was begun. The trial of that action resulted in a judgment for the Plaintiff, and the insurer-garnishee appealed. The garnishee, in denying liability, relied on a trailer exclusion contained in the policy. The Plaintiff countered with the argument that the exclusion was prohibited by the terms of the Motor Vehicle Financial Responsibility Act. The policy involved in that case provided as follows:

> "Such insurance . . . shall comply with the provisions of the Motor Vehicle Financial Responsibility Law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law . . ." 329 P.2d at 854.

The Plaintiff in Walker argued this clause made the provisions of the Financial Responsibility Act applicable despite the fact that the Defendant had not previously had a wreck or otherwise been required to comply with the Financial Responsibility Act. The court disagreed stating as follows:

> "The policy constituting the present action provided that it should comply with the financial responsibility law as required by said law. The Defendant carried it voluntarily. He had never been required to furnish proof of financial responsibility. It had not been certified as such proof under Section 519 (now Section 7-321) or Section 520 (now Section 7-322). It, thus, does not come within the definition of a 'motor vehicle liability policy' as contained in Section 521 (now Section 7-324) and, for that reason is not subject to the absolute liability provisions of said statute." 329 P.2d at 856.

Thus, Plaintiff in this suit finds no comfort in the provisions of Section 7-324 of the Oklahoma Financial Responsibility Act, unless that Act was applicable to the Defendant's policy of insurance which is involved in this suit. Defendant has shown, and the Plaintiff has not controverted, that its policy was not a "motor vehicle liability policy.", which is required to have an omnibus clause contained in it. A "motor vehicle liability policy" is one, according to the statutes of the State of Oklahoma, required of a person who has had previous accidents, and who, at the time of the previous accidents, did not voluntarily maintain "automobile liability insurance". A "motor vehicle liability policy", under the statutory scheme, is one way that such a person can provide proof of financial responsibility. Defendant presented to the Magistrate, as Exhibit "B" attached to its Reply Brief, an affidavit from the Oklahoma Department of Public Safety which verified that Jones Truck Lines, Inc. was not required to post proof of financial responsibility at the time of the accident involved herein.

That being so, any insurance policy maintained by Jones Truck Lines, including that issued by Defendant Transport, was a voluntarily maintained "automobile liability insurance policy". Such a policy, under the law stated by the Oklahoma Supreme Court in Walker, supra, which contains a provision limiting compliance with the financial responsibility laws to those instances in which such laws are applicable does not contain the statutory omnibus clause. The policy in question does limit compliance to instances in which the Financial Responsibility Act is applicable. It actually does so in stronger language than the policy involved in Walker. The case of Howard v. American Service Mutual Insurance Company, 151 So. 2d 682 (Fla. App. 1963) is no help to Plaintiff because the Florida court was dealing with a policy that did not contain a "when applicable" limitation as did Defendant's policy and the one involved in Walker.

Nonetheless, Plaintiff maintains, the public policy of the law of Oklahoma compels the inclusion of the statutory omnibus clause, even in situations in which the Financial Responsibility Act is not applicable. Plaintiff relies upon the recent enactment of the Compulsory Liability Insurance Statute in 47 O.S. §7601. That statute reads as follows:

> "Every owner of a motor vehicle registered in this state, other than a licensed used car dealer, shall, at all times, maintain in force with respect to such vehicle, security for the payment of loss resulting from the liability imposed by law for bodily injury, death and property damage sustained by any person arising out of the ownership, maintenance, operation or use of the vehicle."

Whatever statement of public policy is made by this enactment, it does not serve to provide an omnibus clause to the contract of insurance issued by Defendant Transport. This is true for two reasons. First, the second section of the Compulsory Liability Insurance Act, which is 47 O.S. §7-602, exempts motor carriers from the operation of the Compulsory Liability Insurance Act. Defendant provided uncontroverted proof that Jones Truck Line is such a motor carrier. Secondly, and more important, the previously cited Oklahoma case, of United States Fidelity and Guaranty Company v. Walker, 329 P.2d 852 (Okla. 1958), reveals that under Oklahoma law statutory policy provisions are read into policies of insurance only when the Financial Responsibility Act in which they are contained, is applicable to the individual insured. The compulsory liability insurance law is not applicable. Its provisions are not part of the insurance policy issued by Defendant.

Thus, those jurisdictions upon which Plaintiff relies for a holding that public policy mandates the inclusion of the omnibus clause, are also states in which the courts have held that the statutory omnibus clause is included in all policies of insurance. In Arizona, the Supreme Court has indicated that the statutory

provisions will be read in, under a public policy argument, regardless of the applicability of the Act. Jenkins v. Mayflower Insurance Exchange, 380 P.2d 145 (Ariz. 1963). The law of Oklahoma is directly contrary to such a holding. In Walker, the Oklahoma Supreme Court has stated that it is the law, and therefore the policy of Oklahoma, that such provisions are not applicable if the Financial Responsibility Act is not. A federal district court sitting in Oklahoma will apply Oklahoma law. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

Plaintiffs have failed to show that the Financial Responsibility Act is applicable. The omnibus clause contained in that Act is, therefore, not imputed to the policy of insurance issued by Defendant. The terms of the policy of insurance issued by Defendant indicate that neither Plaintiff nor Intervenor is an insured under the express provisions of the policy. The policy also reveals that it has no omnibus clause. That being so, and there having been advanced no other basis for the inclusion of either as an insured under the policy, the Court finds that the Defendant's Motion for Summary Judgment be sustained, for the reason that Defendant has no obligation to Plaintiff or Intervenor herein since neither is an insured. For the same reason, Plaintiff's Motion for Summary Judgment should be overruled.

IT IS SO ORDERED.

ALLEN E. BARROW, CHIEF JUDGE,
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

APPROVED:

KNIGHT, WAGNER, STUART & WILKERSON
310 Beacon Building
Tulsa, Oklahoma 74103

By_____
ALFRED B. KNIGHT
Attorneys for Plaintiff

McKINNEY, STRINGER & WEBSTER
Ninth Floor, City Center Building
Main and Broadway
Oklahoma City, Oklahoma 73102

By_____
KENNETH N. McKINNEY
Attorneys for Defendant

BEST, SHARP, THOMAS & GLASS
200 Franklin Building
Tulsa, Oklahoma 74103

By_____
JOSEPH F. GLASS
Attorneys for Intervenor

FILED

OCT 30 1978

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

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

OVEL W. OHLER, Plaintiff, vs. SECRETARY OF HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES OF AMERICA, Defendant.	)	75-C-183-B

ORDER REMANDING

Pursuant to the opinion and the mandate of the Tenth Circuit Court of Appeals, IT IS ORDERED that this case is remanded to the Secretary of Health, Education and Welfare of the United States for further proceedings pursuant to the opinion rendered by said Court.

ENTERED this 30th day of October, 1978.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

FILED

OCT 30 1978

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

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

BILLY E. McDONALD, Plaintiff,	)	
vs.	)	NO. 78-C-25
SKELLY OIL COMPANY, a corporation, Defendant.	)	

JOURNAL ENTRY OF JUDGMENT

This action came on for trial on the 16th day of October, 1978, before the Honorable H. Dale Cook, District Judge, presiding, Philip R. Russ and Douglas L. Boyd, attorneys, appearing for plaintiff, and Sam C. Oliver and William T. Robbins, attorneys, appearing for defendant.

A jury of six (6) persons was regularly impaneled and sworn to try said action, and witnesses on the part of plaintiff were duly sworn and examined. After hearing the evidence, the arguments of counsel and instructions of the Court, the jury retired to consider their verdict and subsequently on the 18th day of October, 1978, returned into Court with the Verdict signed by the foreman, and upon the Court inquiring of each juror if it was his or her verdict, each juror replied in the affirmative and said:

"UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BILLY E. McDONALD, Plaintiff,	)	
v.	)	No. 78-C-25-C
SKELLY OIL CORPORATION, Defendant.	)	

We, the Jury, find for the Defendant, Skelly Oil Corporation.

10-18-78 Sgd. Bob Whitchurch
(Foreman)."

Whereupon the Court received the verdict, directed the Court Clerk to file same, and discharged the jury.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, That the plaintiff take nothing against defendant, and defendant recover against plaintiff its costs and disbursements.

DATED this 30th day of October, 1978.

District Judge

JUDGMENT ENTERED this 30th day of October, 1978.

BY THE COURT

JACK SILVER, Clerk.

APPROVED:

PHILIP R. RUSS
621 Meadows Building,
Dallas, Texas 75206.

DOUGLAS L. BOYD
Suite 1504, 320 South Boston,
Tulsa, Oklahoma.

ATTORNEYS FOR PLAINTIFF

WILLIAM T. ROBBINS,
P. O. Box 1650,
Tulsa, Oklahoma 74102.

SAM C. OLIVER,
Suite 138, 4815 S. Harvard,
Tulsa, Oklahoma 74135.

ATTORNEYS FOR DEFENDANT.

FILED

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

OCT 30 1978

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

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	Nos. 78-C-17-B 77-CR-19
WILLIAM DEAN HINSON, Defendant.	)	

ORDER

The Court has for consideration Defendant's Motion to Vacate or Set Aside Sentence and has reviewed the file, the briefs and all of the recommendations concerning the motion, and being fully advised in the premises, finds:

That the Defendant's Motion to Vacate or Set Aside Sentence should be overruled for the following reasons:

On January 11, 1978, Defendant filed a Motion to Vacate or Set Aside Sentence pursuant to Title 28, U.S.C. §2255, alleging mental incompetency at the time of the violation for which he was incarcerated, at the time of his guilty plea therefor, and at sentencing. Defendant had previously filed numerous post-verdict and sentencing Motions, all of which were denied by the Court. In none of said Motions had the issue of competency been raised until the §2255 Motion of January 11, 1978, more than a year after the date of the violation for which he was incarcerated.

The Court, in an Order of June 22, 1978, stated that because the issue of competency was not raised prior to Defendant's plea of guilty and because no mental examination had been requested or otherwise ordered, an evidentiary hearing should be conducted. See, Ellison v. U.S., 324 F.2d 710 (10th Cir. 1963); Arnold v. U.S., 432 F.2d 871 (10th Cir. 1970); Eskridge v. U.S., 443 F.2d 440 (10th Cir. 1971).

Defendant contends that he is being deprived of his liberty in violation of his rights guaranteed by the Constitution

of the United States of America in that he was mentally incompetent at: the time of the acts charged in the indictment, i.e., entering a federally insured bank with intent to commit a felony, in violation of Title 18, U.S.C. §2113(a); the time his plea of guilty was entered thereto to the point that he could not control his acts, understand the gravity and nature of the proceedings or assist in his defense.

In support of his claim, Defendant testified at the hearing that he had consumed two quarts of beer and smoked a marijuana cigarette the early evening of the night the violation occurred; that he frequently smoked marijuana and indulged in other "light" drugs. Although counsel made the point of Defendant's being an alcoholic or heavy consumer of alcoholic beverages, the testimony of Defendant indicated the only such beverage he consumed was beer; that on previous occasions he had consumed more than the two quarts consumed on the night in question. He further testified that he smoked marijuana daily and that on the night in question he smoked one cigarette. By Defendant's own admission, he stated he knew what he was doing, but that the consequences were simply of no moment to him. The only explanation he gave for his actions was that he felt like an outsider at Edison High School because his parents were not wealthy. These feelings of rebellion manifested themselves in the commission of the crime in question as well as in his failure to complete his senior year of high school.

Defendant submitted himself to psychiatric counseling during the interim of his plea of guilty and the date of sentencing. The result of which was a finding of social maladjustment caused by peer group pressure and an unstable marital setting in the home. There was no finding of mental incompetency.

Mr. Steven J. Martin, the United States Probation Officer assigned to the case testified of his visits and consultations with Defendant. In describing Defendant's demeanor, attitude and assessment of his involvement in the offense as charged, Defendant was observed as being a mentally competent young adult who lacked a good sense of self-discipline. Mr.

Martin testified that Defendant admitted his guilt on numerous occasions and indicated a complete understanding of his acts at all times. He stated further that Defendant displayed a total lack of respect for the law, exhibiting no concern for the consequences of past misdeeds.

FINDINGS OF FACT

1. The Defendant, William Dean Hinson, committed the offense as charged in the Indictment.

2. Prior to the commission of such offesne, the Defendant voluntarily consumed two quarts of beer and smoked a marijuana cigarette.

3. The Defendant had previously and with great frequency consumed larger quantities of beer and smoked larger amounts of marijuana voluntarily; that there was no evidence that the consumption of either caused the Defendant to be intoxicated or to be otherwise incapable of appreciating his conduct or the consequences thereof.

4. The Defendant had submitted to professional counseling and guidance and that conclusions drawn therefrom failed to establish the mental incompetency of Defendant.

5. The Defendant was mentally capable of knowing what he was doing at the time the offense in question was committed.

6. The Defendant was capable of knowing that it was wrong.

7. The Defendant was mentally capable of controlling his conduct.

8. The Defendant was mentally capable of understanding and did understand the charge against him at the time he entered his plea of guilty.

9. The Defendant was capable of assisting in his defense at all pertinent times.

10. The Defendant was mentally competent at the time of sentencing in this case.

CONCLUSIONS OF LAW

1. At the evidentiary hearing herein, the Defendant did not meet the burden squarely placed on him to establish by a preponderance of the evidence that he was in fact incompetent at the time and as he asserts in his §2255 Motion. Ridge v. Turner, 444 F.2d 3 (10th Cir. 1971); Crail v. United States, 430 F.2d 459 (10th Cir. 1970).

2. The test for mental competency on the date of the alleged offense is whether the accused was mentally capable of knowing what he was doing, was mentally capable of knowing that it was wrong, and mentally capable of controlling his conduct. Wion v. United States, 325 F.2d 420 (10th Cir. 1963) cert. denied 377 U.S. 946 (1964). Defendant did not satisfy the elements thereof.

3. The test for mental competency at the time of trial, as set out in Dusky v. United States, 362 U.S. 402 (1960), is whether the Defendant is mentally capable of understanding the charge against him and the proceedings, and whether the Defendant is capable of understanding and assisting counsel in his defense.

4. The standard for determining an individual's competency to enter a valid plea of guilty is the same as that required to stand trial. Crail v. United States, Supra., Malinauskas v. United States, 505 F.2d 649 (5th Cir. 1974). Such standards were not met by Defendant herein.

5. A Motion to Vacate will not lie when upon mere allegations of incompetency the record clearly reflects that a complete explanation of the charges and the consequences of a guilty plea to the same had been given to the Defendant by the Assistant United States Attorney, the Court, and able defense counsel who interjected comments freely, especially when no mention of lack of competency was made at any time by Defenant or his counsel. Bongiorno v. U.S., 424 F.2d 383 (1970); Hutchinson v. U.S., 369 F. Supp. 280 (W.D. Okla. 1973).

IT IS, THEREFORE, ORDERED that the Defendant's Motion to Vacate or Set Aside Sentence is hereby overruled.

Dated this 30th day of October, 1978.

Allen E. Barrow

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

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

UNITED STATES OF AMERICA and JAMES K. FRAZER, Special Agent Internal Revenue Service, Petitioners, vs. BANK OF OKLAHOMA and VIRGINIA DOMINGOS, Respondents.	No. 78-C-353-C
UNITED STATES OF AMERICA and JAMES K. FRAZER, Special Agent Internal Revenue Service, Petitioners, vs. AMERICAN BANK OF TULSA and MARY NIXON, Respondents.	No. 78-C-352-C

FILED
OCT 30 1978
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER DISCHARGING RESPONDENTS AND INTERVENOR
AND DISMISSAL

On this 30th day of October, 1978, Petitioners' Motion to Discharge Respondents and Intervenor and for Dismissal came for hearing and the Court finds that Respondents have now complied with the Internal Revenue Service Summons served upon them; that further proceedings herein are unnecessary, and that the Respondents, Bank of Oklahoma and Virginia Domingos, and American Bank of Tulsa and Mary Nixon, and Intervenor, Caribou Petroleum, Ltd. be and they are hereby discharged from any further proceedings herein and this action is hereby dismissed.

H. Dale Cook
UNITED STATES DISTRICT JUDGE

FILED
OCT 30 1978
Jack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

RAY MARSHALL, Secretary of Labor, United States Department of Labor, Plaintiff,	)	
v.	)	Civil Action
T & K ENTERPRISES, INC., a corporation, and THOMAS G. HEINEN, an individual, Defendants.	)	No. 78-C-365-C

J U D G M E N T

Plaintiff has filed his complaint and defendants have waived their defenses and have agreed to the entry of judgment without contest, it is, therefore, upon motion of the plaintiff and for cause shown,

ORDERED, ADJUDGED and DECREED that defendants, their officers, agents, servants, employees and all persons in active concert or participation with them be and they hereby are permanently enjoined and restrained from violating the provisions of sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201, et seq., hereinafter referred to as the Act, in any of the following manners:

1. Defendants shall not, contrary to sections 6 and 15(a)(2) of the Act, 29 U.S.C. §§ 206 and 215(a)(2), pay any employee who is engaged in commerce or in the production of goods for commerce, or who is employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, wages at a rate less than the minimum hourly rates required by section 6 of the Act.

month thereafter until all installments have been paid.

From the proceeds of said payments, plaintiff shall make appropriate distribution to the employees named herein or to their estate if necessary, in the respective amounts due said employees, less income tax and social security deductions. In the event that any of said money cannot be distributed and paid over by plaintiff within the period of one (1) year after payment in full pursuant to this judgment because of inability to locate the proper persons or because of their refusal of accept such sums, the money shall be deposited with the Clerk of this Court who shall forthwith deposit such money with the Treasurer of the United States pursuant to 28 U.S.C. § 2041.

It is further ORDERED, that in the event of default by the defendants in the payment of any of the above-recited installments, the total blance remaining unpaid shall then become due and payable and interest shall be assessed against such remaining unpaid balance at the rate of nine percent per annum from the date of this judgment until the total amount is paid in full.

It is further ORDERED that the costs of this action be, and the same hereby is, taxed against defendants for which execution may issue.

Dated this 13 day of Oct, 1978.

UNITED STATES DISTRICT JUDGE

Defendants waive their defenses to plaintiff's complaint and consent to the entry of this judgment:

Thomas G. Heinen

THOMAS G. HEINEN, Defendant individually and as President of Defendant, T & K ENTERPRISES, INC.,

Plaintiff moves for entry of this judgment:

CARIN ANN CLAUSS
Solicitor of Labor

JAMES E. WHITE
Acting Regional Solicitor

WILLIAM E. EVERHEART
Counsel for Employment Standards

By:

David S. Jones

DAVID S. JONES
Attorney

Attorneys for Plaintiff.

EXHIBIT "A"

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION
Room 306 Center Mall Professional Bldg
717 South Houston, Tulsa, Okla.

COMPLIANCE OFFICER: Charles M. Sturm
DATE: 9/8/78

SUMMARY OF UNPAID WAGES

PAYMENT TO BE COMPLETED AND ORIGINAL COPY OF RECEIPT (S) MAILED TO OFFICE DESIGNATED BY _____

1. NAME	2. ADDRESS	3. PERIOD COVERED by Workweek Ending Dates		4. ACTS (See code below)*	5. GROSS AMOUNTS DUE
Jeff Baldwin	5908 S Birmingham Tulsa, Okla.	4/1/77	4/22/77	1	$ 10.00
Ann Burgess	1355 Kerr Rd Lake Orion, Michigan	9/12/75	9/26/75	1	$ 11.25
Dan Burns	2605 E 67th Tulsa Okla	6/17/77	7/8/77	1	15.40
Bart Conway	2104 E 73rd, Apt. A Tulsa, Okla.	6/24/77	7/8/77	1	11.80
Craig Cottrell	2613 E 6th St Tulsa, Okla.	1/1/76	8/26/76	1	23.65
Dave Curry	5556 S Yorktown Tulsa, Okla.	9/3/76	1/7/77	1	61.20
Scott Gardner		4/30/76	11/26/76	1	73.21
Brett Glass	5809 S Delaware Pl Tulsa, Okla.	10/28/77	11/25/77	1	12.21
Mark Griffin	5625 S 69th E Ave Tulsa, Okla.	8/15/75	8/15/75	1	12.69
Jay Gunn	2996 E 56 Pl Tulsa Okla	8/15/75	5/28/76	1	27.20
Harlan Harris	2547 N Boston Tulsa, Okla.	9/5/75	3/17/78	1	509.27
Mike Haven		10/21/75	4/9/76	1	171.80
Steve Horn	6904 S 76 E Ave Tulsa, Okla.	8/15/75	10/22/76	1	61.94
Kent Kantor	5657 S Delaware Tulsa, Okla.	8/15/75	1/6/78	1	198.12
Delbert Kelley	207 N Elwood Tulsa, Okla.	10/22/76	11/12/76	1	28.48
Keith Knox	505 N Main Sapulpa, Okla.	8/15/75	3/17/78	1	696.38
Mark Lofton		1/30/76	7/22/77	1	96.00
Dan Mainpriza	1723 S Riverside, Apt. 319 Tulsa, Okla.	9/12/75	9/26/75	1	31.05
Galen McCauley		8/15/75	1/9/76	1	12.10
Dan Meador	2530 E 56 Pl Tulsa, Okla.	7/1/77	7/8/77	1	11.80
				Page 1 of 2 Sub TOTAL	$2,075.55

Name and address of establishment

T & K Enterprises d/b/a
Southern Hills DX
5559 S Lewis
Tulsa, Okla.

*Column 4-Code

FLSA	1
PCA	2
SCA	3
DBRA	4
CWHSSA	5
ADEA	6
CCPA	7

See Reverse Side for Instructions

Form WH-56
(Rev. June 1976)

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION
Room 306 Center Mall Professional Bldg
717 S Houston, Tulsa,Okla.

COMPLIANCE OFFICER: Charles M. Sturm
DATE: 9/8/78

SUMMARY OF UNPAID WAGES

PAYMENT TO BE COMPLETED AND ORIGINAL COPY OF RECEIPT (S) MAILED TO OFFICE DESIGNATED BY _____

1. NAME	2. ADDRESS	3. PERIOD COVERED by Workweek Ending Dates		4. ACTS (See code below)*	5. GROSS AMOUNTS DUE
Bill Myers	1319 E 67th St. Apt. #6 Tulsa,Okla.	12/5/75	1/25/76	1	23.74
Lee Ann Myers	1319 E 67th St Apt. #6 Tulsa,Okla.	1/4/76	1/25/76	1	12.90
John Oltman	2616 E 66th Pl Tulsa,Okla.	8/15/75	5/13/76	1	391.37
Ed Paczos	4619 S. Sixty Tulsa, Okla. ~~8825 S Delaware, Apt. #7~~ Tulsa,Okla.	8/15/75	6/10/77	1	392.52
Glen Rice	6926 S Delaware Pl Tulsa,Okla.	1/28/77	2/25/77	1	25.20
Lee Robinson	6706 S Zunis Tulsa,Okla.	12/23/77	1/6/78	1	18.90
Tom Schapiro	7336 E 66 Ct Tulsa,Okla.	5/27/77	10/28/77	1	116.97
Steve Stringer	1639 E 54th St Tulsa,Okla.	7/8/77	8/5/77	1	29.00
Joe Sullivan	118 E 58th St Tulsa,Okla.	7/8/77	11/18/77	1	32.40
Virgil Wheeler	417 N Moccasin Pl Sapulpa, Okal.	9/2/77	3/17/78	1	127.60
		Total this page:			$1,170.60

TOTAL $3,246.15

Name and address of establishment

T & K Enterprises d/b/a/
Southern Hills DX
Tulsa,Oklahoma

*Column 4-Code
FLSA 1
PCA 2
SCA 3
DBRA 4
CWHSSA 5
ADEA 6
CCPA 7

See Reverse Side for Instructions

Form WH-56
(Rev. June 1976)

FILED

OCT 30 1978

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

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

RAY MARSHALL, Secretary of Labor, United States Department of Labor,	)	
Plaintiff,	)	75-C-555-B
vs.	)	
GUARDIAN ENTERPRISES, INC., a corporation, and R. C. COWHERD, an Individual,	)	
Defendants.	)	

ORDER

The Court has for consideration the Motion for New Trial filed by the defendants, the briefs in support and opposition thereto, and, being fully advised in the premises, finds that said Motion for New Trial should be overruled.

IT IS, THEREFORE, ORDERED that the Motion for New Trial filed by the defendants be and the same is hereby overruled.

ENTERED this 30th day of October, 1978.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

10/18/78
RGG:deg

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

JOHN ZINK COMPANY, a Delaware corporation,	)	
Plaintiff,	)	
vs.	)	NO. 75-C-384-B
TUTTLE ELECTRIC PRODUCTS DIVISION - EMERSON ELECTRIC COMPANY, a Missouri corporation, and MORTEX, INC., d/b/a TERRELL J. SMALL COMPANY,	)	
Defendants.	)	

FILED

OCT 30 1978

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

ORDER OF DISMISSAL AS TO MORTEX, INC.,
d/b/a TERRELL J. SMALL COMPANY

On this 30 day of October, 1978, upon the application of the Plaintiff, JOHN ZINK COMPANY, a Delaware corporation, it is ordered that the Defendant, MORTEX, INC., d/b/a TERRELL J. SMALL COMPANY, be dismissed from this cause without prejudice and the cause of action & complaint are dismissed as to said Defendant.

Allen E. Barrow
UNITED STATES DISTRICT JUDGE

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

LINDA PRUNER,	)	
Plaintiff,	)	
-vs-	)	No. 77-C-164-B
WAREHOUSE MARKET, INC.,	)	
Defendant.	)	

FILED

OCT 30 1978

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

ORDER APPROVING
JOINT STIPULATION FOR DISMISSAL

This cause having come before the Court pursuant to a Joint Stipulation for Dismissal, and it appearing to the Court that the parties have mutually agreed to a dismissal of this action, and it further appearing to the Court that such Stipulation should be granted, it is, therefore,

ORDERED, ADJUDGED AND DECREED That the claims of each of the parties against the other and causes of action should be, and hereby are, DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that each party shall bear its own attorney fees and costs incurred in this action.

So Ordered this 30th day of October, 1978.

Allen E. Barrow
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN

DISTRICT OF OKLAHOMA

FILED

OCT 23 1978

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

CHARLES PAPAFRANGOS, d/b/a BELMONT HOTEL, Plaintiff,	)	
-vs-	)	No. 78-C-162-B
MONTGOMERY ELEVATOR COMPANY, Defendant.	)	

APPLICATION FOR DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, by and through his attorney, Richard D. Gibbon, and moves the Court to dismiss the above entitled cause of action against Montgomery Elevator Company without prejudice, and would show to the Court that this cause of action is being dismissed so that the cause of action can be properly brought in the State Court against another Defendant.

That the attorney for the Defendant, Montgomery Elevator Company, joins in this application.

FILED

OCT 30 1978

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

Richard D. Gibbon
Attorney for Plaintiff

Max Mellott
Attorney for Defendant

ORDER

This matter comes on for hearing before the undersigned Judge upon the joint application of the parties hereto. The Court being fully advised in the premises finds that the above and foregoing cause of action and complaint should be dismissed without prejudice.

Allen E. Barrow
Judge of the District Court for
the Northern District of Oklahoma

9.

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 20 1978

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

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation,	)	
Plaintiff,	)	No. 78-C-57-C
vs.	)	
NEWSPAPER PRINTING CORPORATION,	)	
Defendant.	)	

J U D G M E N T

On this 20th day of October 1978, this cause came on for trial, plaintiff appearing by and through its attorney of record, Grey W. Satterfield, and defendant appearing by and through its attorney of record, James R. Jessup. After trial, the Court being fully advised in the premises hereby enters judgment in favor of plaintiff, St. Louis-San Francisco Railway Company, and against defendant, Newspaper Printing Corporation, for $7,805.00. Each party is to bear its own costs.

Dale Cook

U. S. DISTRICT JUDGE

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

LIFETIME DOORS, INC., Plaintiff,	)	
vs.	)	NO: 78-C-480-B
CHARLES E. WILSON, d/b/a WILSON ENTERPRISES, Defendant,	)	

FILED

OCT 20 1978

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

Notice of DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Lifetime Doors, Inc., and hereby dismisses the above entitled cause of action with prejudice to the filing of any future action.

BLACKSTOCK, JOYCE, POLLARD
BLACKSTOCK & MONTGOMERY

BY: Larry D. Leonard
300 Petroleum Building
Tulsa, Oklahoma 74119

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF MAILING

This is to certify that on this 18th day of October, 1978, a true and correct copy of the above and foregoing Dismissal was mailed to Mr. Charles E. Wilson, 5119 E. Tecumseh, Tulsa, Oklahoma, 74115, Defendant.

Larry D. Leonard

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

GARNETT APARTMENTS, INC., a corporation, Plaintiff,	)	
vs.	)	No. 77-C-52-B
RANGER INSURANCE COMPANY, a corporation, Defendant.	)	

F I L E D

OCT 20 1978

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

ORDER OF DISMISSAL

ON this 20th day of October, 1978, upon the written application of the parties for A Dismissal with Prejudice of the Complaint and all said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the plaintiff filed herein against the defendant be and the same hereby is dismissed with prejudice to any future action.

Allen E. Barrow
JUDGE, DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OKLAHOMA

APPROVALS:

JAMES L. KINCAID
Attorney for the Plaintiff.

ALFRED D. KNIGHT
Attorney for the Defendant.

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

CONSOLIDATED GEOPHYSICAL SURVEYS, a partnership,	)	
Plaintiff,	)	78-C-371-B
vs.	)	
STONE CONTAINER CORPORATION, a corporation,	)	
Defendant.	)	

FILED
OCT 20 1978
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has for consideration the Motion to Dismiss and Alternative Motion for Change of Venue filed by the defendant, Stone Container Corporation, the briefs in support and opposition thereto, and, having carefully perused the entire file, and, being fully advised in the premises, finds:

De-endant's Motion to Dismiss is based on 12(b)(2), 12(b)(5) and 17(b) of the Federal Rules of Civil Procedure. Defendant contends that this Court lacks jurisdiction over the person; that the cause of action and complaint should be dismissed for insufficiency of service of process and for lack of plaintiff's capacity to sue. Defendant admits that plaintiff now has complied with the Oklahoma ficitious name statute, as of September 18, 1978, (the litigation was commenced on August 10, 1978) and agrees that compliance may be had at any time before trial and therefore withdraws the lack of capacity to sue as a ground for the Motion to Dismiss.

The affidavit of Arnold F. Brookstone, Senior Vice President-Finance and Treasurer of Stone Contained, dated September 8, 1978, and attached to the Motion to Dismiss, states, in pertinent part:

2. Stone Container Corporation is a corporation duly organized under the laws of the State of Illinois with its principal place of business in Chicago, Illinois.

3. Negotiations leading to the execution of the contract attached as Exhibit "A" to plaintiff's Petition were conducted by defendant in the states of Illinois and Ohio, and the execution of Exhibit "A" by defendant occurred in the State of Illinois.

4. No representative of Stone Container Corporation has ever met or done business with representatives of Consolidated Geophysical Surveys in the State of Oklahoma.

5. Stone Container Corporation is not now and never has been incorporated or domesticated under the laws of the State of Oklahoma. It has no offices, employees, or service agents in the State of Oklahoma; it sells no products in the State of Oklahoma and pays no taxes in or to the State of Oklahoma.

6. Stone Container Corporation does not own any real estate or other property of any kind within the State of Oklahoma.

The plaintiff has filed a counter-affidavit of James R. New and C. D. Roemer, the partners doing business as Consolidated Geophysical Surveys. Said affidavit states, in pertinent part:

2. That negotiations leading to the execution of the contract attached as Exhibit "A" to the complaint herein, were conducted by plaintiffs in the State of Oklahoma, exclusively, and the signing of the contract by plaintiffs was in Tulsa, Oklahoma after which the plaintiffs commenced performance in Tulsa, Oklahoma of said contract.

3. Representatives of Stone Corporation, Howard D. Atha and Bernard Bamer, did solicit plaintiff's services. They initiated the contact and actively engaged in negotiations leading up to the signing by the parties to the said contract, and they did further state areas of work, set up plans and methods for the conduct of contemplated geophysical surveys and pointed plaintiffs toward a wanted reduction of the raw data into preplaned geophysical maps with analyzed and computed information. These contacts were carried on by long distance telephone and by mail.

4. Defendant does in fact sell products in the State of Oklahoma, to the Quality Pharmacal Corporation in Pocola, Oklahoma, and that this information was readily available to Arnold F. Brookstone, when he made his affidavit and stated that defendant "sells no products in the State of Oklahoma".

5. During the first week of April of 1978, defendant owed plaintiff $66,583.18, for the work plaintiff had performed, and at that time defendant informed plaintiff they were selling the geophysical data to Howard D. Atha. Up to this point, Howard D. Atha was employed by defendant as the director of the field work and as laison toward completed information; defendants stated that plaintiffs would have to get their money from Howard D. Atha, and thereafter in order to receive any of the money then due, plaintiffs were forced to enter into an executory contract with Howard D. Atha,.....

6. .....

7. The location of defendant's paper mill had absolutely nothing to do with the scope and manner and performance of work to be done under the contract .....

8. Eight to ten witnesses all from Oklahoma, in addition to both plaintiffs will testify and it is believed the majority of witnesses are from Oklahoma. Arley Paterson will not be inconvenienced by testifying in Oklahoma. And Bernard Bamer has already stated he is sorry for any inconvenience he has already caused plaintiffs.

In response to the affidavit and contentions of the plaintiff, defendant, it its response states:

.....Any products sold in Oklahoma to Quality Phamacal Corporation in Pocola, Okahoma are sold by Lyphomed, Inc., a subsidiary of Stone Container Corporation which is separately incorporated in the State of Illinois, a distinct entity from Stone Container Corporation, and a subsidiary which sells pharmaceuticals and is distant from the normal business of Stone Container Corporation. Further, this subsidiary accounts for 1/8 of 1% of Stone's consolidated earnings. Therefore, the Affidavit and Statements contained therein are accurate---<u>defendant itself sells no products in the State of Oklahoma</u>.

In a recent case from the Tenth Circuit Court of Appeals, arising out of the Western District of Oklahoma, the Court once again examined jurisdiction under the Oklahoma Long-Arm Statute. In CMI Corporation v. The Costello Construction Corporation, No. 77-2075, Tenth Circuit Court of Appeals, decided August 2, 1978, the Court said:

The Oklahoma long-arm statutes, Okla.Stat.Ann. titl.12, Sections 187 and 1701.03 (West), authorize extraterritorial service of process and in personam jurisdiction in cuases of action arising from a nonresident defendant's activities when they constitute doing business within the state. While the existence of jurisdiction over the person of the defendant in diversity actions is determined according to state law, the statutory provisions have been held to authorize personal jurisdiction over nonresidents to the maximum extent permitted by the federal due process clause. Steinway v. Majestic Amusement Co., 179 F.2d 681 (10th Cir. 1949), cert. denied, 339 U.S. 947; Yankee Metal Prod. Co. v. District Court, 528 P.2d 311 (Okla. 1974); B. K. Sweeney Co. v. Colorado Interstate Gas Co., 429 P.2d 759 (Okl. 1967); Vacu-Maid, Inc. v. Covington, 530 P.2d 137 (Okla.App. 1974).

> Whatever restriction (the statutory provisions) may impose is merely co-extensive with, and identical to, that of the federal due process. The range of permissible state action is as wide and the boundary line extends as far under the Oklahoma "doing business" test as the minimum standards of federal due process permit.

B. K. Sweeney Co. v. Colorado Interstate Gas Co., supra at 762.

The Supreme Court stated the applicable due process test in International Shoe Co. v. Washington, 326 U.S. 310 (1945). A defendant not present within the forum may be subjected to judgment in personam only if he has sufficient minimum contacts with the forum so that the maintenance of the suit there does not offend the traditional notions of fair play and substantial justice. No single contact controls; rather it is the totality of an absent defendant's relationship with the forum that is determinative.

The trend of International Shoe and its progeny is unquestionably toward the expansion of the states' powers to exercise personal jurisdiction over absent defendants. However, as the Supreme Court pointed out in Hanson v. Denkla, 357 U.S. 235 (1958), the expansion is not without its limits:

> (I)t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts....Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of the territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.

357 U.S. at 251.

The lessor-lessee relationship between the parties in the present case is sufficiently similar to the buyer-seller relationship to make applicable the cases decided under Oklahoma law concerning personal jurisdiction over nonresident purchasers. The Oklahoma courts have recognized a distinction between active and passive nonresident purchasers. Yankee Metal Prod. Co. v. District Court, supra; Vacu-Maid, Inc. v. Covington, supra. The active-passive purchaser analysis gauges the defendant's participation within the forum. As the court stated in Vacu-Maid, Inc. v. Covington, supra, "The relevancy of this involvement is that it provides a clue to the significance attached by a defendant to his activities within the forum, and thus a clue to his expectations--an element in determining fairness." 530 P.2d at 142.

The classic "active purchaser" is illustrated in Yankee Metal Products Company v. District Court, supra. In that case, a nonresident purchaser contacted an Oklahoma manufacturer of metal products in response to a mail solicitation. The purchaser ordered wire harnesses built to specifications it submitted to the seller. The Supreme Court of Oklahoma held personal jurisdiction over the purchaser was proper in the seller's suit for payment on the contract on the basis of the substantial consequences within the state of the manufacture of harnesses to the purchaser's specifications.

Vacu-Maid, Inc. v. Covington, supra, is illustrative of the "passive purchaser". Vacu-Maid was an Oklahoma manufacturer and wholesaler of central vacuum systems. Vacu-Maid sought to induce Covington, a North Carolina resident, to sell and install its system. Agents of Vacu-Maid traveled to North Carolina several times to talk to Covington. Covington eventually agreed to sell the systems and made a trip to Oklahoma

> to view Vacu-Maid's plant and familiarize himself with the systems. Vacu-Maid supplied Covington's telephoned orders for several years. It brought suit against Covington for the unpaid balance due on an open account. The court held that Covington was a passive purchaser notwithstanding his informational visit to the forum and that neither the manufacture of the systems to fill Covington's orders nor the fact that they were sent "f.o.b. Ponca City" was sufficient contact with the forum to warrant exercise of personal jurisdiction over him.

In its Motion for Change of Venue the defendant asserts that the negotiations leading to the execution of the contract were partially conducted in Ohio; that defendant's paper mill in question is located in the Southern District of Ohio; the surveys which are the subject of the contract in question were conducted in the Southern District of Ohio (in addition to the statements contained in the affidavit submitted and hereinabove recited).

Plaintiff alleges in its responsive brief that the defendant solicited and initiated the contact; that the defendant was an active purchaser through its agents, Bernard Bamer and Howard D. Atha, and actively participated in the negotiations, and in determining the plans and methods for the conduct of plaintiff's work in producing useful geophysical maps and information and that these negotiations were carried on by mail and long distance telephone between out of state locations and Oklahoma and were incident to and prior to the agreement reached between the parties. Plaintiff further asserts that the final signing of the contract took place in Tulsa when plaintiff signed the agreement and that the contract contemplated at least half of the work be performed in Tulsa, Oklahoma, in plaintiff's mapping, computing and engineering offices. Plaintiff further asserts that no person employed by plaintiff ever left the Stat of Oklahoma to negotiate the contract.

Looking at the entire picture as presented by the opposing parties, the Court is constrained to find that the minimum contacts are lacking in this case to confer jurisdiction on this Court.

As the Supreme Court said in International Shoe Co. v. Washington, 326 U.S. 310 (1945): "No single contact controls; rather it is the totality of an absent defendant's relationship with the forum that is determinative."

There is no doubt that there is a dispute as to who made the original contact or solicited the initial contract. Plaintiff alelges that the defendant did and the defendant alleges that the plaintiff did. However, the plaintiff admits that the "negotiations were carried on by mail and long distance telephone between out of state locations and Oklahoma". The file also reveals that the surveys were to be carried out in the State of Ohio (the location of defendant's mill). The only allegation of defendant's contentions and the only statement of Mr. Brookstone that is contested by the plaintiff is that of doing business in the State of Oklahoma. The Court finds that although a separate and distinct subsidiary of defendant evidently does sell some product in the State of Oklahoma (pharmaceuticals) this does not constitue doing business within the state on the part of the defendant.

This Court finds that the defendant in this case was a "passive purchaser" as defined by the Oklahoma cases, and relied on by the Tenth Circuit Court of Appeals. Additionally, the Court is of the opinion that all of the affirmative actions cited by the plaintiff in support of its position constituted conduct on the part of the plaintifff and not the defendant. As was said in Jem Engineering & Mfg., Inc. v. Toomer Elec. Co., 413 F.Supp. 481, 486 (USDC ND Okl. 1976):

> It is not the conduct of the plaintiff or the possible effect on the plaintiff of its own conduct that determines jurisdiction, but rather whether the conduct of defendant can be said to amount to "minimum contacts" sufficient to comport with fair play.....

The Court finds that it lacks jurisdiction over the defendant in this litigation due to lack of "minimum contacts" and that the Motion to Dismiss of the defendant for lack of jurisdiction should be sustained.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss for lack of jurisdiction of the defendant be and the same is hereby sustained and this cause of action and complaint are dismissed for lack of

jurisdiction.

ENTERED this 20th day of October, 1978.

Allen E. Barnes

CHIEF UNITED STATES DISTRICT JUDGE

FILED

OCT 20 1978

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

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

W. FRED PHILLIPS,	)	
Plaintiff,	)	
vs.	)	73-C-407-B
CHARLES J. DAVIS and J. R. GATES,	)	
Defendants.	)	

JUDGMENT

Pursuant to the Memorandum and Order entered this date,

IT IS ORDERED that Judgment be entered in favor of the Defendants, Charles J. Davis and J. R. Gates, and against the plaintiff, W. Fred Phillips.

ENTERED this 20th day of October, 1978.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

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

DONALD CHURCH and LAURA CHURCH, Plaintiffs, vs. PATRICIA ROBERTS HARRIS, Secretary of Housing and Urban Development, Federal Housing Administration; ERNIE BESHEAR and VIRGINIA BESHEAR; RUDY WYATT d/b/a RUDY WYATT REALTORS; and PROFESSIONAL HOME FINDERS, INC., Defendants.	)	78-C-203-B

FILED

OCT 20 1978

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

JUDGMENT

Pursuant to the Order filed this date, IT IS ORDERED that Judgment is entered in favor of the defendant, Patricia Roberts Harris, Secretary of Housing and Urban Development, Federal Housing Administration, and against the plaintiffs, Donald Church and Laura Church.

ENTERED this 20th day of October, 1978.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

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

CARL CORN, Plaintiff, vs. JOSEPH CALIFANO, Secretary of Health, Education and Welfare, Defendant.	)	78-C-424-B

FILED

OCT 19 1978

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

ORDER REMANDING

The Court has for consideration the Motion to Remand filed by the defendant, the brief in support thereof, and, being fully advised in the premises, finds:

Section 205(g) of the Social Security Act, as amended, 42 U.S.C. §405(g) provides:

> ".....The Court shall, on the motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary....."

IT IS, THEREFORE, ORDERED that the Motion to Remand of the defendant be and the same is hereby sustained and this cause of action and complaint are hereby remanded to the Secretary of Health, Education and Welfare for further action.

ENTERED this 19th day of October, 1978.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

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

TERRY EUGENE McDONALD, individually, and MILDRED McDONALD, individually, Plaintiffs, -vs- SURETY MANAGERS, INC., a California corporation, dba Imperial Insurance Company; FRED HOPKINS and RALPH JOHNSON dba DEES BAIL BOND COMPANY; WILLIAM DEES; DEWEY WARD; LAURA MAE TURNER; GEORGE TRENT SPAHR; and FREDDIE MARIE QUICK, Defendants.	)	No. 77-C-305-B

FILED

OCT 18 1978

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

JOURNAL ENTRY OF JUDGMENT

NOW ON this 18th day of October, 1978, this cause comes on for hearing on the plaintiffs' Motion for Default Judgment filed September 20, 1978.

Plaintiffs appear by their attorneys, Robert G. Fry, Jr. and James R. Elder, and the defendants, Laura Mae Turner and Freddie Marie Quick, and each of them, although three times called in open Court, come not but make default.

The Court finds that the defendant, Laura Mae Turner, has been duly served with summons herein on the 22nd day of July, 1977; and that the defendant, Freddie Marie Quick, has been duly served with summons herein on the 20th day of July, 1977; and have failed to answer or otherwise plead herein, and are in default.

It is, therefore, ordered that the said defendants, Laura Mae Turner and Freddie Marie Quick, and each of them, are hereby adjudged to be in default and that the allegations of plaintiffs' complaint be taken as true and confessed as against them, pursuant to Rule 55 of the Federal Rules of Civil Procedure.

Thereupon, this cause coming on for trial, and the Court having heard all of the evidence and oral testimony of witnesses sworn and examined in open Court, and being fully advised in the premises, and on consideration thereof, finds that all of the allegations of plaintiffs' complaint are true as therein set forth.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, Terry Eugene McDonald, be and he is hereby awarded judgment against the defendants, Laura Mae Turner and Freddie Marie Quick, jointly and severally, in the sum of $50,000.00 on plaintiff's first cause of action together with the sum of $150,000.00 as punitive damages on plaintiff's second cause of action for a total judgment of $200,000.00; and the plaintiff, Mildred McDonald, be and she is hereby

awarded judgment against the defendants, Laura Mae Turner and Freddie Marie Quick, jointly and severally, in the sum of $1,751.75 together with the costs of this action, for all of which let execution issue.

Allen E. Barrow

JUDGE

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

PENNWALT CORPORATION, a corporation, Plaintiff,	)	
v.	)	No. 77-C-191-B
TULOMA STEVEDORING, INC., a corporation; OKLAHOMA-Kansas GRAIN CORP., a corporation; and UNION MECHLING CORPORATION, a corporation, Defendants.	)	

FILED

OCT 18 1978

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

ORDER

The Court has for consideration plaintiff's Application to Dismiss without Prejudice as to the Defendant Union Mechling Corporation and to file an Amended Complaint and to strike the Pretrial Setting, and the applications of Defendants, Tuloma Stevedoring, Inc., and Oklahoma-Kansas Grain Corp., to join Union Mechling Corporation as a Third-Party Defendant, and has reviewed the file, the briefs and all of the recommendations concerning the motions, and being fully advised in the premises, finds:

That the plaintiff's Application to Dismiss without prejudice as to the Defendant Union Mechling Corporation and to File an Amended Complaint and to Strike Pretrial Setting should be sustained; and that the Defendants' Motion to join Union Mechling Corporation as a Third-Party Defendant should be denied.

This is a negligence case which Plaintiff commenced against Defendants, Tuloma Stevedoring, Inc., Oklahoma-Kansas Grain Corp., and Union Mechling Corporation, alleging damage to Plaintiff's goods caused by the negligence of said Defendants in the handling and unloading of the goods from a barge at the Port of Catoosa, Oklahoma. On March 31, 1978, the Plaintiff filed its Application to Dismiss the Defendant,

Union Mechling Corporation without prejudice and to file a Second Amendment to Complaint. This Complaint stated that jurisdiction was based on diversity of citizenship. In response thereto, the Defendants, Tuloma Stevedoring, Inc. and Oklahoma-Kansas Grain Corp. filed their application to join Union Mechling Corporation as a Third-Party Defendant on the ground that they were entitled to join such a Third-Party Defendant pursuant to Rule 14(c) of the Federal Rules of Civil Procedure.

In the Amended Complaint sought to be filed by Pennwalt, Pennwalt chooses to assert its tort claim in this court pursuant to the court's diversity jurisdiction. It does not state, as it could have pursuant to Rule 9(h) that it has an admiralty claim.

Since Pennwalt chooses not to designate the claim as one in admiralty, the joinder provision of Rule 14(c) is not available to the defendants, Tuloma Stevedoring, Inc. and Oklahoma-Kansas Grain Corp. In 3 Moores Federal Practice ¶9.09, Page 1990, it is stated:

> If the pleader does not identify his claim as within admiralty jurisdiction, pursuant to Rule 9(h), and the claim is not one which is cognizable only in admiralty, neither the supplemental rules nor the provisions of the other rules enumerated in 9(h) are applicable to his case.

Pennwalt's proposed Amended Complaint should control in the joinder determination. It would be improper for the Court to permit the joinder of the defendant Union Mechling in accordance with Rule 14(c) and at the same time permit the filing of the Amended Complaint. The more liberal impleader provisions of Rule 14(c) are designed to provide consistency in the admiralty practice subsequent to the unification of civil and admiralty practice in 1966.

However, the reasoning advanced by the defendants, Tuloma Stevedoring, Inc., and Oklahoma-Kansas Grain Corp., does not apply to the case which Pennwalt wishes to bring in reliance upon local law.

IT IS, THEREFORE, ORDERED that plaintiff's Application to Dismiss Without Prejudice as to the Defendant Union Mechling Corporation be and is hereby sustained and plaintiff is granted leave of court to file an Amended Complaint as against the defendants, Tuloma Stevedoring, Inc., a corporation, and Oklahoma-Kansas Grain Corp., a corporation, and that the applications of Defendants, Tuloma Stevedoring, Inc. and Oklahoma-Kansas Grain Corp. to join Union Mechling as a Third-Party Defendant be and is hereby denied.

Dated this 13th day of October, 1978.

Allen E. Barrow

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

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

M. J. BRAGG, Plaintiff, vs. FORETRAVEL, INC., and CHRYSLER MOTOR CORPORATION, Defendants.	))))))))))	76-C-421-B

FILED

OCT 18 1978

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

JUDGMENT

Based on the Order filed this date,

IT IS ORDERED that Judgment be entered in favor of the defendant, Chrysler Motor Corporation, and against the plaintiff, M. J. Bragg.

ENTERED this 18th day of October, 1978.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

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

IN RE: RIFFE PETROLEUM CORPORATION, a corporation, ASPHALT INTERNATIONAL, INC., a corporation, NU-WAY EMULSIONS, INC., a corporation, RIFFE MARINE CORPORATION, a corporation, and WEST BANK OIL, INC., a corporation, Debtors in Possession, Plaintiffs, vs. CIBRO SALES CORP., A. ROBERT DEGEN, Attorney, and RAYMOND A. CONNELL, Attorney, Defendants.	)	FILED OCT 17 1978 Jack C. Silver, Clerk U. S. DISTRICT COURT No. 78-B-509 (78-C-421)

ORDER, FINDINGS OF FACT, CONCLUSIONS
OF LAW, JUDGMENT

There came on for hearing before the undersigned Chief Judge of the United States District Court for the Northern District of Oklahoma on the 6th day of September, 1978, the proceedings for civil contempt against the Cibro Sales Corp., A. Robert Degen, Attorney at Law, and Raymond A. Connell, Attorney at Law, arising out of actions by said defendants in connection with the Chapter XI in bankruptcy proceedings of Riffe Petroleum Corporation, a corporation, Asphalt International, Inc., a corporation, Nu-Way Emulsions, Inc., a corporation, Riffe Marine Corporation, a corporation, and West Bank Oil, Inc., a corporation, debtors in possession, after due and proper notification to said defendants of said proceedings. The above named plaintiffs, debtors in possession, being represented by James R. Eagleton, of the firm of Eagleton, Eagleton & Owens, Inc., and Irvine E. Ungerman, of the firm of Ungerman, Conner, Little, Ungerman and Goodman. The defendant,

Cibro Sales Corp. and Raymond A. Connell, being represented by A. F. Ringold and Gene Mortensen, of the firm of Rosenstein, Fist & Ringold. The defendant, A. Robert Degen, being represented by James D. Fellers, of the firm of Fellers, Snider, Blankenship & Bailey, none of said parties having requested a trial by jury. The Court proceeded to hear the testimony on said date and thereafter continued the hearing to September 7, 1978, at which time all parties were present and further proceedings took place. The said proceedings were thereafter continued to the 8th day of September, 1978, for further testimony and proceedings. On said date all parties having rested their respective causes and there having been previously filed trial memorandums on the issues involved and the Court having heard the arguments of counsel and being fully advised in the premises makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On June 2, 1978, Riffe Petroleum Corporation, Asphalt International, Inc., Nu-Way Emulsions, Inc., Riffe Marine Corporation, and West Bank Oil, Inc., filed with the District Court in and for the Northern District of Oklahoma their Petition under Chapter XI of the Bankruptcy Act.

2. On the 5th day of June, 1978, the Court issued an order authorizing the above named plaintiffs, debtors in the proceedings, to be debtors in possession.

3. On June 5, 1978, this Court issued a stay order enjoining and staying all persons from doing any acts which would directly or indirectly interfere in any way with the possession or management of any of the debtors in possession's property, stating:

> Until further order of this Court, all creditors and all sheriffs, marshals and other officers, and their respective agents and employees, and all other persons and entities be and are, jointly and severally, enjoined and stayed: from commencing or continuing, in any court other than this Court, any action at law or suits or proceedings in equity against the Debtor; from executing or issuing or causing the execution or issuance

> out of any court other than this Court, of any writ, process, summons, attachment, subpoena, or other process for the purpose of impounding, taking possession of, interfering with, or enforcing any security interest, mortgage interest or other lien or encumbrance upon any property owned by or in the possession of the Debtor; from directly or indirectly doing any act that would interfere in any way with the possession or management of any of the Debtor's property, the Debtor's discharge of its duties as a debtor in possession, or with the exclusive jurisdiction of this Court over the Debtor and its property until further order of this Court. All persons and entities, and their respective agents and employees, claiming any security interest or mortgage interest in any property of the Debtor are, jointly and severally, stayed, pending the further order of this Court: from taking possession of any property in which Debtor has any right, title or interest, including without limitation, the property claimed as collateral for the claimed security interest or mortgage interest; and, from taking any act to transfer from any bank account, lock box, or other depository any money or other proceeds directly or indirectly realized from any property in which the Debtor has any right, title or interest, including without limitation, the property claimed as collateral for the claimed security interest or mortgage interest.

On June 9, 1978, a copy of this stay order was served on Cibro Sales Corp. by mail and the Manager of Cibro Sales Corp. immediately telephoned his lawyers, Healy & Baille, and advised them of the stay order, and they directed him to mail them a copy, which he did. (Transcript pp. 193, 18).

4. At all times pertinent hereto the S. S. Asphalt Merchant was under a five-year charter to Asphalt International, Inc., one of the debtors in possession, pursuant to the Charter Agreement admitted as Plaintiffs' Exhibit 1.

5. At all times pertinent hereto while the S. S. Asphalt Merchant was under charter to Asphalt International, Inc., the vessel was under the sole control of Asphalt International, Inc., which on a daily basis contacted said ship and gave it instructions as to where the ship would go, what it would pick up, and what it would deliver during the ensuing 24-hour period. (Transcript pp. 69, 70).

6. The S.S. Asphalt Merchant, in its size, is one of only eight to ten ships in the world that are designed, built and equipped to carry asphalt in the open sea. (Transcript pp. 65, 66).

7. It was and is impossible for Asphalt International to continue in business without the use of the S.S. Asphalt Merchant. (Transcript pp. 65, 66, 67, 68, 69, 70).

8. On June 16, 1978, after having received a copy of the June 5, 1978, stay order, A. Robert Degen, of the law firm of Krusen, Evans & Byrne, Philadelphia, Pennsylvania, prepared and filed Complaint in rem in the United States District Court for New Jersey, Civil No. 78-1319, styled: Cibro Sales Corp., plaintiff, vs. M/V Asphalt Merchant, her engines, boilers, tackle, etc., defendant (Plaintiffs' Exhibit 6), wherein they sought to foreclose unpaid bunker oil bills for bunker oil sold to Asphalt International, Inc., (Plaintiffs' Exhibits 8, 9 and 10), in which Complaint they prayed: ". . . that all persons having or claiming any right, title or any interest therein, shall be cited to appear and answer under oath all and singular the matters aforesaid." In this New Jersey proceedings, the debtors in possession made no appearance nor was any attorney employed or authorized to represent debtors in possession in said New Jersey proceedings. (Transcript p. 153).

The "Summons and Warrant for Arrest of vessel or other property" was served on the ship's Captain on Saturday, June 17, 1978, at 10:32 A. M. (Plaintiffs' Exhibits 7 and 11).

9. On or about June 20, 1978, Raymond A. Connell, partner in the firm of Healy & Baillie, of New York, New York,

advised counsel for debtors in possession that he was chief counsel for Cibro Sales Corp. handling the New Jersey proceedings against the Asphalt Merchant and that he would make the decisions with respect to whether or not the stay order would be complied with and whether or not a specific kind of bond or language in a bond would be acceptable to Cibro Sales Corp. (Transcript pp. 141, 142).

10. On June 17, 1978, Asphalt International, Inc., one of the debtors in possession, owed to defendant, Cibro Sales Corp., the sum of $235,194.82, as shown by Plaintiffs' Exhibits 8, 9 and 10, for the purchase by Asphalt International, Inc., from defendant, Cibro Sales Corp., bunker oil previously used on the Asphalt Merchant.

11. The defendants, A. Robert Degen and Raymond A. Connell, are attorneys who were employed by Cibro Sales Corp. to foreclose a lien on the S.S. Asphalt Merchant resulting from Cibro Sales Corp.'s supplying of bunker oil to the debtor in possession, Asphalt International, Inc. (Transcript pp. 204, 205, 254, 255 and Affidavits of Raymond A. Connell and A. Robert Degen).

12. At the time of its arrest, the S.S. Asphalt Merchant was carrying as its cargo approximately 100,000 barrels of asphalt owned by Asphalt International, Inc. which was required to be maintained at a constant temperature of approximately 250° Fahrenheit. (Transcript p. 66).

13. To properly maintain the S.S. Asphalt Merchant's cargo at its required temperature necessitated the constant expenditure of certain fuel known as bunker oil. (Transcript p. 68).

14. The cargo of the S.S. Asphalt Merchant was at the time of its arrest allocated for a two-port delivery, the first delivery to be at the port of arrest, Petty's Island, with the remaining cargo to be delivered to Providence, Rhode Island. (Transcript p. 100).

15. As a consequence of the arrest of the S.S. Asphalt Merchant, that portion of its cargo destined for delivery to West Bank Oil, Inc., another of the debtors in possession, did not commence unloading until 12:20 p.m. on June 23, 1978. (Transcript p. 114 and Plaintiffs' Exhibit 11).

16. As a direct result of the arrest and consequent delay in unloading, West Bank Oil, Inc., was out of its product, asphalt, causing a cessation of its operations and a resultant loss of customer business. (Transcript pp. 115-119). The debtor in possession, West Bank Oil, Inc., suffered a loss of $20,000.54 during the period of time the asphalt was delayed in unloading. (Plaintiffs' Exhibit 4). (Transcript pp. 111-131).

17. The arrest of the S.S. Asphalt Merchant was lifted on June 29, 1978. (Transcript p. 114 and Plaintiffs' Exhibits 6 and 11).

18. The total time elapsed from the arrest of the S.S. Asphalt Merchant until the arrest was lifted and the vessel was permitted to sail for the next port was twelve days, four hours and twelve minutes, during all of which time the defendants herein repeatedly were advised of the existence of the stay order. That the defendants herein refused to permit a release of the arrest order to take place.

19. The total time Asphalt International, Inc. lost use of the S.S. Asphalt Merchant as a direct result of the arrest was eleven days, six hours and fifty-seven minutes. As a result of the delay of the S.S. Asphalt Merchant by the arrest procedure, the debtor in possession, Asphalt International, Inc. was required to expend $27,174.05 in fuel costs to maintain the cargo at the proper temperature. The charter hire and overtime expense incurred by debtor in possession, Asphalt International, Inc., during the delay caused by the arrest

was $50,612.31, as reflected by Plaintiffs' Exhibit 2. (Transcript pp. 75-76).

20. The extra port and agency expense incurred by the arrest delay of the S.S. Asphalt Merchant was $442.00 as reflected by Plaintiffs' Exhibit 2. (Transcript p. 76).

21. As a consequence of the arrest of the S.S. Asphalt Merchant, the plaintiffs, debtors in possession, in this action were required to lease another ship called the Paludino at an additional higher cost for emergency runs, as a major part of the debtor in possession's business is the transportation of asphalt between Curacao and the States along the eastern coast of the United States. As reflected by Plaintiffs' Exhibits 12 and 16, the additional cost to the debtor estate as a consequence of the leasing of this additional ship for this voyage was $73,613.91. (Transcript pp. 78-81).

22. As a result of the arrest of the S.S. Asphalt Merchant the debtors in possession have incurred attorneys fees and costs as reflected by Plaintiffs' Exhibits 3, 5, 18 and 21.

23. The debtors in possession did, as a consequence of the arrest of the S.S. Asphalt Merchant, on two occasions wire the sum of $300,000.00 to Philadelphia, Pennsylvania, in an attempt to have a bond posted to obtain a release of said ship. The interest on said monies so used by the debtor in possession in their unsuccessful attempts to free the ship was $2,465.75. (Transcript p. 125).

24. On June 29, 1978, the S.S. Asphalt Merchant was released when Shell Curacao, N. V., a creditor of debtors in possession, paid to Cibro Sales Corp. the sum of $243,794.82. (Transcript pp. 14, 15). (Plaintiffs' Exhibit 17).

25. The sum $243,794.82 reflects three invoices (Plaintiffs' Exhibits 8, 9 and 10) which were bills incurred by the debtors

in possession for obtaining fuel for the S.S. Asphalt Merchant from defendant, Cibro Sales Corp., plus the sum of $8,600.00 which was the Marshal's fees incurred in the arrest of said vessel. (Plaintiffs' Exhibit 17).

26. As a consequence of the payment by Shell Curacao to Cibro Sales Corp., the latter assigned to Shell Curacao its claims against the debtors in possession. (Transcript p. 164).

27. Debtors in possession thereafter paid to Shell Curacao the sum of $80,574.59 on Invoice No. 2977, Plaintiffs' Exhibit 10, as this was a cost incurred after the filing of the Chapter XI proceeding by the debtors in possession. (Transcript pp. 165-166).

28. The debtors in possession also paid the identical sum of $80,574.59 to Cibro Sales Corp., as reflected by Plaintiffs' Exhibit 20. (Transcript p. 165).

29. Cibro Sales Corp. stipulates that it had and claims no right to the sum of $80,574.59 paid to it by debtors in possession and it agrees to the return of said monies.

30. Debtors in possession attempted to post a cash bond in the New Jersey proceedings by depositing $300,000.00 cash but Cibro objected thereto and protracted the proceedings by objecting to the wording in proposed bonds, maintaining the arrest of the Asphalt Merchant. (Transcript p. 152). Shell Curacao, N. V., has filed a verified application in these proceedings (Plaintiffs' Exhibit 17) asserting in part:

> 4. During this period of time, applicant was actively engaged in discussions with the parties, trying to find some means to effect the release of the Asphalt Merchant and avoid the catastrophic results to AI of its continued arrest and seizure. Applicant and AI were advised by Cibro Sales Corp. that even the posting of a $300,000.00 surety bond would not be sufficient to effect the release of the Asphalt Merchant. Applicant was further advised that, unless all the claims of Cibro Sales Corp. were paid in full, the Asphalt Merchant would be sold on June 29, 1978, to satisfy said claims.

The invoices of Cibro Sales Corp. to Asphalt International, Inc. (Plaintiffs' Exhibits 8, 9 and 10), together with the Marshal's fee of $8,600.00, totalling $243,794.82, was paid by Shell Curacao, N.V., in order to minimize the losses occasioned by the arrest of Asphalt International's property, namely, the ship Asphalt Merchant, its cargo of 100,000 barrels of asphalt, its bunker oil, etc.

31. The evidence introduced at the contempt hearing was clear and convincing to the Court and proved beyond a reasonable doubt that Cibro Sales Corp., A. Robert Degen and Raymond A. Connell were guilty of civil contempt against the stay order of this Court, which contemptuous acts caused actual damages to debtors in possession of $212,119.87. Defendants have offered no proof or evidence rebutting the actual damages suffered by debtors in possession.

32. All damages to debtors in possession herein found were reasonably foreseeable by Cibro Sales Corp., A. Robert Degen and Raymond A. Connell prior to the time that they filed and prosecuted the action in the United States District Court of New Jersey, Civil No. 78-1319, above described.

33. The debtors in possession have a $10,000,000.00 loan from Chemical Bank approved by this Court during the pendency of these Chapter XI proceedings. If any of the funds of this loan were used to pay past indebtednesses to Cibro Sales Corp. (Plaintiffs' Exhibits 8 and 9), this would be an act of default triggering the calling of the entire $10,000,000.00 loan.

CONCLUSIONS OF LAW

1. The Court's Order entered on June 5, 1978, restrained and enjoined all persons from doing any acts which would directly or indirectly interfere in any way with the possession or management of any of the debtors in possession's property and was in full force and effect at all times pertinent hereto.

2. The order of this Court entered on June 5, 1978, is specific and definite.

3. The S.S. Asphalt Merchant, its bunker oil and water, and its cargo of asphalt were properties of the debtors in possession at the time the S.S. Asphalt Merchant was arrested.

4. The Court has jurisdiction of the matter and the parties hereto.

5. The June 5, 1978, stay order of this Court was violated by the defendants in their actions in causing the filing and prosecuting of the New Jersey proceedings (Civil 78-1319), implementing the arrest and detention of the M/V Asphalt Merchant, its cargo of asphalt, its bunker oil and water.

6. The course of action pursued by the defendants constituted a collateral attack upon the order of this Court entered on June 5, 1978, and constituted contempt of this Court.

7. That the defendants, Cibro Sales Corp., A. Robert Degen and Raymone A. Connell, and each of them, are guilty of civil contempt for their course of conduct in having violated the Court's Order of June 5, 1978.

8. The defendant, Cibro Sales Corp., a listed creditor of the debtors in possession, has obtained a preference by its conduct in arresting the S.S. Asphalt Merchant and retaining same until the debtors in possession's indebtedness to it was paid in full.

9. The course of conduct of defendants herein, if condoned by this Court, would make unworkable this Chapter XI proceedings in bankruptcy.

10. The signing and filing of a stay order by this Court in a bankruptcy proceeding constitutes a caveat to the world. Converse v. Highway Construction Co., 6th Cir., 107 F.2d 127 (1973); Fidelity Mortgage Investors v. Camelia Builders, Inc., 2 N.D. Cir., 550 F.2d 47 (1976), Cert. Den. 97 S. Ct. 1107 (1977); Colliers on Bankruptcy, Vol. 6, Paragraph 3.09(3).

11. It is within the powers of this Court to require that the defendants pay to the debtor estate those compensatory damages necessary to make whole the plaintiffs as a consequence of the defendants' conduct. Carbon Fuel Co. v. United Mine Workers, 4th Cir., 517 F.2d 1348 (1975).

12. As a consequence of defendants' actions plaintiffs are entitled to recover herein a reasonable attorneys fee for the time expended as a consequence of the arrest of the S.S. As]halt Merchant and these proceedings. This Court awards plaintiffs' counsel their fees in accordance with the hours as shown in their Exhibits at the following rates: Irvine E. Ungerman at the rate of $75.00 an nour; Associats of the Ungerman, Conner, et al firm at the rate of $50.00 an hour; James R. Eagleton and George W. Owens at the rate of $60.00 an hour; Associates of the Eagleton, Eagleton & Owens, Inc. law firm at the rate of $50.00 per hour. Additionally, the firm of Tomar, Parks, Seliger, Simonoff & Adourian was paid the sum of $308.00 for services rendered to the debtors in possession for which they are entitled reimbursement. Additionally, there were certain expenses incurred by the various attorneys herein for which they are entitled reimbursement. Accordingly, this Court awards as attorneys fees from defendants to plaintiffs the sum of $29,230.75.

13. Damages caused by the arrest of the S.S. Asphalt Merchant to the debtors in possession herein, including attorneys fees, are in the amount of $212,119.87, said amount being dependent upon the receipt by debtors in possession of the $80,574.59 overpayment; otherwise, if said sum is not received by the debtors in possession, they have been damaged in the amount of $292,694.46.

14. The defendants are required to pay the sum of $212,119.87, assuming the debtor estate receives the sum of

$80,574.59; otherwise, the sum of $292,694.46, to purge themselves of contempt.

15. The defendant, Cibro Sales Corp., is to pay the sum of $163,220.23 to Shell Curacao and be reassigned its claim as part of its purging of its civil contempt so Cibro Sales Corp. may file its claim before this Court as any other creditor of the debtor estate.

16. As an inducement to defendants' compliance with this order, it is further ordered that one Christopher Bohlman, General Manager of Cibro Sales Corp., A. Robert Degen, Attorney, and Raymond A. Connell, Attorney, be remanded to the custody of the Attorney General of the United States, to be released when they have purged themselves of civil contempt by full compliance with this Court's order. As to Christopher Bohlman, this order is stayed for a period of thirty (30) days to permit compliance.

17. The procedure herein followed was approved in Fidelity Mortgage Investors v. Camelia Builders, Inc. (2nd Cir., 1976), 550 F.2d 47, Cert. Den. Feb. 22, 1977, 97 S. Ct. 1107, wherein the Second Circuit stated on p. 50:

> Judge Herzog, after a hearing participated in by the parties, held both Camelia and Farnale in contempt for knowingly initiating the Mississippi action without his permission. The lawyers for Camelia and Farnale, as well as two corporate officers, were held in contempt also.
>
> However, Judge Herzog, rather than punishing the contempt with the limited sanctions available to a bankruptcy judge, certified the matter to the United States District Cort for the Southern District of New York (Richard Owen, Judge), pursuant to Rule 920(a)(4) of the Bankruptcy Rules. Judge Owen accepted Judge Herzog's factual findings, accordingly held the defendants in contempt, and ordered that FMI be paid costs, including reasonable attorneys fees for the defense of the Mississippi action and for the prosecution of the contempt proceeding. Judge Owen also ordered the defendants to cause the return of FMI's $76,000 deposit in the Mississippi district court.
>
> Camelia, Farnale and the lawyers and officers held in contempt appeal from Judge Owen's order. They urge us, on a variety of jurisdictional, substantive, constitutional and procedural grounds, to reverse the decision of the district court as to both liability and punishment. We decline this invitation and affirm the contempt order of the district court in all respects.

18.

> The word "property" is not defined in the Act, and no categorical definition of the word can be given. Without question, however, it includes both legal and equitable interests. The word is of the broadest possible signification, embracing everything that has exchangeable value or goes to make up a man's wealth, and every interest or estate which the law regards of sufficient value for judicial recognition. All that can be positively said in reference to the word "property" in a statute like the Bankruptcy Act is that it is not to be construed in any loose, popular sense, but with regard to the limitations which the law attaches to it. 9 Am.Jur.2d §848, p. 630.

The Supreme Court of the United States has held that the Bankruptcy Act's own purposes must ultimately govern as to what is "property" within the purview of the Bankruptcy Act in Segal v. Rochelle, 382 U.S. 375, 15 L.Ed.2d 428, 86 S. Ct. 511, wherein it is stated:

> It is impossible to give any categorical definition to the word "property" nor can we attach to it certain relations, the limitations of which would attach to it in others.
>
> * * *
>
> Whether an item is classed as "property" by the Fifth Amendment's Just-Compensation Clause or for the purpose of a state taxing statute cannot decide hard cases under the Bankruptcy Act, whose own purposes must ultimately govern. . .To this end the term "property" has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed. (15 L.Ed.2d 432).

19. Defendants' actions in violating the June 5, 1978, stay order will not be excused in this civil contempt proceedings, by alleged absence of willfulness. Sanctions to compensate for damages caused by noncompliance are not dependent upon the state of mind of defendants, all as more fully stated In Re: American Associated Systems, Inc., 373 F.Supp. 977 (U.S.D.C. E.D. Ky. 1974):

> It is evident that the commencement of state court actions against the trustee was a direct violation of the January 20, 1971, order. It is equally apparent that the deliberate disobedience by respondents Boarman and Robert E. Lee is not mitigated by their subjective legal conclusions. Unlike its criminal counterpart, civil contempt is "wholly remedial" serves only

the purpose of a party litigant, and is intended to coerce compliance with an order of the court or to compensate for losses or damages caused by noncompliance..: Southern Railway Company v. Lanham, 5th Cir., 403 F.2d 119, 124 (1968); the good faith underlying the respondents' determination to sue in the Kentucky court does not diminish their culpability.

> "If the acts done are clearly in contravention of the court's decree, the intention is of no consequence. The absence of wilfulness does not relieve an individual from civil contempt since it is a sanction to enforce compliance with an order of the court and is not dependent on the state of mind of the respondent." N.L.R.B. v. Ralph Pringing & Lithographing Company, 8th Cir., 433 F.2d 1058, 1062 (1970), cert. denied 401 U.S. 925, 91 S.Ct. 883, 27 L.Ed.2d 829 (1971).

McComb v. Jacksonville Paper Company, 336 U.S. 187, 191, 69 S.Ct. 497, 93 L.Ed. 599 (1949).

21. The action herein taken by this Court is to protect the debtors' estate and not for the purpose of punishment to the defendants.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the defendants, Cibro Sales Corp., A..Robert Degen and Raymond A. Connell are in civil contempt of the court for violation of this Court's Order of June 5, 1978.

IT IS FURHER ORDERED that defendants pay to the debtors in possession the sum of $212,119.87 as compensatory damages, assuming the debtor estate receives the sum of $80,574.59, otherwise to pay the sum of $292,694.46 to the debtor estate to purge themselves of this civil contempt.

IT IS FURTHER ORDERED that the defendant, Cibro Sales Corp., is to pay the sum of $163,220.20 to Shell Curacao and be reassigned its claim as part of its purging of its civil contempt so that Cibro Sales Corp. may proceed in this matter as any other creditor against the debtor estate.

IT IS FURTHER ORDERED that Christopher Bohlman, General Manager of defendant, Cibro Sales Corp., A. Robert Degen and Raymond A. Connell, be remanded to the custody of the Attorney General of the United States as an inducement to compliance with this Court's order. They are to be released upon compliance with this Court's order as heretofore set forth. As to Christopher Bohlman, General Manager of Cibro Sales Corp., the order remanding him to the custody of the Attorney General of the United States is stayed for a period of thirty (30) days to permit compliance with this Court's order.

DATED this 17th day of October, 1978.

Ellen E. Sarrow
Chief United States District Judge

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

UNITED STATES OF AMERICA, Plaintiff, vs. PATRICK B. BEVENUE, SR., et al., Defendants.	)	76-C-549-B

FILED

OCT 17 1978

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

ORDER

The Court has for consideration the following:

Motion for Summary Judgment filed by the United States of America; Motions for Summary Judgment filed by Tom R. Gilbert, Nell N. Gilbert and Sapulpa Lumber Company; Application for Order Substituting Parties filed by the United States of America; Application of Defendants, Patrick B. Bevenue, Sr. and Etha Mae Bevenue (Bevenues) for Leave to File Supplemental Pleadings, Amended Answer and Counter-Claim, and Application for Leave to Substitute Counsel; Findings and Recommendations of the Magistrate; Objections of the United States of America to Findings and Recommendations of the Magistrate; Ojbections of the defendants, Patrick B. Bevenue, Sr. and Etha Mae Bevenue, to the Findings and Recommendations of the Magistrate; Reply to said Objections filed by George E. Brewer, Trustee, to the Objections to Findings and Recommendations of the Magistrate.

The Court has carefully perused the entire file, including all pleadings, exhibits and affidavits, and, being fully advised in the premises, finds:

This action was originally instituted by the United States of America against the defendants, Patrick B. Bevenue, Sr., Etha Mae Bevenue, Tom R. Gilbert, Nell M. Gilbert, and Bilbo Newman, Inc., on October 29, 1976. The allegations raised in the original complaint involve the foreclosure of a first and second real estate mortgage on certain real property described as follows, to-wit:

> The Southwest Quarter (SE/4) of the Northeast Quarter (NE/4) of the Southwest Quarter (SW/4) of Section Eighteen (18), Township Eighteen (18) North, Range Twelve (12) East, in Creek County, State of Oklahoma, LESS AND EXCEPT the East 20 feet for roadway.

The first mortgage was in favor of Tom and Nell Gilbert and the second mortgage was in favor of the United States of America, acting on behalf of the Bureau of Indian Affairs.

The original Complaint additionally set up a claim of some right, title or interest in said real property by reason of a judgment in the amount of $804.78 plus interest from date of judgment and attorney fees, entered in the records of Creek County, on March 11, 1975, being a case styled Bilbo Newman, Inc. v. Patrick Bevenue d/b/a Patrick Bevenue & Sons, Case No. C-75-26.

Thereafter, the United States of America sought leave and was granted leave to add as an additional party defendant the Sapulpa Lumber Company, Inc., the alleged holder of a judgment lien against the property here involved.

After the institution of said litigation and on December 9, 1977, this Court entered an Order authorizing the Bevenues' attorney to withdraw and gave the Bevenues ten days to secure new counsel. In his motion to withdraw as attorney for the Bevenues, Gordon D. McAllister, Jr. stated that his motion was based upon his not being able to communicate with his clients, the Bevenues, and that he had attempted by certified letter to contact the Bevenues and that the Bevenues had "wholly and continually failed to respond." The Bevenues failed to comply with the Order of the Court to secure new counsel. On January 4, 1978, this Court referreed this case to the United States Magistrate, pursuant to Order M-128 and 28 U.S.C. §636 et seq. for non-jury trial, findings and recommendations. The docket sheet reflects that the Magistrate set the case for pretrial hearing on January 27, 1978. A transcript of said hearing before the Magistrate is in the file. It reflects that Mr. Hubert Marlow appeared for the plaintiff, the United States of America, and Mr. Lester D. Henderson appeared for the defendants, Tom R. Gilbert,

Nell M. Gilbert and Sapulpa Lumber Co. Mr. and Mrs. Bevenue appeared in person without counsel. At the pre-trial conference the defendants, Tom R. Gilbert, Nell M. Gilbert and Sapulpa Lumber Co. were granted 20 days to file Motions for Summary Judgment, and the Motions were filed. On February 22, 1978, the Bevenues were granted 10 days to file a responsive brief to a Motion for Summary Judgment filed by the plaintiff, United States of America. On February 27, 1978, the Motions for Summary Judgment of Tom R. Gilbert, Nell M. Gilbert and Sapulpa Lumber Co. were filed. On February 27, 1978, the Bevenues were given ten days to respond to the Motion for Summary Judgment of the Gilberts and Sapulpa Lumber Co. On March 9, 1978, this Court granted the Bevenues to and including March 20, 1978, to file their responsive briefs to the Motions for Summary Judgment. On March 29, 1978, the Court granted the Benevues additional time to April 10, 1978, to respond to said Motions for Summary Judgment. The Bevenues failed to comply with the Orders of this Court with respect to responses to Motions for Summary Judgment. On April 11, 1978, this Court entered an order allowing Don K. Barnes and Patricia Whittaker (counsel for the Bevenues who made their first appearance in this case by a Motion to Enlarge Time to Respond to Motion for Summary Judgment) to withdraw as counsel. and granted the Bevenues 10 days to secure new counsel and file responses to the Motions for Summary Judgment. In their application to withdraw as attorneys for the Bevenues, Don Barnes and Patricia Whittaker stated that the defendants (Bevenues) "have failed and refused to follow the advice of their attorneys;..."

On May 26, 1978, this Court set the case on a disposition docket before the Magistrate for failure of the Bevenues to secure new counsel and file responses to Motions for Summary Judgment. At the hearing on the disposition docket on May 26, 1978, the Bevenues appeared personally and with their new counsel, George E. Brewer. In his findings and recommendations the Magistrate states with reference to this disposition docket:

> At the hearing on the disposition docket on May 26, 1978, the defendants Bevenues appeared personally

> with counsel George E. Brewer. The Bevenues and their counsel advised the Court at the time of the disposition docket that they did not desire to respond to motions for summary judgment of the United States of America and of the defendants Gilberts and Sapulpa Lumber Company and further stated that they had no defense to any of said motions for summary judgment. At that time the undersigned Magistrate stated that he would recommed to Chief Judge Barrow that the motions for Summary Judgment of the United States of America and of the Gilberts and Sapulpa Lumber Company be sustained. The Magistrate passed for further hearing on June 19, 1978, the issues of attorneys fees and costs and to determine the precise amounts due the various lienholders.

In connection with the June 19, 1978, hearing the Magistrate found:

> On June 19, 1978 upon assurances by Bevenues' attorney, George E. Brewer, that the parties had agreed upon a judgment to be entered in the case, the case was stricken from the June 19, 1978 docket pending the filing of the agreed judgment. Thereafter the parties failed to file an agreed judgment and the undersigned Magistrate set the case for disposition on July 17, 1978.

The docket sheet reflects the following filings that are pertinent herein:

> July 3, 1978, Defendants, Bevenues' certified copies of assignment of real estate mortgage and assignment of promissory note, mortgage of real estate and chose of action filed.
>
> July 6, 1978, Case set for disposition before the Magistrate on July 17, 1978 at 9:30 a.m.
>
> July 7, 1978, Plaintiff's application for order substituting parties.
>
> July 14, 1978, Defendants Patrick & Etha Mae Bevenue application for leave to substitute counsel.
>
> July 14, 1978, Defendants Patrick & Etha Mae Bevenue application for leave to file supplemental pleadings, amended answer and counterclaim.
>
> July 14, 1978, Defendants Patrick & Etha Mae Bevenue Motion for continuance re hearing on motion to settle journal entry on July 17, 1978.
>
> July 17, 1978, Defendants Bevenues assignment of chose in action, account, note or contract re Sapulpa Lumber Co.

The case was then passed for disposition on July 27, 1978.

It appears from the motions and supporting documents filed herein by the plaintiff and by the Bevenues that following the docket of May 26, 1978, the plaintiff, United States of America, and the defendants, Gilberts and Sapulpa Lumber Company, worked out some agreement with the Bevenues and their attorney, George E. Brewer, whereby George E. Brewer, as Trustee, took assignments of

the mortgages and liens.

It further appears that the Bevenues and their attorney, Brewer, are now in a dispute as to the nature of the assignment and rights of the Bevenues and Brewer as Trustee in connection with the assignment of the mortgages and liens. The record reflects that these events occured after the Magistrate announced his decision to recommend to the Chief Judge that the Motions for Summary Judgment of the plaintiff and the Gilberts and Sapulpa Lumber Company be sustained. The formal Findings and Recommendations of the Magistrate were filed on August 2, 1978. In said Findings and Recommendations, the Magistrate recommended:

> It is therefore recommended that the Motions for Summary Judgment of the United States of America and the Defendants Tom R. Gilbert and Nell M. Gilbert and Sapulpa Lumber Company be sustained. It is further recommended that the Plaintiff's Application for Order Substituting Parties and Defendants' Bevenues Application for Leave to File Supplemental Pleadings, Amended Answer and Counter-Claim be denied. It is further recommended that Defendants Bevenues' Application for Leave to substitute Counsel be sustained.

Turning to the request for substitution of parties, it is stated in Moore's Federal Practice, Volume 3B, ¶25.08:

> Subdivision (c) of Rule 25 deals with transfers of interest during the course of the action. The situation with which it is concerned may be compared and contrasted to that obtaining where a transfer of interest, such as by assignment, takes place prior to the commencement of the action. In the latter situation Rule 17 controls and requires that the action shall be prosecuted in the name of the real party in interest. <u>But where the transfer of interest takes place during the course of the action, Rule 25(c) controls and provides that the action may be continued by or against the original party whose interest has been transferred, unless the court, upon motion directs that the person to whom the interest has been transferred be substituted in the action, or joined with the original party</u>. Whether or not substitution or joinder is ordered under Rule 25(c), this does not affect the respective substantive rights of the transferor or transferee pendent lite and it is entirely a matter of convenience. (Emphasis supplied)

The United States of America, plaintiff, herein, relies upon three cases in support of its objection. The case of Momand v. Universal Film Exchanges, 172 F.2d 37 (1st Cir. 1948), <u>the assignment in the litigation occurred prior to the institution of the law suit</u>. In this case before the Court, the assignment took place after the

the institution of the litigation and after the announced oral recommendation of the Magistrate as to disposition of the Motions for Summary Judgment. Lumbermen's Mutual Casualty Co. v. Norris Grain Co., 343 F.2d 670 (8th Cir. 1965) also deals with a situation where the assignment was made prior to the institution of the litigation. Dunham v. Robertson, 198 F.2d 316 (10th Cir. 1952) also involved an assignment made prior to the institution of the litigation.

In their application for leave to file supplemental pleadings, amended answer and counter-claim, the Bevenues recite in paragraph 3:

> Due to the transposition of George Brewer, from a position as attorney for the defendants, to a position adverse to the defendants as party plaintiff, and in light of certain transactions incident to this transposition, new issues have been created, posing viable defenses and counter-claims against the substituted plaintiff, which necessitate the filing of supplemental pleadings in this matter.

On page 1 of their objections, the Bevenues state:

> Subsequent to the filing of Motions for Summary Judgment by the United States of America, Tom R. and Nell M. Gilbert, and Sapulpa Lumber Company, the defendants, Patrick B. Bevenue, Sr. and Etha Mae Bevenue retained Mr. George Brewer to represent them in this case. Pursuant to his representation and his agreement with the defendants, Mr. Brewer paid the outstanding claims of the United States of America, Tom and Nell Gilbert, and Sapulpa Lumber Company. Contrary to his agreement with his clients and without their permission, Mr. Beorge(sic) Brewer took assignments of said claims.
>
> The United States of America, Tom and Nell Gilbert, and Sapulpa Lumber Company have received and accepted full payment in satisfaction of their claims against the defendants. The plaintiff and cross-petitioners no longer have a cause of action against the defendants, Patrick B. Bevenue and Etha Mae Bevenue, and are not entitled to judgment. In addition, as a result of the assignments, the plaintiff and cross-petitioners are no longer the real parties in interest in this action.

and further:

> The defendants, Patrick B. Bevenue and Etha Mae Bevenue respectfully submit that the payment in full of the claims of the United States of America, Tom and Nell Gilbert, and Sapulpa Lumber Company by their attorney George Brewer renders the issue of Summary Judgment in favor of said parties moot and this case should be dismissed. In the alternative, George Brewer, Turstee should be substituted as the new real party in interest and the defendants should be allowed to file Supplemental Pleadings, Amended Answer and Counter-Claim.

In Wright & Miller, Federal Practice and Procedure, Volume 7A, §1958, it is stated:

> The most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred. The action may be continued by or against the original party, and the judgment will be binding on his successor in interest even though he is not named. An order of joinder is merely a discretionary determination by the trial court that the transferee's presence would facilitate the conduct of the litigation.

The question posed and which troubles the Court at this juncture is jurisdiction. The Court notes the following cases dealing with Rule 25(c). The case of Television Reception Corporation v. Dunbar, 426 F.2d 174 (6th Cir. 1970) deals with an alleged breach of an oral agreement to secure a cable television franchise. After the complaint was filed, the defendant assigned its franchise to Commonwealth Cable and defendant filed a motion requesting that Commonwealth Cable be made a party defendant (which motion was granted) and Commonwealth then filed a counterclaim. After trial plaintiff filed a motion for new trial and one of the grounds raised by plaintiff was that even if diversity existed at the time the action was commenced, the assignment of the franchise to Commonwealth Cable and its joinder as a party defendant defeated jurisdiction. The Court said at page 177:

> The general rule is that federal jurisdiction is tested according to the facts as they exist at the time an action is initiated and that diversity jurisdiction, once acquired, is not defeated by events occurring subsequent to the commencement of the action. Smith v. Sperling, 354 U.S. 91, 93, 77 S.Ct. 1112, 1 L.Ed.2d 1205n. 1 (1957); Wichita R. & R. & Light Co. v. Pub.Util.Comm'n, 260 U.S. 48, 54, 43 S.Ct. 51, 67 L.Ed. 124 (1922). We perceive no reason to devitate from this general rule in the present case where, pursuant to Rule 25(c), Fed.R.Civ.P., the District Judge ordered the joinder of a transferee pendente lite. See 3B J. Moore, Federal Practice ¶25.08, at 25-326 (2d ed. 1969). Cf. Jones v. Village of Proctorville, 303 F.2d 311 (6th Cir. 1962); People of Porto Rico v. Fortuna Estates, 279 F. 500 (1st Cir. 1922). <u>The joinder did not alter the respective substantive rights of the transferor or of the transferee pendent lite, and, regardless of whether the transferee was made a party to the action, its rights in relation to the franchise depended on the outcome of the litigation between Television Reception and the transferor, Dunbar-Murphy & Co.</u> 3B J. MOORE, FEDERAL PRACTICE ¶25.08 (2d ed. 1969); O'Donohue v. First National Bank. 166 F.Supp. 233 (E.D.Pa. 1958). Joinder merely represented a discretionary determination by the District Judge that Commonwealth Cable's presence would facilitate his conduct of the litigation. (Emphasis supplied)

In Jones v. Village of Proctorville, Ohio, 303 F.2d 311 (6th Cir. 1962) the Court said:

> No question is raised as to the legality of Dr. Jones' purchase of the revenue bonds from the United States of America (which acquired them from the Reconstruction Finance Corporation upon its dissolution). Federal jurisdiction attached originally, and continued while the Reconstruction Finance Corporation and the United States of America were parties plaintiff. The substitution of Jones as plaintiff did not defeat the Court's jurisdiction once that jurisdiction had been invoked properly by Jones' predecessors in interest. Mollan v. Torrance, 9 Wheat. 537, 6 L.Ed. 154. It was proper for the District Court under Rule 25(c) F.R.Civ.P. 28 U.S.C.A. to substitute Jones for the United States of America upon its transfer to him of the subject matter of the litigation. In the case of Hood ex rel. North Carolina Bank & Trust Co. v. Bell, 84 F.2d 136 (C.A.4, 1936) it was held that jurisdiction of a suit initially commenced by the Reconstruction Finance Corporation was not lost when notes, which were the subject matter of the suit, were transferred to a private party. Denial of a motion to substitute the transferee of the RFC as party plaintiff was reversed.....

In Grady v. Irvine, 254 F.2d 224 (4th Cir. 1958), it was said:

> For the purpose of federal jurisdiction, the requirement of diversity of citizenship is ordinarily determined by the situation existing at the time the action is commenced. Once federal jurisdiction has attached, it is not defeated by a subsequent change in the citizenship of one of the parties, Mollan [Mullen] v. Torrance, 9 Wheat. 537, 6 L.Ed. 154, nor by a formal substitution of a personal representative of nondiverse citizenship for an original party who dies while the cause is pending. Smith v. Sperling, 354 U.S. 91, 77 S.Ct. 1112, 1 L.Ed.2d 1205. <u>There is a great difference, however, between a formal substitution of a personal representative to prosecute the action in aid of the same right asserted by his decedent and an amendment or supplemental bill which changes the nature of the right asserted and alters the substance of the action. In the latter instance, jurisdiction should be re-examined in the light of citizenship of all of the indispensable parties, including those introduced</u> upon allowance of the new pleading. See 4 Moore's Federal Practice, 2nd Ed., 25.05. It is analogous to the rule which calls for a re-examination of the diversity requirement after the joinder of an indispensable party. See Rule 19(b), Federal Rules of Civil Procedure, 28 U.S.C.A.;..... (Emphasis supplied)

To recapitulate the events that resulted in the controversy presently before this Court, the plaintiff in this action, the United States of America, instituted action to foreclose a Second Mortgage, joining in the first mortgage holder and two lien claimants. Service was not obtained on one of the lien claimants, i.e., Bilbo Newman, Inc. , by personal service, but was obtained by service by publication.

At a hearing had before the United States Magistrate on January 27, 1978, the following colloquy is found, commencing at page 21, line 25:

> THE COURT: Yes. Is there anything now about the proceedings that you don't understand? The purpose of this hearing was trying to, was to get the parties together to determine just what issues remain for trial, if any, and you understand that the Government has sued you for $5,000.00?
>
> MR. BEVENUE: Yes, sir.
>
> THE COURT: That the Gilberts have sued you for the balance you owe them?
>
> MR. BEVENUE: Yes, sir.
>
> THE COURT: That both parties have sued you to foreclose the mortgage?
>
> MR. BEVENUE: Yes, sir.
>
> THE COURT: And it appears that you have no defenses, because you haven't paid either one of them as you agreed to pay. And your defense that the Government said they would loan you $25,000.00 instead of $5,000.00 really is not a defense that the Court could find would be a defense to the action on the $5,000.00 note. When you don't pay as agreed to and unless you have some agreement in writing that the Government signed in which they breached their agreement with you, and you don't apparently have any such agreement, that they agreed to loan you the twenty-five, you say this was all oral.
>
> MR. BEVENUE: Well, this thing here that I signed that was the application, it's got theprice of the land.
>
> THE COURT: I understand, that was an application for a loan.
>
> MR. BEVENUE: Yes, sir. The promissory note that I did sign I do not have the original.
>
> THE COURT: The original, the Government has and it will be --
>
> MR. BEVENUE: It's for the $5,000.00. I signed a $25,000.00 note.
>
> THE COURT: That note apparently has been destroyed.
>
> MR. BEVENUE: I can't get a letter to that effect.
>
> THE COURT: Well, Mr. Marlow will you see about that?
>
> MR. MARLOW: We will check into it and find out what the status of that is.
>
> MR. HENDERSON: I hate to belabor this but we do represent one other party, the Sapulpa Lumber Company and I would like to know if he contests that small lien?
>
> MR. BEVENUE: No, sir.
>
> THE COURT: What about the other lien?
>
> MR. HENDERSON: Bilbo Newman.

MR. MARLOW: We don't know if he's making any claim or not. He hasn't answered.

On May 26, 1978, the Magistrate orally announced on a regularlay scheduled and noticed disposition docket that he would recommend to the Court that the Motions for Summary Judgment of the Gilberts, Sapulpa Lumber Company and the United States of America. Thereafter, and on June 15, 1978, Patrick Battise Bevenue, Sr. and Etha Mae Reese Bevenue, husband and wife, conveyed by Warranty Deed, to George E. Brewer, a/k/a George Edward Brewer, a single man, the property involved in this litigation. The deed was recorded in Creek County, Oklahoma, on June 16, 1978, and bore Oklahoma Documentary Stamps in the sum of $22.00. The deed recites a consideration of "Ten and No/100 Dollars ($10.00), and other good and valuable considerations". (See Exhibit 1 to the Objections of the Bevenues to the Findings and Recommendations of the Magistrate). It also appears from the file that on July k2, 1978, Sapulpa Lumber Company, Inc., an Oklahoma corporation, assinged their Lien Number ML-76-84, filed in the Office of the District Court Clerk of Creek County, Oklahoma, to George E. Brewer, Trustee, for a payment of $163.21. In the Objections of the United States of America to the Findings and Recommendations of the Magistrate, it is stated on page 2:

> ....At a hearing on or about May 26, 1978, the Magistrate orally recommended that Summary Judgment be entered in favor of the United States. After that date and before written Findings and Recommendations of the Magistrate were entered, the United States assigned the promissory note, real estate mortgage, and chose in action to George Brewer, Trustee.....

This statement is substantiated by a copy of an Assignment attached to the Application for Leave to Substitute Counsel filed on behalf of the Bevenues by Charles R. Hogshead and Patrica J. Whittaker, wherein Thomas J. Ellison, Area Director, Muskogee Area Office, Bureau of Indian Affairs, United States Department of the Interior, executed an Assignment of Promissory Note, Mortgage of Real Estate and Chose in Action in favor of George Edward Brewer, Trustee, which Assignment bore the date of June 21, 1978 and was recorded in Creek County, Oklahoma.

Attached to the same application is a copy of an Assi

of Real Estate Mortgage, wherein Tom R. Gilbert and Nell M. Gilbert, husband and wife, assigned their real estate mortgage covering the subject property to George E. Brewer, Trustee; a/k/a George Edward Brewer, Trustee, dated Jun3 22, 1978, and recorded in the records of Creek County, Oklahoma.

Attached to the Objections of the Bevenues to the Findings and Recommendations of the Magistrate are copies of two letters, one dated June 15, 1978, from George E. Brewer to the Bevenues, and by signature accepted by the Bevenues, setting forth some type of agreement between the parties with reference to the above referenced real property. On June 19, 1978, Mr. Brewer again wrote the Bevenues, evidently supplementing statements made in an oral conservation with Mr. Bevenue on that date and modifying the letter of June 15, 1978.

With all of the above facts adduced, i.e.:

1. From all of the pleadings and information presently before the Court, the Bevenues do not have a defense to the mortgages asserted by the First, Second Mortgage holders nor the Lumber Company lien claimant;

2. That after the Magistrate orally announced his Findings and Recommendations as to Motions for Summary Judgment, the Bevenues entered into some type of agreement with their then attorney, George Brewer, (which is now in dispute) and Mr. Brewer evidently paid off the indebtedness owed on the two mortgages and the lien, and received a Warranty Deed to said property from the Bevenues;

3. That thereafter and prior to the formal Findings and Recommendations being filed, various motions, now before this Court were filed, among which was a Motion to Substitute party plaintiff.

4. That it appears that there is a dispute between Mr. Brewer and the Bevenues as to his actions in this matter based upon an agreement between them.

5. That there is presently no dispute as the validity of the mortgages and lien here involved.

In Moore's Federal Practice, Volume 3B, ¶15.02, it is stated:

> The distinction between amendment and substitution is a vital one. On substitution under Rule 25, the substituted party, in all but name, occupies the same relative position in the continued action as the party he replaced. Where a party comes into the action by an amended or supplemental pleading, the cause of action as to him may or may not be a new one. If it is deemed to be a new action with regard to the added party, this in turn may call for a new assessment of the district court's jurisdiction, or a determination of whether the amendment will relate back to the time of bringing the original action. (Emphasis supplied)

Additionally, in Volume 3 of Moore's Federal Practice, ¶15.16[3] it is stated:

> Rule 15(d) applies to defensive pleadings as well as to complaints. It has been held that a supplemental answer should state new or additional defenses to the claim set forth in the original complaint and should not introduce a new controversy into the case....(Emphasis supplied)

The Court finds that this is not the situation contemplated and envisioned by the promulgators of Rule 25(c). In the cases interpreting this rule, although a transfer did occur and a substitution was effected, the defense of the defendant[s] or causes of action of the plaintiff[s] remained virtually the same. They were not changed or effected by the substitution. There can be no doubt that a new controversy is sought to be interjected by the Bevenues by their application to file supplemental pleadings, amended answer and counter-claim. And this they can only do by the Court sustaining their Motion to Substitute, so as to bring George E. Brewer, a stranger to the law suit, into the controversy. Indeed, counsel for the Bevenues realizes the problem, where it is stated at page 2 of their objections:

> The defendants, Patrick B. Bevenue and Etha Mae Bevenue respectfully submit that the payment in full of the claims of the United States of America, Tom and Nell Gilbert, and Sapulpa Lumber Company by their attorney George Brewer renders the issues of Summary Judgment in favor of said parties moot and this case should be dismissed. In the alternative, George Brewer, Trustee should be substituted as the new real party in interest and the defendants should be allowed to file Supplemental Pleadings, Amended Answer and Counter-Claim.

Additionally, it would appear, irrespective of the alleged agreement between the Bevenues and their attorney, Brewer, that stands in a different position than the creditors here in

this litigation. He evidently holds not only assignments of the mortgages and lien claims, but additionally holds title to the real property by virtue of the Warranty Deed heretofore referred to.

So in fact, the Court would be faced not only with the additional claims sought to be asserted by the Bevenues, but the different position and claims of Brewer. This certainly is not the "routine mortgage foreclosure" referred to by the United States of America.

Additionally, the Court finds that although the Magistrate orally announced his intended recommendations and findings, the formal findings and recommendations were not filed until August 1, 1978, and such findings and recommendations do not constitute a final order, but are subject to objections of the parties and final order of the Court.

IT IS, THEREFORE, ORDERED that the Motion to Substitute filed by the defendants, Patrick B. Bevenue, Sr. and Etha Mae Bevenue be and the same is hereby sustained and George E. Brewer, Trustee, is substituted for the plaintiff, United States of America, and the defendants, Tom R. Gilbert, Nell M. Gilbert and Sapulpa Lumber Company, Inc.

The Court having ordered substitution, it now appears that this Court lacks jurisdiction in this matter by reason of lack of requisite diversity jurisdiction.

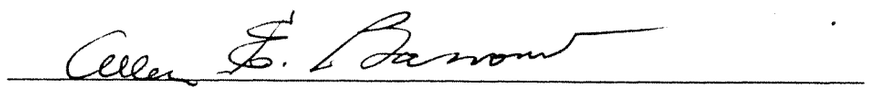
IT IS, THEREFORE, ORDERED, SUA SPONTE, that this cause of action and complaint be and the same are hereby dismissed without prejudice.

IT IS FURTHER ORDERED that the objections of the defendants, Patrick B. Bevenue, Sr. and Etha Mae Bevenue be and the same are hereby sustained as they relate to the denial of the Motion to Substitute.

IT IS FURTHER ORDERED that since this cause of action and complaint have been dismissed, there is no need for the Court

to rule on the other motions and objections raised, said dismissal having mooted the remaining motions and objections.

ENTERED this 17th day of October, 1978.



CHIEF UNITED STATES DISTRICT JUDGE

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

FILED

OCT 16 1978

U. S. DISTRICT COURT

PETROWELL, INC.	)	
Plaintiff,	)	
vs.	)	No. 78-C-82-C
ROBERT R. MATTHEWS,	)	
Defendant.	)	

ORDER OF DISMISSAL

The plaintiff and defendant having filed their Joint Stipulation for Dismissal With Prejudice of the above civil action, it is hereby Ordered that said civil action is dismissed with prejudice, with each party to pay its own costs herein incurred.

SO ORDERED this 16th day of October 1978.

U.S. District Judge

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

FILED

OCT 13 1978

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

REPUBLIC BANK AND TRUST COMPANY, a state banking institution; and GUARANTY LOAN AND INVESTMENT CORPORATION OF TULSA, INC., an Oklahoma corporation,	)	
Plaintiffs,	)	
vs.	)	No. 78-C-386-B
MILLER & MILLER AUCTIONEERS, INC., a Texas corporation,	)	
Defendant.	)	

NOTICE OF

D I S M I S S A L

The plaintiffs, Republic Bank and Trust Company and Guaranty Loan and Investment Corporation of Tulsa, Inc., hereby dismiss the above-styled and numbered action without prejudice.

PRICHARD, NORMAN, REED & WOHLGEMUTH

By _____
Joel L. Wohlgemuth
1100 Philtower Building
Tulsa, Oklahoma 74103

Attorneys for the Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of October, 1978 I mailed a true and correct copy of the foregoing Dismissal to B. J. Brockett, 324 North Robinson, Suite 220, Oklahoma City, Oklahoma 73102.

_____
Joel L. Wohlgemuth

FILED

OCT 13 1978

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

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

RICHARD BISHOP,	)	
Plaintiff,	)	
vs.	)	76-C-85-B
DR. JAMES LEACH and DR. V. L. ROBARDS,	)	
Defendants.	)	

JUDGMENT

Based on the Order filed this date,

IT IS ORDERED that Judgment be entered in favor of the defendants, Dr. James Leach and Dr. V. L. Robards, and against the plaintiff, Richard Bishop.

ENTERED this 13 day of October, 1978.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

FILED

OCT 13 1978

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

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

ALVIN D. MAYBERRY,	)	
Plaintiff,	)	
	)	76-C-99-B
vs.	)	
AKRON RUBBER MACHINERY CORPORATION, et al.,	)	
Defendant.	)	

ORDER

This case came on for jury trial, plaintiff appearing by his attorney, Frank R. Hickman, and defendant Akron Rubber Machinery Corporation appearing by its attorney, Dan A. Rogers, and defendant, Uniroyal, Inc., appearing by its attorney Bert M. Jones, on October 12, 1978.

Plaintiff moved to dismiss the cause of action and complaint against the defendants, Akron Rubber Machinery Corporation and Uniroyal, Inc., without prejudice and defendants announced that they had no objection to such motion.

IT IS, THEREFORE, ORDERED that plaintiff's Motion to Dismiss the Cause of Action and Complaint against the defendants, Akron Rubber Machinery Corporation and Uniroyal, Inc. without prejudice be and the same is hereby sustained and the cause of action and complaint is dismissed without prejduice as to the defendants, Akron Rubber Macinery Corporation and Uniroyal, Inc.

ENTERED this 13 day of October, 1978.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

FILED

OCT 13 1978

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

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

HARTFORD ACCIDENT & INDEMNITY COMPANY, Plaintiff,	)	
v.	)	No. 76-C-101-B
BOARD OF COUNTY COMMISSIONERS OF ROGERS COUNTY, Defendant.	)	

JUDGMENT

Pursuant to the Order entered this date, IT IS ORDERED that Judgment be entered in favor of the plaintiff, Hartford Accident & Indemnity Company and against the defendant, Board of County Commissioners of Rogers County, in the sum of $14,270.00, together with plaintiff's costs incurred herein.

ENTERED this 13 day of October, 1978.

Allen E. Barrow
CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA.

FILED

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

OCT 13 1978

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

ROBERT A. RITZ Plaintiff, vs. DILLARD'S DEPARTMENT STORE, INC., a/k/a DILLARD'S BROWN DUNKIN, a Delaware corporation Defendants.	)	No. 77-C-37-B

FILED

OCT 10 1978

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

ORDER

Both parties having executed and filed a Stipulation and Dismissal whereby the parties have agreed that the Complaint of the Plaintiff should be dismissed, with prejudice, it is, by the Court,

CONSIDERED, ORDERED, and ADJUDGED that the Complaint and causes of action of the Plaintiff, Robert A. Ritz, be, and ~~it is~~ they are hereby, dismissed with prejudice.

Allen E. Barrow
Allen E. Barrow
UNITED STATES DISTRICT JUDGE

Date: October 13, 1978

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

DIVERSIFIED MORTGAGE INVESTORS, A Massachusetts Business Trust, Plaintiff,	)	
vs.	)	No. 77-C-79-B
CHARLES F. COUSINS, ROY COUSINS and STANDARD ABSTRACT AND TITLE CO., Defendants.	)	

FILED

OCT 13 1978

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

ORDER OF DISMISSAL

Now on this 13 day of October, 1978, based upon the stipulations of the parties, IT IS ORDERED:

1. The Plaintiff's causes of actions and complaint against Charles F. Cousins, Roy Cousins, Kathryn Cousins, Administratrix with the Will annexed of Roy Cousins, deceased, and Standard Abstract & Title Co. are dismissed with prejudice to any future action or actions.

2. The Defendants', Charles F. Cousins, Roy Cousins and Kathryn Cousins, Administratrix with the Will annexed of Roy Cousins, deceased, counterclaim and cause of action against the Plaintiff is dismissed with prejudice to any future action or actions.

3. Standard Abstract & Title Co.'s cross claim and cause of action against Charles F. Cousins, Roy Cousins and Kathryn Cousins, Administratrix with the Will attached of Roy Cousins, deceased, is dismissed with prejudice to any future action or actions.

4. Standard Abstract & Title Co.'s Third Party Complaint and cause of action against Sooner Federal Savings and Loan Association, Tom W. Akers and Harley Brock is dismissed without prejudice to any future action or actions.

Allen E. Barrow
Judge

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

SOUTHERN SATELLITE SYSTEMS, INC., a Georgia Corporation, Plaintiff,	)	
vs.	)	Case No. 78-C-205-E
NETWORK ONE, INC., a Utah corporation, Defendant.	)	

FILED
OCT 13 1978
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER FOR DISMISSAL

This cause having come before the Court upon the stipulation for dismissal filed by the plaintiff and defendant herein and, the Court having reviewed such stipulation and being otherwise advised in the premises, it is

ORDERED, ADJUDGED AND DECREED that this cause of action & complaint be and the same hereby ~~is~~ are, be DISMISSED with prejudice.

Allen E. Barrow
United States District Judge

APPROVED AS TO FORM AND CONTENT:

PRICHARD, NORMAN, REED & WOHLGEMUTH

By_____
Timothy J. Sullivan
1100 Philtower Building
Tulsa, Oklahoma 74103

Attorneys for Plaintiff

LAYON AND CRONIN

By Thomas A. Layon
Thomas A. Layon
1601 South Main
Suite 303
Tulsa, Oklahoma 74119

Attorneys for Defendant

FILED

OCT 13 1978

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

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

UNITED STATES OF AMERICA, Respondent,	)	
v.	)	NOS. 78-C-229-B
	)	74-CR-112
JACKIE E. MADEWELL, Movant.	)	

ORDER

The Court has for consideration a motion pursuant to 28 U.S.C. § 2255 filed pro se, in forma pauperis, by Movant, Jackie E. Madewell. The cause has been assigned civil Case No. 78-C-229-B and docketed in his criminal Case No. 74-CR-112.

Movant is a prisoner in the Federal Correctional Institution, LaTuna, Anthony, Texas, pursuant to his conviction by this Court in Case No. 74-CR-112 upon his plea of guilty to a two-count indictment charging sale and disposal of known stolen motor vehicles, which were a part of interstate commerce, in violation of 18 U.S.C. § 2313. He was sentenced therefor on April 29, 1975, to four years on each count, the sentence on Count Two to run consecutive to the sentence on Count One, and Defendant (Movant herein) was made eligible on each count for parole as the Parole Commission might determine pursuant to 18 U.S.C. § 4208(a)(2). This sentence was imposed after the Court had received a report pursuant to 18 U.S.C. § 4208. No appeal was taken, and the Court overruled a Rule 35, Federal Rules of Criminal Procedure, motion for discretionary modification of sentence by Order dated August 19, 1975. Thereafter, by Order dated September 2, 1975, a motion for rehearing and oral argument of the Rule 35 motion was overruled.

In his § 2255 motion, Movant demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of his rights guaranteed by the Constitution of the United States. After repeated readings of the motion, and giving it the broad interpretation required, it appears Movant's claims are particularly that:

1. His sentence is excessive, and the disparity in sentences between Defendant and a co-participant is unequal treatment of the law.

2. His plea of guilty was part of a plea agreement and the Government did not keep its bargain.

3. The pre-sentence report, upon which sentence was based, was not adequate and was incomplete, containing erroneous facts and prejudicial statements.

4. The Judgment and Commitment Order was improper imposing two sentences for one crime, thus exposing the Defendant to double jeopardy.

5. The Court's rehabilitation requirement that Defendant be given vocational training preferably in veterinarian technology has not been and could not be obeyed.

6. The probationary-parole period commenced on imposition of sentence and Defendant should not now be incarcerated.

7. The Court sentenced in a vacuum and the intent of the sentence has been undermined by the Parole Commission.

Movant's first contention is without merit. A sentence within statutory limits, as was the sentence in the instant case, is not subject to attack on the ground of severity or that codefendant, or co-participant, received a less severe sentence. Randall v. United States, 324 F.2d 726 (10th Cir. 1963); Martin v. United States, 364 F.2d 894 (10th Cir. 1966).

Movant's second contention that his plea of guilty was part of a plea agreement and the Government did not keep its bargain is clearly belied by the record. He entered his plea of guilty January 14, 1975. The requirements of Rule 11, Federal Rules of Criminal Procedure, at the time of the plea were that before the Court accepted a guilty plea, it determine that the plea was given voluntarily, with an understanding of the nature of the charge and the consequences of the plea, and that the Judge be satisfied that a factual basis existed for the plea. McCarthy v. United States, 394 U. S. 459, 467 (1969); Guthrie v. United States, 517 F.2d 416 (9th Cir. 1975); United States v. Thomas, 468 F.2d 422 (10th Cir. 1972) cert. denied 410 U. S. 935 (1973); United States v. Birchfield, No. 75-1967 unreported (10th Cir. filed Aug. 25, 1976). In the instant case the Rule 11 requirements and constitutional safeguards were fully met. Further, prior to accepting the plea, the Court determined whether there was a plea agreement, and upon being assured by the Movant, his counsel, and counsel for the Government, that there was no agreement of any kind, carefully explained to Movant that even if there were an agreement the Court had not participated and was not bound by any such agreement. The following is quoted from pages Nos. 5 and 6 of the plea transcript:

"THE COURT: I now ask both defense and government counsel to disclose any agreement, if any, that has been made, within your knowledge,

as to any possible sentence the defendant might receive or as to any dismissal of any charges.

"MR. BRYANT: Been no agreement, Your Honor.

"MR. BROCK: None.

"THE COURT: Do you concur with statements of the counsel, Mr. Madewell, as to no agreement?

"DEFENDANT MADEWELL: Yes, sir.

"THE COURT: The Court has not participated in it, and has no knowledge of it, nor is the Court bound by any recommendation of sentence made to the Court. The Court is only bound by the maximum the Court could give you, as I enunciated to you earlier. Do you understand that?

"DEFENDANT MADEWELL: Yes, sir."

Further, from the sentencing transcript of February 3, 1975, appearing at page No. 7, the prosecuting attorney stated:

"MR BRYANT: Your Honor, may I make just one statement. Even though the defendant has a very extensive criminal background, I would like to bring to Your Honor's attention that he did give a full and complete statement in regards to his activity in this particular case, as well as the case of a co-defendant, a separate charge, who was tried and convicted before Your Honor last week -- but he changed his plea, and I think the reason that he changed his plea in the middle of the trial was the fact that he was aware that Mr. Madewell was about ready to testify in that case.

"THE COURT: I see.

"MR BRYANT: And I would like to bring that to Your Honor's attention, even though there was no plea bargaining and no promises or anything were made to him."

The Court finds on the basis of the record that the Movant's claim is unfounded and clearly refuted by the record, and the Rule 11 proceedings should be treated in the ordinary way with no evidentiary hearing required. Ordinarily, the truth and accuracy of statements made by a defendant during Rule 11 proceedings are regarded as conclusive. Hedman v. United States, 527 F.2d 20 (10th Cir. 1975); Blackledge v. Allison, 431 U. S. 63 (1977). A guilty plea is a solemn act which should not be disregarded because of belated misgivings or dissatisfaction with the sentence.

Movant's third contention that the pre-sentence report contained inadequate, imcomplete, erroneous and prejudicial statements is also without merit. See, Dukes v. United States, 492 F.2d 1187 (9th Cir. 1974). At the sentencing proceedings held February 3, 1975, the Movant stated to the Court that he had read the presentence report. Further, the Court informed him, "And I'm not considering anything of your past record where it doesn't show you were represented by an attorney . . . I do not consider that at all. But those where you were represented by an attorney, on any of those matters, do you have anything that you differ with?

"DEFENDANT MADEWELL: No, sir, they are right."

Thereafter, Movant was given the maximum sentence for study, report, and recommendation pursuant to 18 U.S.C. § 4208. At definitive sentence on April 29, 1975, the Court relied on the § 4208 study and report and discussed the matter fully with the Movant who was unreservedly loquacious at each of the proceedings as the Court remembers and as supported by the transcripts.

Movant's fourth contention, that two sentences for one crime were imposed exposing him to double jeopardy, and his sixth contention, that the probationary-parole period commenced on imposition of sentence and that he should no longer be incarcerated, are without merit and unsupported by fact or law. The indictment charged that Count One occurred on or about June 11, 1974, with a 1974 automobile, VIN 1H57R4R452929; and that Count Two occurred on or about May 20, 1974, with a 1973 automobile, VIN 1H57K3K-501548. It is ludicrous to suggest that under such indictment only one crime was committed. Further, the Court imposed no probationary sentence. The sentence provided that parole would be in the discretion of the Parole Commission. The sentence was to two four-year terms, imposed so that the four-year period on Count Two would run consecutively to the four-year period on Count One, or a total sentence of eight years. Under the sentence, parole commences when in the determination of the Parole Commission Movant has earned parole.

The fifth contention that the rehabilitation requirement of the sentence was not met is meritless. At definitive sentence, the Court at all times used the words "recommend" and "request" in regard to the Movant's claim that he would like to study to be a veterinarian. On page No. 8 of the transcript the Court stated, ". . . and I'll . . . request they send you to an institution where you may learn a trade, and if they have

possibilities in their facilities, to study veterinarian medicine, which is your choice." The Court did not attempt to "require" such rehabilitative program for the Movant, as Movant well knew, however, the Court was willing to and did recommend that the Movant be given the opportunity to study to be a veterinarian if such a program were available.

Movant's seventh contention that the Court sentenced in a vacuum, under the circumstances herein, is frivolous. The Court had not only a pre-sentence report, but obtained a § 4208 study and report prior to sentencing, and listened carefully to the allocution of the Defendant, his counsel, and the Government. There was more than ample information before the Court for determination of the proper sentence. Movant continues this claim with the complaint, and major thrust of his entire § 2255 motion, that the intent of the sentence has been undermined by the Parole Commission's failure to give proper consideration to and failure to make proper application of its guidelines to his case. That allegation involves an administrative responsibility unrelated to the sentencing process. His appropriate remedy on such claim is to file a habeas corpus petition pursuant to 28 U.S.C. § 2241 in the United States District Court having jurisdiction over his place of confinement, and that only after available administrative remedies have first been exhausted. See, Rogers v. United States, No. 76-1122 unreported (10th Cir. filed Nov. 2, 1976); Weiser v. United States, No. 76-1589 unreported (10th Cir. filed Feb. 10, 1977) which cases are applicable to establish the appropriate procedure although they deal with a different factual claim than here presented.

Being fully advised in the premises after having carefully reviewed the motion, supplements, response, and memory refreshed from examination of the files and transcripts in the criminal case, the Court finds that the motion is without merit and should be overruled.

IT IS, THEREFORE, ORDERED that the motion pursuant to 28 U.S.C. § 2255 of Jackie E. Madewell be and it is hereby overruled, denied and dismissed.

Dated this 13th day of October, 1978, 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

FRANK HAROLD KELLERMAN, Defendant,	)	
v.	)	No. 78-C-272-B
DR. JOE E. TYLER, Respondent.	)	

FILED
OCT 10 1978
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has for consideration Frank Harold Kellerman's (Kellerman) Motion for Return of Seized Property and the Suppression of Evidence, and has reviewed the file and the recommendations and being fully advised in the premises finds:

That Kellerman's Motion for the Return of Seized Property and the Suppression of Evidence should be denied and the case dismissed for the following reasons:

This is an action by Kellerman, pro se, a patient at the Eastern State Hospital, Vinita, Oklahoma, against Dr. Joe E. Tyler in which Kellerman claims that certain personal property belonging to him was taken from him by "the hospital police under order of Dr. Joe E. Tyler". In his Motion For Leave To Proceed In Forma Pauperis, Kellerman states that he is proceeding under "Fed. Rule Crim. Proc. 17(c), Subpoenas duces Tecum". He further states that the nature of his action is as follows:

> "The subpoena will command the person to whom it is directed to produce the books, papers, documents and other objects including cash. The purpose is to bring the documents into court in advance for the inspection and are offered in evidence, of enabling the party to see whether he can use them or if he wants to use them."

In addition Kellerman states in his Motion for Leave to Proceed In Forma Pauperis as follows:

> "A person aggrieved by an unlawful search and seizure may move the District Court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized."

In his pleading Kellerman refers to himself as "the defendant Frank H. Kellerman" and as "Petitioner". Kellerman seeks an Order of the Court under Rule 17(c) of the Federal Rules of Criminal Procedure for the issuance of a subpoena duces tecum ordering the respondent to produce in court "law books, papers, documents, and other objects and items" taken from him and further asks the court to suppress "as evidence against him in any criminal proceeding" the use of any of the personal property allegedly taken from him.

Rule 8(a) of the Federal Rules of Civil Procedure provides in part as follows:

> "A pleading which sets forth a claim for relief, * * * shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, * * * (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled."

Kellerman's pleadings filed herein fail to state any claim upon which relief can be granted by this Court.

IT IS, THEREFORE, ORDERED that Kellerman's Motion for Return of Seized Property and the Suppression of Evidence be and is hereby denied and the case and cause of action & Complaint dismissed.

Dated this 10th day of October, 1978.

Allen E. Barrow
CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA.

IN THE UNITED STATES DISTRICT COURT IN AND FOR

THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 10 1978

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

LENHART & BENNETT, INC., an Ohio Corporation,	)	
Plaintiff,	)	
-vs-	)	78-C-332-B
AQUITAINE OIL CORPORATION, A Delaware Corporation,	)	
Defendant.	)	

DISMISSAL WITH PREJUDICE

NOW ON THIS 10th day of October, 1978, the above styled and numbered cause comes on before the Court upon the joint application of the Plaintiff and the Defendant herein to dismiss this matter with prejudice as to its future filing. The Court, having reviewed the statements as contained in said joint application and having reviewed the Agreement between the parties hereto and the Assignment of Oil and Gas Lease, finds that the parties have equitably resolved those matters in controversy before the Court and that the above styled and numbered cause should be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above styled and numbered cause of action and complaint be dismissed with prejudice as to its future filing.

Allen E. Barrow
UNITED STATES DISTRICT JUDGE

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

FILED

OCT 10 1978

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

TOMMY EVANS and KATAY EVANS, individually and as parents and natural guardians of DELORA KAY EVANS,	)	
Plaintiffs,	)	
vs.	)	No. 78-C-47-C
DART CONTAINER CORPORATION; and MARYLAND CASUALTY COMPANY, and HAROLD HOCUTT.	)	
Defendants.	)	

ORDER APPROVING SETTLEMENT OF MINORS
CLAIM AND ORDER OF DISMISSAL

ON this 10th day of October, 1978, upon the written application of the parties plaintiff for Court approval of settlement of any claim which may be made on behalf of Tommy Evans and Katay Evans, individually and parents and natural guardians of Delora Evans, a minor, and for dismissal with prejudice of the Complaint herein, and the Court having examined said Application, and finds that said Tommy and Katay Evans are the natural parents of Delora Evans and further finds that said Plaintiffs are the proper parties to act for said minor and that they are effecting a settlement with the named defendant upon a general release of any and all claims they may have individually as well as on behalf of said minor and that said settlement is in the best interest of said minor, and should be and hereby is approved by the Court. The Court further finds that the parties plaintiff have each individually and in their representative capacity entered into a compromise settlement with said defendant and have requested the Court to dismiss this cause against said named defendant. The Court further finds that said amount paid on behalf of said minor is equitable and proper under the circumstances herein and finds that said complaint against the Defendant should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT

that the Complaint and all causes of action of the Plaintiffs filed herein individually and in their representative capacity is hereby dismisses as requested in said application, and the settlement on behalf of said minor child is found to be in her best interest and is approved by this Court upon the terms and conditions of said release executed on her behalf.

JUDGE OF THE UNITED STATES DISTRICT COURT

APPROVALS:

CHARLES E. PAYNE,
Attorney for the Plaintiffs.

RICHARD D. WAGNER,
Attorney for the Defendants

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

FILED

OCT - 6 1978

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

PAULINE W. RUFFIN, Plaintiff,	)	
V.	)	NO. 77-C-41-C
DILLARD'S DEPARTMENT STORE, INC. Defendant.	)	

D E C R E E

On the 24th, 25th and 26th days of July, 1978, this matter came on for trial before the Honorable H. Dale Cook, United States District Judge, for the Northern District of Oklahoma. Plaintiff was present in person and through her attorney, Mr. Ronald A. Skoller, and Defendant was present through Mr. Dean Haywood and through its attorney, James E. Darr, Jr., and both parties announced ready for trial. The case was tried to the Court on oral testimony and other evidence, and after consideration of all testimony, evidence, stipulations and arguments of counsel, the Court finds:

THAT the Court has jurisdiction of the parties and of the subject matter of this action;

THAT Plaintiff was continuously employed over a period of several years by Defendant and its predecessor;

THAT until at least 1972, Plaintiff was a capable, competent and efficient employee of Defendant;

THAT during the latter portion of the Plaintiff's employment, during approximately 1973 and 1974, Plaintiff experienced numerous personal and health problems which affected her ability to efficiently perform her duties in comparison to those performed in past years;

THAT during the latter period of Plaintiff's employment with Defendant, her performance deteriorated somewhat;

THAT Defendant's practice of paying executive trainees in the Southland Credit Office more than Plaintiff, under the circumstances proven in this case, was not a discriminatory practice;

THAT some of Defendant's business practices may be subject to criticism, but such practices were not discriminatory;

THAT the actions taken by Defendant toward Plaintiff throughout her employment by Defendant were not infected with discriminatory conduct based upon sex;

THAT the Defendant has voluntarily withdrawn its prayer for attorney's fees;

IT IS, THEREFORE, BY THE COURT, ORDERED AND ADJUDGED that the Complaint of the Plaintiff, Pauline W. Ruffin, be, and the same hereby is, dismissed with prejudice, at the cost of the Plaintiff;

IT IS FURTHER ORDERED AND ADJUDGED that, in view of the fact that Defendant has voluntarily withdrawn its prayer for attorney's fees, such attorneys fees shall not be granted in favor of Defendant.

IT IS SO ORDERED.

/s/ H. Dale Cook
H. DALE COOK
UNITED STATES DISTRICT JUDGE

DATE: Oct. 6, 1978

APPROVED:

RONALD A. SKOLLER
Fourth National Bank Building
Tulsa, Oklahoma 74103

ATTORNEY FOR PLAINTIFF

EICHENBAUM, SCOTT, MILLER,
CROCKETT & DARR

By James E. Darr, Jr.

Suite 600, Tower Building
Little Rock, Arkansas 72201

ATTORNEYS FOR DEFENDANT

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

LEROY LOGAN, et al., Plaintiffs,	)	
vs.	)	No. 77-C-363-C
CECIL D. ANDRUS, Secretary of the Interior, et al., Defendants.	)	

FILED

OCT - 5 1978

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

ORDER

The plaintiffs in this action are seven (7) enrolled members of the Osage Tribe of Indians,[1] each of whom resides in the State of Oklahoma and owns one or more Osage "headrights".[2] Originally named as defendants were the Secretary of the Interior and the Commissioner of Indian Affairs (hereinafter "federal defendants"). This action was filed in the United States District Court for the District of Columbia and was subsequently transferred to this Court pursuant to 28 U.S.C. § 1406. Following the transfer, this Court, on the motion of the federal defendants, Ordered that the Osage Tribal Council (Council) be added as a necessary party defendant under Rule 19(a)(2) of the Federal Rules of Civil Procedure. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331 and 2201.[3] The plaintiffs allege that the Council was created by the Act of June 28,

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1. The defendants deny that the plaintiffs are enrolled members of the Osage Tribe; however, the Court views that dispute as immaterial either to the existence of subject matter jurisdiction or to the issues raised in plaintiffs' motion for summary judgment.

2. A "headright" is the right to receive trust funds and mineral interests at the end of the trust period, as hereinafter described, and during that period to participate in the distribution of the bonuses and royalties arising from the mineral estate and the interest on the trust funds. United States v. Mason, 412 U.S. 391, 393, 93 S.Ct. 2202, 37 L.Ed.2d 22 (1973); Globe Indemnity Co. v. Bruce, 81 F.2d 143, 148-149 (10th Cir. 1935).

3. The Court has previously overruled the defendants' motion to dismiss, which was based in part upon an alleged lack of subject matter jurisdiction.

1906, 34 Stat. 539 (hereinafter "Osage Allotment Act"), solely to dispose of certain tribal assets and to manage the mineral resources of the Tribe, and was not intended to be a general governing body. They contend that the Osage Tribe has neither a general tribal government nor a constitution or bylaws. Plaintiffs allege that the federal defendants have acted beyond the scope of their authority in approving actions taken by the Council beyond those expressly enumerated in the Osage Allotment Act, as amended. The plaintiffs further allege that the federal defendants routinely approve disbursements of tribal trust funds for activities unrelated to the management of the Osage mineral estate and that such actions constitute violations of fiduciary standards and the Fifth Amendment to the United States Constitution. The plaintiffs request a declaratory judgment in accordance with their allegations. The defendants take the position that the Council possesses general powers of tribal government and is not limited to the activities prescribed by the Osage Allotment Act. They further contend that any expenditures of trust funds have been necessary and proper and have benefitted all members of the Tribe, including the plaintiffs. Now before the Court for consideration is the motion of the plaintiffs for summary judgment. The parties have filed extensive briefs and presented oral arguments in support of their positions and have stipulated that there is no genuine issue as to any material fact which would preclude the Court from ruling on the merits of the plaintiffs' motion.

Indian tribes have always been considered as distinct, independent, political communities. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1833). As such, they are ". . . qualified to exercise powers of self-government, not by virtue of any delegation of powers from the federal government, but rather

by reason of their original tribal sovereignty." F. Cohen, Handbook of Federal Indian Law, p. 122 (hereinafter referred to as "Cohen"). See also Santa Clara Pueblo v. Martinez, 46 L.W. 4412 (May 15, 1978); United States v. Wheeler, 46 L.W. 4243 (March 22, 1978); United States v. Kogama, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886); The Kansas Indians, 72 U.S. (5 Wall) 737, 18 L.Ed. 667 (1866). "Indian self-government, the decided cases hold, includes the power of an Indian tribe to adopt and operate under a form of government of the Indians' choosing [and] to define conditions of tribal membership. . . ." Cohen at 122.[4] Treaties with the Indian tribes uniformly contained provisions in which the Indians acknowledged that they were under the protection of the United States and of no other sovereign whatsoever.[5] The recognition of that dependent status did not deprive the tribes of sovereign powers which they otherwise possessed, even in the absence of a specific recognition by the United States of the continuance of the right of self-government.[6]

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4. Self-government also includes the power ". . . to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice." Cohen at 122.

5. For example, the Osage treaty of November 10, 1808, 7 Stat. 107, provides as follows in Article 10, 7 Stat. at 109:

> "The United States receive the Great and Little Osage nations into their friendship and under their protection; and the said nations, on their part, declare that they will consider themselves under the protection of no other power whatsoever; disclaiming all right to cede, sell or in any manner transfer their lands to any foreign power, or to citizens of the United States or inhabitants of Louisiana, unless duly authorised by the President of the United States to make the said purchase or accept the said cession on behalf of the government."

6. All of the treaties between the United States and the Osage Indians are silent regarding the power of the tribe to govern itself. See Treaty of November 10, 1808, 7 Stat. 107; Treaty of September 12, 1815, 7 Stat. 133; Treaty of September 25, 1818, 7 Stat. 183; Treaty of August 31, 1822, 7 Stat. 222; Treaty of June 2, 1825, 7 Stat. 240; Treaty of August 10, 1825, 7 Stat. 268; Treaty of August 24, 1835, 7 Stat. 474; Treaty of May 26, 1837, 7 Stat. 533; Treaty of January 11, 1839, 7 Stat. 576; Treaty of September 29, 1865, 14 Stat. 687.

United States v. Wheeler, supra; The Kansas Indians, supra; Worcester v. Georgia, supra. However,

> "Indian tribes are, of course, no longer 'possessed of the full attributes of sovereignty.' [citation omitted]. Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised."

United States v. Wheeler, supra, 46 L.W. at 4246. All rights of sovereignty exercised by Indian tribes are subject to the supreme legislative authority of the United States. Talton v. Mayes, 163 U.S. 376, 16 S.Ct. 986, 41 L.Ed.196 (1896). Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess, Santa Clara Pueblo v. Martinez, supra, including the power to determine their own form of government, United States v. Wheeler, supra; Gritts v. Fisher, 224 U.S. 640, 32 S.Ct. 580, 56 L.Ed. 928 (1912), and their power to define the members of the tribe, Gritts v. Fisher, supra; Wallace v. Adams, 204 U.S. 415, 27 S.Ct. 363, 51 L.Ed. 547 (1907); 25 U.S.C. § 184. In sum, Indian tribes possess an inherent sovereignty except where it has been specifically taken away from them by treaty or by act of Congress.[7] United States v. Wheeler, supra; Oliphant v.

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7. Cohen summarizes the nature of Indian sovereignty at p.123 of his treatise as follows:

> "The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government."

Suquamish Indian Tribe, 46 L.W. 4210 (March 6, 1978); Roff v. Burney, 168 U.S. 218, 18 S.Ct. 60, 42 L.Ed. 442.(1897); Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971).

As a matter of necessity, Congress has delegated much of its power over the Indians to administrative officials. Cohen at 100.

> "Historically, the Secretary of the Interior has been the delegated arm of the Federal government to act as the guardian of the Indian ward; to administer the affairs of its Indians, and to that end has been granted wide discretionary powers in the enforcement of the declared Congressional policy."[8]

Board of Commissioners of Pawnee County, Oklahoma v. United States, 139 F.2d 248 (10th Cir. 1943), cert. denied 321 U.S. 795 (1944). However, the power of the Interior Department over Indians is not absolute.

> "The claim of administrative officers to plenary power to regulate Indian conduct has been rejected in every decided case where such power was not invoked simply to implement the administration of some specific statutory or treaty provision."

Cohen at 103. See, e.g. Francis v. Francis, 203 U.S. 233, 27 S.Ct. 129, 51 L.Ed. 165 (1906); Jones v. Meehan, 175 U.S. 1, 20 S.Ct. 1, 44 L.Ed. 49 (1899). "However laudable may be the motives of the Secretary [of the Interior], he, as all others, is bound by the provisions of Congressional legis-

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8. The Act of March 3, 1849, 9 Stat. 395, which created the Department of the Interior, provided in Section 5 "[t]hat the Secretary of the Interior shall exercise the supervisory and appellate powers now exercised by the Secretary of the War Department, in relation to all acts of the Commissioner of Indian Affairs." The Act of July 27, 1868, 15 Stat. 228, transferred the powers of the Secretary of the Treasury over Indian affairs to the Secretary of the Department of the Interior. Title 43 U.S.C. § 1457 provides that "[t]he Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies: . . . 10. Indians." Title 25 U.S.C. § 2 provides that "[t]he Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." The President's regulatory power is contained in 25 U.S.C. § 9, which authorizes him to prescribe regulations ". . . for carrying into effect the various provisions of any act relating to Indian affairs. . . ."

lation."[9] Ballinger v. Frost, 216 U.S. 240, 249, 30 S.Ct. 338, 54 L.Ed. 464 (1910). An administrative official cannot exercise legislative power under the guise of regulation. United States v. George, 228 U.S. 14, 33 S.Ct. 412, 57 L.Ed. 712 (1913).

Within the framework of the foregoing principles of Indian law, it is necessary to examine the manner in which the Osages have exercised their sovereign power of self-government and the manner in which the United States has responded to that action. For the purpose of this case, the relevant starting point for such an examination is December 31, 1881, the date of the adoption of the Constitution of the Osage Nation. The Constitution established a tripartite system of government modeled after that of the United States. Legislative power was vested in a National Council, composed of fifteen (15) members, three (3) elected from each of five (5) districts for terms of two (2) years. The National Council was given, inter alia, the power ". . . to make all laws and regulations which they shall deem necessary and proper for the good of the Nation . . ." and the power ". . . to make laws for levying and collecting taxes for the purpose of raising revenue." Executive power was lodged in the Principal Chief, who was given the responsibilities of seeing that the laws were faithfully executed, of approving or rejecting bills passed by the National Council, and of nominating three members of, and serving on, an Executive Council. The Constitution also created the office of Assistant Principal Chief, who was to act as Principal Chief in the absence of the Principal Chief, to advise the Principal Chief in the administration of the government, and to serve

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9. In the words of the Ninth Circuit, "[i]n his dealings with the Indians, the Secretary of the Interior does not have the power of an Asiatic potentate or even of a benevolent despot. He, like his wards themselves, is subject to legislative restrictions." United States v. Arenas, 158 F.2d 730, 747-748 (9th Cir. 1946).

on the Executive Council. The Osage Constitution also created a judicial system, comprised of a Supreme Court and such Circuit and Inferior Courts as established by the National Council.

The Osage Nation functioned under its constitutional form of government until 1900, when the Secretary of the Interior issued orders purportedly abolishing the tribal government, with the exception of the offices of Principal Chief and Assistant Principal Chief.[10] The Secretary advised the Tribe that its affairs would thereafter be directly administered by the Bureau of Indian Affairs and the Department of the Interior.[11] However, the National Council failed to dissolve in response to the Secretarial orders.[12]

> "In 1903 the Secretary issued instructions that a Business Committee of eight members be formed, said members to be elected initially by the 'so-called Osage council' and thereafter by majority vote of the qualified voters of the tribe. When the executive council failed to take action on that directive, the Secretary requested the Principal Chief to select eight members of the existing council to serve with him on the first Business Committee, to act upon such matters as 'are brought before the council under the present arrangement' and such other business

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10. Report of the Commissioner of Indian Affairs of October 1, 1900. Sources: 1 Washburn, The American Indian & the United States 701; 5 Fay, Charters, Constitutions & By-Laws of the Indian Tribes of North America 102. See also H.R. Rep. No. 92-963, 92d Cong., 2d Sess. 7 (1972) (hereinafter referred to as "H.R. Rep. No. 92-963"); Hearing on S.1456 and S.3234 Before the Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess., at 14 (1972) (hereinafter referred to as "Hearing on S.1456 and S.3234"). The Interior Department gave the following as the reasons for its actions:

> "The principal causes that led to the abolition of the Osage Tribal government were: (1) Acrimonious disputes between the two factions over elections; (2) entire absence of harmony between the Osage tribal officers and the Indian agent in the administration of tribal affairs; (3) the selection of ignorant men as officeholders, and (4) the profligate use of moneys received from permit taxes."

Report of the Commissioner of Indian Affairs of October 1, 1900, supra.

11. H.R. Rep. No. 92-963 at 7; Hearings on S.1456 and S.3234 at 14.

12. Id.

> as submitted to the Business Committee by the Indian agent under direction of the Commissioner of Indian Affairs, with Secretarial approval."[13]

H.R.Rep. No. 92-963 at 7; Hearings on S.1456 and S.3234 at 14. The so-called Business Committee was appointed by the Principal Chief and continued in existence until the passage of the Osage Allotment Act.[14]

Before proceeding to analyze the Osage Allotment Act, the primary Congressional enactment involved in this case, it is necessary to examine the validity of the actions taken by the Secretary of the Interior in 1900 in purportedly abolishing the tribal government of the Osage Tribe. As we have seen, the Secretary does not have plenary authority over the exercise of sovereign powers by the Indian tribes. We have also seen that those powers are subject to limitation only by the Congress. There is absolutely no indication that Congress in any way delegated, or attempted to delegate,[15] its power to abolish Indian self-government to the Secretary of the Interior. Under the circumstances, the Court is led to the inescapable conclusion that the Secretary of the Interior was attempting to exercise legislative power when he purportedly abolished the government of the Osage Nation in 1900 and that such action was therefore beyond the scope of his authority and of no legal effect. See Harjo v.

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13. The letter from the Acting Secretary of the Interior to the Principal Chief of the Osage Nation requesting the formation of a Business Committee is reproduced in S.Rep. No. 4210, 59th Cong., 1st Sess. 4 (1906) (hereinafter referred to as "S.Rep. No. 4210").

14. H.R. No. 92-963 at 7; Hearings on S.1456 and S.3234 at 14.

15. The Court is inclined to believe that such action by the Congress, if in fact taken, would have been an unlawful attempt to delegate its legislative power and therefore void. See United States v. Mazurie, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 53 S.Ct. 42, 77 L.Ed. 175 (1932); Crain v. First National Bank of Oregon, Portland, 324 F.2d 532 (9th Cir. 1963); Board of Commissioners of Pawnee County, Oklahoma v. United States, supra. However, since the record reveals no attempt by Congress to delegate such power, the Court need not, and does not, decide the issue.

Kleppe, 420 F.Supp. 1110 (D.D.C. 1976). Consequently, at the time of the passage of the Osage Allotment Act, the Osage Nation was still functioning, as a matter of law, under its 1881 Constitution, and it becomes necessary to determine what action, if any, was taken by the Congress in that Act, or in subsequent legislation, to limit, expand or otherwise modify the government of the Osage Nation.

There are several canons of construction and interpretation of Indian legislation which should be discussed before examining the acts relating to the Osages. The most general rule is that legislation affecting the Indians is to be liberally construed in their interest and doubtful expressions resolved in their favor. Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 96 S.Ct. 1793, 48 L.Ed.2d 294 (1976); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918); United States v. Nice, 241 U.S. 591, 36 S.Ct. 696, 60 L.Ed. 1192 (1916); Choate v. Trapp, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912); United States v. Celestine, 215 U.S. 278, 30 S.ct. 93, 54 L.Ed. 195 (1909). Indian legislation must be construed in light of the common notions of the day, the assumptions of the draftsmen and the policy which the legislation was intended to execute.[16] Oliphant v. Suquamish Indian Tribe, supra; Levindale Lead Co. v. Coleman, 241 U.S. 432, 36 S.Ct. 644, 60 L.Ed. 1080 (1916). While the assimilationist policy prevailing at the beginning of the twentieth century must certainly be considered, it is important to note that present federal policy favors the strengthening of tribal self-government,[17] for

> ". . . courts are not obliged in ambiguous

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16. In the case of the Osage Allotment Act, that policy was one of concern for the welfare of the Indians. Levindale Lead Co. v. Coleman, supra.

17. Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976).

> instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship."

Bryan v. Itasca County, 426 U.S. 373, 389 n.14, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976). As the agency charged with the administration of Indian laws, the Interior Department's interpretation of those laws is entitled to "great weight." United States v. Jackson, 280 U.S. 183, 50 S.Ct. 143, 74 L.Ed. 361 (1930). "However, the power to issue regulations is not the power to change the law," United States v. New England Coke & Coal Company, 318 F.2d 138, 143 (1st Cir. 1963), and it is the duty of the courts to determine if an agency's interpretation is consistent both with its earlier or later pronouncements and with the intent of Congress. Morton v. Ruiz, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974); United States v. New England Coke & Coal Company, supra. There is a presumption that a statute is not intended to make a radical change in Indian affairs, and courts must insist that such a purpose be made clear by Congress. United States v. Nice, supra; U.S. v. Celestine, supra. See also Bryan v. Itasca County, supra. In Harjo v. Kleppe, supra at 1142, the court summarized the applicable rules of construction in a case factually similar to the instant one, in which a claim was made that the government of the Creek Indians had been abolished:

> "Congress undoubtedly has the power to terminate the existence of the tribe entirely. However, because such an abolition of the Creek constitutional government would have been tantamount to a total repudiation of the tribe's right, . . . to determine its own form of organization and government -- and indeed a final repudiation of tribal sovereignty itself -- familiar principles of statutory construction in general and of interpretation of federal Indian law in particular mandate that such congressional action be clear and explicit; where the statutes and their legislative histories fail to clearly establish such an intent, the Court may not supply one by judicial

interpretation."

It is within the framework of the above rules of statutory construction that the Osage Allotment Act must be examined.

Section 1 of the Osage Allotment Act provided for a roll of the members of the tribe. Section 2 authorized a division of tribal lands among the members of the tribe as established in Section 1. All of the minerals contained on those lands were reserved to the Osage tribe for a period of twenty-five (25) years[18] in Section 3, which also authorized the execution of mineral leases. Section 4 provided that all monies due to the Osage tribe, including mineral royalties, were to be held in trust by the United States for a period of twenty-five (25) years.[19] The funds so held were to be segregated and placed to the credit of the individual members of the tribe, each such member to receive a quarterly distribution of his pro-rata share of interest earned on the trust funds. Under the provisions of Section 5 of the Act, all lands, moneys and mineral interests were to become the absolute property of the individual members of the tribe at the end of the trust period. Sections 6, 7 and 8 of the Act provided for the inheritance of trust property, the right to lease the lands for agricultural purposes and the execution of deeds by the Principal Chief with the approval of the Secretary of the Interior, respectively. Section 9, the section primarily in issue in this case, provided for the election of tribal officers. Sections 10 and 11 reserved land for public highways and railroads, respectively, and Section 12 gave the Secretary of the Interior the authority to do all things necessary to carry into effect the provisions of the Act.

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18. This period has been extended several times. The most recent extension is until April 28, 1983, and thereafter until otherwise provided by Act of Congress. 78 Stat. 1008 (1964).

19. This period has also been extended. See note 18, supra.

A closer examination of some of the language used by Congress in the Osage Allotment Act reveals, to a certain extent, its intent at the time it was enacted. Section 1 contains more than one provision of significance in the context of this case. That section described the roll of the Osage tribe and provided that it ". . . is hereby declared to be the roll of said tribe and to constitute the legal membership thereof." 34 Stat. at 540. Congress thereby exercised its plenary power to control membership in Indian tribes[20] and defined for all purposes the members of the Osage Tribe of Indians. Section 1 also gave to the Principal Chief the authority to file with the Secretary of the Interior a list of names which the tribe claimed were placed upon the roll by fraud. Significantly, Congress used the following language in that regard:

> ". . . [N]o name shall be included in said list of any person or his descendants that was placed on said roll prior to the thirty-first day of December, eighteen hundred and eighty-one, the date of the adoption of the Osage constitution. . . ." 34 Stat. at 540. (Emphasis added).

Congress thereby explicitly acknowledged the existence of the Osage Constitution and gave no indication anywhere in the Act that it either intended to abolish the Constitution or considered it as having been previously abolished. Section 9 of the Osage Allotment Act provided in its entirety as follows:

> "That there shall be a biennial election of officers for the Osage tribe as follows: A principal chief, an assistant principal chief, and eight members of the Osage tribal council, to succeed the officers elected in the year nineteen hundred and six, said officers to be elected at a general election to be held in the town of Pawhuska, Oklahoma Territory, on the first Monday in June; and the first election for said officers shall be held on the first Monday in June, nineteen hundred and eight, in the manner to be prescribed by the Commissioner of Indian Affairs, and said officers shall be elected for a period

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20. See Gritts v. Fisher, supra; Wallace v. Adams, supra.

> of two years, commencing on the first day of July following said election, and in case of a vacancy in the office of principal chief, by death, resignation, or otherwise, the assistant principal chief shall succeed to said office, and all vacancies in the Osage tribal council shall be filled in a manner to be prescribed by the Osage tribal council, and the Secretary of the Interior is hereby authorized to remove from the council any member or members thereof for good cause, to be by him determined." 34 Stat. at 545.

The section provided for the election of officers for the Osage tribe. Absent some limiting language, the Court must assume that Congress meant what it said and that such a reference was to officers of some type of general tribal government. The first election mandated by the section was to be held in 1908, and the officers were to succeed the officers elected in 1906. Clearly, Congress intended that the officers elected in 1906, presumably under the Osage Constitution, would remain in office until the new election date in 1908. The use by Congress of the term "tribal council" in Section 9 may also have some significance, as that term has been used in other Indian legislation in obvious reference to the general governing body of a tribe.[21] The only specific functions delegated to the Tribal Council in the Act itself were the appointment of one member to a commission to divide Osage land among Osage tribal members,[22] the execution of mineral leases, with the approval of the Secretary of the Interior,[23] and the authority to requisition money from an emergency fund for the Osage tribe.[24] The plaintiffs contend that Congress gave to the Tribal Council the authority to perform only those functions, and no others. However, because the enumerated functions involved subject matters which were created by the Act, a delegation of

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21. See, e.g., 25 U.S.C. § 476.

22. Section 2, paragraph 6, 34 Stat. at 541.

23. Section 3, 34 Stat. at 543.

24. Section 4, paragraph 4, 34 Stat. at 544.

responsibility in those areas to some person or entity was a necessity, and Congress' choice of the Tribal Council is as consistent with its recognition of that body as a general legislative one as it is with an intent to limit the Council's authority exclusively to those functions. From an examination of the language of the Osage Allotment Act, the Court is led to the conclusion that Congress intended only to expand the authority of the Tribal Council and to modify the procedure for the election of tribal officers,[25] and neither to abolish the offices already in existence nor to create entirely new ones.[26] It would not have been difficult for Congress to explicitly abolish the tribal government, or any part of it, had that been its intent.

The legislative history of the Osage Allotment Act[27] is

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25. The details of the election procedures are set forth in 25 C.F.R. § 73.1 et seq. Section 73.21 provides that

> "[o]nly members of the Osage Tribe who will be twenty-one years of age or over on election day and whose names appear on the quarterly annuity roll at the Osage Agency as of the last quarterly payment immediately preceding the date of election will be entitled to hold office or vote for any tribal officers."

One of the plaintiffs' primary objections to the exercise of general legislative authority by the Osage Tribal Council is that the Council represents only those who have an interest in the mineral estate. However, as previously noted, Section 1 of the Act limited the tribal membership to that class of Osage Indians. Therefore, Congress has withdrawn from all those Osages not included in the tribe as defined in Section 1 the right to participate in the tribal government and, consequently, the right to complain of the inability to so participate. The right to representation in the Osage tribal government is an issue which can only be resolved by legislative enactment, and not by judicial decree.

26. The limited number of cases involving Section 9 of the Act are not inconsistent with this Court's interpretation. For instance, in discussing that Section, the court in United States v. Board of Commissioners of Osage County, Oklahoma, 193 F.485, 489 (W.D. Okla. 1911), said that ". . . it was well known that ample interests would in the future continue to command the attention of the tribal organization. . . ." (Emphasis added). In United States v. Aaron, 183 F.347, 349 (W.D. Okla. 1910), the same court noted that ". . . the act of June 28, 1906 . . . recognizes a continuation of the tribe. Section 9."

27. The Court requested that each party submit copies of the legislative history which supported its position. The plaintiffs submitted excerpts from the histories of the Osage Allotment Act and subsequent Osage legislation. The defendants have taken the position that legislative histories are irrelevant to this case and therefore did not submit any such material to the Court.

not inconsistent with this Court's interpretation of the intent of Congress.[28] As originally proposed, the Act would have given the Tribal Council the right to select a majority of the members of the allotting commission. The Commissioner of Indian Affairs urged that the provision be changed, as it ultimately was, for the following reason:

> ". . . I would say that it is known to this Department by unquestioned proof, if not by the admissions of the members themselves, that certain members of the Osage Council are absolutely corrupt. This being true, it is believed that the selection of a majority of the allotting commission by the council might be fatal to the interests of very many of the Indians, and it should not be allowed." (Emphasis added).

S.Rep. No. 4210 at 5. The Interior Department also supported the amendment to Section 9 which gave the Secretary ultimate control over membership in the Council. The Commissioner felt that ". . . because it has been found that certain members of the tribal council are corrupt it is believed that the Secretary of the Interior should have the power to dismiss any councilman for good and sufficient cause." Id. at 6. (Emphasis added). The Secretary himself stated that "[t]his amendment I must insist upon in view of the recent attempted frauds and actual bribery which have been acknowledged by the members of the present council, the absolute control of which must be vested in the Department. . . ."

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28. As originally proposed, the Act provided for the perpetual continuance of the Tribal Council. The Commissioner of Indian Affairs recommended that the Council be abolished at the expiration of the trust period. See S.Rep. No. 4210 at 4. The plaintiffs contend that this recommendation, which was not adopted by Congress, as well as subsequent legislation which did so limit the Council's existence, 45 Stat. 1478 (1929), somehow indicates that Congress intended to limit the authority of the Tribal Council exclusively to matters related to the trust estate. However, Congress similarly limited the existence of the governments of other tribes, e.g. the Five Civilized Tribes (Choctaw, Chickasaw, Cherokee, Creek and Seminole), which clearly had responsibilities unrelated to trust property. See, e.g., 34 Stat. 822 (1906); 34 Stat. 137 (1906); 30 Stat. 495 (1898). Consequently, the Court does not consider the Commissioner's recommendation, or the 1929 legislation, to be inconsistent with its interpretation of Congressional intent.

Id. at 7. It is clear that the Department of the Interior was concerned with the character of the members of the Council as it then existed and as it was to continue under the Osage Allotment Act and the Osage Constitution. Its concern would not have been as great, or of the same nature, had the intent been to completely abolish the existing Tribal Council.

The plaintiffs also contend that subsequent legislation dealing with the Osages, and its legislative history, supports their interpretation of the intent of Congress at the time of the passage of the Osage Allotment Act. The Court does not agree. The primary substantive amendment to Section 9 is found in an Act of March 2, 1929, 45 Stat. 1478. The amendment changed the biennial election to a quadrennial one, gave removed officers due process rights and added the following phrase to Section 9: ". . . [S]aid tribal government so constituted shall continue in full force and effect to January 1, 1959." (Emphasis added). In similar statutes dealing with the Five Civilized Tribes, the term "tribal government" was obviously meant to refer to a government with broad and general powers.[29] The plaintiffs also rely upon several appropriations acts. For instance, Congress has authorized the expenditure of Osage trust funds for the education of Osage children,[30] the employment of special counsel to assist in the prosecution of those charged with the murder of Osage Indians,[31] necessary expenses in connection with oil and gas production[32] and per diem and travel

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29. See, e.g., 34 Stat. 822 (1906); 34 Stat. 137 (1906); 32 Stat. 982 (1903); 30 Stat. 495 (1898).

30. See, e.g. 63 Stat. 765, 775 (1949); 62 Stat. 1112, 1122 (1948); 61 Stat. 460, 469 (1947); 42 Stat. 552, 574 (1922); 41 Stat. 1225, 1241 (1921).

31. See 44 Stat. 453, 476 (1926).

32. See, e.g., 63 Stat. 765, 775 (1949); 62 Stat. 1112, 1122 (1948); 61 Stat. 460, 469 (1947); 44 Stat. 453, 476 (1926); 42 Stat. 552, 574 (1922); 41 Stat. 1225, 1241 (1921).

expenses of Council members.[33] Plaintiffs argue that the appropriations acts "empowered"the Tribal Council to perform the functions for which the funds were to be spent. However, those acts merely authorized expenditures ". . . from the funds held by the United States in trust for the Osage Tribe of Indians in Oklahoma." Absent such express authorization by Congress, those expenditures would have been in violation of the terms of the trust established under the Osage Allotment Act, and that authorization cannot be construed as a grant of power to a body otherwise limited in authority to the terms of the Allotment Act.

The plaintiffs also rely upon the legislative histories of subsequent Osage legislation, primarily that relating to the 1972 legislation providing for the distribution of judgment funds to the Osage Nation.[34] Those histories do contain statements made by officials of the Department of the Interior to the effect that the Allotment Act had ". . . created a Tribal Council to manage the mineral rights and to dispose of other tribal assets,"[35] and that ". . . the tribal council's powers are limited to actions taken within the purview of the mineral trust estate."[36] However, not even legislative declarations of the intent of a previous act are not absolutely controlling, Levindale Lead Co. v. Coleman, supra, and plaintiffs are relying upon an agency's interpretations which are inconsistent with statements made both at the time the Act in issue was passed and at the

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33. Id; 52 Stat. 1034, 1035 (1938). It should be noted that the expenses of Council members were to be paid when they were ". . . engaged on business of the tribe . . . " (63 Stat. at 775), or ". . . making necessary trips to the city of Washington and other places in connection with Osage tribal affairs." (52 Stat. at 1035). Such language does not indicate that the Tribal Council is limited only to matters involving the trust estate.

34. 25 U.S.C. § 883 et seq.

35. Hearing on S.1456 and S.3234 at 10.

36. Id. at 102.

present time and which the Court finds to be inconsistent with the intent of Congress. Therefore, the Court does not consider those interpretations of the Department of the Interior to be controlling in this case.

A comparison of the Osage Allotment Act with other Indian legislation is helpful in determining the intent of Congress when it enacted the former. In its statutes dealing with the Five Civilized Tribes, Congress continually and explicitly provided for the termination of the tribal governments in the year 1906.[37] On March 2, 1906, Congress extended the existence of the tribes and their governments until the distribution of all tribal property to individual tribal members.[38] In the Act of April 26, 1906, 34 Stat. 137, providing for the final disposition of the affairs of the Five Civilized Tribes, reference was made throughout to the dissolution of the tribal governments. The Osage Allotment Act was passed on June 28, 1906 and contained no reference to the termination of the Osage tribal government. The five Civilized Tribes legislation, enacted within months of the Osage Allotment Act, ". . . is cogent proof that Congress knew well how to express its intent directly when that intent was to [terminate tribal governments]." Bryan v. Itasca County, supra, 426 U.S. at 389. Congress has passed two acts dealing with the constitutional organization of Indian tribes: the Wheeler-Howard Act, also known as the Indian Reorganization Act, 25 U.S.C. § 476, and the Oklahoma Indian Welfare Act, 25 U.S.C. § 503. Neither act applies to the Osage tribe,[39] and the plaintiffs contend that the tribe has thereby been rendered powerless to adopt a constitution. However, absent express legislation to the contrary, the

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37. 30 Stat. 495, 512 (1898); 31 Stat. 861, 872 (1901); 32 Stat. 716, 725(1902); 32 Stat. 982, 1008 (1903).

38. 34 Stat. 822.

39. See 25 U.S.C. §§ 473 and 508.

Osage tribe possesses the inherent sovereign power to form a constitutional government, irrespective of any authority which might have been granted in those two acts. See Harjo v. Kleppe, supra; Cohen at 129-130.

To accept the plaintiffs' arguments, the Court would have to impute to Congress an intent to leave the Osage as virtually the only tribe of Indians in the United States without a general governing body or the right to establish such a body. Before the Court would reach such a conclusion, it would require the intent of Congress to be clear and explicit to a degree far beyond that demonstrated in the record of this case.[40]

The plaintiffs also allege that tribal trust funds have been improperly spent in support of activities which are unrelated to the management of the Osage mineral estate. All defendants admit that such expenditures have been made, in the approximate amount of $23,986.77 during the past four years, but contend that such funds represent only a fraction of the income received by the trust during that period and were wisely invested in programs which benefitted all Osage Indians.

The United States serves in a fiduciary capacity with respect to the Indians, and it is therefore duty bound to exercise great care in administering its trust. United States v. Mason, 412 U.S. 391, 93 S.Ct. 2202, 37 L.Ed.2d 22 (1973).

> "[The United States] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."

Seminole Nation v. United States, 316 U.S. 286, 297, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942).

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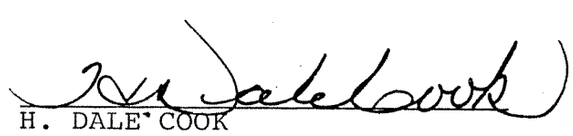
40. For a case in which a similar determination was made by a Court presented with an analogous factual situation, see Harjo v. Kleppe, supra.

> "A fundamental duty of the trustee is to carry out the directions of the testator or settlor as expressed in the terms of the trust. Any attempt to take action contrary to the settlor's directions may be deemed to constitute a unilateral and invalid deviation from the trust terms even though the trustee is otherwise given broad discretions in administering the trust."

Bogert, Trusts & Trustees § 541 at 155 (Rev. 2d ed. 1978). The terms of the trust in issue here were established in Section 4 of the Osage Allotment Act. Expenditures such as those admittedly made by the defendants in this case are not among those authorized by that Act or by any other legislation of which the Court is aware. Therefore, under the principles of ordinary trust law, and especially the principles applicable to the relationship between the United States and the Indian tribes, the use of Osage trust funds for purposes not specifically authorized by Congress is clearly improper.

For the foregoing reasons, plaintiffs' motion for summary judgment is sustained in part and overruled in part. Judgment is hereby entered declaring that the power of the Osage Tribal Council is not limited to those matters specified by the Act of June 28, 1906, as amended, and further declaring that funds held in trust by the United States for the Osage Tribe of Indians, pursuant to the Act of June 28, 1906, may be used only as specifically authorized by Congress.

It is so Ordered this 5th day of October, 1978.



H. DALE COOK
United States District Judge

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

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, Plaintiff, vs. TOMMY C. BRUCE, d/b/a BRUCE'S STONE and SAND COMPANY, ARTHUR FOSTER, Special Administrator of the Estate of Steven T. Ishmael, Deceased, and UNITED STATES FIDELITY & GUARANTY COMPANY, an insurance corporation, Defendants.	)	No. 78-C-283-C

FILED
OCT - 5 1978
Jack C. Silver, Clerk
U. S. DISTRICT COURT

STIPULATION OF THE PARTIES OF
SETTLEMENT AND FOR DISMISSAL WITH PREJUDICE

The parties to this action stipulate and agree that they have entered into a settlement agreement in this cause for the payment by defendants to plaintiff the sum of $32,356.95, the stipulated amount of plaintiff's damages in the accident in issue, and further agree that plaintiff's cause of action against these defendants be dismissed by the Court with prejudice to the filing of any future action.

DATED this _____ day of September, 1978.

Ben Franklin

Ben Franklin, of
FRANKLIN, HARMON & SATTERFIELD, INC.
1606 Park/Harvey Center
Oklahoma City, Okla. 73102

ATTORNEYS FOR PLAINTIFF

Maurice E. Lampton

Maurice E. Lampton
329 Security Building
Sapulpa, Oklahoma 74066

ATTORNEY FOR DEFENDANTS

DISMISSAL WITH PREJUDICE

Upon stipulation of the parties that a settlement agreement has been entered into, as set out above, the Court orders that plaintiff's cause of action be dismissed with prejudice to the filing of any future action.

IT IS SO ORDERED this 30th day of September, 1978.

/s/ H. Dale Cook

H. Dale Cook, District Judge

FILED

OCT - 4 1978

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

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

RICHARD JOHN RICE, Plaintiff,	)	
vs.	)	No. 78-C-281-B
SOUTHWESTERN BELL TELEPHONE COMPANY, Defendant.	)	

STIPULATION OF DISMISSAL

It is hereby stipulated by and between the Plaintiff, Richard John Rice, and Defendant, Southwestern Bell Telephone Company, a corporation, as follows:

1. That the parties have settled and compromised the above-styled cause.
2. That the above-styled cause may be dismissed with prejudice to a future action, each party to bear their own costs.

DATED this 4th day of October, 1978.

Richard John Rice

Richard John Rice, Plaintiff

Frank M. Rowell, Jr.

Frank M. Rowell, Jr., Attorney for Plaintiff

Carey Epps

Carey Epps, Attorney for Defendant

OCT - 4 1978
Jack C. Silver, Clerk
U. S. DISTRICT COURT

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

GEORGE A. FARRAR, Plaintiff, -v- NEW YORK LIFE INSURANCE COMPANY, a foreign insurance company, Defendant,	No. 77-C-359-B
GEORGE A. FARRAR, Plaintiff, -v- MUTUAL OF OMAHA INSURANCE COMPANY, a foreign insurance company, Defendant,	No. 77-C-360-B
GEORGE A. FARRAR, Plaintiff, -v- LIFE INSURANCE COMPANY OF NORTH AMERICA, a foreign insurance company, Defendant.	No. 77-C-361-B

FILED
OCT 4 1978
Jack C. Silver, Clerk
U. S. DISTRICT COURT

STIPULATION AND ORDER OF DISMISSAL WITH PREJUDICE

The plaintiff, George A. Farrar, and defendant, Mutual of Omaha Insurance Company, having stated that so much of the above-entitled action, and each and every claim for relief asserted in No. 77-C-360-B may be dismissed with prejudice as to the bringing of a future action thereon, and each party to bear its own costs, and the court being fully advised, IT IS ORDERED that the plaintiff's causes of action and complaint in No. 77-C-360-B be and the same are hereby dismissed with prejudice to the bringing of a future action thereon and that each party hereto shall bear its own costs.

DATED this 4th day of October, 1978.

Allen E. Barrow
United States District Judge