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Recent Developments

RECENT DEVELOPMENTS

CORPORATIONS: Alien Corporations That Domesticate in Oklahoma May Hold Land

The Oklahoma constitution provides that nonresident aliens may not own land in Oklahoma.[1] In 1979 the Attorney General of the State of Oklahoma issued an opinion holding that this prohibition applied to alien corporations as well as to alien natural persons.[2] The Attorney General Opinion was followed by action to enforce the constitution's restrictions. Under the duty imposed upon him by law,[3] the attorney general brought suit in the District Court for Oklahoma County against Hillcrest Investments, Ltd., a Canadian corporation.[4] In this suit the attorney general alleged that certain lands were held by the defendant corporation in violation of Oklahoma statutory law and of the Oklahoma constitution, and asked the court to find that the lands had escheated to the state.[5]

The trial court gave judgment for the defendant on the grounds that Article 22, Section 1, applied only to alien natural persons, not to alien corporations.[6] Article 22, Section 1, provides in pertinent part:

> *No alien or person who is not a citizen of the United States,* shall acquire title to or own land in this state, and the legislature shall enact laws whereby *all persons not citizens of the United States, and their heirs,* who may hereafter acquire real estate in this state . . . shall dispose of the same within five years upon condition of escheat or forfeiture to the State: Provided, This shall not apply . . . to aliens or persons not citizens of the United States who may become bona fide residents of this State. . . .[7]

The trial court's decision was based on the reasoning that the use of the phrase "and their heirs" in the section was evidence of intent to limit the meaning of "alien or person" to natural persons because only natural persons have heirs.[8]

In *State v. Hillcrest Investments, Ltd.*,[9] the Oklahoma Supreme Court considered the attorney general's appeal from the trial court's judgment. The court affirmed the judgment but rejected the reasoning of the trial court. The mere inclusion of the phrase "and his heirs" in section 1 is not logically in-

[1] OKLA. CONST. art. 22, § 1.
[2] 11 OP. ATT'Y GEN. 452 (Okla. 1979).
[3] 60 OKLA. STAT. § 125 (1971).
[4] State v. Hillcrest Inv., Ltd., No. 79-5599 (Dist. Ct. Okla. Cty.).
[5] *Id.*
[6] As discussed in State v. Hillcrest Inv., Ltd., 52 OKLA. B.J. 581, 582 (1981).
[7] OKLA. CONST. art. 22, § 1 (emphasis added).
[8] 52 OKLA. B.J. 581, 582 (1981).
[9] *Id.* at 581.

compatible with an intent to include corporate persons within the term "person" and so is not sufficient to support the trial court's conclusion.[10]

The court then proceeded to analyze the terms "person" and "alien" as they were used and understood when the state constitution was drafted. The court noted that then, as now, "person" was generally understood to include corporations. The conclusion followed that the drafters intended to include alien corporations in the prohibition of Article 22, Section 1.[11]

Because the restrictions of Article 22, Section 1 apply to corporations as well as to natural persons, the court then considered whether the defendant was an "alien." This issue was easily resolved because it is well settled that a corporation formed under the laws of a foreign nation is an alien.[12]

Because the restrictions of Article 22, Section 1, apply to corporations as well as to natural persons, and because the defendant was admittedly an alien corporation, the court then reached the decisive issue in the case—whether the defendant was a resident of Oklahoma. The proviso to the restriction exempts those aliens who are "bona fide residents of this State."[13] The court noted that there was ample precedent for the proposition that corporations may have several residences. The court cited cases from Oklahoma and other states in which foreign corporations had been held to have established residence in the forum state for various purposes, such as being subject to service of process,[14] being entitled to claim the protection of the statute of limitations,[15] and so on.

Next the court noted that the constitution "provided for the licensing—or domestication—of foreign corporations."[16] In addition, the constitution provides that foreign corporations shall be subject to the same restrictions as domestic corporations, and may be subject to further restrictions enacted by the legislature.[17] The court concluded that the drafters intended that alien corporations that comply with the licensing requirements should be treated as residents and that the drafters had given the legislature power to decide whether to impose on such corporations the restrictions on land ownership that are applicable to nonresident aliens.[18]

Deciding that there is no constitutional bar to the ownership of land by alien corporations that have been licensed in Oklahoma and thereby become residents of Oklahoma, the court turned to the Oklahoma Statutes to determine whether the legislature had enacted provisions under the authority of Article 9, Section 44, which would restrict domesticated alien corporations from owning land.[19]

[10] *Id.* at 582.
[11] *Id.* at 583.
[12] *Id.* at 584.
[13] OKLA. CONST. art. 22, § 1.
[14] Brand v. Auto Serv., 75 N.J.L. 230, 67 A. 19, 20 (1907).
[15] St. L. & S.F. Ry. v. Taliaferro, 67 Okla. 37, 168 P. 788 (1917).
[16] 52 OKLA. B.J. 581, 585 (1981), *citing* OKLA. CONST. art. 9, § 43.
[17] OKLA. CONST. art. 9, § 44.
[18] 52 OKLA. B.J. at 586.
[19] *Id.*

The court noted section 1.119 of Title 18,[20] which provides that a foreign corporation that has been domesticated shall enjoy all rights and privileges of a domestic corporation, and section 1.2 of the same title,[21] a section giving definition of terms, which establishes that "foreign corporation," in section 1.199, includes alien corporations. The court next cited section 1.19,[22] which lists the powers of domestic corporations. Subsection 6 of section 1.19 provides that domestic corporations may acquire and hold real property, subject to the restrictions of Article 22, Section 2 of the Oklahoma constitution and sections 1.20 through 1.25 of Title 18.[23] Article 22, Section 2, places restrictions on corporate ownership of land outside incorporated cities and towns.[24] These limitations apply to all corporations, domestic or foreign. Sections 120 through 125 of Title 18 codify and provide procedures for enforcing these provisions.[25]

Finding that there was no statutory limitation on the ownership of urban land by domesticated alien corporations, the court affirmed the trial court's judgment for the defendant. The court warned that this holding did not permit aliens to form "sham" corporations for the specific purpose of evading the limitations of Article 22, Section 1 of the constitution when such entities were not "legitimate corporations."[26]

Two justices dissented from the decision, focusing their criticism on the majority's holding that an alien corporation becomes a resident of the state by complying with the licensing requirements. The dissent pointed out that while corporations are often deemed to have a residence in a state other than the state of incorporation, such decisions are often based on legal fictions. The present case involves only "real and actual legal residence."[27] according to the dissent, which can only be in the state (or nation) of incorporation. The majority's warning about sham corporations was declared to be "meaningless."[28]

CRIMINAL LAW: Factors That May Be Taken Into Account In Setting Appeal Bonds

The Oklahoma Court of Criminal Appeals in *Kordelski v. Cook*[1] recently clarified two points with regard to appeal bonds. The court held that the district court, and not the Court of Criminal Appeals, has jurisdiction

[20] *Id.* at 587, 18 OKLA. STAT. § 1.199 (1971).
[21] *Id.* at 586, 18 OKLA. STAT. § 1.2 (Supp. 1980).
[22] *Id.* at 587, 18 OKLA. STAT. § 1.19 (Supp. 1980).
[23] *Id.*
[24] OKLA CONST. art. 22, § 2.
[25] 18 OKLA. STAT. §§ 120-125 (1971).
[26] 52 OKLA. B.J. at 588.
[27] *Id.* at 589.
[28] *Id.*

[1] 51 OKLA. B.J. 3039 (Dec. 27, 1980).

over all matters relating to appeal bonds under current statutes.[2] This is apparently so even though an appeal has been perfected, and the Court of Criminal Appeals has jurisdiction over the case. In *Kordelski* the district court had originally set an appeal bond that it later revoked after the appeal had been perfected.[3]

The second point made in the case is with reference to the factors that the district court may validly consider in deciding whether to release a convicted criminal defendant on an appeal bond. The court first held that the right to go free on bail prior to conviction—a constitutional right[4]—was distinguishable from the right to go free on bail during the pendency of an appeal—a right created by statute.[5] The court noted that because of the constitutional origin of the right to bail before trial, the only factor that may validly be considered in setting bail prior to conviction is insuring the appearance of the accused.[6] The court then considered the factors that may be taken into account in granting or denying an appeals bond. The court held that if the decision to grant bond is within the discretion of the court,[7] the court may consider factors other than the likelihood that the defendant will leave the jurisdiction if set free. Specifically, the court held that it was not improper for the lower court to revoke the petitioner's appeal bond on the ground that he was a habitual criminal and a threat to the community.[8] In so holding it overruled a previous decision that had held it was improper to consider factors other than the likelihood of the defendant's reappearance.[9] The court implied that other considerations are proper as well, but their enumeration was left to future decisions.

CRIMINAL PROCEDURE: Good Faith Exception to the Exclusionary Rule

The United States Court of Appeals for the Fifth Circuit, sitting *en banc,* has adopted a broad "good faith" exception to the exclusionary rule,[1] that is, the rule that bars the admissibility of evidence obtained by law en-

[2] *Id.* The opinion cited 22 OKLA. STAT. §§ 1077-1079 (1971), as controlling.

[3] *Id.*

[4] OKLA. CONST. art. 2, § 8.

[5] 22 OKLA. STAT. § 1077 (1971).

[6] 51 OKLA. B.J. 3039, 3040 (Dec. 27, 1980), *citing* Petition of Humphrey, 601 P.2d 103 (Okla. Cr. 1979).

[7] 22 OKLA. STAT. § 1077 (1971), divides convicted defendants into three categories which are treated differently: misdemeanor convictions and felony convictions in which only a fine is imposed—bond will always be allowed; cases in which the judgment imposed a life sentence—bond will never be allowed; and all other felony convictions—the granting of bond is within the court's discretion.

[8] 51 OKLA. B.J. 3039, 3042 (Dec. 27, 1980).

[9] Application of Love, 349 P.2d 767 (Okla. Cr. 1960).

[1] United States v. Williams, 622 F.2d 830 (5th Cir. 1980).

forcement officials in contravention of the fourth amendment strictures against illegal search and seizure.[2]

The case that precipitated the decision involved an arrest by a special agent of the Drug Enforcement Administration. In 1976 the agent arrested the defendant, JoAnn Williams, in Toledo, Ohio, for possession of heroin. Williams was convicted of the offense and appealed her conviction. The district court ordered her released pending appeal with a condition of release being that she remain in Ohio.[3] In 1977 the agent who had made the initial arrest and who was aware of the conditions of her release observed her deplane in Atlanta from a nonstop Los Angeles flight. As she proceeded toward the departure gate for a flight to Kentucky he arrested her for violating the conditions of her bond.[4] In a search incidental to the arrest, heroin and cocaine were found on her person.[5] A search of her luggage pursuant to a search warrant revealed an additional quantity of heroin.[6]

Indicted for this second drug offense, Williams moved to suppress the fruits of the search of her person and luggage, claiming that the arrest was invalid and that the resultant searches were thus invalid. An initial three-judge panel affirmed the district court's suppression of the evidence,[7] but on rehearing the full court determined that the arrest leading to the search was legal.[8] Additionally, a thirteen-judge majority of the court held that even if the arrest had not been lawful, the good faith and reasonableness of the officer in making the arrest precluded the suppression of the evidence under the exclusionary rule.[9] Ten members of the court who joined in the holding that the arrest was legal concurred specially, disagreeing with the majority in its pronouncement of the good faith exception,[10] finding instead that any discussion of an exception where an arrest was illegal or unauthorized was inappropriate whereas in this case there was a legal arrest.[11]

The majority, in adopting the good faith exception, reasoned that the exclusionary rule exists to deter willful or flagrant actions by police, not reasonable or good faith ones.[12] The court concluded that the exclusionary rule would not deter reasonable, good faith actions of law enforcement officials and thus because the reason for the rule did not exist, its application must cease also.[13]

[2] Weeks v. United States, 232 U.S. 383 (1914).
[3] United States v. Williams, 622 F.2d 830 (5th Cir. 1980).
[4] *Id.* at 840.
[5] *Id.*
[6] *Id.* at 835.
[7] United States v. Williams, 594 F.2d 86 (5th Cir. 1979).
[8] United States v. Williams, 622 F.2d 830, 835-39 (5th Cir. 1980).
[9] *Id.* at 840-47.
[10] *Id.* at 847-51.
[11] *Id.* at 848.
[12] *Id.* at 840.
[13] *Id.*

The majority found authority for its decision in commentaries[14] and in decisions of the United States Supreme Court where the exclusionary rule had been ruled inapplicable in specific fact situations.[15] While none of the cited Supreme Court decisions provided direct authority, the Fifth Circuit found justification for good faith violations of the fourth amendment in those decisions both where the law enforcement officer made a mistake as to the existence of facts necessary to constitute probable cause[16] and where there was a technical violation, *i.e.*, reliance on a statute later declared unconstitutional, a warrant which is later invalidated, or a court precedent later overruled.[17]

The court defined reasonable good faith as being a belief that "in addition to being held in subjective good faith, must be grounded in an objective reasonableness. It must therefore be based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully."[18]

The scope of the decision by the Fifth Circuit is exemplified by the conclusion stated by the court:

> Henceforth, in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence.[19]

The judges who specifically concurred were unwilling to agree that deterrence of illegal conduct was the only consideration on which the exclusionary rule was premised.[20] The imperative of judicial integrity[21] and the avoidance of the taint of official lawlessness[22] were cited as considerations which should have been examined in the majority's decision to establish a good faith exception.[23]

Additionally, the judges found that: "The announcement of a radical change in the scope of the exclusionary rule creates a host of interpretive

[14] Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972).

[15] *E.g.*, Michigan v. DeFillippo, 443 U.S. 31 (1979); United States v. Caceres, 440 U.S. 741 (1979); Stone v. Powell, 428 U.S. 465 (1976).

[16] United States v. Williams, 622 F.2d 830, 844-46 (5th Cir. 1980). The court cited three cases recently decided by the Supreme Court to support its position.

[17] *Id.* at 841, 843-44.

[18] *Id.* at 841 n.4a.

[19] *Id.* at 846-47.

[20] *Id.* at 849.

[21] Mapp v. Ohio, 367 U.S. 643 (1961).

[22] United States v. Calandra, 414 U.S. 338, 357-58 (1974) (Brennan, J., dissenting).

[23] United States v. Williams, 622 F.2d 830 (5th Cir. 1980).

problems."[24] The judges were concerned about admissibility of evidence obtained as a result of an invalid search warrant and about the applicability of the exception to questions of fact as well as questions of law.[25]

Because the decision to establish a sweeping exception to the exclusionary rule was announced as an alternative to the court's finding that the arrest was legal, it is unlikely that the decision will be reviewed by the United States Supreme Court.[26] The decision stands as precedent in the Fifth Circuit and provides persuasive authority in other circuits and state courts for adoption of a broad-based good faith exception to the exclusionary rule.

DAMAGES: Insurance for Punitive Damages

In *Dayton Hudson Corp. v. American Mutual Liability Insurance Co.*,[1] the Oklahoma Supreme Court decided four certified questions[2] of law regarding payment of punitive damages under insurance policies.

The plaintiff (insured), Target Stores, Inc. (Target), procured from the defendant, American Mutual Liability Insurance Co. (insurer), a personal liability insurance policy providing in part for payment of "all sums which the insured might become legally obligated to pay. . . ."[3] While the policy was in force and effect, Target became liable, as a result of a state court judgment, to pay Dorothy Moore actual and punitive damages for her false arrest by Target's agent. American Mutual paid the award of actual damages but refused to pay the punitive damages. Target, which paid the punitive damages award, brought suit in federal court to recover from American Mutual the amount of that award.

In response to the four certified questions of law, the court held that: (a) the insurance policy in the suit included coverage for punitive damages; (b) public policy is generally contravened by coverage of punitive damages; (c) an exception to public policy exists when the insured's liability is imposed vicariously; and, (d) prior knowledge of an agent's propensity to commit the wrong for which punitive damages were imposed will not bar recovery against the insurer unless the insured may be said to have been guilty of "gross negligence" in not discharging the "vicious" servant.[4]

Scope of Insurance Coverage

Target's insurance policy provided for payment of *"all sums* which the

[24] *Id.* at 850.
[25] *Id.* at 850 n.4.
[26] *Id.* at 851.

[1] 51 OKLA. B.J. 3025 (Nov. 25, 1980).
[2] The United States District Court for the Western District of Oklahoma certified the questions pursuant to the Uniform Certification of Questions of Law Act, 20 OKLA. STAT. § 1601 (Supp. 1980).
[3] 51 OKLA. B.J. 3025, 3027 (Nov. 25, 1980).
[4] *Id.* at 3025.

insured shall become legally obligated to pay as damages because of injury."'[5] A split of authority exists as to the meaning of the terms, with the majority view being that the terms of such a policy embrace liability for punitive damages.[6] However, the issue is resolved in various ways by courts following the majority view. The Oregon Supreme Court treated a similar "all sums" provision as neither an express exclusion nor a like inclusion of punitive damages.[7] Where such ambiguity existed, Oregon favored the insured.[8] A federal district court, sitting in Indiana, reasoned that where the provisions cover all sums "which the insured shall become obligated to pay" the policy unambiguously includes all sums.[9] In both cases, punitive damages that became liquidated by judgment were considered a "sum" included in the policy.[10] Oklahoma agreed with Oregon's reasoning, holding that where no language of the policy is patently ambiguous it must be construed in favor of the insured.[11]

Public Policy Considerations and Exceptions Thereto

The court in *Dayton-Hudson* formally adopted the McNulty rule.[12] The rule mandates that policy considerations require that where punitive damages are awarded for punishment and deterrence, the damages rest ultimately, as well as nominally, on the party actually responsible for the wrong.[13] The Oklahoma court, however, recognized a common exception to this public policy: It will not preclude recovery of indemnity from the insurer by an employer who is liable for the willfullness or gross negligence of his employee under the Oklahoma application of the respondeat superior doctrine.[14]

Prior Knowledge of the Servant's Vicious Propensities

What if a negligence action is brought directly against the insured where it is shown that the servant was negligently hired?[15] The court ruled that if only "ordinary" negligence were present, the employer who is sued directly in a negligence cause of action could shift his burden of punitive damages to the insurer.[16] But if "gross negligence" is present (and this will depend on the

[5] *Id.* at 3028 n.2 (emphasis added).

[6] *Id.* at 3026, 3028 n.5.

[7] Harrell v. Travelers Indemnity Co., 567 P.2d 1013, 1014 (Or. 1977).

[8] *Id.* at 1015.

[9] Norfolk & Western Ry. v. Hartford Accident & Indemnity Co., 420 F. Supp. 92, 94 (N.D. Ind. 1976).

[10] 51 OKLA. B.J. 3025, 3026 (Nov. 25, 1980).

[11] *Id.*

[12] *Id.* at 3027.

[13] Northwestern Nat'l Gas Co. v. McNulty, 307 F.2d 432, 440 (5th Cir. 1962).

[14] 51 OKLA. B.J. 3025, 3027 (Nov. 25, 1980). *See also id.* at 3030 n.19.

[15] Where the employer had prior knowledge of the servant's propensity to commit the very harm for which damages are sought, the basis of liability invoked is not respondeat superior but rather is the employer's own negligence in not discharging the unfit servant.

[16] 51 OKLA. B.J. 3025, 3028 (Nov. 25, 1980).

extent of the master's prior knowledge), it is the equivalent of positive wrongdoing. Public policy would then not allow the employer to shift his burden to the insurer.[17] Whether the employee was, in fact, "vicious" rather than merely "unfit" or "erratic" is regarded as a question of fact.[18]

OIL AND GAS: Order of the Oklahoma Corporation Commission Required for Change of Unit Operator Status

The Oklahoma Corporation Commission has the authority to order the compulsory pooling of oil and gas interests in an established drilling and spacing unit and to designate an operator to manage the leaseholds within that unit pursuant to Section 87.1(e) of Title 52 of the Oklahoma Statutes (Supp. 1980). Compulsory pooling is a reasonable exercise of the state police power to prevent waste and to protect the correlative rights of owners in a common source of oil or gas.[1] In *Crest Resources & Exploration Corp. v. Corporation Commission*,[2] the Oklahoma Supreme Court held that once the Corporation Commission designates an operator to manage a force-pooled unit, this operator cannot transfer his operator status to another because this would constitute an unauthorized delegation of the responsibilities that were imposed upon him through the exercise of the state's police powers.[3]

Prior to *Crest*, it had been the custom in the oil and gas industry for a designated operator simply to transfer his operator authority by transferring his operating rights to another through a private agreement if he decided not to drill.[4] The only case that had dealt with this issue prior to *Crest* was *Stoltz, Wagner & Brown v. Duncan*,[5] wherein the court held that the transfer of operating rights by a party designated as unit operator in a pooling order of the Corporation Commission was an effective transfer and that it did not impair any rights of owners included within the unit.

In *Crest* the court held that the unit operator's assignment of his operating rights to another did not change the operator's legal status or his liability and that, therefore, this unauthorized transfer of the operatorship had no legal effect and was not a ground for vacating the prior force pooling order.[6]

In order to be redesignated as operator of a force-pooled unit, a person must now apply to the Corporation Commission and introduce sufficient

[17] *Id.*

[18] *Id.*

[1] Helmerich & Payne, Inc. v. Corporation Comm'n, 532 P.2d 419 (Okla. 1975).

[2] 617 P.2d 215 (Okla. 1980).

[3] *Id.* at 217.

[4] *See* Stoltz, Wagner & Brown v. Duncan, 417 F. Supp. 552, 560-61 (W.D. Okla. 1976); Buckles v. Wil-Mc Oil Corp., 585 P.2d 1360, 1361 (Okla. 1978).

[5] 417 F. Supp. 552, 560-61 (W.D. Okla. 1976).

[6] 617 P.2d 215, 218 (Okla. 1980).

proof showing that he is a prudent and competent operator.[7] The Corporation Commission may then redesignate him as the operator by entering a new order that amends its previous pooling order and which releases the prior operator from his responsibilities.[8]

PLEADING: Abolishing "Fact" Pleading

Section 264 of Title 12, Oklahoma Statutes (1971), provides that a petition shall contain a "statement of the facts constituting the cause of action. . . ." This has been construed by the Oklahoma Supreme Court to mean that a plaintiff should plead ultimate issue facts rather than evidentiary facts.[1] Moreover, a trial court may grant a motion to strike evidentiary facts from a petition.[2] Nevertheless, in a recent case the Oklahoma Supreme Court stated that "allegations that the property had been 'platted' [were insufficient] where such allegations were unattended by allegations of fact to support them."[3] Thus, the court held that in addition to pleading ultimate facts, a plaintiff must plead the evidence on which he relies to support his ultimate facts.

This case furnishes another reason for changing the requirements of Section 264. The second part of this section should be amended to read as follows:

> Second. A short statement of the cause of action, in ordinary and concise language, and without repetition. Allegations that are informative are sufficient although they may constitute conclusions of law, and it shall not be necessary for a plaintiff to plead his evidence.

The word "facts" was omitted because of the difficulty that judges and attorneys have had distinguishing between facts and conclusions of law.[4] However, the phrase "cause of action" was retained because it has not caused

[7] *See* Crest Resources & Exploration Corp. v. Corporation Comm'n, 617 P.2d 215 (Okla. 1980); Gose v. Corporation Comm'n, 460 P.2d 118 (Okla. 1969).

[8] Crest Resources & Exploration Corp. v. Corporation Comm'n, 617 P.2d 215 (Okla. 1980); Gose v. Corporation Comm'n, 460 P.2d 118 (Okla. 1969).

[1] Soper v. Enid Hotel Co., 383 P.2d 7 (Okla. 1963); Morriss v. Barton, 200 Okla. 4, 190 P.2d 451 (1948); City of Guthrie v. Finch, 13 Okla. 496, 75 P. 288 (1904). *See* C. CLARK, CODE PLEADING 225 (2d ed. 1947).

[2] Jones v. Novotny, 352 P.2d 905 (Okla. 1960); Cahill v. Pine Creek Oil Co., 40 Okla. 176, 136 P. 1100 (1913).

[3] Chandler v. Independent School No. 12, 52 OKLA. B.J. 252, 254 (Feb. 7, 1981). The court cited Steiger v. Commerce Acceptance, Inc., 455 P.2d 81 (Okla. 1969), as authority for this proposition. However, this case involves a demurrer to the evidence or a motion for a directed verdict although the opinion is confusing because it refers to allegations and facts well pled.

[4] The requirement that a plaintiff must plead facts "has worked least successfully of all the reforms made." C. CLARK, CODE PLEADING 23 (2d ed. 1947). *See also id.* at 242. Judge Clark did not criticize the use of the phrase "cause of action."

difficulties in Oklahoma and, as a result of numerous decisions, it has an established meaning in this state.[5] Therefore, substituting other language that means the same thing is undesirable.

Federal Rule 8(a)(2) provides that the complaint should contain a "statement of the claim *showing that the pleader* is *entitled to relief*" (emphasis added). This statement would be appropriate but for the fact that many attorneys believe that it only requires a plaintiff to give notice of the nature of his action. However, more is necessary; the plaintiff must show that there is a legal basis for recovery. "While the rules have substituted 'claim' or 'claim for relief' in lieu of the older and troublesome term 'cause of action,' the pleading must still state a 'cause of action' in the sense that it must show 'that the pleader is entitled to relief.' "[6] The Federal Rules Advisory Committee stated, "That Rule 8(a) envisages the statement of circumstances, occurrences, and events in support of the claim presented is clearly indicated. . . ."[7] Therefore, the phrase "cause of action" should be retained so that plaintiffs would realize that they must show the existence of the essential elements of their claims.[8] Some other states that revised their rules of procedure after the Federal Rules were promulgated have retained the phrase "cause of action."[9] Also, use of the word "claim" by the Federal Rules has not reduced the number of objections to the sufficiency of complaints that are filed in federal courts.

[5] *E.g.*, Town of Braggs v. Slape, 207 Okla. 420, 250 P.2d 214 (1942); Pugh-Bishop Chevrolet Co. v. Duncan, 176 Okla. 310, 55 P.2d 1003 (1936).

[6] 2A MOORE'S FEDERAL PRACTICE 8-116-7 (2d ed. 1979). This statement is quoted with approval by the United States Supreme Court in Davis v. Passman, 99 S.Ct. 2264, 2273 n.15 (1979). *Accord*, C. WRIGHT & A. MILLER, 5 FEDERAL PRACTICE AND PROCEDURE 121-4 (1969).

[7] 2A MOORE'S FEDERAL PRACTICE ¶ 8.01[3] (1979).

[8] Because a plaintiff must prove the existence of each of the essential elements of his claim or cause of action, requiring him to plead them should assist him in preparing for trial. The difference between a claim and a cause of action is one of name only. Federal courts and courts in states that have adopted the Federal Rules often use the phrase "cause of action" in their opinions rather than the word "claim." Davis v. Passman, 99 S.Ct. 2264, 2273 (1979). *See, e.g.*, Original Ballet Russe, Ltd. v. Ballet Theatre, Inc., 133 F.2d 187 (2d Cir. 1943); Metropolitan Gas Repair Serv., Inc. v. Kulik, 621 P.2d 313, 319 (Colo. 1981); Pocatello Indus. Park Co. v. Steel West, Inc., 621 P.2d 399, 402 (Idaho 1980); Seven Seas Import-Export & Mercantile, Inc. v. Handee Foods, Inc., 621 P.2d 1097, 1099 (Mont. 1981).

[9] ILL. CIV. PRAC. ACT § 33 (1954) provides that, "All pleadings shall contain a plain and concise statement of the pleader's cause of action, counterclaim, defense or reply." N.Y. CIV. PRAC. LAW & RULES § 3013 (1962) provides that, "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and the material elements of each cause of action or defense." TEX. CT. R. 47(a) (1977) provides that a petition shall contain "a short statement of the cause of action sufficient to give fair notice of the claim involved."