

FILED

JUN 28 1979

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

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

CARL E. DOSS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 78-C-554-C
	)	
DEWBERRY, INC., an Oklahoma	)	
corporation, and CARL D.	)	
DEWBERRY, individually,	)	
	)	
Defendants.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

The plaintiff hereby dismisses the captioned cause with prejudice and releases all claims of every nature existing as of this date against the defendants for the reasons and on the grounds that the plaintiff and defendants have reached a satisfactory monetary settlement in the premises.

DATED this 7<sup>th</sup> day of June, 19 79.

THORNTON, WAGNER & THORNTON,  
a Professional Corporation

By Richard A. Wagner II  
Richard A. Wagner, II  
525 South Main, Suite 660  
Tulsa, Oklahoma 74103  
(918) 587-2544

Attorneys for the Plaintiff

Carl E. Doss  
Carl E. Doss

APPROVED: GARRISON, PIGMAN, COMSTOCK & THURSTON,

By Mark O. Thurston  
Mark O. Thurston  
1810 East 15th Street  
Tulsa, Oklahoma 74104  
(918) 932-5757

Attorneys for the Defendant



FILED

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

JUN 26 1979

Jack G. Sling, Clerk  
U. S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 GREGORY W. CRESWELL, )  
 )  
 Defendant. )

CIVIL ACTION NO. 79-C-42-C ✓

DEFAULT JUDGMENT

This matter comes on for consideration this 26<sup>th</sup>  
day of June, 1979, the Plaintiff appearing by Robert P. Santee,  
Assistant United States Attorney for the Northern District of  
Oklahoma, and the Defendant, Gregory W. Creswell, appearing  
not.

The Court being fully advised and having examined  
the file herein finds that Defendant, Gregory W. Creswell, was  
personally served with Summons and Complaint on March 5, 1979,  
as appears on the U. S. Marshal's Service herein, and that Defendant  
has failed to answer herein and that default has been entered  
by the Clerk of this Court.

The Court further finds that the time within which  
the Defendant could have answered or otherwise moved as to the  
Complaint has expired, that the Defendant has not answered or  
otherwise moved and that the time for the Defendant to answer  
or otherwise move has not been extended, and that Plaintiff  
is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that  
the Plaintiff have and recover Judgment against Defendant, Gregory W.  
Creswell, for the sum of \$1,522.33, plus the costs of this action  
accrued and accruing.

  
UNITED STATES DISTRICT JUDGE

HUBERT H. BRYANT  
United States Attorney  
  
ROBERT P. SANTEE  
Assistant U. S. Attorney

14

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

ROBERT JERRY LEE, )  
 )  
 Movant, )  
 )  
 v. )  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Respondent. )

Nos. 79-C-376-D  
76-CR-142-B

**FILED**

JUN 26 1978

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

O R D E R

This is the third pro se motion pursuant to 28 U.S.C. § 2255 filed by Robert Jerry Lee challenging his conviction on plea of guilty to a one-count indictment charging a Dyer Act in violation of 18 U.S.C. § 2312, and sentence November 3, 1976, to three years imprisonment.

In the prior motions, Movant challenged the jurisdiction of the federal court to convict him because of dual state and federal custody. The motion was overruled by Order dated March 1, 1978, Case No. 77-C-450. In Case No. 78-C-249, Movant contended no crime under 18 U.S.C. § 2312 was committed because he had authority to drive the car he was charged with stealing and transporting across state lines. The motion was overruled by Order dated August 9, 1978. These Orders were affirmed on appeal by the Tenth Circuit Court of Appeals, United States v. Lee, Unreported Nos. 78-1513 and No. 78-1637, respectively, filed February 20, 1979.

In the present motion, Movant presents three contentions: First, his plea was not "totally voluntary" because he was drunk and in no mental conditon to think and thus incapable of entering a valid plea of guilty. He further asserts that he had been drunk for over six months prior to his plea, and for the first time in this third § 2255 motion, he claims that he was given whiskey while held in the Rogers County Jail to face both state and federal charges. Second,

Movant contends that no Dyer Act was committed as he was an employee of the Illini Motor Company with lawful possession of the car when it crossed the state line. Third, Movant contends that the sentence imposed was cruel and unusual as he is held nearly two thousand miles from his home and family and he is an alcoholic receiving no treatment for his illness.

Movant's first contention that his plea was involuntary because he was drunk has been previously presented by a motion to withdraw plea of guilty pursuant to Rule 32(d), Federal Rules of Criminal Procedure. The Judge who took the plea and imposed the sentence, the Honorable Allen E. Barrow, deceased, overruled the motion by Order dated July 21, 1978, in which Judge Barrow stated in Part:

"Movant had been in custody, in jail, in an alcohol-free environment from his arrest by police officers in Claremore, Oklahoma, until his appearance in this Court on October 21, 1976, when he entered his plea of guilty to the Federal charge herein. He was at all times before this Court in possession of his faculties and able to understand and respond to the Court's questions. He was alert and gave no indication of dull-wittedness, incoherence or intoxication. Movant's plea of guilty was free, and knowing, it was competently and voluntarily entered in full compliance with Rule 11, Federal Rules of Criminal Procedure, and constitutional safeguards as clearly appears of record and from this Court's memory of the proceedings. . . . Petitioner at sentencing on November 3, 1976, personally advised the Court of his alcoholism and requested that his Federal sentence be run concurrently with his State of Oklahoma sentences."

Movant's motion to withdraw plea of guilty and the Order overruling were before the Tenth Circuit Court of Appeals in the appeal record of the § 2255 denial in Case No. 78-C-249, Appeal No. 78-1513, though not addressed by the appellate court. The prior determination of the allegation based on Judge Barrow's personal knowledge and memory of the plea and sentence should not at this time, almost three years after the conviction, be disturbed on Movant's bald, conclusory allegation, with no factual support as to when, how, and by whom he was given whiskey while in jail from his arrest

October 2, 1976, until his plea to the federal charge on October 21, 1976. See, Martinez v. United States, 344 F.2d 325 (Tenth Cir. 1965).

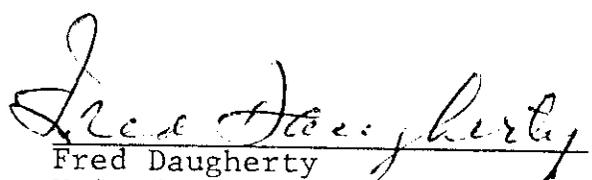
The second contention has also been previously determined adversely to the Movant by Judge Barrow, and that determination affirmed by the Tenth Circuit Court of Appeals. This allegation that no Dyer Act was committed need not again be considered. Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963); Stephens v. United States, 341 F.2d 101 (Tenth Cir. 1965).

The third contention that the sentence is cruel and unusual is without merit. The sentence imposed was well within statutory limits and is not subject to attack on the ground of severity in a direct appeal or a collateral proceeding. United States v. Winn, 411 F.2d 415, (Tenth Cir. 1969) cert. denied 396 U.S. 919 (1969); Randall v. United States, 324 F.2d 726 (Tenth Cir. 1963). Further, pursuant to 18 U.S.C. § 3568 and § 4082(A), the Attorney General has the exclusive power to designate the place where federal sentences shall be served. Stillwell v. Looney, 207 F.2d 359 (Tenth Cir. 1953); Werntz v. Looney, 208 F.2d 102, 103 n. 2 (Tenth Cir. 1953). If Movant seeks to challenge his institutional treatment rather than the severity of the sentence, that should be done by petition to the United States District Court having jurisdiction over the place of incarceration.

Having reviewed the pending motion and the file, the Court finds that neither response nor hearing is required and the motion is without merit and should be overruled.

IT IS, THEREFORE, ORDERED that the motion pursuant to 28 U.S.C. § 2255 of Robert Jerry Lee be and it is hereby overruled and dismissed.

Dated this 26<sup>th</sup> day of June, 1979.

  
Fred Daugherty  
United States District Judge

FILED

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

JUN 26 1979

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

JAMES CADDY,  
Plaintiff,  
v.  
DOVER CORPORATION, NORRIS  
DIVISION,  
Defendant.

CIVIL ACTION NO. 78-C-202-C

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff herein, James Caddy, and hereby stipulates with the Defendant herein, Dover Corporation, Norris Division, that any and all claims of the Plaintiff against the Defendant asserted herein, together with any and all claims of the Plaintiff against the Defendant which could have been asserted herein, are hereby dismissed with prejudice as authorized by Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, and that each party is to bear their own costs.

Defendant hereby agrees to and does waive any and all rights it may have to seek attorneys' fees in connection with any aspect of this action.

DATED this 25<sup>th</sup> ~~7<sup>th</sup>~~ day of June, 1979.

Approved as to form  
and content:

James Caddy  
JAMES CADDY

Attorney for Plaintiff:

Wesley E. Johnson  
Wesley E. Johnson  
1201 Fourth National Bank  
Bldg.  
Tulsa, Oklahoma 74119

DOVER CORPORATION, NORRIS DIVISION

By: E. L. Bechtold  
E. L. Bechtold, President

Attorney for Defendant:

Richard L. Barnes  
Richard L. Barnes  
KOTHE, NICHOLS & WOLFE, INC.  
124 East Fourth Street  
Tulsa, Oklahoma 74103

FILED

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

JUN 26 1979

1979 JUN 26 10 30 AM  
U. S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 79-C-46- <del>PC</del>
	)	
	)	
DOYLE L. PATTERSON,	)	
	)	
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 26<sup>th</sup> day of June, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Doyle L. Patterson, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Doyle L. Patterson, was personally served with Summons and Complaint on February 12, 1979, as appears on the United States Marshal's Service herein, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Doyle L. Patterson, for the sum of \$1,080.70, plus the costs of this action accrued and accruing.

  
UNITED STATES DISTRICT JUDGE

HUBERT H. BRYANT  
United States Attorney  
  
ROBERT P. SANTEE  
Assistant U. S. Attorney

FILED

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

JUN 26 1979

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 78-C-315-C
	)	
	)	
WALTER L. McELYEA,	)	
	)	
Defendants.	)	

Jack G. Clark, Clerk  
U. S. DISTRICT COURT

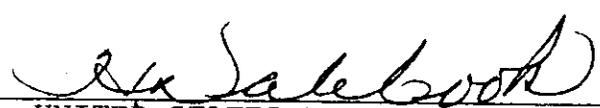
DEFAULT JUDGMENT

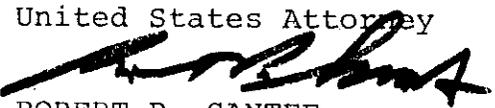
This matter comes on for consideration this 26<sup>th</sup> day of June, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Walter L. McElyea, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Walter L. McElyea, was personally served with Summons, Complaint and Amendment to Complaint on July 31, 1978, and April 20, 1979, respectively, as appears on the United States Marshal's Service herein, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint and Amendment to Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Walter L. McElyea, for the sum of \$657.33, plus the costs of this action accrued and accruing.

  
UNITED STATES DISTRICT JUDGE

HUBERT H. BRYANT  
United States Attorney  
  
ROBERT P. SANTEE  
Assistant U. S. Attorney

FILED  
JUN 26 1979

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

John C. Santee, Clerk  
U. S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 78-C-529-C ✓
	)	
MONTIE J. BARHAM,	)	
	)	
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 26<sup>th</sup> day of June, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Montie J. Barham, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Montie J. Barham, was personally served with Summons and Complaint on March 19, 1979, as appears on the U. S. Marshal's Service herein, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Montie J. Barham, for the sum of \$685.47, plus the costs of this action accrued and accruing.

  
UNITED STATES DISTRICT JUDGE

HUBERT H. BRYANT  
United States Attorney  
  
ROBERT P. SANTEE  
Assistant U. S. Attorney

FILED

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

JUN 25 1979

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

PHIL KRAFT,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 78-C-296-C
	)	
JOHN ROURKE, and	)	
ROURKE AIRCRAFT SALES, INC.,	)	
	)	
Defendants.	)	

JOINT APPLICATION FOR DISMISSAL WITH PREJUDICE

Come now the parties and show to the Court that they have compromised and settled all of plaintiff's claims herein and for and in consideration of same, the parties jointly move this Honorable Court to enter its Order of Dismissal with Prejudice.

JOHN ROURKE and ROURKE  
AIRCRAFT SALES, INC., Defendants  
ROBERT M. BUTLER

By *Robert M. Butler*  
Robert M. Butler  
Attorney for Defendants  
1710 South Boston Avenue  
Tulsa, Oklahoma 74119  
918-585-2785

PHIL KRAFT, Plaintiff  
FELDMAN, HALL, FRANDEN, REED & WOODARD  
(Successors to Green, Feldman, Hall & Woodard)

By *Wm. S. Hall*  
Wm. S. Hall  
Attorneys for Plaintiff  
816 Enterprise Building  
Tulsa, Oklahoma 73106  
918-583-7129

FILED

JUN 26 1979

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

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to the foregoing application for dismissal with prejudice, the Court finds that such Order should issue.

BE IT THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff's cause be, and the same is hereby dismissed with prejudice.

(Signed) H. Dale Cook

U. S. District Judge



A review of the complaint originally filed reveals that there is no claim for monetary damage in a specific amount, but the plaintiffs do claim "irreparable harm".

It is clear that an action sought to be removed on the basis of diversity of citizenship under 28 U.S.C. §1441 is removable only if the amount in controversy requirement of 28 U.S.C. §1332 has been met.

In *Bowman v. Iowa State Travelers Mut. Assur. Co.*, 449 F.Supp. 60, 62 (USDC ED Okl. 1978) Judge Daugherty said:

The federal courts have followed three different rules as to the viewpoint from which the amount in controversy should be measured, namely: (1) the benefit to the plaintiff ("plaintiff viewpoint" rule), C. Wright, *Federal Courts* 134 (3d ed. 1976); (2) the pecuniary result to either party which the judgment would directly produce (to be determined by looking to the object sought to be accomplished by the plaintiff's complaint), *Ronzio v. Denver & R. G. W. R.R.*, 116 F.2d 604, 606 (10th Cir. 1940); or (3) the point of view of the party seeking to invoke federal jurisdiction; (defendant in a case removed to federal court), C. Wright, *Federal Courts*, 135-36 & n. 14 (3d ed. 1976). See *City of Milwaukee v. Saxbe*, 546 F.2d 693, 701-03 (7th Cir. 1976); *Congaree Broadcasters, Inc. v. TM Programming, Inc.*, 436 F.Supp. 258 (S.D.C. 1977). However, in a case sought to be removed from state to federal court "the right to removal is decided by the pleadings, viewed as of the time when the petition for removal is filed." C. Wright, *Federal Courts* 152 (3d ed. 1976) (footnote omitted.) Stated differently,

the grounds for removal must inhere in the plaintiff's claim, rather than in a defense or counterclaim. Accordingly, the federal court must evaluate the substantive underpinnings of plaintiff's claim--and hence the propriety of removal. This typically will be done by examining the record as it stands at the time the petition for removal is filed. Defendant always has the burden of establishing that removal is proper.

14 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* §3721, at 530 (1976) (footnotes omitted,...). Thus, the Tenth Circuit has declared:

Ordinarily, the amount in controversy is to be determined by the allegations of the complaint, or, where they are not dispositive, the allegations in the petition for removal....

The general rule in actions for injunctive relief is that the amount or value in controversy (if it is capable of being reduced to pecuniary value) "...[i]s the value to plaintiff of the right for which he prays protection, or the value to defendant of the acts which plaintiff seeks to restrain or prevent, .... and the

absence of any statement that plaintiffs seek a stated sum of money is not jurisdictionally fatal." 76 C.J.S. Removal of Causes §43, p. 948; State of Alabama v. Robinson, 220 F.Supp. 293, 297 (USDC ND Ala. MD 1963).

In Jackson v. American Bar Ass'n., 538 F.2d 829, 831 (9th Cir. 1976) the Court said:

Where the complaint seeks injunctive or declaratory relief and not monetary damages, the amount in controversy is not what might have been recovered in money but rather the value of the right to be protected or the extent of the injury to be prevented. Marquez v. Hardin, 339 F.Supp. 1364, 1370 (N.D.Cal.1969); Dodge v. Nakai, 298 F.Supp. 17, 21 (D.Ariz.1968).

The rights, however, must not appear to be intangible, speculative and lack the capability of being translated into monetary value. Healy v. Ratta, 292 U.S. 263, 271-72, 54 S.Ct. 700, 78 L.Ed. 1248 (1934); Rosado v. Wyman, 414 F.2d 170, 176-77 (2nd Cir. 1969), rev'd on other grounds, 397 U.S. 397, 91 S.Ct. 106, 24 L.Ed. 2d 68 (1970); 1 Moore's Federal Practice, ¶0.92[5].

In Wright & Miller, Federal Practice and Procedure, Vol. 14, §3725, p. 672 it is stated:

When plaintiff seeks injunctive or...., the question arises, as it does in cases involving the original jurisdiction of the federal courts, whether the amount in controversy is to be determined in terms of the value to plaintiff of the order being sought, or by appraising the cost to defendant of complying with the order, or by some other method. A number of courts have measured the amount in controversy from the viewpoint of the defendant seeking removal on the theory that it is defendant who is invoking the jurisdiction of the federal courts. This approach finds support in some of the cases concerning the effect of a counterclaim on jurisdictional amount. Other courts have adopted the rule, employed by a number of federal courts in the original jurisdiction context, that the amount in controversy is determined from the perspective of plaintiff--the so-called plaintiff-viewpoint rule. This approach is somewhat anomalous since it requires defendant to prove that the value of a judgment to an adversary who apparently does not want to litigate in a federal forum is higher than the amount claimed. Finally, a few courts have found removal proper if more than \$10,000 is in controversy when considered from the viewpoint of either party. Although this approach may seem somewhat inconsistent with the principle that the removal statutes are to be strictly construed, it seems to be the most desirable method of computation.... The lack of consistent judicial treatment of this matter is unfortunate. But as long as removal jurisdiction is keyed to original jurisdiction, the general rules as to jurisdictional amount also should govern removal, which means that the uncertainty will continue until the issue is resolved for original jurisdiction cases. Whichever stand-

ard is used, the burden is on defendant to prove that the requisite amount is in controversy.

In the brief, in support of the Motion to Remand, the plaintiffs, in discussing jurisdictional amount, argue:

....Plaintiffs seek no damages; Plaintiffs do not seek to enjoin the operation of the injection well except insofar as it may forceably inject chemical poisons, pollutants and other deleterious substances into the ground and over and onto and under the lands of these Plaintiffs and others similarly situated....

Plaintiffs further argue:

....Where there has been no injury to the Plaintiff's(sic) property and where injunctive relief is sought to protect from injury of a threatened nature, then obviously the amount in controversy has not been established and cannot be established and certainly is not for an amount in excess of \$10,000....

It is noted in the complaint originally filed in State Court that plaintiffs seek to maintain this action as a "class action"

Defendants, on the other hand, argue in their brief that:

The Plaintiffs -- in effect -- have alleged as follows:

A-(1.07) The prospective destruction of all of their interests in some 5,760 acres of real property which they have described;

B-(1.07) The destruction of the water supply of the City of Broken Arrow, Oklahoma;

C-(1.07) Destruction of all minerals underlying their real property;

D-(1.07) Destruction of the ecology of the area;

E-(1.07) Destruction of the surface owned by others;

F-(1.07) The destruction of the minerals owned by others.

The defendants further argue:

Before discussing any other authority, Defendants ask the Trial Court to apply some simple tests in connection with taking judicial notice of value in the instant case:

A-(3.08) From modern day costs, can a disposal well be drilled, completed, equipped and put into operation for less than \$10,000.00?

B-(3.08) Is the future water supply of the City of Broken Arrow worth less than \$10,000 to all of its citizens and residents?

C-(3.08) If the value of the mineral rights underlying the Arbuckle Formation would justify the bringing of the action, is the value of such mineral rights of some 5,760 acres less than \$10,000.00? Whether yes or no, is the value of the rights of the Plaintiffs in such minerals -- coupled with other interested parties not named as Plaintiffs -- less than \$10,000.00?

D-(3.08) Is the value of the surface which will be allegedly polluted and destroyed in the area described as some 5,760 acres worth less than \$10,000.00?

E-(3.08) Is the alleged pollution of all of the underground water underlying the described area of some 5,760 acres (or the greater area of which would involve the interests of the other members of the class not named as Plaintiffs) worth less than \$10,000.00?

F-(3.08) Can the Plaintiffs seriously contend that all of the foregoing rights and interests are really worth less than \$10,000.00 when cumulated together pursuant to the rule of law? (Emphasis supplied)

In *Snyder v. Harris*, 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969), reversing *Gas Service Company v. Coburn*, 389 F.2d 831 (10th Cir. 1968), the Supreme Court of the United States held that, in a class action brought under Federal Rule of Civil Procedure 23(b)(3), plaintiffs may not aggregate their "separate and distinct" claims in an attempt to reach the jurisdictional minimum. The Court said that each member of the class must have a claim which exceeds \$10,000.00. As stated in *Snow v. Ford Motor Co.*, 561 F.2d 787, 789 (9th Cir. 1977) in discussing the *Snyder v. Harris* case, *supra*:

....While the Court did not speak about "the plaintiff's viewpoint" or "the defendant's viewpoint" in measuring the amount in controversy, it is clear that the Court applied the plaintiff's viewpoint rule---at least for a Rule 23(b)(3) class action not involving a request for injunctive relief. See *Massachusetts State Pharm. Ass'n v. Federal Prescription Service, Inc.*, 431 F.2d 130, 132 & n.1 (8th Cir. 1970); *Lonnquist v. J. C. Penney Co.*, 421 F.2d 597, 599 (10th Cir. 1970). And, if a plaintiff cannot aggregate to fulfill the jurisdictional amount requirement of \$1332, then neither can a defendant who invokes federal jurisdiction under the removal provisions of \$1441. This conclusion follows from the well-settled rule that, in the absence of a specific statutory exception, a federal court can exercise removal jurisdiction over a case only if it would have had jurisdiction over it as originally brought by the plaintiff. (case citations omitted).

In *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), owners of lakeshore property brought an original action in the Federal Court, as a class action on their behalf and other unnamed plaintiffs, against the defendant, charging the defendant with polluting the lake. The Supreme Court, in relying on *Snyder v. Harris*, *supra*, held that each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case--stating that "one

plaintiff may not ride in on another's coattails".

In *Lonnquist v. J. C. Penney Company*, 421 F.2d 597 (10th Cir. 1970), the plaintiffs brought four class actions in state court alleging that Denver Department stores exacted usurious interest on charge accounts in violation of state law. The complaint sought refunds of past excess payments, as well as injunctions to restrain the charge or collection of interest at a rate exceeding the lawful rate. Asserting diversity jurisdiction, the stores removed the cases to a federal district court, which granted motions to dismiss for failure to meet the amount in controversy requirement. On appeal, the parties conceded that the claims were separate and distinct. As for the stores' contention that the jurisdictional amount was satisfied by the total monetary impact on each defendant in view of the prayer for injunctive relief, the Tenth Circuit Court stated that total detriment was not the controlling factor and pointed out that in *Snyder* the Court said nothing about the total detriment to the defendants. The *Lonnquist* court regarded the approach of total detriment to the defendants to be an evasion of *Snyder*, stating: "The threshold question is aggregation and it must be resolved affirmatively before total detriment can be considered." 421 F.2d 25 599. It distinguished cases using the total detriment to the defendant to value a single right asserted by either a class or an individual. The Circuit Court, therefore, ordered that the case be remanded to the state court. To the same effect see *Brechbill v. Diners Club, Inc.*, 80 F.R.D. 486 (USDC WD Pa. 1978); *Barton Chemical Corporation v. Avis Rent A Car System, Inc.*, 402 F.Supp. 1195 (USDC ND Ill. ED 1975).

In *27 Puerto Rican Migrant F.W. v. Shade Tobacco G.A.A., I.*, 352 F.Supp. 986, 991 (USDC D. Conn. 1973) the Court said:

The Court finds that these rights of the individual plaintiffs are separate and distinct and that the aggregation of claims is impermissible under *Snyder v. Harris*, supra. The amount in controversy, therefore, must be determined by reference to the claims of each plaintiff, rather than by reference to the total detriment to the defendants. *Lonnquist v. J. C. Penney Co.*, 421 F.2d 597 (10th Cir. 1970). This approach is in accord with *Givens v. W. T. Grant*, 457 F.2d 612 (2d Cir. 1972) and *Zahn v. International Paper Co.*, 53 F.R.D. 430 (D.Vt.1971), aff'd 469 F.2d 1033 (1972).

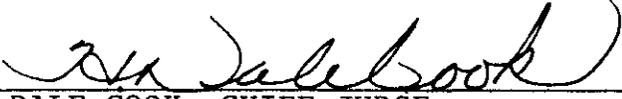
This conclusion is not altered by the petitioners' request for injunctive relief. The plaintiffs cite *Rosado v. Wyman*, 304 F.Supp. 1356 (E.D.N.Y.1969), aff'd 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970), and *Marquez v. Hardin*, 339 F.Supp. 1364 (N.D.Cal.1969), and rely upon the well established principle that, in injunction actions, the amount in controversy is the value of the right to be protected or the extent of the injury to be prevented. 1 *Barron & Holtzoff* (Wright ed.), §24, at 111-112. The plaintiffs represent that they will suffer harm in excess of the jurisdictional amount unless injunctive relief is granted.... Viewed in its proper perspective, the present claim is one for damages resulting from an alleged breach of contract. Jurisdictional amount, therefore, should be measured by the amount of damages which the plaintiffs may in good faith claim, rather than by the detriment to the defendants of carrying on an activity which has ceased, or the value to the plaintiffs of protecting a right not currently being violated.

In the instant case, it appears from the pleadings (i.e., the complaint and the petition for removal) that the injection well has not yet been drilled; and that the plaintiffs complain of a possible future trespass which is not a proven fact but is merely speculative. The Court, in looking at the value of the right sought to be asserted and protected or the extent of the injury to be prevented. Such rights of plaintiff, at this juncture, appear to be intangible, speculative and lack the capability of being translated into monetary value. The Court finds that even the detriment to the defendants is not capable of being translated into monetary value. And, certainly, the claims of the various plaintiffs cannot be aggregated for the purposes of a jurisdictional amount.

The Court is, therefore, of the opinion that the jurisdictional amount is not present in this controversy at this juncture to vest this Court with jurisdiction on removal from the state court.

IT IS, THEREFORE, ORDERED that this case be and the same is remanded to the District Court of Rogers County, Oklahoma.

ENTERED this 22<sup>nd</sup> day of June, 1979.

  
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H. DALE COOK, CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA



The preliminary hearing was duly had on September 8, 1977, and the case was set for jury trial on the next jury docket, with arraignment set for September 16, 1977. On September 16, 1977, the Petitioner waived formal arraignment and bond was denied.

On September 23, 1977, the State once again sought an order of the Court committing Petitioner to Eastern State Hospital for observation for a period of not to exceed 60 days and on the same date the Court granted such request. On October 18, 1977, Dr. R. D. Garcia, Chief Forensic Psychiatrist, rendered his report, with the same opinion as rendered in the previous report. On October 25, 1977, the Petitioner was discharged from the Eastern State Hospital.

The docket sheet on file reveals that on November 4, 1977, the State moved to reduced the charge to Murder, Second Degree, and the Trial Court granted the motion. Thereafter, after testimony, the Court withdrew its permission to reduce the charge.

On November 9, 1977, petitioner's attorney filed a Motion for Determination of Present Sanity. Attached to the Motion was the attorney's affidavit, wherein he asserted under oath, in pertinent part:

The defendant now refuses to wear clothes while in her jail cell; she screams and sings in a loud voice for hours at a time; that she threatens the Sheriff and members of his staff with physical violence; that she offers to seduce other prisoners and members of the male public in general; that she destroyed the prison uniforms that were furnished her, has refused to use toilet facilities and has defecated and urinated on her cell floor; that she has climbed on top of her steel cell for the purpose of sunbathing; that she has flooded the cell block in which she is confined by turning on the shower and clogging the shower drain.

On November 10, 1977, a jury was selected for a hearing on the sanity of the Petitioner. During the hearing, the jury was excused from the Courtroom and a transcript of the proceedings had thereafter has been furnished to the Court for review, along with a transcript of the preliminary hearing and all documents and exhibits in the file.

The two letters from Dr. Garcia were introduced into evidence and the parties were given an opportunity to question Dr. Garcia, who was present at the hearing. No one availed themselves of the questioning. The trial Court then made the following finding:

....Upon the admission of the documentary evidence and observation of the defendant's demeanor today in Court, the Court feels that she is capable of understanding the proceedings and of aiding counsel in her own defense, and is able to proceed to trial, as charged.

Mr. Maddus, petitioner's court appointed attorney, then made the following statement:

If the Court please, I have had occasion to consult with the District Attorney and the Assistant District Attorney, and they have advised me that if the Court should be given sufficient information to cause him to believe that this defendant is sane at the present time, that the charge of First Degree of Murder could be reduced to Second Degree. I have talked to the defendant with regard to entering a plea of guilty to the amended charge of Second Degree Murder and have spent some time conferring with her relative to her entering a plea, and she has indicated to me that she understands the ramifications of entering a plea to Second Degree and she is willing and desires to do so. It is my understanding that the State has a letter....

Thereafter, the petitioner entered her plea of guilty.

The transcript establishes that the Petitioner was advised by the sentencing Judge of the charges against her; that she had the right to trial by jury; as to the sentence that could be imposed; of her right to appeal (which she initially waived). The transcript also establishes that Petitioner was not threatened or coerced into pleading guilty; that she was guilty of the charge as alleged; that she was pleading guilty voluntarily. Additionally, Petitioner waived her right to a pre-sentence investigation and requested that she be sentenced and transported immediately to the State Prison.

On November 10, 1977, the same day and at the same hearing wherein Petitioner entered her guilty plea, she was sentenced to 10 years to life.

On November 21, 1977, Petitioner's Attorney filed an Application to Withdraw Plea of Guilty, wherein he asserted, in pertinent part:

That said defendant should be permitted to withdraw her plea of guilty and an evidentiary hearing should be held for the following reasons:

1. The defendant did not fully understand the consequences of her entry of a plea of guilty to the crime of murder in the second degree.
2. That the defendant was originally charged with the crime of murder in the first degree in the above Court, and upon motion of the State of Oklahoma, the charge was reduced to murder in the second degree. That murder in the second degree is not a lesser included offense of murder in the first degree.
3. That the charge of the crime of murder in the first degree was never dismissed.
4. That a new charge of the crime of murder in the second degree was not filed as a separate case.
5. That the defendant was not aware that she would be eligible for parole until after she had served a term of ten years in the penitentiary.
6. That the defendant did not have the mental capacity to understand the nature of the proceeding or the consequences of the act in entering a plea of guilty to the charge of murder in the second degree.

On December 16, 1977, the docket reflects the following: "[C]ase called. Evidentiary hearing held. Application denied."

On April 14, 1978, Petitioner filed her Application for Post-Conviction Relief. Said Application was denied and the Petitioner appealed to the Court of Criminal Appeals for the State of Oklahoma, and the denial of her Application for Post-Conviction Relief was affirmed on the 12th day of December, 1978. On April 5, 1979, denying petitioner post-conviction relief and affirming the Order of the trial Court entered on the 16th day of February, 1979.

Petitioner is now before this Court, having exhausted her state remedies.

Petitioner asserts the following grounds in support of her §2254 action, to-wit:

- (i) That her involuntary plea of guilty was due to abuse resulting in mental incompetence;

(ii) That she was denied the right to appeal and assistance of counsel on appeal;

(iii) That she is serving an illegal sentence.

The Respondents have filed their answer. The Petitioner has filed a "Traverse" to the Answer of the Respondents, wherein she requests the appointment of counsel and an evidentiary hearing.

The Court finds that there is are no disputed issues of material fact and the writ application, response and the state court records provide an adequate basis for review, and an evidentiary hearing is not necessary. *Townsend v. Sain*, 372 U.S. 293 (1963); *Boyd v. State of Oklahoma*, 375 F.2d 481 (10th Cir. 1967); *Harris v. Nelson*, 394 U.S. 286 (1969); *Oswald v. Crouse*, 420 F.2d 373 (10th Cir. 1969); *Long v. Crisp*, No. 79-1179 (10th Cir., 11/17/1978); *Moore v. Anderson*, 474 F.2d 1118 (10th Cir. 1973). Since the Court has determined that an evidentiary hearing is not required in this matter, there is no need to appoint counsel to represent the petitioner. Petitioner is not entitled to appointment of counsel as a matter of right. *Plaskett v. Page*, 439 F.2d 770 (10th Cir. 1971).

PETITIONER CONTENDS THAT HER INVOLUNTARY PLEA OF GUILTY WAS DUE TO ABUSE RESULTING IN MENTAL INCOMPETENCE.

In this connection, the petitioner basically alleges the following abusive conduct:

That she was stripped and placed in a cell naked; had no privacy from male prisoners while in the nude; her mail was opened and read against her will and used as evidence against her; jail officials and prisoners confiscated and used her personal toilet items, etc.; that she was forced into plea bargaining with the District Attorney and her attorney while she was nude; that she was not allowed to write or call her family and was not allowed out of the cell to go to the "bathroom or get water, nor to shower". She further states that she had to use her cell as a bathroom; that she was scholded by male prisoners because she sang loud or screamed due to being cold and not "loosing her snaity"; that she was not allowed bread and water; that no blankets, or clothes or mattress were given to her; that she was handcuffed to the bunk in her cell while she was naked; that a guard hit her through the bars of the cell with his night stick; that the "undersheriff forced me [petitioner] into undergoing sexual advances and squirted water between my legs with the cold water hose .....

It is now the contention of the Petitioner that the above recited abusive treatment resulted in mental "incompetence" which

precipitated her guilty plea.

The record in this case affirmatively indicates that the petitioner was aware of the consequences of her plea of guilty and of the rights waived by the plea, and no issue of substance under *Boykin v. Alabama*, 395 U.S. 238 (1969) is presented. In *Boykin*, *supra*, p. 243, it was stated:

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Malloy v. Hogan*, 378 U.S. 1. Second, is the right to trial by jury. *Duncan v. Louisiana*, 391 U.S. 145. Third, is the right to confront one's accusers. *Pointer v. Texas*, 380 U.S. 400. We cannot presume a waiver of these three important federal rights from a silent record.

In other words, in the *Boykin* case, *supra*, the trial court asked no questions of the defendant concerning his plea. There was no indication that defendant in any way addressed the court. Other than a bare notation that *Boykin* had appeared before the court and pled guilty, the record was silent. See *Armstrong v. Egeler*, 563 F.2d 796, 799 (6th Cir. 1977).

In *Devold v. Blackburn*, 574 F.2d 1316 (5th Cir. 1978) the Court said:

....The transcript of the plea hearing shows that before accepting the guilty plea, the trial judge asked *Devold* whether he knew that he would receive a life sentence if he pleaded guilty, advised him of the rights that he was waiving by his guilty plea, and elicited statements to assure the Judge that *Devold* understood the basis for his plea. The record thus shows that the hearing fully met the requirements of *Boykin v. Alabama*, 1968, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274; see also *Davis v. Wainwright*, 5 Cir., 1977, 547 F.2d 261, 264-65.

See also *Bell v. State of North Carolina*, 576 F.2d 564 (4th Cir. 1978); *Duffy v. Cuyler*, 581 F.2d 1059, 1064 (3rd Cir. 1978).

It appears from the record before the Court and the transcript of the proceedings when the petitioner entered her plea of guilty that the criteria and guidelines of *Boykin* were followed by the State Court.

Turning to other aspects of petitioner's contentions in respect to her guilty plea, it is fundamental that the conviction of an accused person while she is legally incompetent violates

due process. *Bishop v. United States*, 350 U.S. 961 (1956).

State procedures must be adequate to protect that right.

It appears from the record before this Court that the petitioner in this case had what is called a "Pate hearing" based on *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966).

In *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), the Supreme Court outlines three relevant factors used in determining whether a Pate violation had occurred, to-wit: any history of irrational behavior, the defendant's demeanor at trial, and prior medical opinion. The chronological facts cited hereinabove reveal that all criteria of *Drope*, *supra*, and *Pate*, *supra*, have been met in this case. See *Van Poyck v. Wainwright*, 595 F.2d 1083 (5th Cir. 1979).

Petitioner contends that her mental condition and her plea of guilty were caused by treatment and conditions in the jail where she was incarcerated while awaiting trial.

Jail conditions do not make guilty pleas "coerced". Specialized instances, though inexcusable, still do not amount to duress. As stated in *Federal Habeas Corpus in State Guilty Pleas* by Arthur N. Bishop, 71 F.R.D. 235, 287:

....Specific examples which have reached federal habeas corpus status consist of confining the defendant naked in solitary three days and the jailor's once dousing him with water through the cell bars or confining him in an individual, though not solitary, cell to prevent him from sending out threatening messages as he was caught doing, and to prevent his "infecting" other prisoners with his compulsive propensity to initiate legal documents. The state cases are far more graphic in individualized descriptions, but the national norm is that undesirable jail conditions do not result in "coerced" guilty pleas.

See *Decker v. Sigler*, 310 F.Rupp. 591-2 (USDC Neb. 1969), affirmed, 428 F.2d 453 (8th Cir. 1970); *Hardin v. Hocker, Warden*, 298 F.Supp. 606, 607 (USDC Nev. 1968), affirmed, 409 F.2d 1358 (9th Cir. 1969).

Moreover, broad conclusory assertions unsupported by specific factual allegations are not sufficient to state a claim for relief. Cf., *Gardner v. Benton*, 425 F.Supp. 170, 173 (USDC ED Okl. 1977); *Lorraine v. United States*, 444 F.2d 1 (10th Cir. 1971) (case brought

pursuant to 28 U.S.C. §2255); *Martinez v. United States*, 344 F.2d 325 (10th Cir. 1965) (case brought pursuant to 28 U.S.C. §2255).

It is the finding of the Court, therefore, under all of the case law hereinabove cited, that petitioner cannot prevail on her contention that her involuntary plea of guilty was due to abuse resulting in mental incompetence. It is the further finding of this Court, based on the State Court record, that the petitioner entered her guilty plea voluntarily, intelligently and knowingly.

SHE WAS DENIED THE RIGHT TO APPEAL AND ASSISTANCE OF COUNSEL ON APPEAL.

The record from the state court reveals at page 9 of the transcript on the sentencing the following:

THE COURT: ....You do have the right to appeal from this judgment and sentence if you so desire. If you would like to discuss this matter with your attorney you could be retained here for an additional ten days to give you time to talke about an appeal with your attorney. If you wish to waive that you are directed to be delivered immed-  
iately to the State Penitentiary at McAlester without delay. If you want to appeal notify this Court within ten days and you must perfect your appeal within ninety days. Do you wish to remain here and talk to your attorney about appealing this, or do you want to go right now?

THE DEFENDANT: No, sir. I do not wish to appeal.

Petitioner was sentenced on November 10, 1977. In her pleadings, she quotes a letter from her Court Appointed attorney dated December 3, 1977, wherein he states, after enclosing a transcript of the preliminary hearing that he needed "to have an answer from you about your appeal right away." On December 19, 1977, her Court appointed attorney advised her that "[I]n accordance with the two letters I have received from you since you have been at McAlester, I have taken steps necessary to intstitue an appeal." In a letter from her attorney dated January 24, 1978, the following language is found:

Your last three letters arrived last week while I was gone. I will attempt to answer them. In one of your letters you stated that you would like to go on with your appeal and ask if it would be too late. Yes, it is too late. In your letter that you wrote to me early January, you stated you had decided not to gon(sic) with the appeal, therefore I took no further steps....

There is no evidence in the record, and to the contrary, the record is replete with evidence to show knowledge on the part of the petitioner of her right to appeal, both by the State Court and her Court appointed counsel. Even so, if petitioner had taken a direct appeal from her conviction the only contentions reviewable after her plea of guilty would be the ones presently before this Court, and those contentions have been raised in her post-conviction appeals. *United States ex rel Black v. Russell*, 435 F.2d 546

The record does reveal that the appellant's right to appeal was not abandoned by her court appointed counsel at any time crucial to perfecting an appeal under the applicable Oklahoma Statutes. The record clearly supports a finding that petitioner was advised of her right of appeal; that her court appointed counsel discussed the appeal with her; that she voluntarily waived an appeal. Under these circumstances, the Court concludes that there was no constitutional infringement. *Hines v. Baker*, 422 F.2d 1102, 1005 (10th Cir. 1970), cf. *Marsh v. United States*, 435 F.Supp. 426 (USDC WD Okl. 1976).

SHE IS SERVING AN ILLEGAL SENTENCE.

It is the contention of the petitioner herein, that the trial court sentenced her to an indeterminate sentence of ten years to life imprisonment, unaware that the mandatory provisions requiring such punishment had been repealed by the provisions of 22 O.S.Supp. 1976, §701B, [effective July 24, 1976], which provides:

B. A person who is convicted of or pleads guilty or nolo contendere to murder in the second degree shall be punished by imprisonment in a state penal institution for not less than ten (10) years nor more than life.

The prior statute, which was repealed, 21 O.S.Supp. 1973, §701.4, now found in Oklahoma Sessions Laws, 1973, page 242, provided:

Every person convicted of murder in the second degree shall be punished by imprisonment in the State Penitentiary for not less than ten (10) years nor more than life. The trial court shall set an indeterminate sentence in accordance with this section upon a finding of guilty by the jury of murder in the second degree.

Title 57 O.S. §353 provides, in pertinent part:

In all cases where a sentence of imprisonment in the penitentiary is imposed, the court in assessing the term of the confinement may fix a minimum and a maximum term, both of which shall be within the limits now or hereafter provided by law as the penalty for conviction of the offense....

The colloquy at the time of the sentencing, as revealed by the transcripts reflects:

(COURT): Are you fully aware that...the punishment fixed by law is a minimum of ten years and a maximum of life?

(DEFENDANT): Yes, sir.

(COURT): Do you understand that the Court...may sentence you within the limits of the minimum and maximum sentence prescribed by law?

(DEFENDANT): No, sir.

(ASS'T DISTRICT ATTY): If Your Honor please, that wouldn't apply in this case. The only sentence possible is ten years to life.

(COURT): The Court still is not bound by any agreement. This Court is the one that sets the punishment.

....

(DEFENSE ATTY): ....I think under the circumstances she should be allowed every leniency that the Court can afford her, and that she be given the minimum sentence as provided under the laws. It is my understanding that is ten years and that is the sentence the Court must impose in this case.

(COURT): I understand it is an indefinite type of sentencing and the minimum is ten years. It will be the judgment and sentence of this Court that the defendant be sentenced to serve a period of ten years to life....

In *Harris v. Department of Corrections*, 426 F.Supp. 350, 352 (USDC WD Okl. 1977), the Court said:

Matters relating to sentencing, service of sentence and allowance of any credits are governed by state law and do not raise federal constitutional questions. *Hill v. Page*, 454 F.2d 679 (C.A.10 1971); *Johnson v. Beto*, 383 F.2d 197 (C.A.5, 1976); *Burns v. Crouse*, 338 F.2d 883 (C.A.10 1964); cert. denied, 380 U.S. 295, 85 S.Ct. 930, 13 L.Ed.2d 811; *Handley v. Page*, 279 F.Supp. 878 (W.D.Okl.1968), affmd., CA 10, 398 F.2d 351, cert. denied, 394 U.S. 935, 89 S.Ct. 1212, 22 L.Ed.2d 466. The Oklahoma Court of Criminal Appeals has ruled against the petitioner on the precise point which he

presents here. It is not the function of this court by way of appeal, mandamus, habeas corpus or otherwise to review alleged errors made by state courts in the application of Oklahoma law.

In the instant case this precise question has been raised by the petitioner to the Oklahoma Court of Criminal Appeals and such Court on December 12, 1978, and April 5, 1979 (Judge Tom Brett dissenting each time) has met this precise question and ruled adversely to the petitioner herein. The interpretation of 22 O.S.Supp.1976, §701B, as applied in petitioner's case, has been resolved against the petitioner.

For all of the reasons stated hereinabove,

IT IS ORDERED that petitioner's motion for the appointment of counsel and for evidentiary hearing be denied.

IT IS FURTHER ORDERED that the Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254, be and the same is hereby denied.

ENTERED this 22<sup>nd</sup> day of June, 1979.



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H. DALE COOK, CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

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

RICHARD A SMITH,

Plaintiff,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 1  
of WYANDOTTE, OTTAWA COUNTY,  
OKLAHOMA; LEE JEFFERY, individually  
and in his official capacity as  
Superintendent of Wyandotte,  
Oklahoma; ROBERT KRUSE, LARRY  
DAVIS, ELLEN MONROE, LOUISE  
EASLEY and RALPH HIGHFILL,  
individually and in their official  
capacity as members of the Board  
of Education of Independent School  
District No. 1, Wyandotte,  
Oklahoma,

Defendants.

No. 78-C-274-B

**FILED**

**JUN 22 1979**

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

ORDER

The Court has for consideration Plaintiff's Motion for Summary Judgment and Defendants' Motion to Dismiss, which the Court is treating as a Motion for Summary Judgment, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. The Court has carefully reviewed the entire file, the Briefs submitted by counsel, the cited authorities and the recommendations of the Magistrate concerning said Motions and being fully advised in the premises, finds:

That the Defendants' Motion for Summary Judgment should be sustained and the Plaintiff's Motion for Summary Judgment should be overruled for the reasons stated herein.

This is an action for money damages brought by the Plaintiff, Richard A. Smith, for a declaratory judgment declaring the retirement policy of the Defendant, Independent School District No. 1 of Wyandotte, Ottawa County, Oklahoma, (hereinafter referred to as School District), unconstitutional, for an injunction requiring the Defendant to renew the Plaintiff's teaching contract with the Defendant School District and for money damages. Plaintiff's action is brought under the Fourteenth Amendment to the Constitution of the United States; Article 2 §7 of the Constitution of the State of Oklahoma, 28 U.S.C. §1343(3) and 42 U.S.C. §1983 claiming violation of his civil rights.

The Court has jurisdiction of this matter pursuant to 28 U.S.C. §1343(3) and 42 U.S.C. §1983.

On January 2, 1975, the parties entered into a contract of employment whereby the Plaintiff was employed as a teacher for the remainder of the 1974-1975 school year. The parties thereafter entered into successive contracts employing the Plaintiff as a teacher for the school years 1975-1976, 1976-1977 and 1977-1978. During the 1977-1978 school year the Plaintiff reached age 65, which fact was brought to the attention of the Board of Education of the School District by Defendant, Lee Jeffery. At its meeting of April 3, 1978, the Board of Education voted to request that Plaintiff submit his resignation because Article III, Section 4, Subparagraph 3, of the School Policies of the Board of Education of the Defendant School District provided:

"Teachers shall retire at the age of sixty-five"

The school policies of the Board of Education of the Defendant School District had been enacted pursuant to the provisions of 70 O.S. §5-117 which provides that:

"...the Board of Education of each school district shall have power to...make rules and regulations... governing the Board and the school system of the district...provided, further, the Board of Education of each school district shall adopt and maintain on file in the office of the Superintendent of Schools, and available to the public, an appropriate personnel policy and sick leave guide."

Prior to the employment of the Plaintiff as a teacher the Defendant, School District, had adopted a "School Policies of Board of Education", and copies of this policy were maintained in the teachers' lounges of the various schools, which included the school where the Plaintiff was employed as a teacher, at all times during the Plaintiff's employment by the Defendant. In addition, each of the four written contracts which the Plaintiff had signed provided that, "the teacher agrees to observe and be bound by all present and future rules and regulations of the Board,..."

70 O.S. §6-102.1 (4) provides under the facts of the instant case that the Plaintiff was a "nontenured" or "probationary" teacher, and this point is not disputed by the parties. Thereafter, on April 6, 1978, the Defendant, Jeffery, the School Superintendent, wrote a letter to the Plaintiff stating:

"The policy of the Wyandotte school system is that all teachers retire at age sixty-five. Since you turned sixty-five in January, the Board of Education asks you to honor the school policy and voted 5-0 to ask for your resignation.

"The Board and Administration thanks you for your service to the Wyandotte School and wish you the best in the future."

This letter was handed to the Plaintiff, in person, by the School Superintendent on April 6, 1978, the date which the letter bears. This letter was not mailed certified mail, restricted delivery with return receipt requested as provided by the Oklahoma School Code. The Plaintiff did not demand "a due process hearing" within the ten day period which followed the delivery of the letter to him as provided by 70 O.S. §6-103.4 (E), but on April 18, 1978, more than ten days after Plaintiff received the above quoted letter he, through his counsel, advised the Defendants in writing that the Plaintiff had not submitted his resignation, did not intend to do so and demanded an immediate renewal of his teaching contract. He did not demand a substantive or procedural "due process hearing" before the Board of Education, and no hearing was given him.

The Plaintiff was not employed as a teacher for the 1978-1979 school year by the Defendant, School District.

In his Motion for Summary Judgment the Plaintiff urged that the vote of the Board of Education, which occurred April 3, 1978, was not an official action to terminate because the Board only voted to request the Plaintiff's resignation. Further, Plaintiff contends that he was not notified of the Board of Education's action by registered or certified letter, restricted delivery, return receipt requested, as required by statute. He contends that the personal delivery of the letter to him on April 6, 1978, is insufficient under the statutes and is a nullity. Therefore, two results occur. First, he did not waive his right to a hearing before the Board of Education because there was never a demand or a notice which triggered the running of the ten day period of time in which he had to demand a hearing. Second, the continuing contract provisions of 70 O.S. §6-101 (E) become effective since there was no notification prior to April 10, 1978, that his contract would not be renewed. The Plaintiff admits

that no "liberty interest" was at stake but he does assert that a "limited property right" to continued employment did exist and such was created by Oklahoma statutes. Lastly, the Plaintiff urges that the only reason stated by the Defendants for requesting his resignation was that he had reached the age of sixty-five years and that this is inherently discriminatory and denies him his right to equal protection since it is not based on any justifiable or rational purpose. In addition, the Plaintiff asserts that the requirement of retirement at age sixty-five is not uniformly enforced in the Defendant School District in that noncertified personnel of the School District such as cooks are not required to retire at that age.

In opposition to the Plaintiff's Motion for Summary Judgment and in support of their own Motion for Summary Judgment the Defendants deny that the Plaintiff had any type of "limited property right" to his continued employment since property rights are created by law or by the contract of employment. The Defendants urge that the school personnel policies were made a part of the Plaintiff's contract of employment and that state law does not create any expectation of continued employment of a nontenured teacher. The Defendants submit that the vote of the Board of Education of April 3, 1978, was an official action of the Board which notified the Plaintiff that they expected him to comply with the provisions of his contract and further that the letter of April 6, 1978, which was hand delivered to the Plaintiff, was sufficient notice and did fulfill the notice requirements required by the Oklahoma School Code so that the running of the ten day period of time was initiated upon delivery of the letter. Therefore, the Plaintiff did fail to request any due process hearing and the April 6th letter did terminate and stop any "continuing contract theory" which is contained in 70 O.S. §6-101(E) since it was notification to the Plaintiff prior to April 10, 1978, that the School District did not intend to enter into a contract of employment with the Plaintiff for the coming school year. Defendants contend that the age sixty-five retirement policy of the Board of Education has been uniformly applied to all certified teaching personnel of the School District and that only persons who are certified teaching personnel are within the context of this litigation. It is urged that the State of Oklahoma

requires the Board of Education of independent school districts to adopt personnel policies and that no limitation is placed on these Boards of Education as to age of retirement. Therefore, as long as the Defendant Board of Education enacted a mandatory, across the board retirement policy and treated everyone in the class equally then there is no violation of constitutionally protected rights.

The Court concludes that it is unrefuted that the Plaintiff did receive the letter of April 6, 1978, by hand delivery from the Defendant, Lee Jeffery, on April 6, 1978. This actual delivery of the letter fulfills the requirements of 70 O.S.A. §6-101 (E) since the legislative intent behind the statute is that the teacher actually receive notification that his contract will not be renewed. Further, by serving this letter upon the Plaintiff prior to April 10, 1978, the Defendant School District stopped any "continuing contract" that would be created under the provisions of 70 O.S. §6-101 (E) had the Plaintiff not been given notification prior to April 10, 1978, that he would not be offered a contract for the following year. The delivery of the letter on April 6, 1978, to the Plaintiff also initiated the start of the ten day period of time within which the Plaintiff could have demanded a due process hearing before the Board of Education of the School District as provided by 70 O.S. §6-103.4 (C), and it is clear that Plaintiff did not demand such a hearing within the ten day period and the action of the Board of Education became final and nonappealable according to the provisions of 70 O.S. §6-103.4 (E). As stated in Board of Regents v. Roth, 408 U.S. 564, 92 Sup. Ct. 2701, 33 L.Ed.2d 548 (1972):

"A property interest in employment can, of course, be created by ordinance, or by implied contract. In either case, however, the sufficiency of the claim must be decided by reference to state law."

The question which next must be answered is whether or not any of the Plaintiff's constitutionally protected rights were violated by the action of the Board of Education. The Defendants cite to the Court the case of Palmer v. Ticcione, et al, 576 F.2d 459 (2nd Cir. 1978). In this case the Plaintiff commenced her action under §1983 claiming age discrimination in violation of the

equal protection of due process guaranties of the Fourteenth Amendment. The District Court dismissed her action for want of a substantial federal question and the Court of Appeals affirmed the dismissal. Palmer was a tenured teacher that had been employed by a school board for thirty-two years. She was retired pursuant to a mandatory retirement age of seventy years. The Court of Appeals for the Second Circuit pointed out that compulsory retirement systems had come under constitutional attack in several contexts. However, the equal protection and due process challenges have been rejected by all Courts except the Seventh Circuit which rendered the decision in Galt v. Garrison, 569 F.2d 993 (7th Cir. 1977). The Court went on to state at page 463, that:

"The record is inconclusive on whether Copiague (school board) has adopted a mandatory or discretionary retirement policy. There is nothing in the record to indicate that the appellant was discharged under anything other than an across the board, mandatory retirement policy. If so, then, as noted above, the board's action is clearly immune from constitutional attack. However, even if appellant was retired under a discretionary policy, the result would be the same."

The status of the Palmer case, when this decision was rendered, was that the district court had granted the Defendant's Motion to Dismiss for want of a substantial federal question. Therefore, it is clear that there was no evidence before the Palmer Court which identified any specific reasons set out in the statute and the Court rejected any requirement for the state to specifically identify the reasons behind its policy.

In the instant case we have seen that the State of Oklahoma requires each local school board to adopt a personnel policy and to have it available for inspection by the public. The Defendant Board of Education had adopted a policy which required mandatory retirement at age sixty-five. The Palmer Court discussed the rationale of the Second Circuit Court of Appeals in its Opinion in Galt v. Garrison supra. It said at page 462:

"...Galt too narrowly concedes the possible, rational basis for a compulsory retirement statute. Unrelated to any notion of physical or mental fitness, a state might prescribe mandatory retirement for teachers in order to... (here the Court lists several possible reasons). A compulsory retirement system is rationally related to the fulfillment of any or all of these legitimate state objectives."

On page 463, the Court stated:

"Closer scrutiny of the statute provides the answer for the first argument. Section 501 (1) (b) is permissive; it allows individual school boards to implement compulsory retirement policies... (citation of authority deleted). Thus, if an individual school board adopts a compulsory retirement policy, whether mandatory or discretionary, it may be to further any of the purposes suggested above, without regard to the narrow context of the empowering statute. Since such a board adopted policy would be supportable as rationally based, we would be constrained to uphold it as a legitimate exercise of a statutorily authorized power."

The Palmer Court's rationale has been further upheld by the United States Supreme Court in the case of Bradley v. Vance \_\_\_ U.S. \_\_\_ (Feb. 1979). In the Bradley case the Court was faced with two classes of civil servants. One class of foreign service officers was required to retire at age sixty while a second group of civil servants were not required to retire until age seventy. This system was attacked as discriminatory. However, the Court stated at page 3. of its Opinion:

"The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups of persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."

At page 9 of its Opinion the Court went on to state:

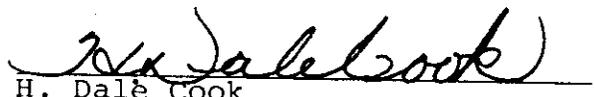
"The judgment that the foreign service needs such a system more than do many other departments is one of policy, and this kind of policy, under our constitutional system, ordinarily is to be 'fixed only by the people acting through their elected representatives', Fireman v. Chicago, R.I. & P.R. Co., 393 U.S. 129, 138 (1968). Since the Congressional judgment to place a high value on the proper conduct of our foreign affairs can hardly be said to be constitutionally impermissible, it was not for the district court to refuse to accept it."

In the instant case an elected Board of Education mandated by statute to administer and run the School District with the welfare and benefit of the district's people in mind, did adopt a retirement policy which was uniformly enforced among certified employees of the Defendant School District. This policy is not discriminatory

against the Plaintiff nor does it violate any of his rights or privileges guaranteed under the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States, or under 42 U.S.C. §1983.

IT IS THEREFORE ORDERED that the Plaintiff's Motion for Summary Judgment be, and the same is hereby overruled, and the Defendants' Motion for Summary Judgment be, and the same is hereby, sustained.

DATED this 22<sup>nd</sup> day of June, 1979.

  
H. Dale Cook  
Chief Judge

FILED

JUN 19 1979

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

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

THE DELAWARE TRIBE OF INDIANS, )  
)  
Plaintiffs, )  
)  
vs. )  
)  
CECIL D. ANDRUS, Individually )  
and as Secretary of the Interior )  
of the United States, and )  
FORREST GERARD, Individually )  
and as Assistant Secretary of )  
the Interior, )  
)  
Defendants. )

CIVIL ACTION NO. 78-C-405-B

and )  
)  
WINSTON & STRAWN, LOONEY, )  
NICHOLS, JOHNSON & HAYES, )  
and BRUCE MILLER TOWNSEND, )  
)  
Plaintiffs, )

CONSOLIDATED WITH

vs. )  
)  
CECIL D. ANDRUS, Individually )  
and as Secretary of the Interior )  
of the United States, and )  
FORREST GERARD, Individually )  
and as Assistant Secretary of )  
the Interior, )  
)  
Defendants. )

CIVIL ACTION NO. 78-C-423-C

ORDER OF DISMISSAL

NOW on this 17<sup>th</sup> day of June, 1979, there came on for consideration the Stipulation for Dismissal filed by the parties herein. The Court finds that an Order of Dismissal should be granted based upon such Stipulation for Dismissal.

NOW IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this action be and the same is hereby dismissed.

*Eric A. Perry*  
UNITED STATES DISTRICT JUDGE

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

N. J. DIEFFENBACH and )  
K. L. DIEFFENBACH, )  
 )  
Plaintiffs )  
 )  
v. )  
 )  
UNITED STATES OF AMERICA, )  
 )  
Defendant )

FILED

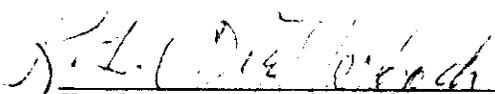
CIVIL NO. 78-C-258-B JUL 19 1979

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

STIPULATION OF DISMISSAL

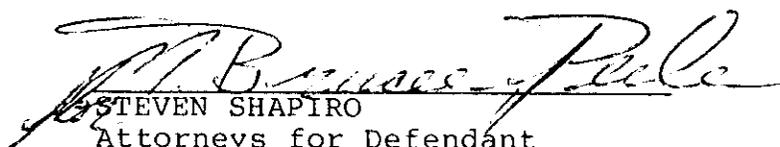
It is hereby stipulated and agreed that the above-entitled action be dismissed with prejudice, each party to bear its own costs.

  
\_\_\_\_\_  
N. J. DIEFFENBACH

  
\_\_\_\_\_  
K. L. DIEFFENBACH

HUBERT H. BRYANT  
United States Attorney

By:

  
\_\_\_\_\_  
STEVEN SHAPIRO  
Attorneys for Defendant  
Department of Justice  
414 - 11th Street, N.W.  
Washington, D. C. 20530

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

O. D. CLEMONS,

Plaintiff,

v.

RIGGS NATIONAL BANK, SEABOARD  
COAST LINE INDUSTRIES, INC.,  
FRUIT GROWERS EXPRESS COMPANY,  
ST. LOUIS-SAN FRANCISCO  
RAILWAY COMPANY, MISSOURI-  
KANSAS-TEXAS RAILROAD COMPANY,  
BEN HILL GRIFFIN, INC.,  
FLORIDA CITRUS MUTUAL,

Defendants.

No. 79-C-132-C

**FILED**

JUN 19 1979

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

O R D E R

The Court now considers the Motion to Dismiss of defendant Riggs National Bank (Riggs) pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. This is an action to recover for personal injuries sustained by plaintiff while unloading a railroad car allegedly owned by defendant Riggs and others. Plaintiff originally filed this action in the District Court of Tulsa County, State of Oklahoma, and it was removed to this Court by Defendant Missouri-Kansas-Texas Railroad Company. Riggs argues that this action is subject to Title 12, U.S.C. § 94 (venue of suits against national banks) which provides that:

Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

Riggs concludes that under the above statute, this Court clearly does not have venue and should therefore sustain its Motion to Dismiss.

Plaintiff responds that § 94 affords national banks a privilege that may be waived, and that in certain cases, the privilege is not applicable at all. Plaintiff asserts that by participating in the motion for removal to this Court, Riggs waived the provisions of § 94. Plaintiff argues further that in its involvement in the situation now before the Court, Riggs was engaged in a business endeavor rather than usual banking activities, and thus should not be allowed the protection of § 94. The business endeavor plaintiff refers to is a mortgage allegedly held by Riggs on the railroad car involved in this action.

First, as to whether Riggs' alleged position as a mortgage holder on the railroad car in question would involve it in a business endeavor so as to preclude coverage by § 94, this Court finds that it would not. Both the District of Columbia (Riggs' locale) and the State of Oklahoma have adopted the Uniform Commercial Code (1962 text). See Title 28, D. C. Code, and Title 12A, Okla. Stat. Annot. Chattel mortgages are governed by Article 9, and Section 9-202 provides that:

Each provision of this Article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor.

The comment to Section 9-202 states in part that

This Article in no way determines which line of interpretation (title theory v. lien theory or retained title v. conveyed title) should be followed in cases where the applicability of some other law depends upon who has title.

Thus, insofar as plaintiff's "ownership by mortgage" argument goes (which of course depends on title passing to Riggs), the applicable statutes fail to establish Riggs as title holder.

However, even if Riggs were deemed owner by way of the mortgage, such would not involve Riggs as a party to a business endeavor absent other participation in the operation and control of the venture. Plaintiff states that Riggs

. . . was not engaged in a banking function but rather was engaged in a business endeavor totally unrelated to the practice of banking

Plaintiff's Brief in Response, filed April 9, 1979, p. 2 (emphasis added). To the contrary, this Court will take judicial notice that mortgages are a part of normal and customary banking practice, and will not, without other evidence of involvement, place a national bank outside the scope of banking activity.

Plaintiff cites Lewis v. Fidelity & Deposit Company of Maryland, 292 U. S. 559, 54 S.Ct. 848, 78 L.Ed. 1425, 92 A.L.R. 794 (1934), and First National Bank of Comanche v. Johnston, 41 P.2d 115 (Okla. 1935) for the proposition that a national bank is subject to state law unless the state law interferes with the purposes of its creation, destroys its efficiency, or is in conflict with some paramount federal law. In Lewis, the Supreme Court decided that a national bank could serve as a depository for state funds pursuant to Georgia law requiring the posting of bond, in spite of the possibility that the Georgia governor or state legislature might impose duties on the bank in the future that the bank would be without authority to undertake. The Court stated that "(w)hat obligations to the State the bank assumes may be defined by the law of that State", 292 U.S. at 566, and further, that if the legislature sought to impose duties which the bank were unable to undertake, those portions of the contract would be unenforceable; but to the extent that Georgia law was consistent with federal law, it could control certain aspects of the function of national banks in Georgia. Id.

First National of Comanche, citing to Lewis, held that the Oklahoma law requiring banks to file a nonusury affidavit in a collection action for loans under \$300 was applicable to plaintiff bank, in spite of the bank's argument that

federal law was controlling. Assuming that both of these cases are viable today, the Court fails to see the applicability to the instant case. If plaintiff is contending that Riggs is liable for injuries caused by its business endeavors in Oklahoma, plaintiff has failed to sufficiently illustrate those business endeavors. As noted above, the holding of a mortgage does not constitute a business endeavor so as to subject Riggs to the long arm process of this state.

As to plaintiff's second proposition, that Riggs has waived any limitations on venue afforded by § 94 by its participation in removal to this Court, this Court finds no such waiver. While it is true that national banks may waive the provisions of § 94, see e.g. Stutsman v. Patterson, 457 F.Supp. 189 (C.D.Cal. 1978), such a waiver must be shown by the bank's express declaration, by its failure to assert the privilege, or by actions which are inconsistent with the assertion of the privilege. Northside Iron & Metal Company, Inc. v. Dobson & Johnson, Inc., 480 F.2d 798, 800 (5th Cir. 1973). In the instant case, the petition for removal was drafted and filed by counsel for co-defendant Missouri-Kansas-Texas Railroad Company, acting for all defendants. In that petition, Riggs specifically stated that ". . . this Court will not have jurisdiction over Riggs National Bank for the reason that the statute of limitations has run and further denies that the state court ever had jurisdiction." Petition for Removal, filed February 27, 1979, p. 2. Riggs had earlier filed similar objections to this action in state court, based on § 94. See Riggs' Brief in Support of Special Appearance, filed in Tulsa County District Court, State of Oklahoma, February 21, 1979, Case No. CT-79-69 (copy attached to Petition for Removal). Riggs has issued no express declaration of waiver, nor has it failed to assert the privilege at every opportunity. Plaintiff cites Altman v. Liberty Equities Corporation, 322 F.Supp. 377 (S.D.N.Y. 1971) in support of his contention that Riggs' participation in the removal petition was an action inconsistent with

Riggs' assertion of § 94. As noted in plaintiff's brief, Altman did hold that § 94 could be waived pursuant to participation in a pretrial motion. But more specifically:

. . . objection to venue has been deemed lost by reason of participation in a motion for injunction pendente lite, Wyrough & Loser, Inc. v. Pelmore Laboratories, Inc., 376 F.2d 543 (3d Cir. 1967), or of moving for summary judgment, Thompson v. United States, 312 F.2d 516 (10th Cir. 1962), cert. denied 373 U.S. 912, 83 S.Ct. 1303, 10 L.Ed.2d 414 (1963), or of substantial passage of time during which pre-trial preparation was undertaken by other parties. Ft. Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp., 31 F.Supp. 403 (W.D.Pa. 1940), but cf. Blank v. Bitker, 135 F.2d 962 (7th Cir. 1943); McGah v. V-M Corp., 166 F.Supp. 662 (N.D.Ill. 1958). But, mere participation in a motion does not necessarily entail such waiver. Rizzo v. Ammond, 182 F.Supp. 456, 469 (D.N.J. 1960); Printing Plate Supply Co. v. Curtis Publishing Co., 278 F.Supp. 642, 645 (E.D.Pa. 1968); cf. MacNeil v. Whittemore, 254 F.2d 820 (2d Cir. 1958). Without deciding whether and in what circumstances participation in a Rule 23 motion alone would entail forfeiture of a later venue objection, cf. Wyrough & Loser, Inc. v. Pelmore Laboratories, Inc., supra, I hold that the failure to raise a venue objection within the context of a section 1404(a) motion constitutes waiver of that particular objection.

322 F.Supp. at 379 (emphasis added). The holding in Altman does nothing for plaintiff's argument. Given that mere participation in a motion is not a waiver of § 94, and that failure to raise a venue objection is a waiver in a section 1404(a) motion, the converse is that the reassertion of a prior venue objection in a removal petition forecloses such a waiver.

Thus, plaintiff's challenge to Riggs' assertion of § 94 appears to be without merit. Riggs is correct in its contention that there was never any viable jurisdiction over it in this action. In considering state court jurisdiction and venue over national banks, the Supreme Court held in 1977 that national banks may be sued only in those state courts in the county where the banks are located, subject to the doctrine of waiver and the "local action exception". Citizens and Southern National Bank v. Bougas, 434 U.S. 35, 38, 98 S.Ct.

88, 54 L.Ed.2d 218 (1977). Neither of those exceptions applies here, and since the action against Riggs was never viable in state court, neither is it viable in federal court on removal. Venner v. Michigan Central Railroad Co., 271 U.S. 127, 46 S.Ct. 444, 70 L.Ed. 868 (1926); Freeman v. Bee Machine Co., 319 U.S. 448, 63 S.Ct. 1146, 87 L.Ed. 1509 (1943) rehearing den. 320 U.S. 809, 64 S.Ct. 27, 88 L.Ed. 489 (1943); Crow v. Wyoming Timber Products Co., 424 F.2d 93 (10th Cir. 1970); Bradford v. U.S. ex rel. Department of Interior, 431 F.Supp. 88 (W.D.Okla. 1977). Furthermore, had this action been filed originally in federal court, venue would be proper only in the federal district where Riggs is established, located, or conducts business. Leonardi v. Chase National Bank, 81 F.2d 19, 2122 (2nd Cir. 1936) cert. denied 298 U.S. 677 (1936); Northside Iron, supra. This Court is therefore without jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

For the foregoing reasons, it is hereby Ordered that defendant Riggs National Bank's Motion to Dismiss be sustained.

It is so Ordered this 19<sup>th</sup> day of June, 1979.

  
H. DALE COOK, CHIEF JUDGE  
UNITED STATES DISTRICT COURT





The defendant has attached exhibits to its Motion to Dismiss, and the Court has excluded such exhibits from consideration of the present motions.

In its brief, the defendant has asserted that the amount withheld from the defendant's salary is the sum of \$1,115.54.

The Court finds, in construing the instant complaint liberally in favor of the plaintiff, that the Complaint must be dismissed for the following reasons:

That this Court lacks jurisdiction under 28 U.S.C. §1331, because the amount in controversy does not meet the jurisdictional requirements.

That the Court lacks subject matter jurisdiction and the Complaint must be dismissed. Title 18 U.S.C. §§241 and 242 are criminal statutes and plaintiff has no standing to sue under these criminal statutes. *Gorham v. Jewett*, 392 F.Supp. 21, 22 (USDC ND Ill. ED 1975); *Kennety v. Anderson*, 373 F.Supp. 1345, 1346 (USDC ED Okl. 1974); *United States Ex Rel Savage v. Arnold*, 402 F.Supp. 172 (USDC ED Pa. 1975).

That this Court lacks jurisdiction under 28 U.S.C. §1343.

Employers are required by law to withhold income tax from wages to employees. 33 Am.Jur.2d ¶3600.

If plaintiff is aggrieved by the withholding of income tax from his wages, the instant litigation is not the proper vehicle to obtain the relief to which he thinks he is entitled. There are other legal means of redress available to plaintiff to vindicate any rights he believes have been violated.

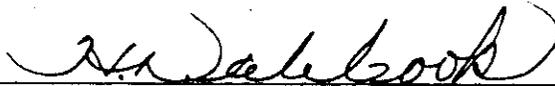
The Court finds that the plaintiff's complaint must be dismissed for lack of jurisdiction and subject matter jurisdiction.

The Court having thus determined lacked of jurisdiction, such finding is dispositive, and there is no need to determine the other issues raised by the defendant's Motion to Dismiss and alternative Motions.

IT IS, THEREFORE, ORDERED that the defendant's Motion to dismiss for lack of jurisdiction and subject matter jurisdiction be and the same is hereby sustained and the Complaint is dismissed.

Since such order is dispositive of the litigation, there is no need to determine the other issues raised by the defendant's Motion to Dismiss and alternative Motions, and they are ORDERED overruled as being moot.

ENTERED this 15<sup>th</sup> day of June, 1979.



---

H. DALE COOK, CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

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

GRAND RIVER DAM AUTHORITY,  
a Public Corporation,  
Plaintiff,

vs

A STRIP OF LAND 50 FEET IN WIDTH,  
IN THE SE $\frac{1}{4}$ , SEC. 20, T. 21 N.,  
R. 19 E, MAYES COUNTY, OKLAHOMA,  
CREEKMORE WALLACE, et al.,  
Defendants.

78-C-44-C

FILED

JUN 15 1979 B

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

JOURNAL ENTRY

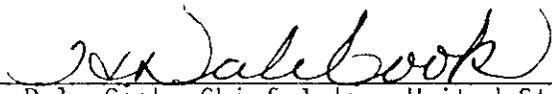
On the 20th day of April, 1979 the plaintiff filed its responsive brief in accordance with the previous order of the court. Plaintiff's brief objected to defendants' filing exceptions to the Commissioners' Report of April 6, 1978 out of time and argued the defendants had not requested a jury trial on the issue of damages.

The court thereafter considered the Commissioners' Report, the pleadings and briefs in the case and issued its Order of May 7, 1979 finding that defendants had not timely demanded a jury as to the issue of damages and overruling the exceptions of defendants and directing that judgment be entered in conformity with the Report of the Commssioners.

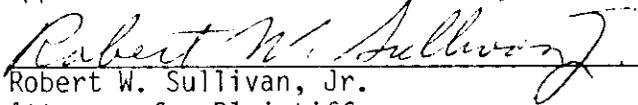
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, based upon the court's order of May 7, 1979 that plaintiff is granted a perpetual easement over defendants' property as more fully set out in plaintiff's petition.

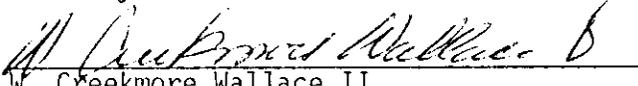
IT IS FURTHER ORDERED, ADJUDGED AND DECREED, based upon the Commissioners' Report that judgment is rendered in favor of defendants and against plaintiff in the amount of Four Thousand Seven Hundred Twenty-Four and no/100 Dollars (\$4,724.00).

Dated this 15<sup>th</sup> day of June, 1979.

  
H. Dale Cook, Chief Judge, United States  
District Court, Northern District of Oklahoma

Approved as to Form:

  
Robert W. Sullivan, Jr.  
Attorney for Plaintiff

  
W. Creekmore Wallace II  
Attorney for Defendants

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

IN RE: )  
)  
VIRGIL A. NIDIFFER and )  
JACQULYN NIDIFFER, )  
)  
Bankrupts, )  
)  
JOHN B. JARBOE, Trustee, )  
)  
Plaintiff, )  
)  
vs. )  
)  
KNOTTS AUTOMOBILE LEASING, )  
INC., )  
)  
Defendant. )

FILED

JUN 14 1979

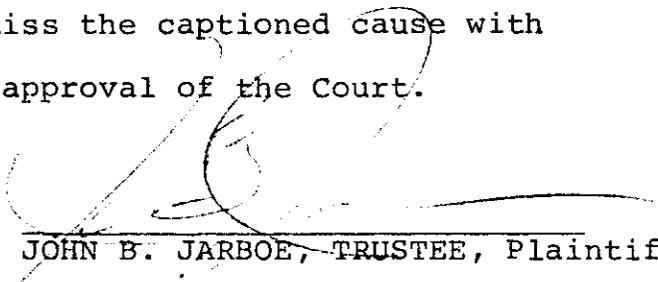
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 78-C-507-B C

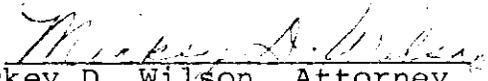
DISMISSAL WITH PREJUDICE AND MOTION FOR APPROVAL

Come now, John B. Jarboe, Trustee, Plaintiff and Knotts Automobile Leasing, Inc., Defendant, by its undersigned attorney, Mickey D. Wilson, and show and represent to the Court that a Compromise Settlement has been reached between the parties hereto for the Dismissal of the captioned proceedings.

In consideration of compromise agreement, and the payment of \$4,000.00 by the Defendant to the Plaintiff, Plaintiff does hereby Dismiss the captioned cause with Prejudice, subject to the approval of the Court.

  
JOHN B. JARBOE, TRUSTEE, Plaintiff

APPROVED:  
Knotts Automobile Leasing, Inc.

By:   
Mickey D. Wilson, Attorney  
for Defendant

ORDER APPROVING DISMISSAL

The foregoing, having come before the Court this 14th day of June, 1979, and the Court, being fully advised in the premises, finds that the Dismissal of the captioned matter with prejudice be approved.

AND IT IS SO ORDERED.

151 H. Dale Cook  
UNITED STATES DISTRICT JUDGE



such time and place as may hereafter be fixed by Special Agent Benuzzi or any other proper officer of the Internal Revenue Service.

Dated this 13<sup>th</sup> day of June, 1979.

  
\_\_\_\_\_  
H. Dale Cook  
Chief Judge

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

IN RE:  
ROBERT B. PHILLIPS and  
MARILYN M. PHILLIPS,  
  
Bankrupts.

)  
)  
)  
)  
)

No. 77-C-92-C

FILED

JUN 12 1973

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

O R D E R

Upon motion of Appellant, Robert B. Phillips, and for  
good cause shown the appeal filed herein is hereby dismissed.



CHIEF UNITED STATES DISTRICT JUDGE



restraining order restraining the defendants, their attorneys, agents, officers, servants and employees from in any way encumbering, alienating, selling, transferring or disposing of any of the properties specified in plaintiff's application, being the stock of Multi-Products, Inc. and the stock of Los Angeles Die Mold, upon the posting of a bond, pursuant to Rule 65(c) of the Federal Rules of Civil Procedure in the amount of \$3,520,000.00

Rule 64 of the Federal Rules of Civil Procedure provides:

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

Title 12 O.S. §1151 provides, in pertinent part:

The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon the grounds herein stated:

9. Fraudulently contracted the debt, or fraudulently incurred the liability or obligations for which the suit is about to be or had been brought; ....

The Court notes, at this juncture, that in subsections 1 and 2 of said statute, the words "[W]hen the defendant, or one of several defendants,...." is used, while in subsections 3 through 9 do not contain such language. The defendants have raised a semantic objection to the "prefatory" language of subsection 2 of said statute being quoted in context with subsection 9. Defendant claims those provisions are disjunctive and asks the Court to hold subsection 9 isolated from the entire statute. The Court finds there is no merit to such argument as propounded by the defendants.

It is the apparent position of the moving defendants that the complaint in issue here alleges a "conspiracy" and that "[T]he Oklahoma courts have refused to extend the application of Subsection 9 of the Oklahoma Statute, §1151 to "conspirators". In support of this contention defendants cite to the case of Investors Royalty Co., Inc. v. Market Trend Survey, Inc., 206 F.2d 108 (10th Cir. 1953) , which was a action by a corporation against defendants charged with conspiracy in the publication and distribution of false and slanderous attacks upon the corporation's officers and directors. The Tenth Circuit Court held that "[A]n attachment statute will not be construed to cover claims arising ex delicto, unless it clearly appears from the language of the statute that the legislature intended to extend the remedy to such claims." The Appellate Court notes that Oklahoma courts had not passed on the question presented, but that the matter had been determined in other jurisdictions, stating:

In other jurisdictions, the courts, in well reasoned opinions construing statutory provisions substantially like paragraph 9, supra, have held that the obligation or liability must either arise from contract or from a wrong growing out of a contract tainted with fraud.

We are of the opinion that paragraph 9, supra, does not embrace an action for conspiracy, nor for the fraudulent and malicious dissemination of false, misleading or untrue statements.

Defendants also rely on the case of Thwing v. Humphrey, 75 P. 1126 (Okla. 1904), wherein the Court stated:

....In our opinion, the plaintiff, upon the facts disclosed in the petition, affidavit, and the agreed statement of facts, was not entitled to an order of attachment in this case. The plaintiff is seeking to invoke the aid of the statute in collecting an indebtedness upon a check on the ground that fraud was committed by the defendant in selling a stock of merchandise to one J. T. Long. Conceding that the defendant committed a fraud upon J. T. Long in the sale of the stock of merchandise which is the primary cause of this controversy, such fraud would not be available to the plaintiff in this case in his action upon the check. The plaintiff in error became the owner of the debt by purchase, and there is no privity between him and the defendant. Fraud committed in the inception of a debt is, in its nature, personal between the contracting parties, and does not follow an assignment of the debt. The right of an assignee of a chose in action to procure a writ of attachment exists only against his immediate assignor, on the ground that the debt or obligation was fraudulently incurred....It follows that, if the plaintiff could have no such remedy, he has no right to cause an attachment to be issued on the ground that the debt was fraudulently

contracted.

Defendants concede that the Courts of Oklahoma have not passed on the precise issue before the Court.

Another case relied on by defendants is *Crist v. United Underwriters, Ltd.*, 343 F.2d 902 (10th Cir. 1965), where the Court held that an alleged violation of §10(b) sounded in tort. The Court concluded that the principal cause of action should be examined and considered under the applicable federal laws and cases rather than state law, to determine its character. (It should be noted that this case was decided in connection with the Colorado Rule on the issuance of attachments, which provided in part that "the plaintiff, at the time of issuing the summons or filing the complaint in an action on contract, express or implied....") The Court, after citing cases in support of the tort theory, states:

The Restatement of Torts provides that a violation of a statute such as is alleged here shall constitute an invasion of the rights of another if this person is within the class sought to be protected, the interest or rights are protected by the particular statute and the violation of the act is the "legal cause" of the invasion of the rights.... As stated in *Miller v. Bargain City, U.S.A., Inc.*, supra, the cause of action "\*\*\*derives from common law tort principles which impose liability for the violation of a statute designed to prevent a particular type of harm."....

It is the origin and basic nature of the cause of action which must be examined to determine whether it is a tort or in contract. The appellants would instead have the emphasis placed on the remedy sought in their complaint. The origin of this cause of action shows that it is in tort. According to the complaint there was a sale of securities and a contractual relationship may have arisen from it, but the cause of action is instead based on the alleged violation of the act. The complaint so asserts. The cause of action is thus in tort, and it may be of such nature although not wholly disassociated from a contract between the parties. The appellants' remedy exists without the benefit of fictions creating an implied consensual arrangement.

In *Myzel v. Fields*, 386 F.2d 718, 744 (8th Cir. 1967) at footnote 22 it is stated:

Although recision is sought as relief, it has been properly observed that an action, under Rule 10b-5 lies in tort and not on contractual grounds. *Crist v. United Underwriters, Ltd.*, 343 F.2d 902 (10th Cir. 1965)....

Title 12A O.S. §8-317 provides:

(1) No attachment or levy upon a security or any share or other interest evidence thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy but a security which has been surrendered to the issuer may be attached or levied upon at the source.

(2) A creditor whose debtor is the owner of a security shall be entitled to such aid from courts of appropriate jurisdiction, by injunction or otherwise, in reaching such security or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

In *United States v. Moss*, 562 F.2d 152, 155 (2nd Cir. 1977)

it was said:

Rule 64 Fed.R.Civ.P. makes available to federal district courts all remedies providing for the seizure of property to secure satisfaction of judgment in the same manner as is provided by the law of the state in which the court is sitting. Under Connecticut law, the prejudgment remedy of attachment is authorized by §8-317 of the Uniform Commercial Code,.... Although this section requires that there be actual physical possession and control of the stock certificates by the sheriff before the attachment is perfected, see *Neifeld v. Steingert*, 438 F.2d 423, 432 (3d Cir. 1971), subdivision (2) of the statute authorizes the court to issue an injunction in aid of the attachment which make take the form of a mandate requiring the defendant to bring the certificates into the state, as was done here, and to deliver them into the actual physical control and possession of the sheriff. (case citations omitted)....

The Court, therefore, finds that Plaintiff's Motion for Attachment and Motion for an Order in Aid of Said Attachment should be granted.

In this connection the Court notes at page 5 of the Findings and Recommendations of the Magistrate the following language is found:

....Further, defendants have stated upon the record that, should the Court grant the attachment requested by plaintiff, they would not object to the order in aid of attachment in effectuation thereof.

Plaintiff has stipulated upon the record and in open Court that, in order to avoid any possibility of damage to defendants during the pendency of the attachment, defendants may sell or otherwise dispose of the property attached, subject to the approval of the Court as to the fairness of the consideration received by them in exchange for that property and the deposit with the Clerk of the Court of proper and adequate substitute collateral for plaintiff's security.

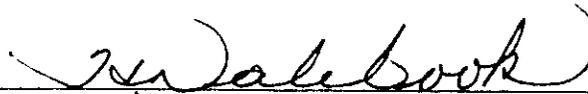
Defendants have requested an interlocutory appeal of an adverse ruling on the attachment, should such attachment issue, and the Court, in its discretion, finds that such request should be denied.

IT IS, THEREFORE, ORDERED that the Plaintiff's Motion for Attachment and Motion for an Order in Aid of said Attachment be and the same is hereby granted, and plaintiff is ordered to prepare and submit to this Court the proper documents to effect such attachment and order in aid of attachment within ten days.

IT IS FURTHER ORDERED that the objections to the Findings and Recommendations of the Magistrate be and the same are hereby overruled.

IT IS FURTHER ORDERED that defendants' request for an interlocutor appeal be and the same is hereby denied.

ENTERED this 11<sup>th</sup> day of June, 1979.



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H. DALE COOK, CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA



Plaza Bank, in its defense, asserts lack of in personam jurisdiction. See the Findings and Recommendations of the Magistrate; affidavit of Robert Coatsworth, Vice President and Trust Officer of the Plaza Bank.

The Court is not here concerned only with in personam jurisdiction. The instant complaint contains asserted violations of §10b of the Securities Exchange Act of 1934 (15 U.S.C. §78j[b]). Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. §78aa states, in pertinent part:

Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder....may be brought in any such district,....and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

In *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1229 (2nd Cir. 1972) the Court said:

....Since we hold that Congress meant §27 to extend personal jurisdiction to the full reach permitted by the due process clause, it is unnecessary to discuss the applicability of the New York statutes, which could reach no further.

See also *Fitzsimmons v. Barton*, 589 F.2d 330 (7th Cir. 1979); *Bath Industries, Inc. v. Blot*, 427 F.2d 97, 114 (7th Cir. 1970).

In *Warren v. Bokum Resources Corp.*, 433 F.Supp. 1360, 1364 (USDC New Mex. 1977), the Court said:

*Llennocco* states by affidavit of its president, Walter F. O'Connell, that it does no business in New Mexico, has no contacts with New Mexico and has not engaged in any activity in New Mexico. It is clear, however, that for purposes of venue for claims brought under the Act, it is not necessary that each defendant named have engaged in acts or transactions within the forum district.

Venue under the Exchange Act is proper if one act in furtherance of the unlawful scheme is done in the forum district. This does not require that each defendant perform such an act; sufficient is an act of which all the defendants were the intended beneficiaries and a part of the fraudulent scheme. (case citations omitted).

Given the extraterritorial service of process provision of §27, it is evident that so long as venue is properly laid in the forum district for claims brought under the 1934 Act, it is not necessary that each defendant have personally engaged in acts or transactions with the forum in order to sustain personal jurisdiction over him. In the case of *Mitchell v. Texas Gulf Sulphur Company*, 446 F.2d 90 (10th Cir. 1971), cert. denied, 404 U.S. 1004, 92 S.Ct. 564, 30 L.Ed.2d 558

(1971), an individual defendant raised objections to personal jurisdiction and venue similar to those raised by Llenoco Corporation in the present Motion, claiming that the court lacked personal jurisdiction over him because he had never been an inhabitant of the forum district, was not found there and transacted no business there. The Court of Appeals ruled that where the acts and transactions which formed the basis for claims brought under the 1934 Act had occurred within the forum district, the objecting defendant was properly before the court. 446 F.2d 106. See also *Sohns v. Dahl*, supra, 392 F.Supp. at 1218 (since venue properly lay in the forum district under §27 of the 1934 Act, court had in personam jurisdiction over defendant who was served out of state and who was not a resident, did no business in and had no contact with the forum district); *Stern v. Gobeloff*, 332 F.Supp. 909, 911-914 (D.Md.1971) (International Shoe "minimum contacts" theory normally inapplicable where jurisdiction and venue based on and authorized by Securities Acts of 1933 and 1934; in personam jurisdiction of forum sustained where venue is satisfied and service is made in distant districts of which defendants are inhabitants or where they are found),  
.....

The Court went on to say, in discussing pendent claims:

....There is a split in authorities on this issue, the older cases tending toward the view that service as to related claims under the nationwide service provisions of the Securities Exchange Act is not permitted. Courts taking this position have reasoned that Congress had not explicitly provided for such service and that implied extensions of statutes authorizing service of process are discouraged. (case citations omitted). More recent cases by contrast, appear to take the view that such service is permissible, reasoning that such approach is supported by the policy considerations which underlie the judicial economy, convenience and fairness to litigants. See, e.g., *Robinson v. Penn Central Co.*, 484 F.2d 553 (3rd Cir. 1973); *Bertozzi v. King Louie International, Inc.*, supra, at 1172 and cases cited at n.2 therein. See also 2 Moore, *Federal Practice & Procedure: Civil* §1125 at 528-529....

See also *Bertozzi v. King Louie Intern., Inc.*, 420 F.Supp. 1166, 1171 (USDC Rhode Island 1975).

The Court has noted the arguments of both the plaintiff and the defendant, Plaza Bank, in connection with the objections to the Findings and Recommendations of the Magistrate. In reviewing the arguments submitted by the plaintiff, the Court notes that it appears that counsel for plaintiff has made the necessary averments in his brief and memorandum of law, but a party is not entitled to amend his pleading through statements in his brief. *Chambliss v. Coca Cola Bottling Corp.*, 374 F.Supp. 401, 409 (E.D.Tenn. 1967), aff'd 414 F.2d 256 (6th Cir. 1969), cert.denied 397 U.S. 916, 90 S.Ct. 921, 25 L.Ed.2d 97 (1970). In closing the brief on objections, the plaintiff requests leave to amend the complaint in the event the Court finds that such complaint is insufficient as to the defendant, Plaza Bank.

In viewing the instant complaint, as to the defendant, Plaza Bank, it is apparent that plaintiff has not set forth enough facts to state a cause of action for damages under the securities laws as to Plaza Bank.

The Court, therefore, finds that the Motion to Dismiss of Plaza Bank should be granted, but for the reasons stated above, the plaintiff is given leave to serve a suitable amended complaint against Plaza Bank, within twenty days.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss of Plaza Bank be and the same is hereby granted, for the reasons above stated, and plaintiff is given leave to serve a suitable amended complaint against Plaza Bank, within twenty days. Jacobson v. Peat, Marwick, Mitchell & Co., 445 F.Supp. 518 (USDC SD NY 1977).

IT IS FURTHER ORDERED that the objections to the Findings and Recommendations are overruled in part and sustained in part in conformity with this order.

ENTERED this 11<sup>th</sup> day of June, 1979.



H. DALE COOK, CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

FILED

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

JUN 11 1979

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

WESLEY S. WALKER, JR., )  
 )  
 Plaintiff, )  
 )  
-vs- )  
 )  
 ROLLINS PROTECTIVE SERVICES )  
 COMPANY and ORKIN EXTERMINATING )  
 COMPANY, INC., )  
 )  
 Defendant. )

No. 77-C-311 (C)

STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED by the plaintiff, Wesley S. Walker, Jr., and by the defendant, Orkin Exterminating Company, Inc., that the above-entitled action be dismissed with prejudice as to the defendant Rollins Protective Services Company and each party to bear their own costs.

MOYERS, MARTIN, CONWAY, SANTEE  
& IMEL

CRAWFORD & JACKSON

By Ronald M. Reynolds  
John M. Imel  
920 NBT Building  
Tulsa, Oklahoma 74103

By Robert L. Bainbridge  
Robert L. Bainbridge  
1714 First National Building  
Tulsa, Oklahoma 74103

Attorneys for Defendants,  
Orkin Exterminating Company,  
Inc., and Rollins Protective  
Services Company

Attorneys for Plaintiff,  
Wesley S. Walker, Jr.

FILED

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

JUN 11 1979

CONSOLIDATED GEOPHYSICAL )  
SURVEYS, )  
 )  
Plaintiff, )  
 )  
-vs- )  
 )  
STONE CONTAINER CORPORATION, )  
 )  
Defendant. )

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

No. 78-C-371-C

NOTICE OF DISMISSAL

TO: Stone Container Corporation, defendant, and Claire Eagan Barrett, its attorney.

Please take notice that the above-entitled action is hereby dismissed without prejudice, pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure.

CRAWFORD & JACKSON

By Robert L. Bainbridge  
Robert L. Bainbridge  
1714 First National Building  
Tulsa, Oklahoma 74103

CONSOLIDATED GEOPHYSICAL  
SURVEYS

C. D. Roemer  
C. D. Roemer

James R. New  
James R. New

CERTIFICATE OF MAILING

I hereby certify that on this 11<sup>th</sup> day of June, 1979, I mailed a true and correct copy of the foregoing Notice of Dismissal, postage prepaid, to Claire Eagan Barrett, Hall, Estill, Hardwick, Gable, Collingsworth & Nelson, 4100 Bank of Oklahoma Tower, One Williams Center, Tulsa, Oklahoma 74172, attorney for defendants.

Robert L. Bainbridge  
Robert L. Bainbridge



The securities involved are Industrial Development Revenue Bonds (the "Osage Bonds") issued by the defendant, Osage Industrial Development Authority ("Osage DA") in the name of the peoples of Osage County and the State of Oklahoma.

Plaintiff has asserted 7 claims for relief against the defendants predicated upon the same factual basis.

According to the plaintiff, and--as the Court shall not always repeat--the Court states only plaintiff's version--the complaint alleges the following events and circumstances which give rise to the present controversy.

The defendant, Donald F. Roberts ("Roberts") caused Federal Investment Corporation ("Federal") and Power Resources International, Inc. ("Power Resources") to be incorporated. From the time of inception Roberts served as President and Chief Executive Officer of these two corporations. At sometime in this "time frame", Roberts caused Federal and Power Resources to acquire ownership interests in certain patents, applications for patents, trademarks and copyrights necessary to manufacture a product called "The Beauty Fountain"--- Federal acquired a 1/3 interest and Power Resources acquired a 2/3 interest. It is asserted that Roberts wished to obtain money by selling all or part of the patent rights, etc., to "The Beauty Fountain" and working through the defendant, Roy G. Miller (a principal of the defendant, Stone & Co., a securities broker), and others, conceived a plan or scheme to sell these rights to the Osage DA and and to raise capital with which the Osage DA could make such purchase through the "guise or sham" of an Oklahoma industrial revenue bond issue.

In furtherance of this "scheme", Roberts caused Multi-Products, Inc. ("Multi-Products") to be incorporated. In fact, Roberts is alleged to have been the principal stockholder, direct or indirect, of Multi-Products, Inc., Federal Investment Corporation, American Indian Development, and Power Resources International, Inc. Roberts represented Multi-Products to Osage DA to be a company capable of manufacturing the "Beauty Fountain". Miller caused the defendant, E. V. Johnson, to become Chairman of Osage DA and the defendant,

Russell A. Howard, to be Secretary or Clerk of Osage DA. The services of Fred W. Rausch, Jr. were engaged as bond counsel. (In connection with Mr. Rausch, it is noted that of the 7 counts asserted by the plaintiff, only Count 7 involves Mr. Rausch.) The defendant, Plaza Bank and Trust Company ("Plaza Bank") agreed to act as trustee for the bond issue. The defendant, Stone & Co., under the direction of Miller, became the underwriter of the issue.

Under agreements dated February 24, 1973, Multi-Products agreed with the Osage DA to lease from and operate on behalf of Osage DA the facilities to be purchased, built or otherwise acquired by the Osage DA with the proceeds of the bond issue; that Multi-Products would utilize such facilities to produce the product ("The Beauty Fountain") authorized by the Osage DA's acquisition of the patent rights, etc. to the "Beauty Fountain" to be sold to Osage DA by Roberts and his corporations (Federal and Power Resources); that Osage DA would direct the underwriters of the Osage Bonds to pay the proceeds thereof directly to Multi-Products; that Multi-Products was authorized to expend such proceeds as it saw fit for the purposes of effecting the objects of the agreement. The agreements were signed by Roberts on behalf of Multi-Products and Johnson on behalf of Osage DA.

Under an agreement dated February 24, 1973, Federal sold to Osage DA its 1/3rd interest together with a license for the use of those rights in a limited portion of the Mid-Western US for the sum of \$800,000 cash and \$2.00 to \$4.00 for each "Beauty Fountain" produced by or on behalf of the Osage DA for an unlimited period of time, plus royalties of 2 to 3 cents for each unit of certain cosmetic products produced. The agreement was to expire by its terms on April 15, 1973, unless Osage DA, prior to that date, made payment of the \$800,000. The assignments were filed on April 9, 1973, in the office of the Clerk of Osage County.

Sometime in July, 1973, Roberts informed the Osage DA that Federal did not own the patent rights, etc., previously assigned. At sometime prior to July, 1973, Roberts had caused to be incorporated American Indian Development (AID) and had transferred all of Federal's rights in the patents, etc., to AID. Roberts and the Osage DA then entered into a new agreement whereby Osage DA was to pay to Roberts the sum of \$800,000 in exchange for 100% of the stock of AID (the only assets of AID being the patents, etc.).

At this juncture, it will be well to identify certain of the cast of characters, either hereinbefore identified, or now to be identified, and their respective positions as alleged by the plaintiff in the complaint.

Plaintiff asserts that the following individuals were "Control Persons", and each control person's name will be underscored for the purposes of simplification.

Hugh J. Bell was a principal stockholder, a director and chief executive officer of Tower Brokerage, Inc. Tower Brokerage, Inc. ("Tower") holds itself out as a securities broker specializing in municipal and revenue bond issues.

Bruce Bressman was a principal stockholder, a director and the chief executive officer of National Municipals, Inc. National Municipals, Inc. ("National") holds itself out as a securities broker specializing in municipal and revenue bond issues.

Donald F. Roberts was a principal stockholder, direct or indirect, of Multi-Products, Federal, AID and Power Resources, and was President of each.

Russell A. Howard and E. V. Johnson were Secretary or Clerk, and Chairman, respectively, of the Osage DA.

Eugene Stewart was a principal stockholder, a director and the chief executive officer of Stewart Securities. Stewart Securities holds itself out as a securities broker.

C. W. Deaton was a principal stockholder, a director and the chief executive officer of International Surety and Casualty Company ("International Surety"). International Surety holds itself out as a company licensed and authorized to conduct a business of insurance and reinsurance, including the insuring and reinsuring of the principal of and the interest on said principal of municipal and industrial revenue bonds. In this connection, plaintiff alleges that International Surety is not licensed or authorized to conduct a business of insurance or reinsurance in any jurisdiction in the United States, including the State of Oklahoma.

Randy Blanton was a general partner and owned a majority interest in Blanton and Associates. Randy Blanton and Blanton and Associates hold themselves out to be certified public accountants authorized and competent to investigate and report to the public on the financial condition and operations of corporations.

Osage County was beneficiary of the Osage DA Public Trust and was the beneficial owner of all of the assets of the Osage DA Public Trust. Osage County, by and through its governing body, expressly approved the creation of the Osage DA and the Osage DA was, pursuant to Title 60 O.S. §179 of the laws of Oklahoma, an agency of Osage County and the governing body thereof.

State of Oklahoma was a control person in that the Osage DA, as hereinabove stated, was an agency of the State of Oklahoma.

Roy G. Miller was a principal stockholder, a director and officer of C. M. Stone & Company. C. M. Stone & Company (Stone) holds itself out as a securities broker.

Julian M. Riley was an officer of Multi-Products, Federal, Power Resources and AID, and was attorney and counsel to each of those corporations and to Roberts.

Plaintiff asserts that there was no formal closing of the bond issue. Fred W. Rausch, Jr., issued a legal opinion, as bond counsel, the text of which opinion, together with a facsimile signature of Rausch, was printed on the bonds. The bonds were signed by Johnson as Chairman of the Osage DA and authenticated by Howard, as Clerk of the Board of Trustees of the Osage DA.

Stone & Co. declined to honor its commitment to underwrite the bond issue. Tower, National, Stewart and Fidelis Securities Corp. ("Fidelis") agreed to replace Stone & Co. as underwriters for the bond issue. Thereafter, the bonds of a face value of \$3,000,000 ("the Osage Bonds") were released by the Osage DA to Stewart, Tower, National and Fidelis for sale to the public.

Stewart Securities failed to pay for the \$1,000,000 face amount of bonds delivered to it as underwriter and those bonds were transferred by Stewart Securities to Tower for sale to the public. Tower did not pay the Osage DA for those bonds received by it from Stewart Securities.

Plaintiff further alleges that on October 20, 1973, defendant, Windsor Insurance Company, Ltd. (Windsor) issued its Surety Bond No. 863 insuring payment of the principal and interest of the Osage Bonds. A "Certificate of Coverage" disclosing said policy of insurance was attached to and made a part of each Osage Bond.

Defendants, International and Windsor executed an "Assumption and Reinsurance Agreement" whereby International reinsured and assumed 100% of the liability of Windsor on Surety Bond No. 862.

The defendants, Blanton and Blanton and Associates, as Certified Public Accountants, prepared a "Balance Sheet" of the assets and liabilities of International as of July 15, 1974, showing International to have assets exceeding \$713,000,000, including a net worth of assets exceeding liabilities of over \$701,000,000. The "Balance Sheet" was included in and made a part of a Prospectus issued by and with the knowledge of the defendants.

The defendants had either prepared, reviewed or approved the Prospectus to be used by Tower, National and Fidelis in the subsequent sale of the bonds.

The plaintiff alleges that the Prospectus and bond certificates and other documents executed in furtherance of the bond issue contain false and misleading statements and omissions, including, among others:

- (a) Such documents failed to disclose the fact that the bonds were being issued at the substantial discount of 25% of face value;
- (b) Such documents failed to disclose that at least 1/3 of the bonds had not been paid for when issued;
- (c) Such documents failed to disclose exhorbitant and unreasonable fees and expenses being incurred out of the bond proceeds;
- (d) Such documents failed to disclose that less than substantially all of the proceeds were to be used for acquisition, construction, reconstruction or improvement of land or property of a character subject to allowance for depreciation; and that the interest on said Bonds would, therefore, not be subject to exclusion from gross income under Section 103 of the Internal Revenue Code of 1954, and that the bonds, therefore would not be "exempt securities" and would be subject to all of the requiriements of the Securities Act of 1933, the Securities Exchange Act of 1934 and the Trust Indenture Act of 1939;
- (e) Such documents failed to disclose that more than an insubstantial amount of the proceeds would be used as working capital and to finance and acquire inventory; and that interest on said Bonds would, therefore, not be subject to exclusion from gross income under Section 103 of the Internal Revenue Code of 1954, and that the Bonds, therefore, would not be "exempt securities", and would be subject to all of the requirements of the Securities Act of 1933, the Securities Exchange Act of 1934 and the Trust Indenture Act of 1939:

(f) Such documents falsely represented that the bond proceeds would be used to pay only normal and reasonable expenses in connection with the issuance and sale of the bonds and the costs of acquiring, equipping and constructing the plant;

(g) Such documents grossly overstated the worth and value of Multi-Products and of the patent, trademark, license and copyright rights acquired by Osage DA;

(h) Such documents falsely represented the total cost of the project to be approximately \$3,000,000.

(i) Such documents falsely represented the value and net worth of the reinsurer, International.

Plaintiff avers that: (i) the defendants (excluding Rausch) knew of the false and misleading statements and omissions and knew or should have known that said statements would be used in the sale of the bonds and that the public would and did rely on such statements; and (ii) that substantial sums of the funds received by the Osage DA were disbursed for matters unrelated to the affairs of the lessee company and for purposes other than benefit of the lessee company.

Plaintiff alleges that the plant site, though constructed, was never operational. That the defendants (excluding Rausch) maintained a "facade" of a functioning manufacturing business by expending substantial sums for the proceeds of the bond issue for the purchase of inventory from unrelated suppliers and that Multi-Products had no realizable assets, no business and no means of paying the rental due the Osage DA.

It is the position of the plaintiff that the defendants (excluding Rausch) knew or should have known, prior to the sale of any Osage Bonds that one or more of the following material facts were not disclosed or suppressed:

- (a) The bond issue was never fully funded;
- (b) The bond proceeds were being expended for unlawful purposes and /or in violation of the bond trust indenture;
- (c) Multi-Products had no real worth or assets, no earnings experience and no reasonable prospects of meeting its obligations under the lease;
- (d) Stewart had defaulted on its obligation to pay for \$1,000,000 face value of the bond issue;
- (e) There was no reasonable expectation that the Osage Bonds would be paid as they matured;
- (f) That the Osage Bonds had been sold to the underwriters at the excessive discount of 25%;
- (g) That there was no reasonable expectation that Windsor or International could honor their obligations as insurer or reinsurer of the principal and interest on the Osage Bonds.

Plaintiff's position in the litigation is that the Osage Bonds so issued and sold are worthless and of little value and the insurance and reinsurance rights under the policies and agreements of Windsor and International are of little or no value.

Plaintiff, BSPS, is a corporation engaged in the business, inter alia, of performing clearance and custody services with respect to municipal and industrial development bonds for municipal bond dealers and brokers. As part of plaintiff's service, on its customer's instructions, it received in, on behalf of that customer, bond certificates which the customer has purchased, and, on behalf of the customer, pays to the seller the purchase price agreed upon between the seller and plaintiff's customer. By making such payment, plaintiff advances to its customer the amount paid, retaining as security for that advance the bond certificates received. Plaintiff's security interest in and status as pledgee of those bonds is perfected and maintained by plaintiff's continued possession of the bond certificates until such time as the advance is repaid, either by plaintiff's customer directly or by a purchaser of those bonds from plaintiff's customer, which purchaser then accepts delivery of the certificates from plaintiff and pays to plaintiff the purchase price agreed to between plaintiff's customer and that purchaser. All of these services are performed pursuant to written clearance and hypothecation agreements.

On March 5, 1974, Bell became a customer of plaintiff and on April 1, 1974, Bressman personally and as President of National requested of plaintiff that National become a customer and this was accomplished. Between the opening of each account and September, 1974, Tower and National purchased a net total of \$2,075,000 face value of the Osage Bonds which they instructed plaintiff to receive and pay for on their behalf. Said sums were advanced by plaintiff to Tower and National and plaintiff retained the Osage Bonds delivered as security for the advance of \$2,075,000.

Plaintiff believes that National, Federal and Fidelis were among the sellers of the bonds to Tower and National.

Tower and National defaulted on their repayment to plaintiff of the advances. On March 15, 1975, plaintiff exercised its rights to the Osage Bonds as collateral for those advances and foreclosed on said bonds, and, in mitigation and not in release of its damages returned said Osage Bonds to defendant, Roberts, in exchange for the sum of \$315,000. Thus, plaintiff, it is contended, became a "forced purchaser". Plaintiff allegedly has been damages in the sum of \$1,760,000.

Plaintiff alleges that the defendants (excluding Rausch), in furtherance of their scheme, never released the Osage Bonds for sale to any persons other than themselves or other persons, presently unknown to plaintiff, who were a part of defendants' scheme, and said defendants traded the Osage Bonds between and among each other, thereby depriving plaintiff, prior to and for a considerable period of time after the pledging of the same to plaintiff, of any information as to the value of said Osage Bonds, except for that value artificially and fraudulently established by the said transactions by and among defendants and their alleged co-conspirators.

Industrial Revenue Bonds are securities within the meaning of the Securities Act of 1933 (15 U.S.C. §77a et sq.), the Securities Exchange Act of 1934 (15 U.S.C. §78a et sq.) and the Trust Indenture Act of 1939 (15 U.S.C. §77aaa et seq.).

Under §3(a) of the Securities Act of 1933 (15 U.S.C. §77c[a]) Industrial Revenue Bonds are required to be registered with the Securities and Exchange Commission unless the interest on such bonds is excludable from gross income under §103 of the Internal Revenue Code of 1954 (26 U.S.C. §103).

Under §3a(12) of the Securities Exchange Act of 1934 (15 U.S.C. §78c[12]) transactions in Industrial Revenue Bonds are subject to the requirements of the Securities Exchange Act of 1934

unless the interest on such bonds is excludable from gross income under §103 of the Internal Revenue Code.

Under §304(a)(4)(B) of the Trust Indenture Act of 1939 (15 U.S.C. §77ddd[a][4][B]), Industrial Revenue Bonds are subject to the provisions of that Act, and Indentures of Trust over the proceeds of such bonds are required to be registered or qualified with the Securities and Exchange Commission if the bonds are required to be registered under the Securities Act, 1933, i.e., if the interest thereon is included in gross income under §103 of the Internal Revenue Code of 1954.

Section 103(c) of the Internal Revenue Code of 1954 provides that interest upon Industrial Revenue Bonds (termed therein as Industrial Development Bonds) is excluded from gross income if, inter alia, substantially all of the proceeds of the bond issue are to be used for the acquisition, construction, reconstruction or improvement of land or property of a character subject to depreciation allowance.

If the interest upon an issue of Industrial Revenue Bonds is included in gross income under §103 of the Internal Revenue Code of 1954, that issue is required to be registered under, and it, and all purchases, sales, transactions and dealings in and with that issue are subject to all of the provisions of the Securities Act of 1933, the Securities Exchange Act of 1934 and the Trust Indenture Act of 1939.

If an issue of Industrial Revenue Bonds is subject to the provisions of the Securities Act of 1933, the Securities Exchange Act of 1934 and the Trust Indenture Act of 1939, then any policy of insurance against a default in the payment of interest or principal is deemed to be a separately issued security, and is also subject to all of the provisions of said Acts.

Count One of the Complaint alleges the violation of Section 10b of the Securities Exchange Act of 1934 (15 U.S.C. §78j[b]) and Rule 10b-5.

Count Two of the Complaint charges fraud, deceit or reckless

and grossly negligent conduct under the laws of Oklahoma and New York.

Count Three alleges a violation of Section 12(1) of the Securities Act of 1933 (15 U.S.C. §771[1]), alleging that said defendants have each, directly or indirectly, singly or in combination with others, either as participants, principals, co-conspirators and/or as aiders and abettors sold unregistered securities (the Osage Bonds).

Count Four alleges that the defendants have violated Section 12(2) of the Securities Act of 1933 (15 U.S.C. §771[2]) in that said defendants have each, directly or indirectly, singly or in combination with others, either as participants, principals, co-conspirators and/or as aiders and abettors offered or sold securities by use of means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus and oral communications which included untrue statements of material facts and omitted to state material facts necessary in order to make the statements, in light of the circumstances under which they were made, not misleading, which untruths and omissions were not known to plaintiff at the time it became pledgee of the Osage Bonds.

Count Five alleges that the defendants have violated the provisions of Section 17(a) of the Securities Act of 1933 (15 U.S.C. §77q [a]) in that said defendants have, directly or indirectly, singly or in combination with others, either as participants, principals, co-conspirators and/or as aiders and abettors, by use of means or instruments of transportation or communication in interstate commerce or by use of the mails employed a device, scheme or artifice to defraud, made untrue statements of material fact and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading and engaged in transactions, practices and courses of business which operated as a fraud and deceit upon plaintiff in and about the sale and offering for sale of the Osage Bonds.

Count Six alleges the defendants violated the provisions of the Trust Indenture Act of 1939 (15 U.S.C. §77aaa, et seq.) in that said defendants have, directly or indirectly, singly or in combination with others, either as principals, co-conspirators and/or aiders and abettors, sold or offered for sale securities with respect to which no indenture had been qualified under said Act.

Count Seven alleges a claim against the defendant, Rausch, in his capacity as an attorney. Mr. Rausch issued a letter of opinion in which he represented, either expressly or by necessary implication for the language used that the entire consideration for the bond issue had been paid; that said Bonds were legally issues; and that the interest upon the Osage Bonds would be excludable from gross income under Section 103 of the Internal Revenue Code. Plaintiff further alleges that Rausch knew, or should have known by the exercise of reasonable diligence, that said letter of opinion would be used in the sale of the Osage Bonds and relied upon by purchasers of the Bonds. Plaintiff avers that Rausch negligently failed to ascertain that the purchase price for said Bonds had not been paid and that the uses contemplated for the proceeds of the Osage Bond issue would remove the interest upon said Osage Bonds from the income exclusion of Section 103 of the Internal Revenue Code of 1954, which facts were each material facts to ultimate purchasers of said Bonds, or Rausch negligently failed in the issuance of said letter of opinion to advise the true facts relating thereto.

Plaintiff further alleges that in accepting the bonds on behalf of Tower and National, and in advancing funds and becoming the pledgee of the bonds, that the plaintiff relied upon the opinion of the defendant Rausch which was printed upon said bonds.

The various and sundry motions were referred to the United States Magistrate for hearing, Findings and Recommendations.

The Magistrate has filed his Findings and Recommendations and the defendants, Donald F. Roberts, Julian M. Riley, Multi-Products, Inc., Power Resources International, Federal Investment Corporation, American Indian Development Corporation, Osage Development Authority,

E. V. Johnson and Russell A. Howard have filed their exceptions (objections) to the Findings and Recommendations of the Magistrate. The parties have thoroughly briefed their respective positions and the Court has carefully perused the entire file, and the matter is now ready for dispositive action by the Court.

Various Motion to Dismiss for failure to state a claim have been filed by defendants.

In Bryan v. Stillwater Bd. of Realtors, 578 F.2d 1319, 1321 (10th Cir. 1977) it was said:

....A rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted puts in issue the legal sufficiency of plaintiff's declaration by admitting all of the well pleaded facts in the plaintiff's pleadings, thereby taking the position that even if all of those allegations are true, still no relief is warranted. Wright and Miller, Federal Practice and Procedure, Rule 12, §§1355, 1356, 1357, pp. 587-617. The test most often applied to determine the sufficiency of the complaint to state a claim is set forth in Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957):

....In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief.

355 U.S., at pp. 45, 46, 78 S.Ct., at p. 102

(case citations omitted)

On a motion to dismiss, facts well pleaded are taken as correct, but allegations of conclusions or of opinions are not sufficient when no facts are alleged by way of the statement of the claim. (case citations omitted).

See also Mitchell v. King, 537 F.2d 385, 386 (10th Cir. 1976); In Re Home-Stake Production Co. Securities, etc., 76 F.R.D. 337, 347 (USDC. ND Okl. 1975); Jackson v. Alexander, 465 F.2d 1389, 1390 (10th Cir. 1972); Williams v. Eaton, 443 F.2d 422, 432 (10th Cir. 1971).

Additionally a complaint should not be dismissed unless it appears to a certainty that the plaintiff is not entitled to any relief under any state of facts which could be proven in support of the claim. The Court, in reviewing the sufficiency of the complaint on motions such as these, must consider not whether the plaintiff will ultimately prevail, but whether it should later be

entitled to offer evidence in support of its claim. *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Ballou v. General Electric Co.*, 393 F.2d 398 (1st Cir. 1968); *Moore's Federal Practice and Procedure*, Vol. 2A, ¶12.08.

The Court finds, under the criteria hereinabove set forth, that the complaint of the plaintiff is sufficient and the Motions to Dismiss for Failure to State a Claim should be overruled.

Various other motions to dismiss have been filed in this litigation, which can be catagorized as follows:

1. Motion to Dismiss for Lack of Subject Matter Jurisdiction. This Motion is directed to the Third, Fourth and Sixth Claims asserted by the plaintiff.
2. Motion to Dismiss for "Lack of Purchaser" Status.
3. Motion to Dismiss First and Fifth Claims for Relief for Failure to Comply with Rule 9(b) of the Federal Rules of Civil Procedure.
4. Motion to Dismiss on Ground that Plaintiff is Not the Real Party in Interest.
5. Motion of Johnson and Howard to Dismiss, or in the alternative, Motion for Summary Judgment.
6. Motion of Osage County to Dismiss and Supplemental Motion to Dismiss. (Note: The Magistrate recommended that this Motion be sustained and no objection has been filed to such recommendation.)

The Court having heretofore determined that the Motions to Dismiss for Failure to State a Claim should be overruled, the Court will turn, ab initio, to the Motion to Dismiss for Lack of Subject matter Jurisdiction, directed to the Third, Fourth and Sixth Claims.

In *Wright & Miller, Federal Practice and Procedure*, Vol. 5, §1636, it is stated.

....The general rule, therefore, is that a pleading's allegations of jurisdiction are taken as true unless denied or controverted by the movant. Thus, if the movant fails to contradict the pleader's allegations of subject matter jurisdiction in his motion to dismiss under Rule 12(b)(1), then he is presumed to be challenging the pleading's sufficiency under Rule 8(a)(1), and the allegations of the pleading pertaining to jurisdiction are taken as true. But if the movant, either in his motion or in any supporting materials, denies or controverts the pleader's allegations of jurisdiction, then he is deemed to be challenging the actual existence of subject matter jurisdiction, and the allegations of the complaint are not controlling.

Turning the instant motion, Industrial Revenue Bonds are securities within the meaning of the Securities Act of 1933 (15

U.S.C. §77a et seq.), the Securities and Exchange Act of 1934 (15 U.S.C. §78a et seq.) and the Trust Indenture Act of 1939 (15 U.S.C. §77aaa, et seq.)

Under §3(a) of the Securities Act of 1933 (15 U.S.C. §77[a]) and §3a(12) of the Securities Exchange Act of 1934 (15 U.S.C. §78c [12]), Industrial Revenue Bonds are required to be registered with the SEC if the interest upon such bonds is taxable as income under the provisions of §103 of the Internal Revenue Code of 1954 (26 U.S.C. §103). Pursuant to §304(a)(4) of the Trust Indenture Act of 1939, if securities are subject to the registration requirements of the Securities Act of 1933, they must be issued in compliance with the requirements of the Trust Indenture Act (15 U.S.C. §77ddd[a][4][B]).

Section 103(c)(1) of the Internal Revenue Code of 1954 provides that interest upon Industrial Revenue Bonds (termed therein as Industrial Development Bonds) is taxable (and the bonds thereby subject to the numerous requirements of the Federal Securities Act) if, inter alia, less than "substantially all of the proceeds" of the bond issue are used for the acquisition, construction, reconstruction or improvement of land or property of a character subject to depreciation allowance. See also, 26 C.F.R. §1.103-10b.

The moving defendants contend that this Court lacks subject matter jurisdiction over the claims in Counts Three, Four and Six, because the question of whether Industrial Revenue Bonds (such as the Osage Bonds) must legally be registered with the Securities and Exchange Commission, and comply with the provisions of the Trust Indenture Act can be answered only by a construction of the provisions of §103 of the Internal Revenue Code of 1954 (26 U.S.C. §103). Defendants contend that such "construction" can only be made by the Internal Revenue Service, by reason of 26 U.S.C. §7801(a) which provides:

Except as otherwise expressly provided by law, the administration and enforcement of this title shall be performed by or under the supervision of the Secretary of the Treasury.

It is the contention of the moving defendants that this section and Section 401 of the Employment Security Amendments of 1970, signed into law on August 10, 1970, which amended the Securities Act of 1933, the Securities Exchange Act of 1934 and the Trust Indenture Act of 1939, vest exclusive jurisdiction of such bonds (the Osage Bonds) as to exemption and the interpretation and effect of Section 103(c) with the Secretary of the Treasury. Defendants contend that "[S]ince such bonds as Osage Bonds clearly are exempt from the securities laws but fall under the provisions of the Internal Revenue Code of 1954, as amended, this Court has no duty to enforce nor jurisdiction enforce the revenue laws" and that such duty is required by law to be under the supervision of the Secretary of the Treasury. The defendants further contend, in this connection that "[T]he internal revenue code makes no provision for a right of private action either express or implied."

Title 15 U.S.C. §78(c)(a)(12) provides:

The term "exempt security" or "exempted securities" includes....; or any security which is an industrial development bond (as defined in section 103(c)(2) of Title 26) the interest on which is excludable from gross income under section 103(a)(1) of Title 26 if, by reason of the application of paragraph (4) or (6) of section 103(c) of Title 26 (determined as if paragraphs 4(A), (5), and (7) were not included in such section 103(c)), paragraph (1) of such 103(c) does not apply to such security;....

See also Title 15 U.S.C. §77c(a)(2); Title 15 U.S.C. §77ddd.

This Court has been able to discover only two cases dealing with industrial developments bonds (neither of which are relevant to the instant problem), i.e., Kirkpatrick v. United States, 449 F.Supp. 186 (USDC WD Okl. 1978), and Franke v. Midwestern Okl. Development Authority, 428 F.Supp. 719 (USDC WD Okl. 1976).

The primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated securities market. The focus of the Acts is on the capital market of the enterprise system: the sale of securities to raise capital for profit-making purposes, the

exchanges on which securities are traded, and the need for regulation to prevent fraud and to protect the interest of investors. Because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto.

United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975). At page 849 the Court said:

"[A] thing may be within the letter of the statute and yet not within the statute, because not within the spirit, nor within the intention of its makers." Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).

Ab initio, the moving defendants have not demonstrated to this Court what, if any bearing the existence of an overlapping statute would have in determining whether the activities here involved are subject to the registration provisions of the Securities Act.

Both plaintiff and the moving defendants cite to the following release in support of their respective positions (Securities Act Release No. 5103; Exchange Act Release No. 9106; and Trust Indenture Act Release No. 284):

Sec. 401 of the Employment Security Amendments of 1970.... provides for the amendment of....Securities Act of 1933....Securities Exchange Act of 1934....to reflect the desire of Congress to exempt from....those Acts certain issues of Industrial revenue bonds.

The primary result....from the reference....to paragraph 6 of Sec. 103(c) of the [internal revenue] Code is that industrial revenue development bonds issue in a face amount not exceeding five million dollars will not require registration under the Acts.

A close analysis of Section 103 of the Internal Revenue Code should, however, be made in the case of any particular industrial development bond issue, to determine its eligibility for such tax [an, therefor, registration] exemption.

The Magistrate found:

It is immaterial that the Internal Revenue Service may not yet have ruled on this bond issue. Defendants have the burden of proving their entitlement to the exemption claimed, to be tested by the actual operation of their business, not the words of its enabling documents. SEC v. Ralston Purina Company, 347 U.S. 119 (1953); FTC v. Morton Salt Company, 334 U.S. 37 (1948); Bowers v. Lawyer's Mort. Co., 285 U.S. 182 (1932); SEC v. Children's Hospital, 214 F.Supp. 883 (D. Ariz. 1963); SEC v. American International S. & L. Ass'n, 199 F.Supp. 341 (D.Md. 1961). The failure of an agency to take action is not dispositive of any claim. It does not raise any presumption as to the legality of the acts which have not been investigated.

In paragraph 4, page 3 of their reply brief to the exceptions filed by the defendants, the plaintiff states:

In simplest terms, defendants claim that because they have operated in a security the parameters of which are defined in the Internal Revenue Code, they have found, in effect, a "free zone" in which their illegal acts are inaccessible to scrutiny -- outside of the jurisdiction of the SEC and this Court, they claim, since those bodies are somehow statutorily prohibited from reading the Internal Revenue Code, and, they would certainly claim if pursued by the IRS, outside of that agency's jurisdiction as well since that body may only levy and collect taxes, a matter not at issue in this lawsuit.

The Court is faced with a securities question in the instant litigation---not a tax question. There is no doubt of the authority and jurisdiction of a Court to interpret exemptions such as the one at issue herein concerning a tax refund or deficiency when instituted by or against the taxpayer. This Court can find no authority that a determination of this Court concerning the applicability of the exemption here involved under the Securities Laws would be mandatory as to a determination of the tax exempt status (it is conceded that a ruling by this Court might be persuasive).

The Court is, therefore, of the opinion that the Motion to Dismiss for Lack of Subject Matter Jurisdiction directed to the Third, Fourth and Sixth Claims should be overruled.

The next Motion to Dismiss is directed to "Lack of Purchaser" Status. It is the contention of the moving defendants that plaintiff has failed to satisfy the Birnbaum rule, enunciated in *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2nd Cir. 1952), cert. denied, 343 U.S. 956, in that plaintiff is neither a purchaser nor a seller of the securities in issue. (In this connection, the Magistrate noted in his Findings and Recommendations the following:

Defendants had coupled with this motion claims that the complaint failed to state a proper cause of action and that suit was barred by the statute of limitations. The request for relief under the statute of limitations was withdrawn, without prejudice, upon the oral argument of these motions. The alleged failure to state a cause of action was based upon the same factual and legal arguments as their motion claiming lack of subject matter jurisdiction, and should be denied for the reasons stated in connection with that motion.

In Bradford Securities Processing Services, Inc. v. County Federal Sav., 450 F.Supp. 208 (USDC SD NY 1978), the Court said in pertinent part:

Defendant initially contests plaintiff's standing to prosecute its private securities action, contending that plaintiff is neither a purchaser nor seller of the securities in issue within the guidelines pronounced by the Supreme Court in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975). I disagree.

The complaint characterizes plaintiff as a pledgee for the bonds delivered it by First Federal and held by it as collateral for the sums it advanced therefor on its customer's account. .... In Mallis v. Federal Deposit Insurance Corp., 568 F.2d 824 (2d Cir. 1977), cert. dismissed sub nom. Bankers Trust Co. v. Mallis, \_\_\_ U.S. \_\_\_, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978), the Second Circuit determined that the definition of "sale" in section 3(14) of the Securities Exchange Act of 1934, 15 U.S.C. §78(c)(14), and incorporated into section 10(b) thereof, 15 U.S.C. §78j, and its implementing rule 10b-5, encompassed a pledge of stock which secured a loan....The Second Circuit... and ruled that the plaintiffs were purchasers consistent with the Blue Chip Stamps standards "by virtue of their acceptance of the pledge by [their obligors]." Id. at 830.

Here plaintiff is concededly a pledgee of the bonds in issue. Under Mallis, plaintiff by virtue of its acceptance of the pledge, is a purchaser (albeit a "forced purchaser") entitled to prosecute this suit against defendant...

See also American Bank & Trust Co. v. Barad Shaff, 335 F.Supp. 1276 (USDC SD NY 1972); Jefferies & Company, Inc. v. Arkus-Duntov, 357 F.Supp. 1206, 1213 (USDC SD NY 1973).

The Court, therefore, finds that the Motion to Dismiss for "Lack of Purchaser" Status should be overruled.

The next Motion for consideration is the Motion to Dismiss First and Fifth Claims for Relief for Failure to Comply with Rule 9(b) of the Federal Rules of Civil Procedure, which provides:

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

The motion asserted requests the Court to either compel a more definite statement of plaintiff's First and Fifth Claims for Relief, or dismiss.

In discussing Rule 9(b), it is stated in Moore's Federal Practice, Vol. 2A, ¶9.03:

The requirement of particularity does not abrogate Rule 8, and it should be harmonized with the general directives in subdivisions (a) and (3) of Rule 8 that the pleadings should contain a "short and plain statement of the claim or defense" and that each averment should be "simple, concise and direct". Rule 9(b) does not require nor make legitimate the pleading of detailed evidentiary matter.

The Court has reviewed Counts 1 and 5 and finds that the Motion here under consideration should be overruled. See *Tomera v. Galt*, 511 F.2d 504 (7th Cir. 1975); *duPont v. Wyly*, 61 F.R.D. 615 (USDC Del. 1973). The Court further finds, in this connection, that the Findings and Recommendations of the Magistrate are more than sufficient to defeat the Motion here under consideration (See pages 15 through 21 of the Findings and Recommendation of the Magistrate filed October 27, 1978).

The final motion to dismiss is the Motion to Dismiss or in the Alternative Motion for Summary Judgment filed by the defendants, Johnson and Howard. As indicated hereinabove, E. V. Johnson was the Chairman of the Osage DA and Russell A. Howard was its Clerk.

Chapter 60, §179 of the Laws of Oklahoma (under which the Osage DA was created) states:

The trustee, or trustees, under such an instrument....shall be an agency of the State and the regularly constituted authority of the beneficiary for the performance of the functions for which the trust shall have been created. No trustee or beneficiary shall be charged personally with any liability whatsoever by reason of any act or omission committed or suffered in the performance of such trust or in the performance of such trust or in the operation of the trust property; but any act, liability for any omission or obligation of a trustee, in the execution of such trust, or in the operation of the trust property, shall extend to the whole of the trust estate, or so much thereof as may be necessary to discharge such liability or obligation, and not otherwise.

The Magistrate found:

But plaintiff's complaint alleges violations of substantive Federal law, law which, under Article VI, clause 2 of the Constitution is paramount to conflicting state enactments. Under the Federal system it is beyond the power of any state to grant any person or agency immunity from liability for the violation of Federal law. (Case citations omitted).

The Magistrate found that such a conclusion was especially compelling in this case, since the persons seeking immunity are claimed to have misused and knowingly permitted the misuse of the very public trust from which they seek advantage.

The Court, therefore, finds that the Motion of Johnson and Howard should be overruled.

Additionally, the Court notes that the defendants have moved to dismiss on the ground that plaintiff is not the real party in interest. Defendants allege that W. E. Hutton & Co., Inc., a corporation, which at one time (but not when the claimed loss occurred) had owned the stock of the plaintiff corporation and should be the party bringing this litigation. The Court finds that even if E. W. Hutton had owned the stock of plaintiff when the loss sued upon occurred, BSPS, as a corporation, is a separate, recognizable jural entity, and is fully and legally entitled to bring this action in its own name.

The Court has noted the additional contentions and arguments raised by the defendants in their brief in support of their exceptions (objections) to the Findings and Recommendations of the Magistrate and finds that a consideration of those arguments does not alter the view of this Court that the various and sundry Motions propounded by the defendants, encompassed by this Order, should be overruled.

The Court has additionally noted the requests of the defendants for interlocutory appeal pursuant to 28 U.S.C. §1292(b) as to the various motions, in the event the Court overruled the instant Motions, and this Court finds that, in its discretion, the requests for interlocutory appeal should be denied.

IT IS, THEREFORE, ORDERED that the following Motions are overruled:

1. Motion of defendants to Dismiss for Failure to State a Claim;
2. Motion to Dismiss for Lack of Subject Matter Jurisdiction (directed to the Third, Fourth and Sixth Claims).;
3. Motion to Dismiss for Lack of "Purchaser" Status;
4. Motion to Dismiss on Ground that Plaintiff is not the Real Party in Interest;
5. Motion of Johnson and Howard to Dismiss, or in the alternative, Motion for Summary Judgment.

IT IS FURTHER ORDERED that the exceptions (objections) of the defendants to Findings and Recommendations of the Magistrate be and the same are hereby overruled and the Findings and Recommendations of the Magistrate are adopted and affirmed and incorporated as a part

of this Order.

IT IS FURTHER ORDERED that the defendants request for interlocutory appeals be and the same is hereby denied.

IT IS FURTHER ORDERED that the Motion of Osage County to Dismiss and Supplemental Motion to Dismiss be and the same is hereby sustained. (It is noted that no objections were filed to the Recommendations of the Magistrate with reference to the Osage County Motion).

ENTERED this 11<sup>th</sup> day of June, 1979.



H. DALE COOK, CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

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

TEDDIE D. MARTIN, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
CARL THOMAS COLLINS, BILL )  
F. HUTCHINS, JR., and )  
WILLIAM F. HUTCHINS, M.D., )  
 )  
Defendants. )

FILED

JUL 11 1979

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

NO. 78-C-503-B

ORDER

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

DATED this 11<sup>th</sup> day of JUNE, 1979.

*Red Daugherty*  
UNITED STATES DISTRICT JUDGE

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

BILLY RAY WALTERS, # 90927 )  
 )  
Petitioner Pro Se, )  
 )  
v. )  
 )  
MACK H. ALFORD, Warden, and )  
THE STATE OF OKLAHOMA, et al., )  
 )  
Respondents. )

No. 79-C-7-C

FILED

JUN 11 1979

O R D E R

This is a proceeding brought pursuant to the provisions of Title 28 U.S.C. § 2254 by a state prisoner confined at the Oklahoma State Penitentiary, McAlester, Oklahoma. Pursuant to the Order of this Court, the Attorney General of Oklahoma has filed a Response, in which he argues that petitioner has failed to exhaust his state remedies and that the present writ is substantially similar to one filed by petitioner in this Court in 76-C-644-C. In that case and the present one, petitioner attacked the validity of the sentence imposed on him by the District Court of Tulsa County, State of Oklahoma in Case No. CRF-75-1014, wherein, after a trial by jury, petitioner was found guilty of Burglary, First Degree, After Former Conviction of a Felony, and was sentenced on September 19, 1975 to forty (40) years imprisonment. Petitioner then perfected a direct appeal to the Court of Criminal Appeals of the State of Oklahoma, Case No. F-76-168, which affirmed the Judgment and Sentence on September 13, 1976.

In the petition now before the Court, petitioner demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of rights under the Constitution of the United States of America. In particular, petitioner claims:

- 1) That the trial court erred in admitting gruesome and highly prejudicial photographs depicting injuries sustained by the victim, which had no probative value of any material offense alleged;
- 2) That the trial court erred in allowing the jury to separate after final submission of the case;

- 3) That the sentence imposed was excessive;
- 4) That the trial court failed to instruct on a lesser included offense, over the objections of trial counsel, and that the evidence presented failed to support a conviction for first degree burglary;
- 5) That the state failed to prove that petitioner had broken into the victim's apartment, or that he used force to enter the apartment house, and
- 6) That the trial court failed to admonish the jury to consider the prior felony conviction of the victim, which was admitted on the witness stand, and that her testimony was not supported by strong or competent evidence.

The only issues raised in the direct state appeal of petitioner's conviction were (1) the evidentiary error of admitting prejudicial photographs, (2) allowing the jury to separate after submission of the case and (3) the excessiveness of the sentence. As this Court noted in its Order dismissing petitioner's similar claim in 76-C-644-C, the remaining issues raised in petitioner's federal habeas corpus petitions have not been presented to a state court for review, and the petitioner has not sought post-conviction relief provided by Title 22 Okla. Stat. Annot. § 1080. There is no evidence in the record now before the Court that petitioner has attempted to cure the defect in his last petition.

This Court must, therefore, agree with the Attorney General of Oklahoma. Petitioner's failure to exhaust state remedies by presenting the issues in this petition to a state court for review precludes this Court from acting. Hoggatt v. Page, 432 F.2d 41, 43 (10th Cir. 1970).

Moreover, four of the six issues raised in the petition now under consideration were raised in 76-C-644-C, and should not now be re-considered. Edwards v. State, 436 F.Supp. 480 (W.D.Okla. 1977); Sanders v. U.S., 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963). Those issues were, at any rate, dealt with in the earlier petition. The two new issues raised in this action concern the trial court's failure to instruct on a lesser included offense and its failure to admonish the jury of the victim's prior felony conviction. Both of these are matters of state criminal law, and unless there is a denial of fundamental fairness or the denial of a specific constitutional right, no constitutional issue

is involved. Maglaya v. Buchkoe, 515 F.2d 265, 268 (6th Cir. 1975). Both issues include a claim that the evidence derived failed to support a conviction for first degree burglary, but the sufficiency of evidence is not a constitutional question. Capes v. State of Oklahoma, 412 F.Supp. 1111, 1115 (W.D.Okla. 1975). With no constitutional issues involved, these issues are not the proper subject of a federal habeas corpus review. Sinclair v. Turner, 447 F.2d 1158, 1161 (10th Cir. 1971).

For the foregoing reasons, petitioner's Writ of Habeas Corpus is denied.

It is so Ordered this 11<sup>th</sup> day of June, 1979.

  
H. DALE COOK, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

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

J. A. C. Silvey, Clerk  
U. S. DISTRICT COURT

CONSOLIDATED GEOPHYSICAL )  
SURVEYS, )  
 )  
Plaintiff, )  
 )  
-vs- )  
 )  
STONE CONTAINER CORPORATION, )  
 )  
Defendant. )

No. 78-C-371-C ✓

NOTICE OF DISMISSAL

TO: Stone Container Corporation, defendant, and Claire Eagan Barrett, its attorney.

Please take notice that the above-entitled action is hereby dismissed without prejudice, pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure.

CRAWFORD & JACKSON

By Robert L. Bainbridge  
Robert L. Bainbridge  
1714 First National Building  
Tulsa, Oklahoma 74103

CONSOLIDATED GEOPHYSICAL  
SURVEYS

C. D. Roemer  
C. D. Roemer

James R. New  
James R. New

CERTIFICATE OF MAILING

I hereby certify that on this 11<sup>th</sup> day of June, 1979, I mailed a true and correct copy of the foregoing Notice of Dismissal, postage prepaid, to Claire Eagan Barrett, Hall, Estill, Hardwick, Gable, Collingsworth & Nelson, 4100 Bank of Oklahoma Tower, One Williams Center, Tulsa, Oklahoma 74172, attorney for defendants.

Robert L. Bainbridge  
Robert L. Bainbridge

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 8 1979

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

A. F. BUSH, a/k/a "Skip" Bush )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 FIRST WESTROADS BANK; CHUCK )  
 HALL, an individual; AIR-KAMAN )  
 OF OMAHA, INC., a Connecticut )  
 corporation; DR. JAMES E. )  
 MONTGOMERY and JAMES L. ROLD, )  
 individuals, )  
 )  
 Defendants. )

No. 79-C-375-C

Notice of DISMISSAL

COMES NOW the plaintiff herein, and hereby enters his dismissal without prejudice as to the defendant, Air-Kaman of Omaha, Inc., only, in the above-entitled cause of action.

JONES, GIVENS, BRETT, GOTCHER,  
DOYLE & BOGAN, INC.

By Mac D. Finlayson  
 Mac D. Finlayson  
 201 W. 5th, Suite 400  
 Tulsa, OK 74103  
 (918) 583-1115

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Dismissal, was, on the 5 day of June, 1979, mailed to Mr. Glen Messemer, c/o Air-Kaman of Omaha, Inc., A.T.O. Eppley Air Field, Omaha, NE 68119, with proper postage prepaid thereon.

Mac D. Finlayson  
 Mac D. Finlayson

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

FILED

JUN 11 1979 B

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

RONALD BRADLEY McMINN, )  
 )  
 Plaintiff, )  
 -vs- )  
 )  
 E. M. KIRKLAND, JERRY MCKNIGHT, )  
 and ERIC BAKER, individually and )  
 as police officer in the Police )  
 Department of the City of Tulsa, )  
 Oklahoma; and the CITY OF TULSA, )  
 a municipal corporation, )  
 )  
 Defendants. )

NO. 77-C-141-B

ORDER OF DISMISSAL

NOW on this 8<sup>th</sup> day of June, 1979, this matter comes before the Court for scheduled pretrial conference. Plaintiff appears not; defendants appear by and through their attorney, David L. Pauling.

The Court, having carefully examined all pleadings filed herein, and being familiar with the nature of the controversy herein presented, and the allegations and defenses of the parties hereto, finds:

1. That plaintiff's complaint was filed on April 11, 1977, and this lawsuit has been pending for more than two years;
2. That the defendants herein, on June 23, 1978, requested an order of the Court dismissing this lawsuit for failure to prosecute; said motion was thereafter overruled on the basis of "excusable neglect";
3. That on March 2, 1979, plaintiff was ordered by the Court to obtain new counsel and have counsel file an entry of appearance herein within ten days from said date. Subsequent to the entry of this order, plaintiff has failed, refused and neglected to comply with the terms of the Court's order;
4. That notice of pretrial conference scheduled this date was duly mailed to the plaintiff by the Court on March 30, 1979. Subsequent to the issuance of this notice, plaintiff has had no contact either with the Court or with the defendants' counsel;

5. That the plaintiff's failure this date to appear at the scheduled pretrial conference is not in compliance with the Court's notice of pretrial conference given plaintiff on March 30, 1979;

6. That, considering the foregoing circumstances, it is appropriate for the Court to enter default judgment against the plaintiff pursuant to Rule 32(b) of the United States District Court for the Northern District of Oklahoma;

7. That the defendants have duly served plaintiff with notice as required by Rule 55 F.R.C.P., and plaintiff has made no response thereto to the Court.

IT IS THEREFORE ORDERED THAT, pursuant to Rule 32(b) of the Rules of the United States District Court for the Northern District of Oklahoma, that default judgment be entered herein against the plaintiff, with costs assessed against the plaintiff.

  
\_\_\_\_\_  
H. Dale Cook, Chief Judge  
United States District Court for  
the Northern District of Oklahoma

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

EQUILEASE CORPORATION,

Plaintiff,

v.

HENRY OIL COMPANY, INC., a  
corporation; EARL E. HENRY, JR.;  
and STATE FEDERAL SAVINGS AND LOAN  
ASSOCIATION, a federal savings and  
loan association,

Defendants.

No. 77-C-47-C

**FILED**

JUN 7 1979

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

O R D E R

The Court now considers plaintiff's Application for an Order certifying that the interlocutory order of September 26, 1977, is ripe for review. This is an action seeking recovery from defendants Henry Oil Company, Inc. (Henry Oil) and Earl E. Henry, Jr. (Henry) for alleged defaults in lease agreements, and to recover from defendant State Federal Savings and Loan Association (State Federal) for allegedly wrongfully returning to Henry Oil the proceeds of six savings certificates which had been assigned to plaintiff as security on the lease agreements. Henry Oil and Henry filed voluntary petitions in bankruptcy and were granted stays in this action on October 31, 1977. State Federal's motion for summary judgment was sustained on September 26, 1977, with the issues between plaintiff and defendants Henry and Henry Oil Company remaining to be litigated.

Rule 54(b) of the Federal Rules of Civil Procedure provides that:

When more than one claim for relief is presented in an action, . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of

fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

All defendants have responded that they have no objection to this Application.

State Federal requested in its response to this Application that the bankruptcy schedules and orders of discharge of defendants Henry and Henry Oil be made a part of this record. At the time of State Federal's request, the affirmative defenses of discharge had not been pleaded. Since then, Henry and Henry Oil have pleaded such defenses, and State Federal's request is apparently satisfied.

Appearing that there is no just reason for delay, this Court's summary judgment of September 26, 1977 is hereby certified as a final judgment.

It is so Ordered this 7<sup>th</sup> day of June, 1979.

  
H. DALE COOK, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BERTHA JOHNSON, a/k/a, BERTHA L.  
JOHNSON, TULSA ADJUSTMENT BUREAU,  
INC., COUNTY TREASURER, Tulsa  
County, Oklahoma, BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

CIVIL ACTION NO. 78-C-583-D

FILED

JUN 6 1979

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

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 6<sup>th</sup>  
day of June, 1979, the Plaintiff appearing by Robert  
P. Santee, Assistant United States Attorney; and the Defendants,  
County Treasurer, Tulsa County, Oklahoma and Board of County  
Commissioners, Tulsa County, Oklahoma, appearing by their attorney,  
Deryl L. Gotcher, Jr.; and Defendants, Bertha Johnson, a/k/a,  
Bertha L. Johnson, and Tulsa Adjustment Bureau, Inc., appearing  
not.

The Court being fully advised and having examined  
the file herein finds that Defendant, Bertha Johnson, a/k/a,  
Bertha L. Johnson, was served with Summons and Complaint on  
December 22, 1978; that Defendant, Tulsa Adjustment Bureau, Inc.,  
was served with Summons and Complaint on December 6, 1978; and  
that Defendants County Treasurer, Tulsa County, Oklahoma and  
Board of County Commissioners, Tulsa County, Oklahoma, were  
served with Summons and Complaint on December 4, 1978; all as  
appears from the United States Marshal's Service herein.

It appearing that the Defendants, County Treasurer,  
Tulsa County, Oklahoma and Board of County Commissioners, Tulsa  
County, Oklahoma, have duly filed their Answers on December 26,  
1978; and that Defendants, Bertha Johnson, a/k/a, Bertha L.  
Johnson, and Tulsa Adjustment Bureau, Inc., have failed to answer  
herein and that default has been entered by the Clerk of this  
Court.

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

Lot Eighteen (18), Block Eleven (11), SUBURBAN ACRES SECOND ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded plat thereof.

THAT the Defendant, Bertha Johnson, did, on the 15th day of June, 1976, execute and deliver to the Administrator of Veterans Affairs, her mortgage and mortgage note in the sum of \$9,000.00 with 9 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendant, Bertha Johnson, made default under the terms of the aforesaid mortgage note by reason of her failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendant is now indebted to the Plaintiff in the sum of \$8,983.38, as unpaid principal with interest thereon at the rate of 9 percent per annum from April 1, 1978, until paid, plus the cost of this action accrued and accruing.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Defendants, James E. and Hattie M. Henderson, the sum of \$ 0 plus interest according to law for personal property taxes for the year(s)            and that Tulsa County should have judgment, in rem, for said amount, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendant, Bertha Johnson, a/k/a, Bertha L. Johnson, in personam, for the sum of \$8,983.38 with interest thereon at the rate of 9 percent per annum from April 1, 1978, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced

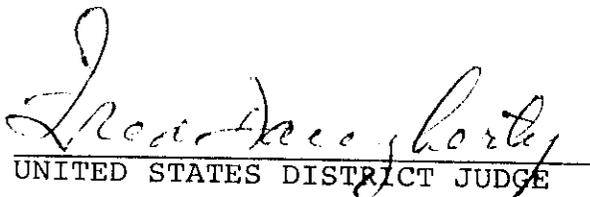
or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Tulsa have and recover judgment, in rem, against Defendants, James E. and Hattie M. Henderson, for the sum of \$ 0 as of the date of this judgment plus interest thereafter according to law for personal property taxes, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendants, Tulsa Adjustment Bureau, Inc., County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma.

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

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

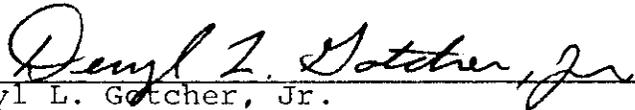
  
UNITED STATES DISTRICT JUDGE

APPROVED

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney

  
\_\_\_\_\_  
ROBERT P. SANTEE  
Assistant United States Attorney

  
\_\_\_\_\_  
Deryl L. Gotcher, Jr.  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

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

MIAMI STONE, INC., )  
 )  
 Plaintiff, )  
 )  
 -vs- )  
 )  
 RUSTIQUE BRICK OF )  
 HOUSTON, INC., )  
 )  
 Defendant. )  
 )  
 )

No. 78-C-397-C

**FILED**

JUN 6 1979

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

JOURNAL ENTRY OF JUDGMENT

Now on this 21st day of May, 1979, the Court being regularly in session, the above entitled cause came on for hearing on plaintiff's Motion for Default Judgment pursuant to Notice.

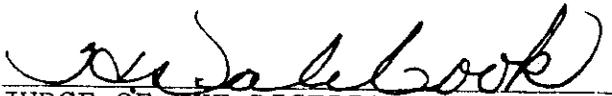
Plaintiff appeared by its attorney of record, Ben T. Owens, and defendant appeared not.

Plaintiff presented its evidence and rested.

The Court having examined the pleadings on file in said cause and having heard the evidence finds that:

1. Defendant has wholly failed to file any responsive pleadings to the Complaint of Plaintiff filed herein and is in default.
2. Notice of hearing on plaintiff's Motion for Default Judgment was duly issued and served upon defendant.
3. Plaintiff is entitled to recover on its open account against defendant in the sum of \$20,947.00.
4. Plaintiff is entitled to recover from defendant the additional sum of <sup>\$1,955.58</sup> ~~\$3,910.97~~, for attorney's fees, which plaintiff has incurred and expended in connection with said account.
5. Plaintiff is entitled to recover from defendant interest at the rate of 10% per annum from this date on each of said sums until each of said sums is paid.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that  
the plaintiff shall have judgment against defendant in  
the sum of <sup>\$22,902.58</sup> ~~\$24,857.87~~, together with interest at the  
rate of 10% per annum thereon from this date until paid.

  
JUDGE OF THE DISTRICT COURT

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

MIAMI STONE, INC., )  
 )  
 Plaintiff, )  
 )  
 -vs- )  
 )  
 RUSTIQUE BRICK OF )  
 HOUSTON, INC., )  
 )  
 Defendant. )

No. 78-C-398-C

FILED

JUN 6 1979

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

JOURNAL ENTRY OF JUDGMENT

Now on this 21st day of May, 1979, the Court being regularly in session, the above entitled cause came on for hearing on plaintiff's Motion for Default Judgment pursuant to Notice.

Plaintiff appeared by its attorney of record, Ben T. Owens, and defendant appeared not.

Plaintiff presented its evidence and rested.

The Court having examined the pleadings on file in said cause and having heard the evidence finds that:

1. Defendant has wholly failed to file any responsive pleadings to the Complaint of plaintiff filed herein and is in default.

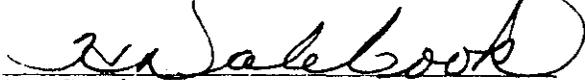
2. Notice of hearing on plaintiff's Motion for Default Judgment was duly issued and served upon defendant.

3. Plaintiff is entitled to recover on its open account against defendant in the sum of \$55,519.80.

4. Plaintiff is entitled to recover from defendant the additional sum of ~~\$3,910.97~~<sup>\$1,955.58</sup>, for attorney fees, which plaintiff has incurred and expended in connection with said account.

5. Plaintiff is entitled to recover from defendant interest at the rate of 10% per annum from this date on each of said sums until each of said sums is paid.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that  
the plaintiff shall have judgment against defendant in  
the sum of <sup>\$57,475.38</sup> ~~XXXXXXXXXX~~, together with interest at the  
rate of 10% per annum thereon from this date until paid.

  
JUDGE OF THE DISTRICT COURT

FILED

JUN 6 1979

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

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

UNITED STATES OF AMERICA,

v.

OTIS ELMER BRIMER,

Movant.

)  
)  
)  
)  
)  
)

79-C-391  
75-CR-83

ORDER

The Movant, Otis Elmer Brimer, has instituted a proceeding pursuant to Title 28 U.S.C.A. §2255 attacking a sentence heretofore imposed by this Court in 75-CR-83. The Court has examined the file and determines that the files and records in the case conclusively show that the prisoner is entitled to no relief, and, therefore, no response need be ordered from the United States of America.

Movant, Otis Elmer Brimer, propounds two grounds for consideration by the Court, i.e., (i) That he should have a reduction in his sentence due to the disparities involved [in connection with this contention he complains that his sentence was more severe than sentences imposed on other co-defendants]; and (ii) that some of the entries on his record in the presentence report have since been expunged and that he is of the opinion that these entries were considered by the Court in imposing the sentence, and thus "enhanced" the sentence imposed.

Initially, it is observed that the time has long elapsed for the consideration of a sentence reduction pursuant to Rule 35.

In *Cochran v. United States*, 567 F.2d 1288 (5th Cir. 1978) the petitioner moved to vacate his sentence, pursuant to §2255, on the ground that the length of his sentence, which was greater than that of his two codefendants, must have been based on his prior invalid convictions. The Court said:

In his §2255 motion, the appellant argued that because he received a greater sentence than his two codefendants, the trial court must have relied on prior invalid convictions in determining his sentence. The district court, in denying relief, certified that the sentence was not enhanced by the existence of the allegedly invalid prior convictions. There is nothing in the record with which to challenge the correctness of the certificate. In light of this certification, the appellant is not entitled to relief. *Rogers v. United States*, 466 F.2d 513 (5th Cir.), cert. denied, 409 U.S. 1046, 93 S.Ct. 546, 34 L.Ed.2d 498 (1972). See also *Jenkins v. United States*, 530 F.2d 1203 (5th Cir. 1976).

In *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 502 (1972), the Supreme Court affirmed the decision of a panel of the Ninth Circuit, 431 F.2d 1292 (9th Cir. 1970), and remanded to the trial court for reconsideration of the defendant's sentence where the trial court had given explicit consideration to two prior convictions which were later held to be invalid under *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

In *Tucker*, supra, the Supreme Court, at page 449 said that "[t]o permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense...is to erode the principle of that case" [*Burgett v. Texas*, 389 U.S. 109, 115, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967)]. In the *Tucker* case, the Court made it clear that it was dealing with "[a] sentence founded at least in part upon misinformation of constitutional magnitude," rather than one imposed in the informed discretion of the trial judge. Three criteria are evident from the *Tucker* case to form the successful predicate for a challenge to a presumptively valid sentence, i.e., (i) a prior conviction rendered invalid by *Gideon*; (ii) the sentencing judge's mistaken belief that the prior conviction was valid; and (iii) enhancement of the defendant's sentence because of it.

In *Lipscomb v. Clark*, 468 F.2d 1321 (5th Cir. 1972), the Fifth Circuit addressed the procedure to be followed in disposing of motions in situations raising *Tucker*, supra, by stating:

First, the district court should review the records involved in this conviction and determine if, treating the state convictions alleged to have been unconstitutional as void and thus not to be considered in sentencing, the [original] sentence would still be the appropriate sentence .... If [so], an order so setting forth would seem sufficient to comply with the requirements of *Tucker*. If, on the other hand, the district court finds that...the [original] sentence would not be appropriate, then it should grant petitioner an evidentiary hearing and allow him to present evidence on his claim that the prior convictions in question were unconstitutional due to *Gideon*. If the district court is convinced of the validity of petitioner's allegations after such a hearing, it may then properly resentence.

All ten Circuits that have considered the question have continued to adhere to their adoption of the *Lipscomb* approach. (See footnote 7 at page 1374 of *Farrow v. United States*, 580 F.2d 1339 (9th Cir. 1978). Tenth Circuit Court of Appeals cases so holding are *United States v. Green*, 483 F.2d 469 (10th Cir. 1973, cert. denied 414 U.S. 1071, 94 S.Ct. 583, 38 L.Ed.2d 477 (1973)); *Johnson v. United States*, 485 F.2d 240 (10th Cir. 1973); *United States v. Bambulas*, 571 F.2d 525 (10th Cir. 1978); *Watson v. United States*, 575 F.2d 808 (10th Cir. 1978). In *Watson*, supra, the Court said:

Under circumstances somewhat similar to the case at bar this court has accepted disclaimers of consideration of misinformation in sentencing. In *Hampton v. United States*, 504 F.2d 600 (10th Cir. 1974) the §2255 petitioner argued that his presentence report contained incorrect information regarding prior convictions. In denying petitioner a resentence, the district court held that "The matters in the presentence report now criticized by the petitioner were not determinative matters in the imposition of sentence and upon present reconsideration of all relevant and proper information and circumstances and without consideration of such matters the sentence is appropriate and should stand." *Id.* at 604. This court affirmed, citing *Johnson v. United States*, 485 F.2d 240, 242 (10th Cir. 1973); *United States v. Green*, 483 F.2d 469 (10th Cir. 1973), cert. denied 414 U.S. 1071, 94 S.Ct. 583, 38 L.Ed.2d 477 (1973). In *Johnson v. United States*, supra, this court in reviewing the denial of a §2255 motion, regarded as conclusive the statement by the district court that it did not rely on any prior convictions, valid or invalid, in pronouncing sentence.

See also *Ennis v. United States*, 428 F.Supp. 265 (USDC WD Okl. 1976).

In *United States v. Eidum*, 574 F.2d 581 (9th Cir. 1973) the Court said at 582:

This court will not refute the judge's own estimation of the deleterious impact of the prior convictions on his determination of sentence. The record shows on its face that the

judge did not consider those convictions in imposing sentence.

To the same effect see *Dukes v. United States*, 492 F.2d 1187 (9th Cir. 1974). In *Wilson v. United States*, 534 F.2d 130 (9th Cir. 1975) the Court said:

*Leano, supra*, created an exception to *Eidum* and *Dukes* providing that where the record of sentencing shows a "reasonable probability" that the prior invalid conviction played a vital role in the fixing of the questioned sentences, a reversal for resentencing was required.

In *Farrow v. United States*, 580 F.2d 1339 (9th Cir. 1978) the Circuit Court undertook to outline the procedure for district courts to follow in §2255 motions claiming Tucker violations, i.e.:

(i) The Tucker opinion clearly contemplates that the §2255 petition will be heard by the same judge as well as the history of §2255 motions, which demonstrates that motions under that section are properly presented to the original sentencing judge.

(ii) The Lipscomb procedure permits the §2255 judge to determine whether, treating the challenged prior convictions as invalid, the original sentence would still be the same, thus obviating the need for a hearing on the issue of validity of the priors. In other words, where the Judge determines that a new sentence formulated without reliance on the challenged priors would nonetheless be the same, a hearing into the validity of the priors is a fortiori not required.

(iii) The judge should make a finding of no enhancement based on his own recollection and the record and his own estimation of the deleterious impact of the prior convictions on his determination of sentence

The Court additionally notes that in the *Farrow* case, *supra*, the Court said:

The Government asserted in its brief on appeal, and again in its suggestion for rehearing en banc, that *Farrow* must be held to have waived his Tucker claim by virtue of his failure to raise his objection to certain of his prior convictions at the time of sentencing or on direct appeal. Without deciding what is the appropriate standard for disposition of these claims of waiver, we note that under the Supreme Court's decision in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), a convict's failure to comply with RedR.CrimP. 32(a)(1) by presenting "any information in mitigation of punishment" at the time of sentencing may waive a subsequent §2255 challenge to his sentence based on such information, absent a showing of cause and prejudice....

In his §2255 motion, movant states:

I have, since being locked up, got some of the incorrect and erroneous(sic) entries(sic) that was on my record expunged. I no longer have those entries which alleged that I was a Federal PV and seven other Entries. There has been about eight or nine entries removed from my record which were untrue but which were taken into consideration at the time I was sentenced and the presentence report was done. I think that I should(sic) be taken back before the court and resented in light of the fact that my record was not what it was thought to be at the time of the sentence.

The record reveals that movant was represented by retained counsel throughout the proceedings before this Court in 75-CR-83.

The Court has reviewed the record and finds, notwithstanding the allegations of the movant, that there was no enhancement of the sentence imposed; that the sentence imposed was just and proper under the circumstances; that the sentence previously imposed would be reimposed if the movant were before this Court for resentencing.

IT IS, THEREFORE, ORDERED that the §2255 motion of the movant herein be and the same is hereby denied.

ENTERED this 6<sup>th</sup> day of June, 1979.

  
\_\_\_\_\_  
H. DALE COOK, CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA



Defendant-appellee was notified on May 9, 1979, to file a brief in this matter, and the file reflects that no brief has been filed, nor extension requested and granted.

The Court finds that the case is now ready for dispositive ruling by the Court.

The Court has carefully persued the entire file submitted, and independently reviewed the facts and the cases cited, and finds that the Findings of Fact and Conclusions of Law and Judgment of the Bankruptcy Judge are not clearly erroneous and are supported and substantiated by law and should be adopted and affirmed on this appeal.

IT IS, THEREFORE, ORDERED that the Findings of Fact, Conclusions of Law and Judgment of the Bankruptcy Judge be adopted and affirmed.

ENTERED this 5<sup>th</sup> day of June, 1979.



H. DALE COOK, CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA



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

VICTORIA ARMSTRONG,

Plaintiff,

vs.

ST. JOHN'S MEDICAL CENTER,

Defendant.

)  
)  
) 78-C-364-C  
)  
)  
)

**FILED**

JUN 5 1979

ORDER

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

Plaintiff seeks relief pursuant to Title 7 of the Civil Rights Act of 1964 (§2000e-5 of Title 42 U.S.C.).

A chronology of events leading up to the Motion to Dismiss presently under consideration is necessary for the disposition of the Motion.

On August 4, 1978, plaintiff submitted to the Clerk her Notice of Right to Sue (dated July 17, 1978); an Affidavit of Financial Status; and an Application for Leave to File Action Without the Prepayment of costs, fees or security and for the Appointment of an Attorney. On August 8, 1978, the Court entered an Order denying the Application for Leave to File Action Without Prepayment of costs, fees, or security, because the Affidavit of Financial Status reflected that the plaintiff was earning \$280.00 per week. At the same time and in the same order the Court denied the application for appointment of attorney. On August 18, 1978, plaintiff filed an Amended Affidavit of Financial Status, stating that she was unemployed and the \$280.00 figure in the first affidavit was the salary she had been making prior to her leaving and/or discharge from employment at the defendant hospital. On August 23, 1978, the Court entered an Order directing that the plaintiff's Application be granted, but again denying the appointment of counsel request. Thereafter, and on September 29, 1978, the Court granted plaintiff's application for the appointment of counsel and appointed Kenneth L. Stainer as plaintiff's

attorney. On December 29, 1978, Kenneth L. Stainer, the appointed attorney, filed a Motion to Withdraw as Court Appointed Attorney, alleging basically lack of cooperation on the part of plaintiff in pursuing the litigation. In his application Mr. Stainer stated:

1. That on the 23rd day of August, 1978, Kenneth L. Stainer was appointed to represent the Plaintiff, VICTORIA ARMSTRONG, in this litigation. That Kenneth L. Stainer immediately gave VICTORIA ARMSTRONG written notice of his appointment and asked said VICTORIA ARMSTRONG to come to his office for a conference as soon as possible. That said VICTORIA ARMSTRONG after considerable time did come to the office of Kenneth L. Stainer and did bring with her certain documents pertaining to the above captioned matter. That VICTORIA ARMSTRONG was advised by Kenneth L. Stainer that she must furnish to him a signed written statement stating therein all pertinent facts of which she relied upon to sustain her cause of action against the Defendant, ST. JOHN'S MEDICAL CENTER. That although reminded many times that she must furnish this statement, she has to this date not complied with this request.

2. That on the 28th day of December, 1978, Kenneth L. Stainer talked to the Plaintiff, VICTORIA ARMSTRONG, by telephone. That Movant requested VICTORIA ARMSTRONG to come to his office and attempt to get a petition together in order that the same might be filed or in the alternative to give Kenneth L. Stainer authority to dismiss her cause of action against ST. JOHN'S MEDICAL CENTER. That the Plaintiff, VICTORIA ARMSTRONG, replied to Kenneth L. Stainer that she did not have time to come to his office and had not prepared the statement of which he requested. Said VICTORIA ARMSTRONG further stated that she had called an attorney in the State of New Mexico and she would do nothing until she received advice from said attorney.

On December 29, 1978, the Court entered an Order granting Mr. Stainer leave to withdraw and ordered that the plaintiff file her complaint within 10 days of the order, or the case would be dismissed for failure to prosecute. On January 5, 1979, plaintiff filed a hand written instrument, which was treated as a complaint, and on January 10, 1979, summons was issued, said summons being served on January 11, 1979.

The defendant filed a Motion to Dismiss on the grounds that the litigation was not commenced within 90 days of receipt by plaintiff of a Right-to-Sue Letter (lack of jurisdiction); that the complaint fails to comply with the requirements of Rule 8 of the Federal Rules of Civil Procedure; and that the complaint (if arguendo the instrument of the plaintiff can be considered a complaint) fails to state a claim upon which relief can be granted.

The Motion was referred to the United States Magistrate for Findings and Recommendations. The Magistrate had a hearing, and, thereafter filed his Findings and Recommendations that the Motion to Dismiss be overruled. Defendant filed objections to said Findings and Recommendations and the matter is now ready for review and dispositive ruling by the Court.

The Court has first reviewed the cases relied on by the defendant in support of its contention that the action was not timely filed within the 90-day period following receipt by the Plaintiff of her Right-to-Sue Letter.

In *Archuleta v. Duffy's Inc.*, 471 F.2d 33 (10th Cir. 1933) the plaintiff commenced her action within the statutory thirty days but named an incorrect defendant. The Court held that the action by the plaintiff did not constitute a misnomer and that the trial court erred in allowing the plaintiff to amend her complaint to designate the correct defendant after the thirty day period had expired.

In *Melendex v. Singer-Friden Corporation*, 529 F.2d 321 (10th Cir. 1976), plaintiff received her Right-to-Sue letter on March 13, 1974 (90 days terminated on June 11, 1974). Plaintiff filed his complaint on June 12, 1974, and the Tenth Circuit Court of Appeals affirmed the dismissal of the claim, stating that "[A]lthough 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 judicial yielding of statutory limitation for purposes peculiar to the Civil Rights Act." It is interesting to note the comment of the Court as to equitable consideration, wherein it was said:

The trial court noted, as do we, that the cases cited by plaintiff, where courts have held that equitable considerations warranted a tolling of the statutory limitation, involved factual backgrounds of judicial inaction or Commission statutory dereliction or administrative delay, all being matters beyond the control of the plaintiff.

In *Cleveland v. Douglas Aircraft Company*, 509 F.2d 1027 (9th Cir. 1975), plaintiff received the Right-to-Sue Letter on March 26, 1968 and his court-appointed attorney filed a complaint in the Court on April 9, 1968. The case was held in abeyance pending decision on a limitation question in another suit. After that case was decided the EEOC sent a letter to plaintiff explaining the decision in the case and advising plaintiff that he was "free" to move to dismiss the complaint without prejudice to allow the Commission to exhaust administrative process. Plaintiff did dismiss his case and a second Right-to-Sue Letter was issued on September 9, 1971 and plaintiff once again filed suit. The Court held that plaintiff had not commenced his action within 30 days of the right-to-sue letter of March 26, 1968, finding the EEOC had no statutory authority to issue the second right-to-sue letter

In *Hinton v. CPC International, Inc.*, 520 F.2d 1312 (8th Cir. 1975) the EEOC issued its right-to-sue letter and it was received by the plaintiff on July 19 or 20, 1973. From July 17, 1973, through October 15, 1973, the EEOC was actively engaged in conciliation negotiations with defendant. One week prior to the expiration of the 90 day period, plaintiff discussed the approaching expiration date with defendant's attorneys and an agreement was reached whereby defendant agreed not to raise the 90 day limitation as a defense if the case were filed after October 15 but prior to November 15. By way of another agreement, the filing date was extended to December 17, 1973. The complaint was actually filed December 20, 1973, some 150 days after the right to sue notice was received, and the Court, on its own motion, dismissed the action. The Circuit Court, in affirming said:

In *Huston v. General Motors Corp.*, 477 F.2d 1003, 1006 (8th Cir. 1973) we said:

We agree that the time limitation imposed by [42 U.S.C. §2000e-5(f)(1)] generally bars any civil proceeding which is not initiated within 30 days after the complaining party receives a right-to-sue letter from the EEOC.

The Court held in *Huston*, however, that an application to the court for the appointment of counsel within the 30 day period

constituted a "bringing of the civil action under Title VII." 477 F.2d at 1008. The issue of whether the filing period could be extended on equitable grounds was not decided because it was held that the application for appointment of counsel constituted a bringing of the action within the specified time period.

The circuit courts of appeal which have considered the issue have uniformly held that the 90-day period found in 42 U.S.C.A. §2003-5(f)(1) is jurisdictional and mandatory. (case citations omitted). However, some courts have relaxed somewhat the pleading requirements in determining what constituted a bringing of the action. In *Harris v. Walgreen's Distrib. Center*, 456 F.2d 588, 592 (6th Cir. 1972), the court held that an application for appointment of counsel pursuant to 42 U.S.C. §2000e-5(e) tolled the statutory period in Title VII suits until the motion was disposed of. (case citations omitted). The mere filing in the district court of the right-to-sue letter by plaintiff within the specified time period has been held to an initiation of the action which satisfies 42 U.S.C. §2000e-5(f)(1) despite the fact it does not comply with the requirements for pleadings found in the Fed.R.Civ.P. (case citations omitted)

The Court found in the instant case that plaintiff made no contact whatsoever with the Court within the jurisdictional 90 day period and affirmed the dismissal.

In *Harris v. National Tea Company*, 454 F.2d 307 (7th Cir. 1971) plaintiff was issued a right-to-sue notice that she had 30 days within which to institute an action. Plaintiff initially requested the appointment of an attorney, which was denied. She once again petitioned for the appointment of an attorney, which was allowed and an attorney was appointed. The first application for the appointment of an attorney was 6 days after the receipt of the right-to-sue notice; the second application was 36 days after such receipt and 6 days after the expiration of the 30 day period. The complaint was filed 85 days after receipt of the right-to-sue notice, and 47 days after the date when the attorney was appointed on the second application. The Court said:

Thus, the court evidently recognized that it erred in its denial of the first application [first application was denied on the ground that the Commission had not made a finding of a reasonable cause], which was corrected by its allowance of the second. While the court did not so state, it must have considered the order entered on the second application as *nunc pro tunc*. On this basis we hold that the running of the 30-day period was stayed when her first application was improperly denied, but it again commenced to run when an attorney was appointed on her second application. This means that her attorney had 24 days in which to commence an action by the filing of a complaint. Her complaint, however, as noted, was not filed until 47 days after the attorney was appointed.

In *Goodman v. City Products Corp., Ben Franklin Div.*, 425 F.2d 702 (6th Cir. 1970), plaintiff did not file suit until 31 days after the receipt of the right-to-sue notice. The Court said:

As regards jusicial extension of the time limitation to further the remedial purpose of the legislation, it is sufficient to cite the following language from the United States Supreme Court case of *Kavanagh v. Noble*, 332 U.S. 535, 68 S.Ct. 235, 92 L.Ed. 150 (1947), where, in dealing with a limitation provision in the tax law, the Court had this to say:

Such period are established to cut off right, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. *Rosenman v. United States*, 323 U.S. 658, 65 S.Ct. 536, 89 L.Ed. 535. Remedies for resulting inequities are to be provided by Congress, not the courts.

To the same effect see *Genovese, III v. Shell Oil Company*, 488 F.2d 84 (5th Cir. 1973), where plaintiff commenced his action after the expiration of 30 days.

In *Swails v. Service Container Corporation*, 404 F.Supp. 835 (USDC WD Okl., 1975) the Court held that unless tolled on recognized equitable grounds the time limit for filing a private action set out in 42 U.S.C. §2000e-5(f)(1) must be complied with, stating:

None of the traditional equitable grounds for tolling a statute of limitations: disability, fraudulent concealment, evasion of process, etc. appears to be present herein. As a general rule, in the case of a statutorily created right, a limitation period will be tolled in a given situation if the Congressional purpose behind the legislation will thereby be effected.

In *Hankins v. Fansteel Metals, Inc.*, 425 F.Supp. 509 (USDC ED Okl., 1978), in holding that plaintiff's case was not timely filed, the Court said:

In the case at hand, plaintiff admits that he received his notice of right to sue regarding defendant Fansteel on April 28, 1977, more than 90 days prior to the institution of this action on November 30, 1977. There can be no doubt, in light of plaintiff's admission, that this lawsuit was untimely filed under §2000e-5(f)(1). Plaintiff's reliance on *Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), for the proposition that failure to comply with the 90 day requirement is not fatal to instituting suit is misplaced; *Dartt* involved a construction of a different federal statute, the Age Discrimination in Employment Act, 29 U.S.C. §626(d). Moreover, this is not a case involving a factual background of judicial inaction, commission statutory dereliction or administrative delay, wherein courts have held that equitable considerations warrant a tolling of the statute of limitations. See *Melendez v. Singer-Friden Corp.*, 529 F.2d 321, 324 n.2 (10th Cir. 1976). The matters leading to the delay in filing this suit were not matters beyond the control of plaintiff, ....

in *McNeal v. General Motors Corp.*, 6 FEP 749 (USDC Kans. 1972) plaintiff received his right-to-sue letter on March 18, 1972. On April 17, 1972 (the 30th day following the receipt of the notice) plaintiff lodged with the Clerk (i) the notice of right-to-sue; (ii) a form complaint letter signed by the plaintiff and Laurence M. Jarvis, his attorney. Eleven days thereafter the formal complaint was filed. The Court dismissed the case stating:

Our view of the cases upon which plaintiff relies discloses situations where the court itself was responsible for the delay in filing of a complaint because of its failure to act expeditiously or where there was extenuating circumstances attributable to the court's action or inaction. In such instances equitable principles have been applied to permit a plaintiff to avail himself of the remedy provided....

In *Steadman v. Hundley*, 421 F.Supp. 53 (USDC ND Ill. ED, 1976) the Court said:

Although the ninety day limitations period is jurisdictional, the rule in this circuit is that a pro se plaintiff who requests court-appointed counsel tolls the limitations period until the court appoints an attorney for him. *Harris v. National Tea Co.*, 454 F.2d 307 (7th Cir. 1971). Applying this rule to the facts of this case, the ninety day period was running from May 16 to May 28, and then from October 23 to December 2, when the amended complaint was filed. The amended complaint thus named all defendants within the 90 days, and defendants' motion to dismiss on this ground is denied.

In *Pace v. Super Valu Stores, Inc.*, 55 F.R.D. 187 (USDC SD Iowa, CD 1972), the Court said:

There seems to be agreement that if the aggrieved party does nothing within the thirty day period, action is barred by statute. (case citations omitted).

However, time after time ordinary laymen acting on their own without legal assistance and guided by misleading instructions from the EEOC have filed in a United States District Court some, if not all, of the papers filed by plaintiff here believing they thus complied with the statutory time limitation. The Courts have reached widely varying results in applying the statute.

Some Courts have applied the statute of limitations strictly by pointing out that such filing did not comply with Federal Rules of Civil Procedure 3 and 8 and as no action has been commenced within the thirty day period dismissal was required. *Harris v. National Tea Company* (7th Cir., 1971), 454 F.2d 307, 312; *Brady v. Bristol-Meyers* (E.D.Mo., 1971), 332 F.Supp. 995, 998-999, rev'd on other grounds (8th Cir. 1972) 459 F.2d 621.

Most courts, however, have refused to apply the statute of limitations strictly and for various reasons have refused to dismiss plaintiff's action. *Harris v. Walgreen's Distribution Center* (6th Cir. 1972), 456 F.2d 588, 592; *Reyes v. Missouri-Kansas-Texas R.R. Co.* (D.Kan., 1971), 53 F.R.D.

293, 296; Rice v. Chrysler Corporation (E.D. Mich., 1971), 327 F.Supp. 80, 84; Prescod v. Ludwig Industries (N.D.Ill., 1971), 325 F.Supp. 4146, 416; McQueen v. E.M.C. Plastic Company (E.D.Tex. 1969), 302 F.Supp. 881, 884-885; Witherspoon v. Mercury Freight Lines, Inc. (S.D. Ala., 1968), 59 CCH Lab.Cas. ¶9218.

It has also been held that the letter filed (Notice of Right to Sue) constituted the bringing of an action. Austin v. Reynolds Metals Co. (E.D.Va. 1970), 62 CCH Lab.Cas. ¶9408.

The statutory scheme contemplates that a layman, unassisted by trained lawyers, initiate the lawsuit. Under such circumstances technicalities are particularly inappropriate. Love v. Pullman Co. (1972) 404 U.S. 522, 92 S.Ct. 616, 30 L.Ed.2d 679.

This law is a remedial one, and the Congressional purpose would not be furthered by making plaintiffs of the kind with which we are concerned, members of the working class generally without substantial higher education, dot every 'i' or cross every 't' on their way to the courthouse. Antonopulos v. Aerojet General Corporation (E.D.Cal.1968), 295 F.Supp. 1390, 1395

Without decideing whether such filing alone would meet the requirement for bringing an action under the Federal Rules of Civil Procedure, the Court is of the opinion that the filing of all of the above papers did constitute the bringing of an action within the meaning of 42 U.S.C. §2000e-5(e). Certainly they are not in the form ordinarily expected of a professionally prepared complaint, but they can be read together to state jurisdictional grounds, plaintiffs claim and a demand for equitable relief as requiried by Fed.R.Civ.P. 8. Notice pleading requires no more. If counsel is appointed he can ammend the complaint to put it in more professional form....

In Huston v. General Motors Corporation, 477 F.2d 1003 (8th Cir. 1973), the Court held that a plaintiff, who had timely filed documents requesting appointment of counsel and right to proceed without payment of fess, costs or security, but whose appointed counsel did not file formal complaint until approximately one month after expiration of the specified time period had timely initiated the proceeding.

In two cases in the Norther District of Oklahoma, the Judge held that the filing, within 30 days of receipt of notice of right to sue from EEOC of application for the appointment of counsel and leave to file action without the prepayment of costs was sufficient compliance with the 30-day filing period, there being no showing that plaintiff was dilatory in pursuing the cause of action.

Shaw v. National Tank Co., 3 FEP 712 (USDC ND Okl., 1971); Island v. W. W. Grainger, Inc., 3 FEP 647 (USDC ND Okl. 1971).

In *Wrenn v. American Cast Iron Pipe Co.*, 575 F.2d 544, 546-547 (5th Cir. 1978), rehearing en banc denied 8/9/78, 578 F.2d 871, the Court said:

....Admittedly the limitation period is mandatory, and plaintiffs who do nothing to call their case to the attention of the district court before the period runs will suffer dismissal. *Genovese v. Shell Oil Co.*, 488 F.2d 84 (5th Cir. 1973); *Goodman v. City Products Corp.*, 425 F.2d 702 (6th Cir. 1970); *Stebbins v. Nationwide Mutual Insurance Co.*, 469 F.2d 268 (4th Cir. 1972), cert. denied, 410 U.S. 939, 93 S.Ct. 1403, 35 L.Ed.2d 606 (1973). Significant authority holds, however, that, in the special context of Title VII, the statutory requirement that an action be "brought" within the time period is satisfied by presenting a right-to-sue letter to the court and requesting the appointment of counsel. *Huston v. General Motors Corp.*, 477 F.2d 1003 (8th Cir. 1973); *Pace v. Super Valu Stores, Inc.*, 55 F.R.D.187 (S.D.Iowa 1972); *McQueen v. E.M.C. Plastic Co.*, 302 F.Supp. 881 (E.D.Tex.1969); *Austin v. Reynolds Metals Co.*, 327 F.Supp. 1145, 1147-1151 (E.D.Va. 1970); see Annot. 4 A.L.R.F. 833 at §12[c], [d]. The court may then, as it did here, specify an extending time for more exact requirements of pleading.

Assuming, arguendo, that the application for the appointment of counsel tolled the running of the 90-day period, the plaintiff then had 76 days left in which to file suit after the Court appointed counsel for her (plaintiff sought initially appointment of counsel on August 4, 1978, and against on August 18, 1978, and said application was finally granted on September 29, 1978), plaintiff had 76 days to file her complaint after counsel was appointed, the time for filing such complaint expiring on December 13, 1978. Mr. Stainer asked permission to withdraw as hereinabove stated on December 29, 1978. In the order allowing the withdrawal the Court granted plaintiff 10 days within which to file a complaint and she did file a document on January 5, 1979. In this connection, the Court is of the opinion that the order granting plaintiff 10 days to file a complaint was entered without authority and that, giving plaintiff the benefit of the doubt in the instant case, the limitation period ran on December 13, 1978. This is not a case where the plaintiff proceeded throughout the proceedings without benefit of counsel; counsel was appointed to aid plaintiff at no cost or expense to her and she chose not to cooperate with said counsel. There is no showing in this case of any "extenuating circumstances, to excuse

the neglect on the part of the plaintiff in this case and to apply equitable principles to permit plaintiff to avail herself of the remedy afforded by Title 7.

The Court, therefore, finds that the defendant's Motion to Dismiss for lack of jurisdiction should be sustained.

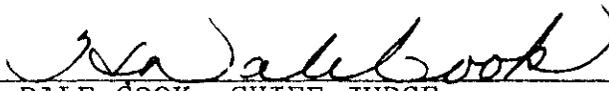
The second ground for dismissal raised by the defendant is that the complaint filed by plaintiff on January 5, 1979, fails to comply with the requirements of Rule 8 of the Federal Rules of Civil Procedure. Although, the finding of the Court hereinabove that the Motion to Dismiss for Lack of Jurisdiction should be sustained is dispositive of this action, the Court will nonetheless consider the other grounds raised by the defendant. In the instrument filed by plaintiff on the 5th of January, giving plaintiff the benefit of doubt, the only discrimination she alleges is that "[I] feel that I was deprived of my job because I felt that everyone was equal". There is no allegation of discrimination by virtue or race, sex or color. The claim asserted by plaintiff is vague and illusory. Further, in the instrument filed by plaintiff she asserts only that she was employed by defendant 4 years and seven months; that she occasionally worked on her scheduled days off; that she worked when her child was ill; that she believed everyone was equal; that she was conspired against and that she did not have a hearing before the "board". Additionally, no jurisdictional elements are alleged in the instrument. In plaintiff's response to the objections to the Findings and Recommendations of the Magistrate plaintiff states that she always wanted to work to help other that were sick; she disputes statements made at to previous employment; she complains that other persons took time off and were not discharged; that her family has lost faith in her; that her mother's death was not noted in a publication of the defendant called "The Pulse" when she died, and that this upset her daughter; that this has ruined her "ego"; and that she liked her job very much.

The Court is, therefore, of the opinion that the instrument filed by the plaintiff on January 5, 1979, designated a complaint, must be dismissed for failure to comply with the requirements of Rule 8 of the Federal Rules of Civil Procedure. Additionally, the Court finds that the complaint fails to state a claim upon which relief can be granted.

IT IS, THEREFORE, ORDERED that the defendants' Motion to Dismiss be and the same is hereby sustained and the Complaint in this action is hereby dismissed.

IT IS FURTHER ORDERED that the objections of the defendant to the Findings and Recommendations of the Magistrate be and the same are hereby sustained.

ENTERED this 5<sup>th</sup> day of June, 1979.

  
\_\_\_\_\_  
H. DALE COOK, CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

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

FILED

JUN - 5 1979

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

Gene L. Hart, )  
Plaintiff, )  
)  
)  
vs. )  
)  
)  
Sidney D. Wise, et al., )  
Defendants. )

No. 79-C-141-C

ORDER

Upon application of the plaintiff, Gene L. Hart, and for good cause shown, it is hereby ordered that the above styled and numbered cause be dismissed against the Honorable Tom Brett, Tom Cornish, and Hez Bussey; District Judge William J. Whistler; Prosecutors Royce Hobbs, S. M. Fallis, Ron Shaffer, and T. Jack Graves.

Dated this 5<sup>th</sup> day of June, 1979.

  
H. DALE COOK  
United States District Judge  
Northern District of Oklahoma

On this 1 day of June, 1979 a true and correct copy of the foregoing Notice of Dismissal was served on the aforementioned parties by mailing.

  
GARVIN A. ISAACS

NOTE: THIS ORDER IS TO BE MAILED  
BY MOVANT TO ALL COUNSEL AND  
PRO SE LITIGANTS IMMEDIATELY  
UPON RECEIPT.



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

JAMES H. (JIM) SHIPMAN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DENZIL ROBBINS, )  
 )  
 Defendant. )

CIVIL ACTION

No. 79-C-58-I

**FILED**

JUN 4 1979

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

ORDER OF DEFAULT JUDGMENT

NOW on this 4 day of June, 1979,  
there comes before the Court for its consideration and ruling  
the Motion for Default Judgment filed herein by the plaintiff  
pursuant to Rule 55 of the Federal Rules of Civil Procedure.

Upon review of the file in this civil action, includ-  
ing plaintiff's certified Motion for Default Judgment and plain-  
tiff's supporting Affidavit, it appears that pursuant to a  
prior Order on April 6, 1979, the plaintiff has obtained service  
upon the defendant, Denzil Robbins, by publication of legal  
notice of this civil action in the Tulsa Daily Legal News on  
April 13, 20 and 27, 1979, in accordance with publication re-  
quirements under applicable Oklahoma statutes. By reason of  
such publication notice, this Court has in person jurisdiction  
over the defendant, Denzil Robbins, and the subject matter  
of this civil action as set forth in plaintiff's complaint.

FURTHER, the Court finds that the plaintiff and his  
attorney did pursue diligent efforts to mail a copy of said  
publication notice and also a copy of the Motion for Default

Judgment to the defendant at his last known address, in compliance with applicable statutory requirements.

FURTHER, the Court finds that said defendant was required to file his answer to the plaintiff's complaint on or before April 24, 1979, that being forty-one (41) days following the first date of publication of said notice in the Tulsa Daily Legal News, but the defendant has failed to answer or otherwise plead in this civil action and is now in default under the Federal Rules of Civil Procedure, and therefore the plaintiff is entitled to proceed to the entry of a default judgment on his complaint.

FURTHER, the Court finds that the plaintiff's complaint is based upon a written promissory note dated February 3, 1977, made and delivered by the defendant to the plaintiff, copy of which is attached to the complaint, and that the plaintiff's prayer for relief herein is for a monetary amount certain based upon the written provisions of said note, to-wit: \$22,500 principal amount past due since February 3, 1979, plus interest at 6% per annum since February 3, 1977, plus the costs of this action including an attorney's fee. The Court finds an attorney's fee in the amount of \$ 2250.00 is reasonable.

WHEREFORE, it is the Order of This Court that Judgment by Default is hereby entered in favor of the plaintiff, James H. (Jim) Shipman and against the defendant, Denzil Robbins, as follows:

Monetary judgment upon the written promissory note dated February 3, 1977, as attached to the complaint herein, in the principal amount of \$22,500.00, together with interest thereon

of 6% per annum since February 3, 1977, plus the costs of this action including a reasonable attorney's fee in the amount of \$ 2250.00, all as provided for in said promissory note.

SO ORDERED.

FRED LAUGHELEY

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UNITED STATES DISTRICT JUDGE

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

IN RE: )  
LEVI SHOUSE, JR., )  
 )  
Bankrupt, )  
VALSPAR CORP., d/b/a )  
PAINTERS SUPPLY OF OKLAHOMA, )  
a Minnesota Corporation, )  
 )  
Plaintiff-Appellant, )  
vs. )  
LEVI SHOUSE, JR., )  
 )  
Defendant-Appellee. )

Bankruptcy No. 77-B-1062  
79-C-27-*BC*

**FILED**

JUN 11 1979

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

ORDER

Now on this 1st day of June, 1979, the above-styled matter came on for hearing pursuant to the motion of the plaintiff-appellant for a Dismissal of the above entitled action with prejudice.

It appears that defendant-appellee has made no counterclaim against the plaintiff-appellant and will not be substantially prejudiced by a dismissal; the court therefore orders that the above-entitled action be dismissed with prejudice.

The Court further finds that the parties have reached a mutually agreeable settlement of this cause and that plaintiff-appellant is not making any claim for court costs expended herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above-entitled action be, and it is hereby dismissed with prejudice; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that there be no award of costs in that the parties have reached a settlement of this cause and further plaintiff-appellant is making no claim for court costs expended herein.

  
JUDGE

MIU:jas  
5/25/79

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

FAUNEAL PERKINS, and Others )  
Similarly situated, )  
 )  
Plaintiff, )

vs )

No. 78-C-26-C

CLIFFORD L. ALEXANDER, )  
Secretary of the Army of the )  
United States of America; )

COL. ANTHONY SMITH, District )  
Engineer, United States Army )  
Corps of Engineers, Tulsa )  
District, Tulsa, Oklahoma; )

KLON D. BUCKLES, Civilian )  
Personnel Officer, United )  
States Army Corps of Engineers, )  
Tulsa District, Tulsa, Oklahoma, )  
 )  
Defendants. )

FILED

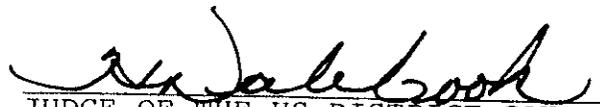
MAY 1 1979

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

ORDER

This cause came on for hearing upon the joint motion of both parties to the above entitled action for an order of dismissal of the action because said action has been rendered moot, subject to the condition that a hearing be held on the issue of what if any attorneys fees are to be awarded to plaintiff's counsel and the Court based upon said joint application, it is

ORDERED that the above entitled action be and the same is hereby dismissed subject to a hearing to be held on the 15<sup>th</sup> day of June, 1979 at 9:15 A.m. for the determination of whether or not attorneys fees should be awarded plaintiff's counsel.

  
JUDGE OF THE US DISTRICT COURT

DATED THIS 1 day of June, 1979.

LAW OFFICES  
UNGERMAN,  
CONNER,  
LITTLE,  
UNGERMAN &  
GOODMAN

1710 FOURTH NATL.  
BANK BUILDING  
TULSA, OKLAHOMA