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FEDERAL PRACTICE AND PROCEDURE

OVERVIEW

Introduction

During this survey period the Tenth Circuit decided more than a hundred cases involving federal jurisdiction, the Federal Rules of Civil Appellate Procedure, and other issues relating to practice in the federal courts. Many of the cases arose under the diversity jurisdiction of the federal courts and are of interest here only in the procedural or jurisdictional context.

Although few of these cases represent issues of first impression, the overview which follows presents a limited discussion of a representative number of cases, to indicate the types of legal issues dealt with by the Tenth Circuit during this period. Following the overview are comments on two areas of greater importance, class action certification and availability of mandamus relief from discovery orders.

Throughout the entire Federal Practice and Procedure section, all references to rules are to the Federal Rules of Civil Procedure, unless otherwise indicated.

I. JURISDICTION AND VENUE

A. *In Personam Jurisdiction; Minimum Contacts*

In *Eckles v. Sharman,*[1] the Tenth Circuit concluded that a California corporation, owner of the Los Angeles Lakers basketball team, had sufficient direct contacts in Utah for the United States District Court for the District of Utah to exercise in personam jurisdiction by service under Utah's long-arm statute.[2]

The extent of defendant California Sports' contacts with Utah were "exhibition and scouting ventures and nation-wide

[1] 548 F.2d 905 (10th Cir. 1977). Eckles was trustee in bankruptcy for Mountain States Sports, owner of the Utah Stars basketball team. In the action, he alleged that defendant California Sports, Inc. had tortiously induced William Sharman to breach his coaching contract with the Utah Stars and sign a new contract with the Los Angeles Lakers.

[2] UTAH CODE ANN. § 78-27-22 (Supp. 1971). Long-arm statutes are state statutes conferring upon courts jurisdiction over a party not served with process if the party has constitutionally sufficient contacts within the state. *See, e.g.*, Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

telecasts,"[3] and this was sufficient contact for the Utah trial court to sustain in personam jurisdiction over the California corporation.

The Tenth Circuit approved this exercise of jurisdiction, stating simply that "there were sufficient direct contacts,"[4] but the court did not state whether any of the three activities by the out-of-state corporation (exhibition and scouting ventures or nationwide telecasts) standing alone would have satisfied the "minimum contacts" requirement.[5]

The "minimum contact" criteria were set forth in *International Shoe Co. v. Washington.*[6] The Supreme Court has ruled that the contacts need not give rise to the cause of action.[7] The trial court in the case at the bar acknowledged this, and correctly gave little or no credence to the fact that California Sports' contacts in Utah were unrelated to the alleged inducement of Sharman to breach his contract.

International Shoe permits extension of in personam jurisdiction to a nonresident if there are minimum contacts, and if local maintenance of the suit would not offend traditional standards of fair play.[8] The Tenth Circuit noted with approval that the trial court had indeed applied "the twin tests of fairness-reasonableness to the defendant on the one side and territorial respect for sister states' due spheres on the other."[9]

B. *Venue*

In *First Security Bank of Utah v. Aetna Casualty and Surety Co.*,[10] the Tenth Circuit considered the application of two venue statutes[11] in a diversity action brought to recover a bond.

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[3] 548 F.2d at 908.

[4] *Id.*

[5] If scouting ventures and nationwide telecasts are sufficient contacts, it would seem that all or most professional sports teams would be susceptible to in personam jurisdiction in all states with similar long-arm statutes.

[6] 326 U.S. 310, 320 (1945).

[7] Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

[8] 548 F.2d at 908.

[9] *Id.*

[10] 541 F.2d 869 (10th Cir. 1976).

[11] Relevant sections are as follows:

28 U.S.C. § 1391(a) (1970) provides:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where

The case had been transferred for improper venue from the United District Court for the Northern Division of Utah to the Central Division "for the convenience of parties and witnesses and in the interest of justice."[12] It was later dismissed for failure to state a claim.

The Tenth Circuit, in applying 28 U.S.C. §§ 1391 and 1393, stated that defendant Aetna was a resident and therefore could be sued in the Northern Division as well as the Central Division "because it is licensed to do business throughout the state."[13] Such residency made venue in the Northern Division proper,[14] and the Tenth Circuit set aside the dismissal. The case was re-transferred to the Northern Division.

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all plaintiffs or all defendants reside, or in which the claim arose.

28 U.S.C. § 1391(c) (1970) provides:

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

28 U.S.C. § 1393(a) (1970) provides:

(a) Except as otherwise provided, any civil action, not of a local nature, against a single defendant in a district containing more than one division must be brought in the division where he resides.

[12] 541 F.2d at 870.

[13] *Id.* at 871.

[14] The Tenth Circuit cited Guy F. Atkinson Co. v. Seattle, 159 F. Supp. 722 (W.D. Wash. 1958), "as holding that a corporation is a resident for venue purposes of any division in which it is incorporated, or licensed to do business, or is doing business." 541 F.2d at 871.

[15] In Cassity v. R.J. Connor, Inc., No. 76-1704 (10th Cir., Apr. 14, 1977) (Not for Routine Publication), the Tenth Circuit considered the jurisdictional mandate of 40 U.S.C. § 270b(b) (1970), a section of the Miller Act, which requires that performance bonds be posted by persons doing certain kinds of contract work for the United States government. Cassity filed suit against R.J. Connor, Inc. and its surety, seeking an award from the performance bond. However, the suit was filed in the United States District Court for the District of Utah, not in Nevada where the contract in dispute was performed. *Id.* at 2.

Citing McDaniel v. University of Chicago, 812 F.2d 583 (7th Cir. 1975), the Tenth Circuit held that 40 U.S.C. § 270b(b) requires that the suit be instituted in "any district in which the contract was to be performed and executed and not elsewhere . . . ." *Id.* at 6. The Utah trial court therefore was correct in dismissing the matter for lack of jurisdiction, since no part of the contract had been performed in Utah.

Plaintiff had argued that the wording of section 270b(b) was merely a venue requirement and that the matter could be brought in any United States district court. *Id.* at 4. In rejecting that logic, the Tenth Circuit said that the statutory language was to be strictly construed. Further, the Tenth Circuit noted that the language of the statute was a clear statement of Congress' intention as to venue *and* jurisdiction. *Id.* at 7.

Secondarily, the Tenth Circuit rejected Cassity's contention that defendant had waived its right to object to improper venue because it had appeared in the case and had not raised the venue objection previously. *Id.* at 7.

C. *Mootness*

In *Napier v. Gertrude,*[16] the Tenth Circuit outlined the circumstances under which a class action may or may not proceed after the named plaintiff's claim has been declared moot.

The named plaintiff, a "child in need of supervision" according to a state adjudication, sought habeas corpus release alleging that she was being held in a state institution under an unconstitutionally vague statute.[17]

The Tenth Circuit upheld the statute and denied habeas corpus, saying that her intervening release from custody had mooted the action. Additionally, the Tenth Circuit said the action was mooted as to the class because the class was not yet certified and the failure to certify, while attributable to a trial error, was not now correctable.[18]

In stating that criterion, the Tenth Circuit rejected the trial court's more simplistic logic that the request for a class action becomes moot when the merits are determined against the named plaintiff.[19] Should the non certification error of the trial court now be corrected, permitting the class to go forward without the named plaintiff?

The Tenth Circuit answered the question, applying a test that considered whether the cause of action was "capable of repetition, yet evading review."[20] Quoting from *Sosna v. Iowa,*[21] the Tenth Circuit stated:

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the District Court can reasonably be expected to rule on a certification

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[16] 542 F.2d 825 (10th Cir. 1976), *cert. denied,* 429 U.S. 1049 (1977).

[17] *Id.* at 826.

[18] *Id.* at 827-28.

[19] Nothing in Rule 23 of the Federal Rules of Civil Procedure indicates the merits of the case should be determinative of whether the class should be certified. . . . Class determination does not become 'moot' when the merits are determined against the named plaintiff . . . .[C]lass members maintain a vital interest in the outcome of any possible appeal. Also, a judgment in a class action is not intended for use only to benefit class members when the representative prevails but is meant to preclude them from further litigating the issue when it is decided against them.

Id. at 827.

[20] *Id.* at 828.

[21] 419 U.S. 393 (1975).

> motion. In such instances, whether the certification can be said to "relate back" to the filing of the complaint may depend upon the circumstances of the particular case and *especially the reality of the claim that otherwise the issue would evade review* (emphasis added).

The Tenth Circuit said that the issue in the case at the bar would not evade review, as members of the class would in some instances "be in state custody for several years and could maintain a personal adverse interest throughout the course of litigation."[23] Therefore the class could not go forward in the face of mootness as to the named plaintiff.

D. *Retention of Jurisdiction in Bankruptcy*

In *Tilco Inc. v. Mobil Oil Corp.*,[24] the Tenth Circuit stated that the trial court properly retained jurisdiction over a Chapter X bankruptcy so that the trustee could reject executory contracts of the debtor well after the assets had been transferred from the debtor.

Ordinarily, it would be expected that the trustee's standing to seek rejection of such executory contracts (for the sale of natural gas) would expire with the bankruptcy's "closing agreement" and the trustee's transfer of the bankrupt's assets.[25] However, the Tenth Circuit stated that the trustee had retained standing because the reorganization plan recognized that the trustee might seek rejection of the executory contracts. Moreover, the bankruptcy court had approved the closing agreement, "which obligated the Trustee to seek rejection of the executory contracts."[26]

The Tenth Circuit noted that the Bankruptcy Act[27] provides that property transferred according to the reorganization plan be free of debtors', creditors' or stockholders' claims "except such claims and interests as may otherwise be provided for in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of such property."[28]

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[23] 542 F.2d at 828.
[24] *Id.*
[25] 558 F.2d 1369 (10th Cir. 1977).
[26] *Id.* at 1371.
[27] *Id.*
[28] 11 U.S.C. § 501 *et seq.* (1970).
[29] 558 F.2d at 1372.

Thus, reorganization courts "have been permitted to retain jurisdiction after transfer of assets to assure the consummation of the approved plan."[29]

E. *Relations Between Federal Courts and the Military*

In *Schulke v. United States*,[30] the Tenth Circuit held that an action for mandamus relief[31] was not available to direct a general court-martial against military personnel.[32] The court noted that a decision whether to prefer military charges against military personnel is discretionary[33] and an internal military affair.[34] Citing a number of prior cases,[35] the court held that "[t]he role of the federal judiciary" in such cases was "narrow and restricted."[36]

F. *Federal-State Jurisdiction Conflicts*

The Tenth Circuit considered the propriety of a state court injunction of federal proceedings in *Aluminum Products Distributors, Inc. v. Aaacon Auto Transport, Inc.*[37] Although the case mainly concerned the validity of a contract arbitration clause, the jurisdictional question arose when the defendant, Aaacon, unsuc-

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[29] *Id.*

[30] 544 F.2d 453 (10th Cir. 1976).

[31] Jurisdiction was based on 28 U.S.C. § 1361 (1970).

[32] Sergeant Schulke had sought to bring court-martial proceedings against former President Richard M. Nixon in 1973. Shortly thereafter, he was referred to Fitzsimmons Army Hospital in Denver for psychiatric evaluation. After being returned to active duty, he sought courts-martial against the persons responsible for his hospitalization; after exhausting the military channels, he filed the instant suit in federal court. 544 F.2d at 454-55.

[33] Mandamus is not appropriate when the act sought to be compelled is discretionary. *See, e.g.*, Scarafiotti v. Shea, 456 F.2d 1052 (10th Cir. 1972) (plaintiff had sought notice before issuance of an I.R.S. summons to a third party).

[34] 544 F.2d at 455.

[35] *E.g.*, Arnheiter v. Chafee, 435 F.2d 691 (9th Cir. 1970) (unsuccessful attempt by plaintiff to convene a court of inquiry to investigate his relief from command Vietnam War); Smith v. Resor, 406 F.2d 141 (2d Cir. 1969) (refusal to review reserve commander's decision that plaintiff's hair was too long; holding, however, that the Army must abide by its own regulations; 406 F.2d at 146); Moore v. Schlesinger, 384 F. Supp. 163 (D. Colo. 1974) (after writing a series of letters to Congress, plaintiff was relieved of his teaching duties and given psychiatric examinations; no showing, however, of abuse of discretion).

[36] 544 F.2d at 455. Several months later, Sergeant Schulke was back before the Tenth Circuit, this time attempting to force the *Lowry Airman*, the base newspaper, to print several advertisements requesting congressional candidates to state their views on "redress of grievances by military personnel." The court held that his suit must fail for the same jurisdictional defects faced by his earlier suit. Schulke v. United States, No. 76-1565 (10th Cir., Mar. 1, 1977) (Not for Routine Publication) at 2, 4.

[37] 549 F.2d 1381 (10th Cir. 1977).

cessfully maintained that the district court[38] must give full faith and credit[39] to a prior New York state court decision[40] that the arbitration clause was valid. The Tenth Circuit held that *Donovan v. City of Dallas,*[41] which held that a state court could not enjoin an in personam action in federal court, was "the complete answer" to the issued raised.[42]

In *Donovan,* the Supreme Court did not decide whether a plea of res judicata could bar the federal proceeding, where the state court determination went to the merits.[43] Unfortunately, Aaacon failed to plead res judicata, relying solely on its full faith and credit argument. Although the Tenth Circuit noted that the full faith and credit argument was distinct from a plea of res judicata, it refused to consider the effect of a successful plea by Aaacon,[44] and thus did not expand the *Donovan* decision in this regard.

The Tenth Circuit also held that federal district courts have no jurisdiction to review a state's refusal to admit a law school graduate to the bar, in *Doe v. Pringle.*[45] The trial court had dismissed the case for lack of subject matter jurisdiction, distinguishing between "constitutional challenge[s] to the state's general rules and regulations governing admission," where federal courts do have federal question jurisdiction, and claims, whether or not based on constitutional grounds, that "the state has unlawfully denied a particular applicant admission."[46]

In an opinion by Judge Barrett, the Tenth Circuit affirmed the trial court's dismissal, holding that Doe's only remedy was

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[38] The plaintiff had originally filed suit in Oklahoma state court. Aaacon removed the case to the Western District of Oklahoma, on the ground that original federal jurisdiction lay under 28 U.S.C. § 1337 (1970), dealing with cases arising under acts of Congress relating to commerce. 549 F.2d at 1382.

[39] *See* U.S. CONST. art. IV, § 1.

[40] Before removal, Aaacon filed suit in New York state court to compel arbitration. 549 F.2d at 1383.

[41] 377 U.S. 408 (1964).

[42] 549 F.2d at 1383.

[43] 377 U.S. at 412.

[44] 549 F.2d at 1384.

[45] 550 F.2d 596 (10th Cir. 1976). Doe, a convicted felon, was denied admission to the Colorado bar " 'on the basis of the proofs submitted on [his] ethical and moral qualifications.' " *Id.* at 597.

[46] *Id.*

review of the Colorado Supreme Court's decision by certiorari to the United States Supreme Court.[47]

Cases in this area can be divided into two classes: those dealing with refusal of admission to a state's bar, and those dealing with state disbarment. In the latter cases, although a federal trial court may not directly review the state disbarment, it may nevertheless re-examine the grounds for state disbarment in determining whether federal disbarment will follow.[48] As a result, these cases are not directly on point with the issue in *Doe,* although Judge Barrett's opinion does not draw a clear distinction and, in fact, relies heavily on *Theard v. United States,*[49] a disbarment case.

Three of the cited cases dealing with disbarment involved attempted direct review of the state disbarment, the respective circuit courts of appeals holding that certiorari to the Supreme Court was the only appropriate means of review.[50] However, in a Supreme Court opinion not cited by Judge Barrett, *Selling v. Radford,*[51] the Court, while reviewing a federal disbarment, gave some indication that it would not review a state disbarment proceeding, even on certiorari.[52] *Theard,* which reached the Supreme Court through the federal system, was also a review of a federal disbarment. It would therefore appear that the disbarment cases provide poor precedent for the issues raised in *Doe.*

Two companion cases concerning review of an admission denial, *Konigsberg v. State Bar*[53] and *Schware v. Board of Bar Examiners,*[54] actually reached the Supreme Court on certiorari from the state courts. In neither case, however, did the Court specifically state that this was the only proper method of review. Of the cases cited by Judge Barrett concerning a challenge to a general admission requirement, only one, *Keenan v. Board of*

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[47] *Id.* at 597, 599.

[48] Theard v. United States, 354 U.S. 278 (1957); Selling v. Radford, 243 U.S. 46 (1917).

[49] 354 U.S. 278 (1957).

[50] MacKay v. Nesbett, 412 F.2d 846 (9th Cir.), *cert. denied,* 396 U.S. 960 (1969); Ginger v. Circuit Court, 372 F.2d 621 (6th Cir.), *cert. denied,* 387 U.S. 935 (1967); Gately v. Sutton, 310 F.2d 107 (10th Cir. 1962).

[51] 243 U.S. 46 (1917).

[52] *Id.* at 50.

[53] 353 U.S. 252 (1957).

[54] 353 U.S. 232 (1957).

Law Examiners,[55] actually discussed the federal jurisdiction issue.[56]

Nevertheless, Judge Barrett's opinion is consistent with every case cited, and is clearer on the jurisdictional issue than most.[57] It represents the logical, if not inevitable, explication of precedent in the area and should be of great assistance to courts in the future in resolving state bar admission issues.[58]

II. PROCEDURE

A. *Rules 12(b) and 56(c)*

In *American Home Assurance Co. v. Cessna Aircraft Co.*[59] and *Torres v. First State Bank,*[60] the Tenth Circuit addressed itself to a common misapplication of rule 12(b)(6) by the district courts; trial courts often "receive, and do not exclude, matters outside the pleadings and then grant a motion to dismiss rather than a summary judgement"[61] as required by rule 12(b).

In *Torres,* plaintiff brought an action under 42 U.S.C. § 1983

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[55] 317 F. Supp. 1350, 1353 (E.D.N.C. 1970) (challenge to residency requirement for admission to North Carolina bar).

[56] In other cases, federal jurisdiction was either presumed or the issue was quickly settled with little or no discussion. *See* Feldman v. State Bd. of Law Examiners, 438 F.2d 699 (8th Cir. 1971) (challenge to bar examination grading procedures); Goldsmith v. Pringle, 399 F. Supp. 620 (D. Colo. 1975) (challenge to Colorado reciprocity rule); Huffman v. Montana Supreme Court, 372 F. Supp. 1175 (D. Mont. 1974) (challenge to Montana's diploma privilege).

[57] After holding that the federal courts had no subject matter jurisdiction in the case, Judge Barrett went on in Part II of the opinion to discuss a number of recent Supreme Court opinions restricting federal jurisdiction in civil rights cases. This lengthy—and totally gratuitous—discussion probably prompted the two concurrences by Judges Breitenstein and Seth, 550 F.2d at 604, which would have limited the holding to lack of subject matter jurisdiction over denial of admission to a state bar.

[58] In a third case concerning federal-state jurisdictional conflicts, Wright v. Douglas, No. 76-1419 (10th Cir., Aug. 29, 1977) (Not for Routine Publication), the Tenth Circuit held that the entire suit was barred in federal court by the eleventh amendment. This was a diversity action for wrongful death, brought against the State of Wyoming, the project supervisor (Douglas) and the principal contractor (Rissler & McMurry Co.) of a highway construction project. The court noted that a waiver of sovereign immunity by a state in state courts does not waive its eleventh amendment immunity in federal courts, *id.* at 4, and that a suit against a state employee acting in his official capacity (defendant Douglas) is also barred, because it seeks a judgment from state funds. *Id.* at 7. Finally, Wyoming's common law of sovereign immunity extended to the contractor, and therefore the federal court was totally without jurisdiction in this case. *Id.* at 10-11.

[59] 551 F.2d 804 (10th Cir. 1977).

[60] 550 F.2d 1255 (10th Cir. 1977).

[61] *Id.* at 1256-57.

(1970) against the defendant bank. Defendant moved for dismissal pursuant to rule 12(b)(6). Although the trial court received depositions and exhibits which it did not exclude, it granted defendant's motion. The Tenth Circuit reversed, holding that the complaint adequately alleged a violation of section 1983, that the good faith of the bank was in issue, and that the good faith issue could not be resolved on a motion to dismiss.[62]

Judge Breitenstein stated the applicable law as follows: (1) When matters outside the pleadings are presented and not excluded, the court must treat the motion as one for summary judgment pursuant to rule 56;[63] (2) noncompliance with the provisions of rule 56 deprives the court of authority to grant summary judgment.[64]

Since the district court had accepted material outside the pleadings and had not complied with the provisions of rule 56(c), one would expect that the inquiry would end there—with reversal of the district court's decision to grant the 12(b)(6) motion to dismiss. But the Tenth Circuit continued its analysis, stating the rule: "If, as a matter of law, the complaint, *without consideration* of matter presented but not excluded, is insufficient, a motion to dismiss is proper."[65] The Tenth Circuit found that the complaint was sufficient in this case.

The Tenth Circuit reaffirmed the *Torres* rule in the *American Home Assurance*[66] case. That case, a diversity action, involved substantive questions of Montana state law and presented essentially the identical issue raised by *Torres*. Judge Breitenstein stated that if the trial court did not *consider* matters outside of the pleadings, the question was whether Montana law permitted plaintiff's recovery.[67] The Tenth Circuit concluded that material questions of fact existed which could not be decided on a motion to dismiss for failure to state a claim.[68]

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[62] *Id.* at 1257.

[63] *Id.* This well settled principle is expressly stated by the last sentence of rule 12(b). *Accord*, Carter v. Stanton, 405 U.S. 669, 671 (1972).

[64] 550 F.2d at 1257. *See* Adams v. Campbell County School Dist., 483 F.2d 1351 (10th Cir. 1973).

[65] 550 F.2d at 1257 (emphasis added). *See* text accompanying note 69 *infra*.

[66] 661 F. 2d 804 (10th Cir. 1977).

[67] *Id.* at 807.

[68] *Id.* at 808.

Since both *Torres* and *American Home Assurance* were reversed despite the Tenth Circuit's inquiry into the possibility of accepted outside material not being considered, it can be hypothesized that the court was merely adding boiler plate to its decision and did not create an exception to the general rule that where outside materials are accepted the trial court must proceed to rule 56. But the *Torres* decision casts doubt on that hypothesis by citing *Utah State University v. Bear, Stearns & Company.*[69] In that case, upon defendant's filing a motion to dismiss, supporting affidavits were filed on each side. The Tenth Circuit did not articulate its reasoning, but held that the granting of a rule 12(c) motion for judgment on the pleadings was proper.

Thus, the Tenth Circuit has apparently created an exception to the rule that a 12(b) motion cannot be granted after outside materials have been received and not excluded. The court's new rule leads to confusion, since it is difficult to know whether the trial judge considered matters received and not excluded. In any event, since a plaintiff is normally free to amend his complaint upon dismissal under rule 12(b)(6), the *Torres* rule will probably not be prejudicial to future plaintiffs affected by it.[70]

B. Statutory Interpleader

In *General Atomic Co. v. Duke Power Co.*,[71] plaintiff General Atomic, a seller of uranium concentrates, sought subject matter jurisdiction pursuant to 28 U.S.C. § 1335 statutory interpleader,[72] alleging that there were adverse claims between two or more of the defendants for uranium in which plaintiff had rights. The Tenth Circuit ruled that the trial court properly decided it lacked subject matter jurisdiction pursuant to the "exacting demands"[73] of the statute: the *res* was not under the control of the person

[69] 549 F.2d 164 (10th Cir. 1977).

[70] 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (1969).

[71] 553 F.2d 53 (10th Cir. 1977).

[72] Named as defendants were four utility companies, with whom plaintiff was under contract to sell uranium, and United Nuclear Corporation. United Nuclear was under contract to supply plaintiff with the quantity of uranium required to fulfill plaintiff's contracts with the utilities. (United Nuclear had been the direct supplier to the four utilities but had assigned its rights under the contracts to General Atomic. United Nuclear retained its duties under the contracts). The lawsuit arose when United Nuclear claimed it was entitled to be released from its obligations under the supply contract or that it was entitled to receive current (inflated) market prices.

[73] 553 F.2d at 56.

bringing the lawsuit,[74] but was in the possession of United Nuclear; secondly, the suit lacked the element of competing claimants[75] since United Nuclear was not asserting entitlement to anything General Atomic had tendered to the district court and because the four utilities were not competing among themselves for the benefit of their individual contracts.

The Tenth Circuit recognized that as a result of the dismissal, plaintiff would be subject to a number of lawsuits involving the potential of conflicting adjudications. But the court concluded that Congress did not intend that interpleader be a cure-all for every multi-party relationship, citing *State Farm Fire & Casualty Co. v. Tashire.*[76]

The court's holding that the action was lacking in adverse claimants may be criticized; a more liberal[77] reading of the statute could have supported a ruling that United Nuclear's claim was adverse to the claims of the utility companies. The utilities claimed that they were entitled to the uranium at the agreed-upon prices; United Nuclear claimed that it could retain the uranium or sell it elsewhere unless it received higher prices. The Tenth Circuit conceded that if General Atomic had the material in its possession the parties might have met the adversary claimants requirement.[78]

C. *Rule 37: Failure to Comply With a Discovery Order*

In *Glezos v. Blackett,*[79] the trial court granted plaintiff's motion for a default judgment, citing defendant's failure to file an answer to interrogatories in compliance with law.[80]

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[74] 28 U.S.C. § 1335(a)(2) (1970) requires plaintiff to deposit the money, property, or obligation sought by the adverse claimants or to deposit a bond payable to the clerk of the court.

[75] 28 U.S.C. § 1335 (a)(a) (1970) requires that two or more adverse claimants claim to be entitled to the money, property, or bond deposited by the plaintiff.

[76] 386 U.S. 523 (1967).

[77] The court stated that plaintiff's theory did not satisfy the "exacting demands" of the statute. *See* text accompanying note 73 *supra.* Other courts have held that the statute should be read liberally. *See, e.g.*, State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967). *See also* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1704 (1972).

[78] 553 F.2d at 57.

[79] No. 76-1225 (10th Cir., Apr. 25, 1977) (Not for Routine Publication).

[80] Plaintiff filed a motion for an order compelling an answer on August 18, 1975. Defendant filed an answer on August 25, 1975. When defendant failed to respond to plaintiff's motion for production of documents and plaintiff's interrogatories on the agreed day, the court ordered that the interrogatories be answered and the documents produced.

Under rule 37, trial judges have authority to enter default judgments in cases where a party fails to comply with a discovery order.[81] The question presented in *Glezos* was whether the trial judge abused his discretion[82] in granting the default judgment under the stated facts. The Tenth Circuit held that the trial court did abuse its discretion in granting plaintiff's motion for default judgment.

The Tenth Circuit reasoned that dismissal as a sanction should be applied only in extreme cases[83] since the Rules of Civil Procedure favor ultimate determinations on the merits. The court ruled that where noncompliance is not willful or in bad faith, but is merely technical, a default judgment should not be granted.[84]

Arguably, the trial court did not abuse its discretion in this case. There is little in the Tenth Circuit's opinion to indicate that the defendant's noncompliance was inadvertent or was due to an inability to comply. The opinion does not disclose whether defendant *ever* complied with the order for production of documents. On the other hand, the trial court could have imposed one or more of the less stringent sanctions available under rule 37.[85]

D. *Rule 42: Consolidation for Settlement*

American Employers' Insurance Co. v. King Resources Co.[86] was an appeal by John M. King (King) of a district court's *en*

Within the time allowed, defendant filed answers to the interrogatories, but they were signed by defendant's attorney rather than defendant (rule 33(a) requires that interrogatories to a party be signed by the party served).

The Tenth Circuit did not make clear whether defendant complied with plaintiff's motion for production of documents.

[81] FED. R. CIV. P. 37(b)(2)(C), 37(d).

[82] *E.g.*, 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2284 (1969).

[83] *See, e.g.*, Murphy v. Fatzer, No. 76-1265 (10th Cir., June 1, 1977) (Not for Routine Publication). In *Murphy*, plaintiff, a law school graduate, appeared *pro se*. Plaintiff's answers to interrogatories were ruled not responsive and plaintiff was ordered to give further answers. Plaintiff failed to comply. Defendant's initial motion to dismiss was denied, but plaintiff was again ordered to answer defendant's interrogatories. Again, plaintiff failed to comply with the order. The trial court's subsequent dismissal was upheld by the Tenth Circuit.

[84] *See* Robinson v. Transamerica Ins. Co., 368 F.2d 37 (10th Cir. 1966).

[85] While any failure to comply with a discovery order brings rule 37 sanctions into play, the reason for the failure is to be considered in determining which sanction is appropriate. The Tenth Circuit determined that the eventual compliance, though technically imperfect, was sufficient to make default judgment inappropriate.

[86] 545 F.2d 1265 (1976). The nine actions included securities fraud cases, reorganization proceedings, bankruptcies, and a rescission action.

banc denial of his motion to consolidate nine actions "for purposes of settlement only."[87]

The Tenth Circuit found that in the *King* case it would be difficult for a judge to be impartial and fair[88] to all of the parties while trying to settle nine actions with interrelated facts and facets.[89]

While the involvement of John King provided a common thread among the several actions, the Tenth Circuit found no common question of law or fact, a requisite for consolidation under rule 42. King was involved in each case, but in varying degrees. Even though King was not predicating his motion to consolidate on a common basis of fact or law, but rather "for purposes of settlement only,"[90] the Tenth Circuit found no finality to any of the actions and a settlement, given their development to that point, might be unfair because of the many unresolved matters related to the nine actions.[91]

Citing *NAACP of Louisiana v. Michot*,[92] the court noted that denial of a motion to consolidate had been held to be a nonappealable order.[93]

For all of the above reasons, the Tenth Circuit upheld the denial of King's motion to consolidate for purposes of settlement only.

E. *Relief from Extraordinary Actions by the Trial Court*

In *Circle v. Jim Walter Homes, Inc.*,[94] before the Tenth Circuit for the third time, petitioners sought a writ of certiorari to review the district court's action in the case and asked for removal of the trial judge.[95] After a second remand from the Tenth

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[87] *Id.* at 1269.

[88] For this part of its decision, the court relied on 28 U.S.C. § 455 (1970) *as amended by* P.L. 93-512: "Any justice . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Id.* at 1268.

[89] *Id.* In United Family Life Ins. Co. v. Barrow, 452 F.2d 997 (10th Cir. 1971), a Chapter XI action and suit for recovery on life insurance policies, the court held that the interrelationship of the actions precluded assigning them to one judge.

[90] 545 F.2d at 1269.

[91] *Id.*

[92] 480 F.2d 547 (5th Cir. 1973).

[93] 545 F.2d at 1269. Judge McWilliams, in a specially concurring opinion, would have denied the motion on this ground alone. 545 F.2d at 1270.

[94] No. 77-1293 (10th Cir., June 9, 1977) (Not for Routine Publication).

[95] When the complaint was originally filed, the case was assigned to a district judge

Circuit, in this class action suit, the trial court was still expressing doubt as to the appropriateness of a class action and further indicated at a pretrial conference that it was "his intention to start from the beginning as if the two decisions of the Tenth Circuit had never been written."[96] He refused to acknowledge as controlling the previous holdings of the Tenth Circuit in the case. Because of the delay involved in such actions by the trial court judge and the resulting unfairness from the judge's seeming predilection for one result—no class action—the Tenth Circuit ordered the judge removed from the case.

Because of the repeated filing of frivolous claims[97] by plaintiff, in *Miller v. Continental Oil Co.*[98] the district court tried to enjoin plaintiff from filing any further actions without obtaining the court's prior approval. The Tenth Circuit pointed out that there are sanctions for abusing process.[99] While the Tenth Circuit upheld the district court's dismissal of the action against the defendants,[100] it directed the district court to vacate that part of its decision which attempted to deny plaintiff free access to the courts.

F. *Res Judicata*

Katzburg v. Krebs[101] involved an action between stockholders in a New Mexico corporation. The action, originating in state court and later removed to the federal court, was based on fraud, conspiracy and violation of a fiduciary duty.[102] The trial court

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who denied certification of the requested class action, ordered the district court to reconsider the class action motion and to give reasons for its refusal to certify. *Id.*

When the action again came before the trial court, a class action was again denied and the case was dismissed. *Id.* at 3. The Tenth Circuit remanded the case a second time, ruling that it had been dismissed on erroneous grounds and that, contrary to the district court's holding, the case was a classic one for class action treatment. *Id.*

[96] *Id.*

[97] Plaintiff made 17 appeals to the Tenth Circuit, eight in one year alone. Plaintiff also had a history of refusing to appear at hearings, either in person or represented by counsel.

[98] No. 76-1229 (10th Cir., Feb. 2, 1977) (Not for Routine Publication).

[99] *Id.* at 3.

[100] *Id.* at 2.

[101] 545 F.2d 104 (10th Cir. 1976).

[102] The plaintiff and defendants had formed a corporation in New Mexico for the production of Christmas ornaments. The corporation began experiencing financial difficulties. The defendant, Erika Krebs, was authorized by the board of directors to negotiate with the bank for a settlement. She did reach an agreement with the bank on behalf of her family, but not the corporation. Through a judicially approved sale, the collateral was

granted summary judgment in favor of the defendants; the Tenth Circuit reversed.[103]

The trial court based its res judicata finding on a judicially approved sale of the collateral in an action brought by the lender against the corporation.[104] The Tenth Circuit stated that the doctrine of res judicata was inapplicable. After considering the purpose of the res judicata-collateral estoppel doctrine,[105] the Tenth Circuit determined that a comparison of the two proceedings must be made. Through this analysis, the court found there was an identity neither of parties nor of causes of action. The first proceeding was between the lender and the corporation on an overdue note; the second action, between directors of the corporation, was based on fraud and conspiracy. Under these circumstances, res judicata was not applicable and the summary judgment was an error.[106]

Johnson v. City of Wheat Ridge[107] involved an action brought

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sold to a limited partnership, owned by the defendants. The plaintiff, a director in the New Mexico corporation, brought this action asserting that the defendants had breached their fiduciary duty by purchasing the corporation assets for their own benefit. In other courts, the plaintiff sought to have a constructive trust placed on the properties acquired by the defendants, and asserted fraud by the defendants seeking punitive damages. *Id.* at 107.

[103] *Id.*

[104] *Id.*

[105] Id. at 108-09. The Tenth Circuit stated that the rule of res judicata provides that a final judgment on the merits of a cause of action rendered by a court of competent jurisdiction binds the parties to the action and their privies with regard to every issue that was or might have been raised. However, if the second proceeding is upon a different cause of action between the same parties, there is an estoppel upon only the controverted issues which were the basis of the prior judgment.

[106] Another case, Burch v. Stringham & Follet, No. 76-1223 (10th Cir., Apr. 22, 1977) (Not for Routine Publication), involved a federal action arising under various rules and regulations of the Securities and Exchange Act of 1934, 15 U.S.C. § 77-78 (1970). The trial court dismissed the action under the doctrine of res judicata. The state court had dismissed an earlier complaint involving the same parties, stating that the state statute did not provide a remedy. No. 76-1223 at 2.

In discussing the doctrine of res judicata, the Tenth Circuit stated that the first ruling must be a judgment on the merits. *Id.* at 5 (citing Commissioner v. Sunnen, 33 U.S. 591 (1948)). If the second cause of action between the same parties contains different issues, then there is an estoppel with regard to the controverted points which were the basis of the first finding or verdict. No. 76-1223 at 5.

The Tenth Circuit in reversing the district court judgment determined that res judicata was not applicable in this case; the cause of action in the state court was different. Secondly, the state court had no jurisdiction to consider the federal cause of action, and therefore there had been no decision on the federal merits in the state action. *Id.* at 6.

[107] No. 76-1526 (10th Cir., Jan. 3, 1977) (Not for Routine Publication).

by the executor of an estate alleging deprivation of property and due process violations of the fifth and fourteenth amendment. The property which was the subject of the federal cause of action had been involved in a quiet title action between the same parties in the state court. A determination was reached by the state court that the property was validly donated.[108]

The Tenth Circuit applied the doctrine of collateral estoppel and affirmed the district court decision.[109] Though the causes of action were different, the issues, underlying facts, and parties were identical. The Tenth Circuit stated that it would be contrary to the policies underlying res judicata and collateral estoppel to allow such similar actions to be brought in the federal and state court.[110]

G. *Privacy of Jury Deliberations*

In *Crowley v. Cloes*[111] the plaintiff brought a wrongful death action as administratrix of the estate of William F. Crowley, Jr.[112] The verdict form given to the jury allowed a consideration of the negligence of Crowley and Cloes, but not of a third party to the accident, Harris. After the jury had begun its deliberations, the trial judge and counsel for both parties decided at a meeting in chambers that the verdict form was erroneous. After the jury returned a verdict based on the first form and was polled, the court explained the error in the verdict form. While the jury members were still in court, grouped around the bench, they were given a second verdict form which allowed for a consideration of Harris' negligence. The court indicated the differences in the forms. Jurors signed the new form in open court, they were then polled again, and discharged. There were no deliberations on the new form.[113]

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[108] *Id.* at 2.

[109] *Id.* at 3.

[110] *Id.*, citing Spence v. Latting, 512 F.2d 93 (10th Cir. 1975), *cert. denied*, 423 U.S. 893; Lavasek v. White, 339 F.2d 861 (10th Cir. 1965).

[111] No. 76-1232 (March 15, 1977) (Not for Routine Publication).

[112] This wrongful death action was brought under the Oklahoma comparative negligence statute, OKLA. STAT. tit. 23 § 11 (Supp. 1973). The deceased and defendant Cloes had parked on a rural road at night. Though Cloes noticed an approaching car a quarter of a mile or more away, he failed to warn the deceased who was standing behind the car, until the oncoming vehicle was about 100 feet away. The deceased was struck by a truck driven by Harris. Plaintiff settled with Harris pursuant to a covenent not to sue and asserted a claim of negligence against Cloes. No. 76-1232 at 2-3.

[113] *Id.* at 4-5.

The Tenth Circuit reversed and remanded the case.[114] The court considered the issue of the privacy of jury deliberations and found an invasion of that privacy, finding no federal precedent for the deliberation process which took place.[115]

The Tenth Circuit also found that the trial court's good faith participation resulted in a directed verdict, as a practicality.[116] The consequence of the trial court's failure to return the jury to further secret deliberations on the second verdict form and its participation in the voting process constituted an impermissible invasion of an exclusive province of the jury.[117]

H. *Judgment N.O.V.*

In *Yazzie v. Sullivent*[118] the Tenth Circuit considered whether the district court properly granted judgment notwithstanding the verdict.[119] The case was submitted to the jury which returned a verdict for the plaintiff for wrongful death. The trial court then granted the defendants' motion for judgment n.o.v. on the basis of insufficient evidence of a causal relation between the negligent driving of Sullivent and Yazzie's death.[120]

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[114] *Id.* at 8.

[115] *Id.* at 6. The trial court participated in the voting process of the second verdict form, though authority indicates that the status of the vote is not to be disclosed to anyone prior to rendering a verdict or reaching a deadlock. *Id.* at 6-7. The Tenth Circuit cited United States v. Sexton, 456 F.2d 961 (5th Cir. 1972); Benscoter v. United States, 376 F.2d 49 (10th Cir. 1967); Mullin v. United States, 356 F.2d 368 (D.C. Cir. 1966).

The trial court is not permitted to ask questions or make suggestions after the jury begins its deliberations. No. 76-1232 at 7 (citing Castleberry v. NRM Corp., 470 F.2d 1113 (10th Cir. 1972).

[116] No. 76-1232 at 7.

[117] *Id.* at 8.

[118] Yazzie v. Sullivent, 561 F.2d 183 (10th Cir. 1977), *rev'd on rehearing*, No. 75-1619 (10th Cir., Oct. 6, 1976) (Not for Routine Publication).

[119] The defendant Sullivent was the driver of a tractor trailer rig which allegedly struck the decedent Yazzie and apparently dragged his body 18 to 20 miles. Sullivent was arrested for, and admitted, to drunken driving. Evidence showed erratic driving. Bloodstains were found on the side-board racks of the trailer, on the mud flaps, and on the rear guard. A discernible trail of blood and body parts extended along the highway. Near the beginning of the trail, Yazzie's blookstained shirt sleeve was discovered slightly off the road and between two tracks of the trailer rig. Significantly, there was no direct testimony concerning the accident and Sullivent claimed to know nothing about any contact with the body of Yazzie.

[120] In a memorandum opinion denying the plaintiff's motion for a new trial, the New Mexico District Court stated:

> At its most favorable, plaintiff's evidence showed that defendant Sullivent was driving his truck in a negligent manner, and that decedent's body came into contact with the truck and was dragged by the truck for a number

On appeal to the Tenth Circuit, the majority upheld the judgment n.o.v. in an opinion written by Judge Barrett, with Judge Doyle dissenting.[121] On rehearing the court reversed, and Judge Doyle, writing for the majority, held that the district court erred in setting aside the jury's verdict.[122]

Judge Barrett and Judge Doyle differ on the role of inference in showing causation and the legitimacy of the inferences drawn from the facts in Yazzie.[123] Since there was no direct evidence of how the accident occurred, Judge Barrett claimed insufficiency of evidence.[124] Furthermore, he maintained that finding a causal relationship required piling inferences upon inferences and that New Mexico law does not permit establishing proof in that way.[125]

On the other hand, Judge Doyle urged a broader use of circumstantial evidence. To sustain the burden of proof, the plaintiff need not prove that his own conduct was not a cause. Rather, circumstantial evidence is sufficient to raise a jury question where the reasonable person could conclude that it is more probable than not that the event was caused by the defendant.[126]

> of miles. There is no evidence to show how or why decedent's body came into contact with the truck or even if decedent was alive at the time his body came into contact with the truck. In short, there is no evidence that decedent's death was proximately caused by defendant Sullivent's negligence.

No. 75-1619 at 4.

[121] No. 75-1619 (10th Cir., Oct. 6, 1976) (Not for Routine Publication).

[122] 561 F.2d 183 (10th Cir. 1977).

[123] In granting judgment n.o.v., the court must view the evidence most favorable to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence. Judgment n.o.v. should not be granted where the party against whom the motion is made presents substantial evidence, but more than a scintilla of evidence is required. Ahrens v. American-Canadian Beaver Co., 458 F.2d 607 (10th Cir. 1972).

[124] No. 75-1619 at 6. Judge Barrett refused to find a causal relationship because one must assume "that Yazzie was walking along the side of the highway in a reasonable manner, remaining clear of traffic thereon, when Sullivent negligently drove his truck off the side of the hardtop and struck Yazzie, thereby causing his death." *Id.* Judge Barrett proposed alternate explanations that Yazzie was already dead or had crawled into the spare-tire rack.

[125] *Id.* Judge Barrett cited Adams v. Highland Corp., 450 P.2d 442 (N.M. Ct. App. 1969). However, Wright and Miller do not support the theory of piling inference upon inference. They state: "There are still traces in the cases of the ancient slogan that an inference cannot be based on an inference. Modern scholarship has demolished this fallacy and most courts recognize that there has never been such a rule and, in the nature of things, could not be." 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2528 (1969). Furthermore, state law ought not to be considered. *Id.* n.33 at 569.

[126] Judge Doyle posited that the sufficiency of evidence is a federal question, and the

Judge Doyle contended that the most probable theory is that Yazzie was killed by contact with the truck.[127] He dismissed the piling-of-inferences argument and stated that it is the nature of circumstantial evidence that inferences must be drawn. Judge Doyle's position seems more persuasive, especially in view of the philosophy behind judgment n.o.v. of minimum interference with the jury.

I. *Rule 60(b)*

Fleming v. Gulf Oil Corp.[128] began in 1972, when Fleming sued Gulf for misrepresentation of the value of a business that he agreed to lease from Gulf. In 1974, the Agrico Corp., which had been assigned Gulf's rights to the lease contract, won a favorable judgment against Fleming in another suit to recover rentals and possession under the same lease. Gulf then filed a motion which was granted to dismiss Fleming's action against Gulf, based on the argument that the settling of the Agrico-Fleming matter resolved the Gulf-Fleming matter.[129]

In 1976,[130] Fleming filed a motion for relief under rule 60(b)[131] because of Gulf's failure to notify plaintiff of the 1974 motion to dismiss. The district court denied the motion and this appeal followed.

The Tenth Circuit concluded that Fleming was entitled to relief from the judgment. It based the decision on two factors. First, Gulf had received authorization to supplement the record on appeal;[132] however, instead of supplementing an existing re-

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judge stated the federal standard. 561 F.2d at 188. *See* Dick v. New York Life Ins. Co., 359 U.S. 437 (1959); Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690, 696 n.6. (1962).

[127] "We viewed the speculations as to possibilities such as the decedent being dead when he was caught up by the trailer or that he had crawled into the spare tire rack as being no more than guesses or speculations." 561 F.2d at 188.

[128] 547 F.2d 908 (10th Cir. 1977).

[129] The motion to dismiss and the order to do so are reprinted. *Id.* at 909.

[130] The Tenth Circuit found nothing to indicate that Fleming should have made an earlier discovery of what had happened to him. *Id.* at 913.

[131] FED. R. CIV. P. 60(b) states: "[T]he court may relieve a party . . . from a final judgment . . . for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment."

[132] Gulf had requested authority to proceed under FED. R. APP. P. 10(c) (allows preparing a new record from the best available means if no report or transcript of the proceedings is available), but no such authority was granted. 547 F.2d at 910.

cord with documents that had been presented in court or that accurately reflected the previous proceedings, Gulf attempted to create a *new* record for the appeal.[133]

Secondly, rule 60(b)(6) provides relief from a final judgment for "any other reason justifying relief from the operation of the judgment." The judges found that this rule is not limited to fact situations which would authorize relief under the common law writs of *coram nobis* and *audita querela.*[134] In the opinion of the Tenth Circuit, failure to give notice to the plaintiff denied him a fair opportunity to be heard. The case had been disposed of by the trial court without notice and without legal authority;[135] when these factors were viewed with the appellee's attempt to create a new record on appeal, the case was one in which relief should be granted.

In reversing the dismissal, the Tenth Circuit determined that the trial judge's "positive participation"[136] in the dismissal of plaintiff's appeal precluded that same judge from retrying the case.

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[133] An affidavit of appellant's former attorney was "prepared for the occasion" of the appeal. *Id.* at 910. Gulf also presented a deposition of appellant which was represented as having been prepared in July of *1973* and not transmitted with the original record on appeal. The reporter's cerification indicated, however, that the deposition was, in fact, transcribed just before its filing in March, *1977.*

[134] Klapprott v. United States, 335 U.S. 601 (1949).

[135] 547 F.2d at 913.

[136] *Id.* at 914. The trial judge furnished a document (in which he made findings in response to the affidavit in the supplemental record) which described what took place in January of 1974 at the Agrico-Fleming disposition. At that time, the judge concluded that the Agrico-Fleming matter also disposed of the Fleming-Gulf matter and that the court and "all parties . . . understood" that to be the situation.