WASHINGTON POST
May 22, 1946

Washington Calling

By Marquis Childs

Law Industry

ONE OF PRESIDENT Truman's recurring complaints is that he finds it more and more difficult to recruit able men for public office. Boom-time prosperity is luring them into private business.

Younger men have left the Government in droves. One goal is the law industry here in Washington. It is fast becoming nothing less than that—an "industry," with office space so scarce that houses are being remodeled and suites of offices rented even before the plaster is dry.

One of the recent recruits to the law industry is Abe Fortas, who was Undersecretary of the Interior for nearly four years. A few days after he left the Department of the Interior to join partnership with trust-buster Thurman Arnold, Fortas accepted a $12,000 retainer to represent the Government of Puerto Rico in this country.

A press release issued by the Office of Puerto Rico—a recent creation of the Territory's Gov. Rexford G. Tugwell—declared that Fortas would represent his important new client "in all future proceedings before the United States Supreme Court, the United States Circuit Court in Boston and agencies of the Federal Government." This announcement touched off a dispute which may affect the entire law industry in Washington.

It so happens that Puerto Rican legal matters in this country have been ably handled by the Department of the Interior and the Department of Justice at no cost to the government of Puerto Rico. In the past three years, 18 cases have been briefed and argued by Justice and Interior. Of the cases in which decisions have been rendered, only one was lost.

Therefore, Solicitor Warner W. Gardner of the Interior Department was considerably surprised by the announcement of Fortas' retainer. Gardner promptly called on Tugwell to explain just what the relationship was.

In the course of his letter to Tugwell, he quoted at length from a letter that Fortas had written less than a year before on this very same subject. Because it has so much bearing on the whole question of the propriety of those who leave the Government to take cases in which they have had a previous interest, the Fortas letter is worth quoting.

"I believe," said Fortas when, as Undersecretary in charge of territorial affairs, he wrote to Tugwell to protest against the same kind of arrangement, "that continuing representation of a Government or a governmental agency by private attorneys is unsound and unwise. I know that, from time to time, governmental agencies must and should retain private counsel on specific matters in order to assist Government counsel. But except for such specialized assistance, governments and governmental agencies should, in my opinion, be represented by lawyers who are public officials. In my opinion, it is neither seemly nor appropriate for governmental agencies to be represented by counsel who are not regularly constituted public officials."

Fortas went on to say that such a relationship "is apt to lead to embarrassment, regardless of the unimpeachable character of the private attorneys who might be concerned." "In the event," he said, "that the private lawyers obtained law business from private sources which involved dealing with the Government, it is obvious that the situation would be embarrassing for both the lawyers and the Government."

That was good counsel. The interweaving of private and public business is dubious. No matter how good the intentions, the public customarily gets the short end of the bargain.

When New Dealers such as Fortas leave the Government, they do not mean to surrender their convictions or their objectives. They are convinced that they can help the cause of liberalism and at the same time make more money than the Government can pay them.

The prototype, of course, is Thomas G. Corcoran, who was so close to the New Deal and President Roosevelt. Leaving the Government, he went into a private law office and his fabulous fees are part of the Washington legend. His old friends in the Government gave invaluable aid.

The Washington law industry is taking on oppressive size. While former New Dealers flourish, the really big money goes to the old established firms, some of which have opened branch offices here. A dozen proposals before Congress would increase the legal barriers that the Government must face in doing its job. That means more fees, and the public finally foots the bill.

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generation, Abe Fortas made the transition from public servant in that early war on poverty (he was general counsel of the Public Works Administration at 29) to private practitioner handling legal problems for the industries that profited from the Government-induced prosperity.

As Max Frankel of the New York Times said, Fortas pioneered in the pattern of "brokerage between the rich and the mighty, for both noble and profitable causes." He was, for many years, both a skilled advocate for his private clients and a cherished counselor to Lyndon Johnson, who shared his view of the compatibility of liberal politics and private profits.

In their world, there was no sharp line between private and public interests. As a lawyer and as a Justice, Fortas was also a White House insider. And the presidential assistants with whom he worked knew they could join the Fortas firm, or others like it, at handsome salaries when their White House duties were finished.

TO THOSE who said the system was suspect, the reply was always that it served the cause of liberalism, of freedom and of social justice. Just as the profits of Fortas' private law practice allowed him to serve as indigents' counsel in landmark civil rights and civil liberties cases, so the profits of the war-inflated, Government-subsidized economy permitted Democratic Presidents from Truman through Johnson to pay for the education and welfare programs they passed.

The operating principle of the liberal program from the New Deal through the Great Society was the purchase of public programs through the guarantee of industrial prosperity. It seemed a perfect marriage —but the blurring of public and private interests at its root was essentially corrupt.

That Fortas' particular involvement was with a businessman indicted and later convicted of stock fraud may be regarded as accidental. But the intimate interweaving of private and public interests symbolized by his dealings with Wolfson is all too typical of the political tradition from which we came.

The New Left campus radicals who are trying to destroy the institutions of liberalism have long contended that liberalism's achievements in the social welfare-civil rights area are simply window-dressing or accidental byproducts of what is essentially a corporate-governmental mechanism for providing profits and protection to the privileged.

By confirming the radicals' view of the system, particularly at this moment, Fortas has compounded a personal tragedy into something of a national calamity.

Capital Law Firms Skin U.S. Indians

By Jack Anderson

Sen. Fred Harris' beautiful Comanche wife LaDonna has gone on the warpath in behalf of flimflammed Indians. She is raising a legal defense fund to help them fight their battles in court.

A confidential working paper on the subject tells in angry detail of Indian-skinning by Washington law firms, local officials and white traders. Presiding benignly over the corruption, the document alleges, is the Bureau of Indian Affairs.

"What the government failed to take by military force has been picked over by skillful manipulation of the law, corrupt courts and sometimes deliberate deception of Indian tribes . . . by avaricious whites," declares the working paper.

The blistering document, prepared by Americans for Indian Opportunity whch LaDonna Harris heads, proposes legal aid that would cost $175,430 the first year and rise to $280,000 the third year.

Tough-minded lawyers would be hired and solicited as volunteers to protect Indian rights. The document cites abuses in 25 states.

In Oklahoma, for example, the Bureau of Indian Affairs contracted with the state to spend $580,000 in federal funds to educate Indians. When Indians suggested the fund had been misused to educate whites, the document charges, the Bureau improperly "waived the right to a complete accounting of these funds."

Indian Justice

Mrs. Harris would like to force states to put Indians on juries. They are excluded in the main from Oklahoma juries, although they make up 10 per cent of the state's population.

The Bureau of Indian Affairs, instead of aiding Indians, invalidated Indian wills so white men can buy up Indian land and appoints white men as "guardians" over Indians. The Washington law firms, which are supposed to represent the tribes, show more interest in pressing claims that will increase fees than in gaining justice for Indians.

The LaDonna Harris group praises poverty corp lawyers but says there aren't enough of them working with the Indians. As for Indian lawyers, there are only about 10 in private practice.

"The need for legal education in the case of Indian citizens is even more pressing than in the Negro movement," says the working paper. "The Indian must contend with more than 2,000 regulations, 389 treaties, 5,000 statutes, 2,000 federal court decisions, 500 Attorney General opinions and 33 volumes of the Indian Affairs Manual.

"The shameful, but widely recognized truth is that the government has often acted in ways which violate the concept of trusteeship. Often the highest interests of the Indian tribes are sacrificed by their trustee for the objectives of the Corps of Engineers or the Forest Service, or for other federal and state programs."

May 20, 1969

David S. Broder

Fortas Case Demonstrated A Corrupt Strain in Liberalism

IN HIS LETTER of resignation from the Supreme Court, Associate Justice Abe Fortas defended his fee from the Wolfson Family Foundation—whose head, a former law client, had continued to consult with the Justice on his legal problems with the Government—with these words:

". . . Its program—the improvement of community relations and the promotion of racial and religious cooperation—concerned matters to which I had been devoting much time and attention . . . . Because of the nature of the work, there was no conflict between it and my judicial duties."

Official Washington was shocked by the Fortas case, but it should not have been. It has been a long time coming, but, tragically, it was in many ways the logical culmination of New Deal liberalism.

Two years ago, John Kenneth Galbraith wrote in his book "The New Industrial State" that "only the innocent reformer and the obtuse conservative" can be unaware of the ways in which "the interests or needs of the industrial system are advanced with subtlety and power. Since they are made to seem coordinate with the purposes of society, Government action serving the needs of the industrial system has a strong aspect of social purpose. And . . . . the line between the industrial system and the state becomes increasingly artificial and indistinct."

All the Fortas case really shows is that Galbraith's dictum applies to the Supreme Court as well as the other branches of the Government. The evolution has been plain.

THE NEW DEAL, which brought Fortas and his friend, Lyndon B. Johnson, to Washington, was a merger of two elements, an old-fashioned political liberalism committed to civil liberties and (later) to civil rights and a new economic liberalism based on the use of governmental power to expand and redistribute the national wealth.

The economic program, which was dominant, was originally directed to the relief of the Depression problems of unemployment and poverty. Though many of its pump-priming efforts failed, the New Deal reaped the economic benefits of World War II and liberalism emerged in the postwar period as a sponsor of a variety of public programs—military and civilian, foreign and domestic—that kept the industrial system prosperous.

Like many others of his

(OVER)

Bureau of Indian Affairs

JAMES E. CURRY
ATTORNEY AT LAW
3709 FOURTEENTH STREET, N. W.
WASHINGTON, D. C. 20010

December 10, 1970

Honorable Carl Albert
U. S. House of Representatives
Washington, D. C. 20515

Sir:

Enclosed is the "typo" version of my brief in Cohen v. Curry (and a copy of my petition for certiorari in the related case of Sher v. Curry) about which I have previously been in touch with you. The evidence described therein confirms the existence and some of the sinister activities of the "Washington Law Industry" that Marquis Childs identified back in 1946 and David Broder described in 1969. It demonstrates the stranglehold that these lawyers have on such agencies as the Indian Bureau.

The Interior Department refuses to authorize federal intervention in the Cohen case. It answers Congressional inquiries with a form letter saying that the issues are "purely a private matter between individual attorneys" and are "of no concern to the tribes or this Department." The case is complex, purposely made so by my opponents. But a reading of the enclosed will show that the Department's position is pure sophistry, a transparent evasion of Uncle Sam's sacred duty as trustee of Indian rights.

I have already been badly beaten in the District Court and (in the Sher case) in the Court of Appeals. I have never had a trial on the merits, the lower court openly averring that such a trial would "reflect on the bar in the eyes of the general public." I have little hope of obtaining reversal of these decisions. But I must continue the struggle so long as any court remains open to me. Win or lose, I also hope, after the case is finally decided, to present the public issues involved in such other forum or forums as may be available.

If you have any comments or suggestions at this time, I would like to hear from you.

Yours very truly,

James E. Curry

James E. Curry

Encl.: 2 briefs and 3 articles.

MSIC.

January 7, 1971

James E. Curry, Esq.
Attorney at Law
3709 Fourteenth Street, Northwest
Washington, D. C. 20010

Dear Mr. Curry:

Thank you for sending me a copy of your brief in Cohen v. Curry. I have not yet had an opportunity to read it, but do appreciate having this information.

Sincerely,

CARL ALBERT, M. C.

CA/Rckh

See pp. 33-36

BRIEF FOR DEFENDANT-APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24340

CEIL BRYSON COHEN

v.

JAMES E. CURRY

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR DISTRICT OF COLUMBIA

JAMES E. CURRY
APPELLANT, PRO SE
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DOWDEY, LEVY AND COHEN
OF COUNSEL.

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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CEIL BRYSON COHEN

v.

JAMES E. CURRY
Appellant

No. 24,340

BRIEF FOR THE APPELLANT

ISSUES PRESENTED FOR REVIEW

The issues presented for review on this appeal are whether the lower court erred in any or all of the following respects:

1. By enforcing a stipulation for settlement that was neither (a) in writing nor (b) made in the presence of the Court as required by its own Rule 3.

2. By enforcing an arrangement as to fees allegedly earned by Congressman Jonathan B. Bingham and Felix S. Cohen which violated the public policy inherent in (as well as the very terms of) federal laws, regulations and contracts intended to prevent graft and corrupt practices by Indian attorneys and federal officials; also by refusing instructions and excluding evidence tending to show such violations.

3. By denying me leave to implead certain additional parties, especially my successor as attorney of record in the claims cases, I. S. Weissbrodt, who had promised me in writing to pay out of his share of the Indian claims fees any such claim by other lawyers such as

is herein sought to be enforced.

4. By enforcing an alleged stipulation which was an assignment in trust although it was not in writing and signed by the person making it, as required by the Statute of Frauds.

5. By excluding legally admissible evidence tending to prove perjury by Congressman Bingham's assignee, the plaintiff in this case.

6. By excluding competent evidence of litigious harassment tending to prove duress in the form of threats that I would be forced into trial without counsel and without adequate opportunity to prepare.

7. By excluding competent evidence, refusing instructions, and omitting from the special verdict any interrogatory, about my defense that the alleged stipulation to pay for the services of Congressman Bingham et. al. on Indian claims at the rate of $1500 per hour was unconscionable and therefore unenforceable.

8. By admitting evidence of my former attorneys, I.S. Weissbrodt and Robert E. Sher, concerning privileged confidential communications between me and them and by excluding evidence tending to show the ethical and legal impropriety of previous disclosures of said communications.

9. By admitting incompetent evidence about alleged unaccepted offers of settlement prior to the stipulation allegedly accepted by the plaintiff.

10. By falsely informing the jury, in Judge Waddy's instructions to them, that I had admitted to my attorneys' having made the alleged

stipulation in my behalf and by instructing the jury that I had the burden of disproving said attorneys' authority to do so.

11. By submitting interrogatories to the jury in a way that suggested or intimated the answer expected or desired by Judge Waddy.

12. By submitting (and by basing final judgment upon) a special verdict three of whose findings were flagrantly contrary to the pleadings and the evidence.

13. By declining to rule on my motion for summary judgment based on the 21 year delay by Congressman Bingham, his two associates and his assignees, Mrs. Ceil Cohen, in the filing of this lawsuit.

REFERENCES TO RULINGS

The final judgment (1) appealed from was entered on February 18, 1970, providing for payment to Congressman Bingham's assignee,, Mrs. Ceil Bryson Cohen Mears of $150,000 out of Indian claims fees transferred to an "escrow" fund by order of the lower court. I also request review of other orders including the following:

(a) An order (2) denying my motion to implead I.S. Weissbrodt as being liable over for payment of any such claim as is herein sought to be enforced;

(b) An order (3) denying my motions to implead various other parties including the various interested Indian tribes;

(c) An order (4) postponing decision on my motion for summary judgment based on the 21 year delay pending trial of the merits;

(d) Various other rulings during the trial of the so-called "supplementary proceedings" with respect to evidence, instructions, motions, etc.

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1. Judgment, February 18, 1970 (R-140).

2. Order, December 8, 1969

3. Order, filed on both December 2, 1969 and December 1969 (R-115).

4. Order, May 19, 1969 (R-32).

STATEMENT OF THE CASE

This case arose out of disputes among four attorneys about fees earned in Indian claims cases that were filed and prosecuted by me under my contracts with the tribes. The disputants included myself (on the one side) and (on the other) three lawyers who were never hired by the Indians or approved by them. They were (a) a former top Indian affairs lawyer in the Department of the Interior; (b) an incumbent Congressman from the Bronx and (c) another New York lawyer (1). It was filed on the basis of a 1947 agreement (2) between me and the two New Yorkers which also mentioned Felix Cohen as a possible participant in non-claims work. The agreement was ended by them a few months after it was signed and so far as I know they never did any work on the claims.

My purpose on this appeal is to obtain either a trial below on the merits of the controversy or a judgment in my favor in this Honorable Court. No such trial took place in the earlier proceedings in the lower court. Judge Alexander Holtzoff, who was

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1. The nominal plaintiff is Ceil Bryson Cohen Mears who says that she was married to Henry Cohen at the time of his death. But she sues as his executrix and as assignee of Congressman Jonathan Bingham of the Bronx and of Felix S. Cohen, former First Assistant Solicitor of the U.S. Department of the Interior.

2. Curry-Cohen Bingham agreement, 9 1 47 (mistakenly dated 9 1 46) Defendant's Exh. 23, R-153, filed 6 5 70. This is an alleged copy, the original seemingly hacing been lost by both parties.

first assigned to try the case, announced on the record(3) that "if conduct like this is publicized, it reflects on the bar in the eyes of the general public." He said that he "could not guarantee freedom from publicity in a public courtroom." He urged my then-lawyer, Mr. Robert E. Sher, to negotiate a settlement. He specifically urged that it be done out of my presence and that it be brought back for approval as a "fait accompli."

The case was then set for immediate trial and Judge Holtzoff urged that negotiations proceed the same day. There followed short but stormy negotiations. As a result, plaintiff Ceil Cohen claims that an "oral" agreement or stipulation was made between us. She says that it was for payment of $150,000 out of fees previously ordered to be placed "in escrow" by the lower court, for services rendered to the Indians by Bingham and the two Cohens. This would be at the rate of $1500 per hour for the 100 hours of work that Bingham claims was done by him and his two associates.

The case involves not only directly the rights and claims of the parties. It also involves indirectly, but very substantially, the rights of American Indians and the general public. It involves, as I allge, a whole series of federal laws etc. enacted to protect the government as trustee of the Indians and the Indians themselves from "claims brokerage," unconscionable fees, and other forms of graft, corruption and exploitation by cronies of Indian bureau officials and other politicians who control Indian affairs. I also

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3. Hearing Transcript of May 21, 1969, vol. A, R-35 6 2 69 (also Def. Exh. 13 B, R-154 filed 6 5 70) Exhibit 13 B was never docketed or included in the record as such although Judge Waddy's order of August August 5, 1970 (R-164) so required.

alleged violation of the federal conflicts-of-interest laws and anti-assignment laws and of the local statute of frauds.

As stated, the case was not tried on its merits. Instead, the judgment was the result of a so-called "supplementary proceeding" to enforce the alleged oral stipulation (which I denied having made) without trying the original claim. The stipulation was enforced by the final judgment of Judge Joseph C. Waddy in face of an ancient local rule (4) which specifically forbids enforcement of any stipulation in a case unless it is (a)in writing and signed by the parties or (b) made in court and recorded by a court reporter. The plaintiff does not even allege that the stipulation was written down or so recorded.

The verdict and judgment below resulted at least in part from actions of two lawyers who were supposed to be representing me but became star witnesses for the other side. These were Messrs I.S. Weissbrodt and Robert E. Sher. A crisis arose when I was confronted with immediate trial without adequate preparation before an obviously unfriendly judge. Sher threatened, if I did not settle, that he would move to withdraw immediately, leaving me to try the case alone. He did this although he knew that I had not tried a case for thirty or more years. I still refused to settle. Weissbrodt and Sher then (or perhaps earlier) changed sides and collaborated with the opposing attorneys.

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4. Rule 3, Local Rules of the United States District Court for the District of Columbia which provides:

> Stipulations. Requisites of. A stipulation in an action will not be considered by the Court unless the same be in a writing signed by the parties thereto or their attorneys; or made before the court or a master at a hearing stenogrpahically reported; or made in the taking of a deposition and recorded by or at the direction of the officer before whom the deposition is being taken.

On the same day as the alleged "oral" stipulation, Sher obtained $150,000 from Weissbrodt before it had even been deposited in the court-created escrow account. Although he was still supposed to be my attorney, he purported to hold this money as escrow agent, or trustee, for payment over to Mrs. Cohen. When I asserted to Judge Holtzoff that I had never agreed, he was obviously displeased but when push came to shove he refused to approve it, said I had a right to repudiate it and ordered the money returned to the escrow fund, subject to trial of the case on the merits.

After Judge Holtzoff's death, a motion was pursued "for judgment on agreement of the parties", i.e. the same agreement which Judge Holtzoff had refused to approve. It was pursuant to this motion that the final judgment was entered.

Weissbrodt was my successor as attorney of record in the Indian claims cases. I had turned over this responsibility to him when in 1954 and 1955 I was a victim of total paralysis. The sickness had followed a series of persecutions initiated by Bingham and his cronies in the Indian Bureau and in the Senate of the United States(5). After I turned the work over to Weissbrodt, he and I came to a written agreement, based on the value of the work I had done up to that time and was to do in the future. It provided that I should receive a fixed part of the fees. Weissbrodt also agreed to assume responsibility to pay out of the balance for any such nuisance claims of other lawyers as the one that is now before this Court. The

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5. See pages 34-36

effect of the judgment if affirmed will be to transfer this responsibility back to my shoulders.

I use the term "nuisance" advisedly. This suit could have been decided on my motion for summary judgment(6). I alleged, and it was not denied, that Felix Cohen never took any part in the 1947 arrangement; that a few months after the deal was made, Henry Cohen and Jonathan Bingham repudiated their obligations and accepted my concomitant repudiation of my own. We asserted claims against each other and there were desultory negotiations. I refused arbitration and suggested that they go to court but they did not do so. No suit was ever filed for more than 20 years after our dispute, when the present litigation was commenced.

The affidavit that I filed with my motion for summary judgment describes how I fell in with this crowd in the first place. I had a thriving law practice of my own including numerous contracts and opportunities for contracts with Indian tribes. My 1947 agreement with them was written very carefully. It specifically avoided setting up any partnership between me and the two New York lawyers. It was written very much the way that municipalities write revenue bond agreements when they seek to borrow money without "pledging full faith and credit."

It set up a trust fund into which my revenues were to be deposited and out of which Cohen and Bingham were to be paid their "shares or fees" for Indian claims work, they specifically agreeing to do one half the work and to receive one half the net fees. They also agreed to share with me some of the expenses of my office.

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6. My motion for summary judgment, with attached affidavit etc., R-22, 4 17 69

These advances were to be repaid out of the same fund as soon as net profits appeared, from any source, Indian or non-Indian. Because they withdrew so soon and did no work on the claims, they were never approved for work on the claims. They never met my Indian clients nor were they accepted by them to do the work. Because they welched on the arrangement so early, the trust fund was promptly abolished, with their consent.

Incorporated into the settlement stipulation, as Mrs. Cohen alleges it, was the same concept of payment for "services rendered" by the three lawyers and of a trust fund for that payment. The stipulation as stated by her was that the services should be paid out of the escrow fund established by earlier order of the lower court. It is because of these two points that many issues arise that would not arise if the settlement were for a share in the profits of a partnership.

I also contended that prior to the alleged settlement stipulation I was subjected to various forms of harassment that are par for the course in nuisance suits. Some of these were described in an affidavit that I filed in August of 1969 (7). Others are described in the body of this brief.

It is hard to summarize the testimony at the week-long jury trial of the "supplementary proceedings" to enforce the alleged oral stipulation. The witnesses against me were Mrs. Cohen and my two defecting lawyers. They told widely varying stories. For instance, Mrs. Cohen said that Sher was the first to make the $150,000 offer. Sher denied it. He said that I had made it in his

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7. My motion for separate trials of separable issues, with attached affidavit, R-R-49 filed 8 27 69.

presence. Weissbrodt was not present but testified to his general impressions that I had agreed to the deal "by a nod of my head." Much of this testimony will be discussed in the body of this brief.

In the nature of things, I could have no witness but myself. I admitted that there was a great deal of talk about possible settlement, that I permitted this talk to continue because I was "scared to death" of going to trial without preparation. But I denied agreeing to any binding stipulation either oral or in writing. I also denied that I could have made the stipulation that Mrs. Cohen alleged because it would have been illegal and improper. The reasons will be shown in the body of this brief.

During the "supplementary proceedings," Judge Waddy made a host of erroneous rulings which were very prejudicial to me and which will also be described in the main body of the brief.

I. THE COURT ERRED BY ENFORCING A STIPULATION OF SETTLEMENT THAT WAS NEITHER (A) IN WRITING NOR (B) MADE IN THE PRESENCE OF THE COURT, AS REQUIRED BY ITS OWN RULE 3.

With due respect, it seems to me almost preposterous to suggest that any group of five or six lawyers actively practicing before the District Court and presumably familiar with Rule 3 (1),which has been in force since the District was established, would have got together and made an oral stipulation expecting it to be binding and enforcible. This could never have been intended by the parties while the negotiations were in progress. When my attorney changed sides I was frightened that I might be forced into trial without counsel and without preparation. So I permitted the discussions to continue. I did not announce "No, I will never agree." But neither did I say "I do agree." Certainly it could not have occurred to me, in the light of Rule 3, that a binding stipulation could be made orally.

It appears that Judge Holtzoff felt the same way. The transcripts of the hearings at which he presided (2) make clear that he wasted no love on me. He had objected again and again to my speaking for myself. He had urged again and again that a settlement be negotiated by Mr. Sher, my attorney, out of my presence. But when the showdown came, he refused to enforce the alleged "oral" stipulation.

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1. Local Rule 3, U.S. District Court, D.C., quoted in footnote 4 at page 7 above.

2. Hearing transcripts, 5 21 69, Vol. 1, R-48 filed 8 22 69, also Def. Exh. 13a attached to my motion to correct record, R-154, filed 6 5 70; same, Vol. A, R-35 filed 6 2 69, also Def. Exh. 13b, attached to same motion to correct record; 5 23 69, R-36 filed 6 2 69; and 6 20 69, Def. Exh. 6 filed 6 5 70.

At the hearing of June 20, 1969 (3) he refused again and again to enforce the alleged settlement, saying that (4) "a party has a right to repudiate an oral agreement."

Why did the jury not find such an oral agreement preposterous? Simply, it was because Judge Waddy tried to nullify Rule 3. He refused to enforce it and actually concealed its existence from the jury. He denied my motion, invoking that rule, to dismiss for failure to state a cause of action (5). He enied my motion, similarly grounded, to direct a verdict at the close of plaintiff's statement to the jury (6). He denied my similar motion for a directed verdict at the close of plaintiff's case (7). He denied our proposed instruction to the jury citing said rule and overruled our objection to his failure to give said instruction (8). Mrs. Cohen's argument against applying the rule was stated by her counsel when opposing my motion to dismiss. He said (9):

> Your Honor will recall the decision in Autera v. Robinson

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3. Hearing transcript 6 20 70, Def. Exh. 6, R-153, filed 6 5 70

4. Id, page 17 lines 1-4.

5. Trial transc. 1 13 70, pl 6 line 10 to p. 16 line 20, R-145, filed 5 15 70.

6. Id, p. 39 line 13 to p. 40 line 7.

7. Trial transc. 1 19 70, p. 639 line 9 to p. 643 line 1, R-149, filed 5 15 70.

8. Defendant's Instruction N. 4, R-136, filed 1 22 70; see trial transc., 1 22 70 p. 827 lines 9-13, R-152, filed 5 28 70; id, p. 925 lines 11-16.

9. Trial transc. 1 13 70, p. 11 lines 10-16, R-145, filed 5 15 70

> (10) decided June 30, 1969 in the Court of Appeals wherein that court had reason to review the whole matter of settlements in cases and pointed out that settlements negotiated may, of course, be in writing or oral, and here we have a transcript which is very material, Your Honor, because it shows what took place.

Judge Waddy seems not to have relied on the Autera case. So far as I can find, the only theoretical justification advanced by him for disregarding Rule 3 was stated by him in connection with my motion to direct a verdict at the end of the plaintiff's evidence. He said (11) that:

> Rule 3 was certainly not designed to stop parties from settling cases if they could agree to a settlement. Otherwise we could have no settlements such as are worked out in this court every day, frequently with the assistance of judges themselves.

Judge Waddy certainly took a long jump to the conclusion that enforcement of Rule 3 would prevent settlements. All it does is to require that they be reduced to writing so that the courts will know that they have been made and will not have to spend time and energy determining whether or not they have been made. The purpose of the rule is to prevent just such an exercise of futility as the "supplementary proceedings" below which occupied almost two weeks of the time of judge, jury, parties and counsel without even touching upon the merits of the case.

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10. Autera v. Robinson, 419 F2nd 1197, 136. App. D.C. 216 (1969)

11. Trial transc. 1 19 70 pp 16-20, R-149, filed 5 15 70.

The decision of this Honorable Court in the Autera case (12) came down on June 30, 1969. On July 22, 1969, Mrs. Cohen's lawyer followed the example of the defendant in that case and filed his "motion for judgment on agreement of the parties " (13). He cited the Autera decision in support of said motion. That case concerned a situation in which one of the plaintiffs in an accident case signed a release and praecipe which was not signed by the other, her husband. Over objection, the lower court had enforced it against both plaintiffs without any hearing as to whether the stipulation had actually been made. Mr. Frohlich was probably on firm ground in citing the case to support his motion for a "supplemental proceeding." In Autera, this court held (14) that:

> To the extent that their several representations to the court left issues of fact for determination they are entitled to an evidentiary hearing.

The above was the main burden of the Autera decision. It was only very incidentally that this court in a footnote made the remark which Mrs. Cohen's attorney relied on to nullify Rule 3. What this court of appeals said(15) was:

> Lawsuits may, of course, be compromised by oral contract. "[I]t is well settled that the compromising of legal proceedings and the relinquishment of rights in connection therewith...are such part performance of an oral agreement as to except it from the operation of the Statute of Frauds."

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12. Autera v. Robinson, 419 F 2nd 1197, 136 App. D.C. 216 (1969).

13. Cohen motion for judgment, R-43, 7 22 69.

14. Autera v. Robinson, 419 F 2nd 1197, 136 App. D.C. 216 (1969).

15. Id.

It is true that lawsuits may be comprmmised by oral contract or stipulatinn. If the agreement is "partly performed" by relinquishment of one party's rights, such a stipulation will not be set aside. But in this case, the lawsuit of Mrs. Cohen was not dismissed. When the stipulation was rejected by Judge Holtzoff, the case was set down for trial. If Judge Waddy had rejected the stipulation, Mrs. Cohen would have been free to proceed with the main litigation. If this court rejects the "oral" stipulation, she will still be free to proceed on her complaint.

Oral stipulations for settlement may also be enforced if, in compliance with Rule 3, they are made orally in facie curiae and made a part of the record. But in Autera this court had no intention to nullify or qualify Rule 3. If it had, the Court would certainly have mentioned that rule, which it did not do. I have also examined the record in Autera and find no reference to Rule 3. therein. Our most omnipresent rule of jurisprudence requires courts to "abide by former precedents, stare decisis, when the same points are again in litigation "(16). But my point with respect to Rule 3 was clearly not in litigation in the Autera case.

The rule against enforcement of oral stipulations made en pais and not in facie curiae originated in the early common law. It seems to have been enforced in the courts of the District from the very beginning, even before any such rule was enacted. Five years after the District was founded, the Circuit Court in 1806

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16. Broome, Legal Maxims, 7th ed., 147, cited in Bouvier's Law Dictionary, Third Rev. p. 3118 under "stare decisis."

decided a case (17) in which one of the parties sought to enforce an informal agreement of opposing counsel that a certain deposition might be taken:

> But the court refused, there being no consent entered on the record, and the court cannot undertake to enforce the private agreements of counsel, they must depend upon the honor of each other. The court will not suffer a party to be entrapped by such agreements. (Underlining added.)

So far as I have been able to discover there is no decision in this jurisdiction qualifying or repudiating this firm statement. It seems to have stood the test of 164 years until the time of Judge Waddy's action. It was soon fortified by being enacted as a rule of the Court which has been reenacted over and over again.

There are a few other federal cases which restate and reaffirm the common law rule (18). An 1884 decision (19) was issued after the Louisiana Circuit Court had enshrined the common law in its Rule #22. Giving firm enforcement to said rule, the Court said:

> Rule 22 of this court is but a statement of the universal canon or precept which is observed by all courts where the matter of rights is involved....The rule is thus stated in Hoff, Ch. Pr.: It will be noticed that the agreement or consent, unless thus established, is not even to be suggested against the party; and our chancellors have been very strict in adhering to this rule...The necessity and wisdom of the restriction is attested by its universal adoption by the courts, and, having been further emphasized by being enrolled as a rule of this court, is obligatory and must be followed.

Indirectly, the United States Supreme Court has also recognized this

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17. Moore v. Dulany, 17 F. Cas. 678 (No. 9,758 [C.C.D.C. 1806]).

18. The Martha, 16 F. Cas. 860 (No. 9,144 [D.C.S.D.N.Y., 1830]); American Saddle Co. v. Hogg, 1 F. Cas. 719 (No. 316 [C.C. D.Mass., 1878]).

19. Evans v. State Nat. Bank, 19 F. 676 (1884).

old common law rule(20). The stipulatinn there in question was one which provided for a reduction in the amount of a judgment. It was not signed by the parties. The court enforced it but only after making clear that it had been made in open court and noted by the clerk in the journal.

The District of Columbia seems to have the strictest rule on this subject. However, rules in most jurisdictions contain similar provisions and they seem always to be strictly enforced. Thus in an early California case(21) it was sought to enforce a stipulation disposing of the case pursuant to the outcome of a similar pending case. The stipulation had been "reported" to the courtt but not recorded as required by the code of civil procedure. Of such stipulations, the court said: (underlining added.)

> To allow the court to enforce them, as was done in this case, against the will or without the consent of the parties, is to allow the court to work the precise mischief which the statute was designed to prevent. Instead of being nullified in that way, the statute ought to be strictly adhered to, for it is the dictation of wisdom. Without it the court would frequently be annoyed by disputes between counsel concerning their agreements and thus forced to try innumerable side issues more perplexing than the case itself, attended, also, with delay to its business and with detriment to the public service.

There could be no better example of the "mischief" that the court above described than the case here on appeal. The court spent two weeks of its time trying a "side issue" that was clearly more perplexing than the main issue under my 1947 contract with Bingham. Perhaps the trial involving Bingham was avoided for the reason stated

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20. Lewis v. Wilson, 151 U.S. 551, 38 L. Ed. 267, 14 S. Ct. 419 (1893).

21. Borkheim v. North British & Mercantile Ins. Co. 38 Cal. 623 (1869).

by Judge Holtzoff(22), i.e. that "to publicize conduct like this would reflect on the bar in the eyes of the general public." But it did not even serve that purpose, for it publicized similarly reprehensible conduct on the part of other members of the bar.

In a later California case(23) it was sought to dismiss an appeal on the ground that appellant's counsel had agreed orally that the judgment below should be final and non-appealable. The court refused to dismiss it and said:

> [E]ven though an attorney may have the implied authority to waive his client's right of appeal,...a party is not bound by an oral agreement of his counsel to dismiss or abandon his appeal where no agreement or stipulation is entered in the minutes of the court.

In support of this conclusion, the court cited an earlier opinion which said that:

> The evident object of this [provision in the Code of Civil Procedure] is that, whenever the attorney shall enter into an agreement for the purpose of binding his client, there shall be such a record thereof as will preclude any question concerning its character or effect and that the extent of the agreement may be ascertained by the record.

Again, the present case serves as a horrible example. As above stated (24) Mrs. Cohen's own witnesses could not agree among themselves as to the most important characteristics of the alleged "oral" stipulation that she was seeking to enforce.

A 1920 Colorado case (25) concerned a stipulation extending the

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22. Hearing transc. 5 21 69, Vol.A. p. 2 lines 5-7, and p. 4 lines 21-22, R- 45, filed 6 2 69.(also Defendant's Exh. 13a, att. to my motion for corection of record, R-154, 6 5 70.)

23. Harrold v. Harrold, 224 P. 2nd 66, 100 Cal. App. 2nd 601 (1950).

24. See page 10 above.

25. Mogote-Northeastern Ditch Co. v. Gallegos, 193 P. 670, 69 Colo. 221 (1920).

time for filing a bill of exceptions. The court refused to enforce it. The decision did not mention any court rule and therefore was probably based on the common law rule, like the District of Colubia case and others above mentioned. (26) The Court said:

> We cannot try a question of veracity of attorneys as to the their oral agreements made out of court, nor correct their misunderstandings. If they trust to such uncertainties and do not take the prescribed and certain methods of written stipulations or regular orders made upon notice or appearance, they must understand that each is relying solely on the other, and that in case of dispute the stipulation cannot be enforced. In this case, then, we must take the record as it stands before us. (Underlining added.)

The above seems to confirm my proposition stated above (27) that practising attorneys who know the rule against oral stipulations would have understood in advance that an oral agreement was not final and binding. It is also supported by a 1937 decision in Georgia (28)

Unlike the others above cited, the Georgia case did not deal with a settlement or other final disposition of the case. It referred only to a stipulation as to the admissibility of certain evidence. The court rule provided that "consents" must be signed by the parties. The agreement was composed of an exchange of correspondence between attorneys but nothing was signed by the clients. With what seems to me a rather harsh result, the court rejected the stipulation and said:

> The above [rules] seem to have been adopted so as to notify

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26. Moore v. Dulany, 17 F. Cas. 678 (No. 9758 [C.D.D.C. 1806]).

27. See page 12 above.

28. American Surety v. Smith, 191 S.E. 137, 55 Ga. App. 633 (1937).

> counsel that no consent will be enforced unless it be in writing and signed by the parties to the consent, and, if there is a misunderstanding as to what was the agreement actually made, the court will leave the parties where it found them, and will not undertake to enforce the agreement as contended for by either counsel. Honorable men, honestly, and in the utmost good faith, often remember things, at least as to some of their details, differently. (Underlining added.)

When it became apparent that the alleged stipulation in the present case was not in writing (which happened very early in the case) Judge Waddy likewise should have refused to enforce it, "leaving the parties where he found them" saving his own time and the jury's, and should have proceeded to trial of the main case on its merits.

An old Montana case (29) made valid observations on the necessity for courts to comply with their own rules. A default judgment was set aside on the sole ground that the attorneys had agreed en pais that it would not be entered. The court rule was substantially similar to the District of Columbia rule. Again this Supreme Court seems to have emphasized its point with a rather harsh result. It seems that courts have inherent discretion to set aside defaults and that its action could have been sustained as an exercise of that discretion. But the Supreme Court vacated the order because of the grounds stated for it and said:

> The power of the district court to make reasonable rules and regulations for governing and facilitating their practice and procedure, in reference to all matters not provided for by law, is expressly conferred [by the code of civil procedure]. But when the power has been exercised, and a rule adopted, courts as well as the members of the bar, should respect the same and regulate their conduct in conformity therewith....

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29. Martin v. DeLore, 39 P. 312 at 31-13, 15 Mont. 343 (1895).

> ... Doubtless, rules of court may be rescinded or modified at the just convenience of the court which makes them, but there should be some better reason for wholly ignoring them than the respondent relies upon in this case.

In the present case it should be noted that Judge Waddy had no authority to "rescind or modify" Rule 3. That rule was enacted pursuant to the Federal Rules of Civil Procedure(30) which provide that:

> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. (Underlining added)

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For the reasons above stated, the judgment below should be reversed for erroneously enforcing a stipulation which failed to comply with the Rule of Court described and discussed herein.

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30. Rule 83, Rules of Civil Procedure for U.S. District Courts, as amended to July 1, 1965.

2. THE COURT ERRED BY ENFORCING AN ARRANGEMENT AS TO FEES ALLEGEDLY EARNED BY CONGRESSMAN JONATHAN BINGHAM AND FELIX S. COHEN WHICH VIOLATES THE PUBLIC POLICY INHERENT IN (AS WELL AS THE VERY TERMS OF) FEDERAL LAWS, REGULATIONS AND CONTRACTS INTENDED TO PREVENT GRAFT AND CORRUPT PRACTICES BY INDIAN ATTORNEYS AND BY FEDERAL OFFICIALS; ALSO BY REFUSING INSTRUCTIONS AND EXCLUDING EVIDENCE TENDING TO SHOW SAID VIOLATIONS.

The original claim in this case was for fees allegedly due to Felix S. Cohen, Jonathan B. Bingham and Henry Cohen for legal work provided for Indian tribes (1). As I will show at a later point the alleged (but not admitted) stipulation between me and Mrs. Ceil Cohen which forms the basis of the judgment was made in consideration of the same services and constitutes an assignment of the fees therefor (2).

There are various federal laws which promote a public policy intended (a) to prevent "claims brokerage," exorbitant fees and other kinds of exploitation of Indian tribes by their attorneys(3) and also (b) generally to promote the integrity of federal officers and employees and to prevent "bribery, graft and conflict of interests."(4)

In various terms these laws forbid the illegal and improper "receipt," "transfer," "assignment," "payment," etc. of fees supposedly earned under certain circumstances by such lawyers (5). Such laws

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1. Amended complaint, 1 21 69, ¶¶ 4 and 9, R-13, 1 21 69, (Also Def. Exh. 4, D-153, Filed 6 5 70).

2. See page 40 below, ¶¶ 7 and 9 also pp 82 + 87

3. This public policy is described at pp. 33-35.

4. Case v. Helwig, 65 F.@nd 186, 62 App. D.C. 98 (1933) which holds that this is the purpose of the conflict-of-interest laws.

5. The key provisions of said statutes are set forth at pages 25-27.

apply not only to the attorney involved but also to those who "claim through" him as does Mrs. Cohen in this case,(6), as well as to public officials and other persons making the forbidden payments.

The provisions referring to Indian tribal attorneys are described in ¶¶A-K on pages 25-30 of this brief. They apply to this case because the original claim (7) as well as the alleged (but not admitted) stipulation between me and Mrs. Cohen were based upon "services rendered" by the three lawyers mentioned above in Indian claims cases(8). The provisions which refer generally to federal officials are described in ¶¶L-N on page 30 below. They apply to this case because , less than two years before the work was allegedly done, Felix Cohen had resigned as First Assistant Solicitor of the Department of Interior in charge of Indian matters (9). They also apply because, after the work was done (as alleged by Bingham but denied by me) but before claim for said services was made Bingham became first a State Department official, then a representative of the United States at the United Nations, and finally a Congressman representing the Bronx district in New York City(10).

6. Case v. Helwig, 65 F. @nd 186, 62 App. D.C. 98(1933) which held that such provisions apply not only to the public official-lawyer involved but also to one who "claims through" him.

7. Amended complaint ¶3, R-13, 1 21 69 (also Def. Exh. 4, R-153, filed 6 5 70).

8. See pages 40 PP PB 7+9, also pp. 86-87

9. Trial transcript, 1 19 70, pages 699-700, R-149, filed 5 15 70.

10. Bingham deposition, 11 24 69 p. 99 line 27 to page 100 line 23, R-111 filed 12 8 69; this evidence was erroneously excluded by Judge Waddy, trial transcript, 1 21 70 pp 804-5, R-151 filed 5 15 70.

The statutes and contracts referred to were invoked as defenses in various paragraphs of my answer(11) to the "motion for judgment"(12) which served as a complaint in the "supplementary proceedings." I also invoked these statutes and contract provisions in various proposed instructions which were erroneously refused by Judge Waddy(13).

* * * * * *

I quote below the various provisions referred to above, underlining certain key words:

A. The law respecting contracts with Indian tribes (14) provides that:

> No money shall be paid to any...attorney...by any officer of the United States under any such contract or agreement other than fees due him for services thereunder.

This section applies to the present case because under the judgment the money is to be paid to Mrs. Cohen. She is not an "attorney" but she "claims through" such attorneys as are referred to in the law. Therefore, she is also covered by the law (15). The provision also applies here because payment is to be effectuated through various judicial officials, all of whom are "officers of the United States."(16) The public policy of the law is clearly to prevent such payments as this, where "services rendered" are being paid for at $1500 per hour. Such a figure is clearly exorbitant and the

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11. My answer to Mrs. Cohen's motion for judgment, R-61, 10 6 69.

12. Mrs. Cohen's motion for judgment, R-43, 7 22 69

13. My proposed instructions Nos. 9-14 inclusive, R-136, filed 1 22 70

14. 25 U.S. Code 1964 Ed. §§ 81-85 at §81.

15. Case v. Helwig, 65 F. 2nd 186, 62 App. D.C. 98 (1933).

16. See pages 39-42 and "(5)", "(6)", "(8)", "(9)" and "(10)"

payment would actually represent "claims brokerage" money rather than legal fees. The above provision is discussed further in ¶"(a)" at page 42.

B. The Criminal Code (17) provides that:

> Whoever receives money contrary [the provisions above quoted] shall be fined not more than a thousand dollars or imprisoned not more than six months, or both, and also forfeit the money so received.

Just as the payment of said money forbidden so is the "receipt" of the money by her. And a substantial jail sentence is provided for violation. The above provision is discussed again in ¶"(b)" at page 43.

C. The Criminal Code (18) also provides that all persons aiding or abetting the violation of any such law shall be liable as a principal. See also ¶"(c)" at page 43.

D. The law concerning Indian contracts further provides (19) that:

> No assignment of any contract embraced by [the provisions mentioned above] or any part of one shall be valid unless... consent of the Secretary of the Interior and the Commissioner of Indian Affairs to such assignment...be endorsed thereon.

The fees that Judge Waddy awarded to Mrs. Cohen are "a part of" my original contracts with the Indians(20). They were assigned by Bingham and by Felix Cohen to Henry Cohen (21). As will be shown

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17. 18 U.S.Code,1964 Ed. § 438.

18. 18 U.S.Code 1964 Ed. §2.

19. 25 U.S. Code 1964 Ed. §81-85.

20 Tlingit Attorney Contract ¶¶7-8, 1 3 47, Def. Exh. 23, R-153 filed 6 5 70.

21. Bingham Assignment of 10 3 51, R-8, filed 1 14 69 (also Def. Exh. 8, R-153, filed 6 5 70).

below, the effect of the various interlocking arrangements culminating in Judge Waddy's judgment was also to "transfer" or "assign" said fees to her(22). See further discussion of this provision in ¶"(d)" at page 43.

E. The law with respect to Indian contracts further provides (23) that:

> No contract with any Indian where such contract relates to tribal funds or property in the hands of the United States shall be valid nor shall any payment for services rendered in relation thereto be made unless consent of the United States has previously been given.

The original attorney contracts with me were made and executed by members of the tribe with relation to tribal funds and tribal property, towit their claims against the U.S. The money to be transferred and paid to Mrs. Cohen below is for services rendered pursuant to said contracts. No consent to such payment has been given by the United States. See also ¶"(e)" on page 43.

F. The so-called Indian Reorganization Act provides that Indian tribes may organize and adopt a constitution. It further provides (24) that:

> ...[T]he constitution adopted by said tribe shall...vest in said tribe the following rights and powers: To employ legal counsel the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior.... etc.

The choice of neither Felix Cohen, Jonathan Bingham, nor Henry Cohen as counsel for the claimant tribes was approved by the Secretary. Neither were the fees herein sought to be collected by Mrs. Cohen. See also ¶"(f)" at page 43

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22. See pages 37-42 ¶¶ "(a)" to "(e)".

23. 25 U.S. Code 1964 Ed. §85.

24. 25 U.S.Code, 1964 Ed. §§461-479.

G. The claims of Alaska Indians were authorized under the so-called Tlingit and Haida Claims Act(25). These are claims on which Bingham specifically insists that he did some work(26) though I contended otherwise. (27). The act provided:

> ...[S]uch petition may be verified by any attorney or attorneys employed by said Indians under contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior. A true copy of the written contract or contracts by which such attorney or attorneys are employed by said Indians to represent them in such suit or suits shall be filed in said Court of Claims as their authority to appear in said suit or suits for said Indians and to prosecute said claim or claims in the Court of Claims.

The contract was made with the Alaska Indians under the above provision (28) but the names of neither Henry Cohen nor Felix Cohen nor Jonathan Bingham appears thereon. They did not file any contract in the Court of Claims. See also ¶"(g)" below at page 43.

H. The Indian Claims Commission Act, under which the other claims were filed (29) provides that:

> Each such tribe...may retain to represent its interests in the presentation of claims before the Commission an attorney or attorneys of its own selection...

None of the lawyers through whom Mrs. Cohen asserts her rights was "selected" by any of the tribes to represent them. See ¶"(h)" at page 44.

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25. Ch. 275, 49 Stat. 388, 74th Cong. Sess. 1, 6 19 35, Pub. L. No. 152.

26. Bingham affidavit page 2 lines 5-8, attached to Mrs. Cohen's Opposition, R-30, 5 12 69.

27. My answer to Mrs. Cohen's motion for judgment, ¶9, R-61, 10 6 69.

28. Tlingit attorney contract, 1 3 47 page 1 lines 4-5, Def. Exh. 23, R-153 filed 6 5 70.

29. 25. U.S. Code 1964 Ed. §§70-70w at §70n.

I. The same section of the Act further provides:

> The fees of such attorney or attorneys for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, unless the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, be fixed by the Commission at such amount as the Commission...finds adequate.

The fees here in dispute were not provided for in the tribal contracts. Neither were they fixed by the Commission. Nor was the Commission asked to fix said fees. The provision that the fees shall be "adequate" again emphasizes the public policy against such exorbitant sums as the $1500-per-hour figure enforced by the lower court. See also ¶"(i)" below at page 44.

J. The Code of Federal Regulations provides (30) extremely detailed procedures for negotiation of agreements for legal work for Indian tribes. They include a provision that the attorneys be admitted to the bar of the Department, that their qualifications be investigated, that the choice be by a general council of the tribe, that the proceedings be recorded and a resolution be adopted which must be made a part of the contract etc. etc. None of these requirements were complied with by Bingham or either of the two Cohens. See also ¶"(j)"below at page 44.

K. The Indian tribes are themselves federal municipal institutions and their public policy should be respected by this court. Their contracts with me set forth such policies. The Alaska Indian contract (31) provided that all attorneys employed for work on the contract should be approved by the Secretary. It also provided against any

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30. 25 Code of Federal Regulations §71-72, p. 101, Revised as of 1 1 70.

31. Tlingit attorney contract 1 3 47 §§6 and 9, Def. Exh. 23, R-153 filed 6 5 70.

unapproved assignment of the fees payable thereunder and that such an assignment would work a forfeiture of all fees earned. Similar provisions are found in another typical contract, the one with the Hoonah Indians (32).

At a later part of this brief, I will recite the anti-assignment provisions of the contract and argue that it is legally binding on this court, the same as similar provisions in federal law. See ¶"(k)" below beginning at pages 44-47.

L. The Federal Anti-Assignment Act (33) provides:

> All transfers and assignments made of any claim upon the United States or any part or share thereof or interest therein ...and all powers of attorney, orders or other authority for receiving payment of any such claim or any part or share thereof...shall be absolutely null and void unless they are freely made and executed in the presence of at least two attesting witnesses....[and other procedures prescribed at length]
>
> *** That...no claim shall be assigned if it arises under a contract which forbids such assignment.

I assume there is no question that the fees here in dispute are a "part or share" of the Indian claims. The assignments here involved did not comply with the above statute. See also ¶"(l)" below at page 48.

M. The Criminal Code (34) further provides:

> Whoever, having been employed in any agency of the United States...within two years after the time after such employment or service has ceased, prosecutes or acts as counsel, attorney, or agent for prosecuting, any claims against the United States involving any subject matter directly connected with which such person was so employed or performed duty...[shall be fined not more than $10,000 or imprisoned not more than two years or both]

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32. Hoonah attorney contracts 6 12 47, Def. Exh. 8, R-153 filed 6 5 70. These and other contracts under which the Indian claims were prosecuted were excluded from the evidence by Judge Waddy.

33. 31 U.S.Code 1964 Ed. §203.

34. 18 U.S. Code 1964 ed. §207.

The above provision applies to the situation of Felix Cohen whose rights Mrs. Cohen is also here seeking to enforce. It is discussed in ¶"(m)" below at page 48.

N. The federal conflicts-of-interest law (35) provides:

> Whoever, being an officer or employee of the United States in the executive, legislative or judicial branch of the government or any agency of the United States... otherwise than in the proper discharge of his official duties...acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of said claim...[shall be fined or imprisoned or both]...

This provision is intended to maintain decency in government. No official, especially a Member of Congress, should be in a position to achieve financial gain (or to confer such gain on an "assignee") thru the successful prosecution of a claim against his own government. If this court fails to enforce the law above quoted it would mean that Congressman Bingham has been in such a position for the past twenty years. See ¶"(n)" below, beginning on page 49.

* * * * * * *

Before considering the particular terms of the laws, etc. above quoted, I hope this Honorable Court will give thought to the public policies that they express. In a 1933 case (36) this court held an agreement invalid and void because it "violated the public policy of the Unite States as expressed in §109 of the Criminal Code." This section was a predecessor of the conflict-of-interst law cited above (37). The decision was based, in turn, upon an 1882 case

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35. 18 U.S. Code 1964 Ed. §205.

36. Case v. Helwig, 65 F. 2nd 189, 62 App. D.C. 98 (1933). Discussed at length at page

37. IN above

(38) holding such laws constitutional.. At that time, the Supreme Court listed a number of them and said that

> The evident purpose of Congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service.

Just as in 1933/(39) this court held a contract void for violating not the letter but the policy of the law, so in 1880 (40) the Supreme Court held a contract invalid for a conflict of interests which was not forbidden by any law but actually encouraged by the lawgiver. The conflict was between the duties of a Turkish consul and his own government. The court held void a contract by which he agreed to use his influence to help get arms contracts for the Winchester Arms Co. The court refused to enforce his claim for commissions on a million dollar deal even though there was no Turkish or American law forbindding such arrangements and the monarch of Turkey actually approved his consul's way of doing business!

The reasons given by our high court were:

> The contract was a corrupt one--corrupt in its origin and corrupting in its tendencies. The services stipulated and rendered were prohibited by considerations of morality and policy which should prevail at all times and in all countries without which fidelity to public trust would be a matter of bargain and sale and not of duty.
>
> ...It is intrinsically so vicious in its character and tendency and so repugnant to all our notions of right and morality that it can have no countenance in the courts of the United States.

As in Helwig the court made clear that it would hold the contract

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38. Ex parte Curtis, 106 U.S. 371 at 372-3 (1882), 27 L. Ed. 234, 1 S. Ct. 381

39. Case v. Helwig, 65 F. 2nd 186, 62 App. D.C. 98 (1933).

40. Oscanyan v. Arms Co. 103 U.S. 261 at 268-9, 271, 278, 26 L. Ed. 539(1880).

void even as to persons not directly involved. It said:

> The defense is allowed not for the sake of the defendant but for the sake of the law itself.... The principle is indispensable to the purity of administration. It wil not enforce what it has forbidden or denounced. The maxim ex dolo malo non oritur actio is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation.
>
> Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be stained with the vice of the original contract and is void for the same reasons. Wherever the contamination reaches it destroys. The principle is that the law will not lend its support to a claim founded on its violation. (41) (underlining added in last paragraph.)

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The cases cited immediately above refer to such laws as apply to public officials (cited in ¶¶L,M, and N on pages 30-31) but the same comments may be applied to the laws etc. which concern Indian tribal attorneys (¶¶A-K on pages 25 to 29 above). Regarding the public policy inherent in the latter, I refer the court to a 1953 report by a Senate Subcommittee (42) which recommended, among other things, that these laws be continued in effect. The reasons stated were that they would help to prevent political cronyism in the administration of Indian affairs.

AT page 4, the report refers to and quotes a statement made by another Congressional Committee almost a century ago(43). That 1873 committee said:

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41. Coppell v. Hall, 74 U.S. (7 Wall) 542 at 558, 19 L. Ed 244 (1868).

42. Senate Report No. 8, 85th Congress, First Session, January 6, 1953, entitled "Attorney Contracts with Indian Tribes."

43. House Report No. 98, 42nd Congress, Third Sess. , 1873, page 2.

> Great frauds and wrongs have been committed with impunity in the past by means of exorbitant and fraudulent contracts for nominal services of attorneys made by persons more or less familiar with the management of the Indian office either as agents or attorneys, by which the Indians were the sufferers, and which have caused much bad feeling and distrust between them and our government and greatly retarded the progress of the Indians in a civilization that they have doubted (underlining added.)

Certainly no words could better describe the claim of Congressman Bingham herein sought to be enforced by his assignee.

However, where political cronyism is involved there are always wheels within wheels. The 1953 report was signed by, among others, a close family relation of Congressman Bingham, the distinguished Senator from New York, Herbert H. Lehman. It was based on a complaint filed by Bingham after he and I had quarreled and after he had welched on his deal with me. The letter was quoted in the Commitee Report at page 10 and reads as follows:

> We[presumably Bingham and the two Cohens] have learned from attorneys who are working with Mr. Curry--until now without compensation--that while some progress has been made on research in Washington, the cases are at a standstill generally because of lack of funds to carry forward either the necessary investigations outside of Washington or the hearings which should have been under way long before now.
>
> It is our view that so long as Mr. Curry refuses to come to an agreement with us, he will be unable to obtain the financial assistance necessary to go forward with the cases.. If such an agreement is made with us, however, we stand ready to assist in interesting other attorneys who could carry the cases along financially. We believe we could readily do so if Mr. Curry would make an appropriate agreement covering the control and conduct of the cases.

Clearly Bingham made this complaint in order to force me into an"appropriate" agreement with him and his associates, presumably including the Felix Cohen syndicate which the report also mentioned. Such an agreement would include giving them "control" of the cases

that the Indians had entrusted to me alone. This would be unethical "claims brokerage" of the worst possible kind. Bingham was also obviously also using the Senate Subcommittee as a means of forcing me into his net. And the Senators who signed the report loyally served the purposes of Senator Lehman's crony.

They were blind to Bingham's and Cohen's obviously improper oonduct and levelled all their criticism at me. The only fault they proved in any respect was that I had accumulated law business that I was in a bad position to handle. But this was because of the desertion of Cohen and Bingham and their withdrawal of financial aid. The Senators, for good measure, added a lot of other small items of gossip about me that they picked up around the Indian country at great public expense. They never gave me an opportunity to answer their charges.

I cite the subcommittee report here because it so fairly states the public policy that these laws are suppoed to serve. I cite it without hesitation although it contains vicious attacks on me personally. This is because, 20 years later, time has vindicated me. I have never come to terms with Bingham. I contimed keeping my clients and serving them well until their claims were all filed and on the way to being tried. Then I fell very ill and had to turn them over largely to other lawyers--but not to the Cohen-Bingham crowd.

Now, a generation later, Bingham is seeking payment of an exorbitant fee that/is again unethical and improper "claims brokerage." $150,000 for 100 hours of work is more than "adequate." It is so large that it could not be for services but must be a commission on brokerage. Bingham has himself admitted

that the work he claims to have done had no significance in the cases (44). Just as I resisted his 1950 demands, even under pressure of the Senate Committee, so I resist them now. I will not pay him or his "assignee"one cent unless and until I am forced to do so. I hope that this court will not force me to but will reverse the decision against me.

* * * * * *

Aside from the public policy considerations above suggested, I also insist that the decision of the lower court in this case violates the terms of the laws. etc. above mentioned. Of course I could not make this argument if I accepted the validity of the jury's finding No. 1 (45). That finding describes the alleged stipulation between me and Mrs. Cohen as being based only on the consideration of her lawsuit. Accepting this would bar further discussion of the true consideration which was, as she stated, the services allegedly rendered by Congressman Bingham etc.

I do not accept Finding No. 1. In another portion of the brief I will show that it was composed by Judge Waddy and accepted by the jury in flagrant disregard of the facts and was therefore void (46). I will show that, as stated by Mrs. Cohen and her witnesses, the alleged stipulation was for services. This opens up for consideration the validity of the alleged settlement in the light of its background.

The background is found in various documents

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44. Bingham deposition of 11 5 69 pages 6-11, R-90, filed 11 20 69

45. Special Verdict, $-138filed 1 22 70.

46. See page s 122 - 173.

which I will describe in chronological order as follows.

(1) My contracts with the Indians were signed long before I even knew Cohen and Bingham. I tried to introduce them all into evidence but was blocked by Judge Waddy. The record contains copies of two, one of January 3, 1947 with the Alaska Indians ((47) and another of June 12, 1947 with the Hoonah Indians(48). It was pursuant to such contracts that the fees here in dispute were earned. It should be noted that the names of Bingham and the two Cohens do not appear in these contracts. They did not appear on any of my contracts for claims cases.

(2) The contract of September 1, 1947 between me and the two New York lawyers(48a) This contract provides for the operation of my already-established Washington and San Juan offices under the firm name of "Curry, Cohen and Bingham." (§1). But it also makes clear (§2) that said firm should consist only of myself--unless Felix Cohen should become my partner, which never happened.(§2). It also provides against participation by Felix in any cases forbidden to him by law (§9). Nowhere in the contract is there any provision for a partnership between me and the two New York men.

The contract also provides for advances by Henry and Jonathan of certain of the expenses of my business, both Indian and non-Indian (§§ 4 and 5). In the ccomplaint it was asked that this money be returned but that claim was not pressed and it is not included in

47. Tlingit attorney contract, 1 3 47, Def. Exh. 23, R-153 filed 6 5 70.

48. Hoonah attorney contract, 6 12 47, Def. Exh. 8, R-153, filed 6 12 70

48a. Bingham-Cohen-Curry agreement, 9 1 47(mistakenly dated 9 1 46) Exh. A of amended complaint, R-18, 1 21 69 (also Def. Exh. 17, R-153, filed 6 5 70).

the (alleged but not admitted) stipulation for settlement. The principal obligation of Henry and Jonathan is defined in §19, i.e. that they should do half the work on my Indian claims cases. It also provides that they shall share equally with the "Washington partners" (i.e. myself) in the fees therefrom after expenses.

My own principal obligation is defined in §§ 3 and 4. It provides for a special "Washington firm account" in which shall be deposited all the receipts of the "Washington Firm" (i.e. myself) and out of which shall be paid (§20) all the expenses of my firm, including the "fees or shares" due to Henry and Jonatham for their work. Thus with a document comparable to a municipal revenue bond agreement I provided for their fees without creating any personal liability for them.

Viewed very superficially this document looks a little like a partnership agreement. Mrs. Cohen at first contended that it was such. But a careful reading will indicate the contrary. Basically it is a contract for employment by me of Henry and Jonathan for work on the Indian claims. They never did any of the work but soon welched on their agreement. They insist that they did 100 hours' work (49) unreported to me as attorney of record. This is the work for which Judge Waddy awarded $150,000.

(3) Bingham's assignment of October 3, 1951 to Henry Cohen (50) "as of April 30, 1951." Mrs. Cohen testified that her husband paid $20,000 for this assignment (51) but Bingham claimed he got nothing

49. Bingham affidavit, p. 2 lines 5-8 attached to Mrs. Cohen's opposition, R-30, 5 12 69.

50. Bingham assignment, 10 3 51, R-8, filed 1 14 69, (also Def. Exh. 1, R-153 filed 6 5 70).

51. Trial transcript, 1 14 70 pages 147-149.

for it (52). At any rate, as I contend below,(53) Bingham had then gone to work for the government, and his conflict of interest forfeited any fees to which he might otherwise be entitled.

(4) The amended complaint of January 21, 1969 (54). Mrs. Cohen sued as executrix of Henry Cohen to enforce his rights. She also sues as assignee to enforce the rights of the Congressman and of Felix Cohen.

(5) The order of February 11, 1969, signed by Judge McGuire with attached escrow agreement (55). This establishes that the Indian claims fees here in dispute were transferred to the "escrow agents" (various banks) by action of this court. Incidentally, the escrow agreement seems to be void because not signed by the person "to be charged" namely myself, as required by the Statute of Frauds (56). The order also provides for a sort of lis pendens notice to be served on the Indian Claims Commission.

(6) Order of April 23 1969 of the Indian Claims Commission in the Paiute Indian case(57). It awards a fee of more than a million and half dollars "to be paid out of the final award" (p.432). It provides for payment of the money to I.S. Weissbrodt, attorney of record "for distribution of the amounts due to each of the participating

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52. Bingham deposition 11 24 69 page 112, R-111 filed 11 20 69

53. See pages 49 - 53, fn "(n)"

54. Amended complaint, ¶¶2, 4 and 9, R-13, 1 21 69 (also Def. Exh. 4, D-153 filed 6 5 70).

55. Judge McGuire's order of 2 11 69 and escrow agreement attached, Def. Exh. 12, R-153 filed 6 5 70.

56. District of Columbia Code 1967 ed. Titled 28 §3503, second paragraph.

57. Northern Paiute Nation v. U.S., 20 Ind. Cl. Comm. 414.

attorneys"(p.432). It also acknowledges the order of Judge McGuire requiring that my share be paid into the "escrow" account (p. 418).

(7). Petition of June 2, 1969 of Mrs. Cohen for approval of the alleged settlement stipulation of May 23(58). It alleges an

> agreed settlement whereby Defendant Curry agreed to pay your petitioner, as ancillary executrix of said estate, one hundred and fifty thousand dollars ($150,000) in full and complete settlement of all of petitioner's claims in said lawsuit as compensation for the services rendered by the decedent and his assignors in connection with said Indian claims cases.

The petition was rejected by Judge Holtzoff on June 20 but on July 22 Mrs. Cohen filed her "motion for judgment" (59) on said alleged settlement and asked for an evidentiary hearing.

(8) Letter of July 2, 1969 from Weissbrodt to Sher and Frohlich transferring the Indian fees to the escrow account as ordered by Judge McGuire and by the Indian Claims Commission(60).

(9) Pretrial report of November 14, 1969(61). It restates Mrs. Cohen's claim that there was a settlement in the following terms:

> Plaintiff asserts that the case was settled between the parties themselves, in the presence of their attorneys, on May 23, 1969, by an agrement that the defendant would pay plaintiff the sum of $150,000 for services rendered with the payment of such sum to be made to plaintiff by I.S. Weissbrodt Esquire from defendant's money held by him. (underlining added.)

It is held that a valid assignment exists whenever the person to whom an obligation is due authorizes its payment to another either

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58. Mrs. Cohen's notice to legatees and attached petition, ¶5, line 6, R-37 filed 6 2 69(also Def. Exh. 30, R-153 filed 6 5 70

59. Mrs. Cohen's motion for Judgment, R- 43 filed 7 22 69.

60. Weissbrodt letter 7 2 69, Def. Exh. 16, R-153 filed 6 5 70.

61. Pretrial report page 2 line 4-9, R-86, 11 4 69.

for his own use or that of another person (61a). Therefore the underlined words seem to indicate that the alleged stipulatin was an assignment from me to Mrs. Cohen of the fees held by Weissbrodt and later transferred by him to the depositories as ordered by Judge McGuire. The pretrial statement further says that:

> The oral settlement agreement was reported by defendant's attorney, Robert E. Sher, Esq.and Plaintiff's attorney,Newton Frohlich, Esq., in the presence of both parties, to Judge Alexander Holtzoff in open court on May 23, 1969, at which time the court commended counsel for settling this lawsuit which involves attorneys' disputes over the division of fees from claims cases over many years. The settlement agreement was reflected in the letter of May 23, 1969.

The last reference was to a letter from Frohlich to Weissbrodt asking him to turn over the $150,000 to Sher(61b). The pretrial report further says that:

> On May 23, 1969, Mr. Weissbrodt turned over $150,000 of defendant's money to Mr. Sher to hold and pay to plaintiff after notice of the settlement had been given to the legatees of plaintiff's decedent's estate.

This is correct. The money was turned over to Sher, but no mention is made of the fact that it was turned back to Weissbrodt by order of Judge Holtzoff when his Honor rejected the alleged stipulation of settlement. However, the above passage also tends to reassert Mrs. Cohen's understanding that the alleged settlement was a "transfer" or "assignment" of the fees as that term is used in the statutes, etc. above quoted.

(10) The judgment of February 18, 1970 (61c). It provides that "this judgment shall be paid out of the money held in escrow pursuant

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61a. Hall v. Hutchenson,(Tex. Civ. App., 196 S.W. 626.

61b Frohlich letter 5 23 69, Ptf. Exh. 2, attached to Mrs. Cohen's opposition, R-158, 6 17 70.

61c Judgment, R-140, 2 18 70.

to the order of this court entered February 11, 1969." This also tends to confirm that the alleged settlement was a transfer or assignment of the fees held in escrow.

* * * * * * *

I wil now try to show how the various arrrangments violated the statutes quoted above in ¶¶A to N on pages 25-31 above.

(a) I contend that they violate the statute quoted in ¶A above at page 25, forbidding payments to any tribal attorney by any officer of the United States except for services under the tribal attorney contract. The alleged stipulation provided payment "for services" but there is no indication that any services were ever rendered. When I tried to show that Cohen and Bingham did no work, Judge Waddy blocked me from so testifying(62). When I tried to introduce Bingham's admission that his work was of little value, it was excluded (63). In any event it can hardly be claimed that 100 hours work has any reasonable relation to the $150,000 fee awarded by Judge Waddy.

The provision forbids such payment "to an attorney" and it must be admitted that Mrs. Cohen is not an attorney. But under the Helwig case (64) since she "claims through" Bingham, payment to her is the same as payment to Bingham or the other two Cohens.

The provision forbids such payment "by an officer of the U.S." The final judgment,under which payment will be made if at all, is

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62. Trial transcript 1 20 70, page 736, R-150 filed 5 15 70.

62a. Trial transcript 1 21 70 page 730, R-151 filed 5 15 70.

63. Bingham deposition 11 5 69 page 11, R-90, filed 11 20 69.

64. Case v.Helwig, 65 F 2nd 186, 62 App. D.C. 98 (1933, last sentence.

signed by Judge Waddy, an officer of the U.S.

The fees have never been out of the control of "officers of the United States including the Treasurer, then the Claims Commission, then Judge McGuire, and finally Judge Waddy.

(b) Do these arrangments violate the law quoted in ¶B on page 26 which makes the receipt of such payments illegal and punishable? Clearly this would apply to Mrs. Cohen.

(c) The "aiding and abetting" provision quoted in ¶C on page 26 above would seem to subject the custodians of the "escrow" fund, Messrs Sher, Frohlich and Witt to the same penalties as Mrs. Cohen.

(d) The provision quoted in ¶D on page 27 above invalidates assignments of Indian attorney contracts "or any part thereof." The fees here under dispute are clearly "part" of said contracts. This would seem to invalidate not only the assignment from Bingham and Felix to Henry (See ¶"(4)" above at page 39) but also the alleged stipulation by me transferring said fees to Mrs. Cohen (See ¶¶ 9 and 10 at page 40-42 above.)

(e) The provision of Indian contracts law quoted in ¶E at page 27 above which forbids payment by anyone of fees without government approval seems clearly to be violated by the transactions culminating in a final judgment requiring payment of said fees to Mrs. Cohen.

(f) The provision in the Indian Reorganization Act as to choice of counsel and fixing of fees (set out at ¶F, page 27 above) is likewise violated because Cohen and Bingham were not chosen by the Indians.

(g) The provision from the Tlingit and Haida Claims Act cited in ¶ G above at page 28 is of the same kind and the violation is

for the same reason.

(h) The provision of the Indian Claims Act cited at ¶H on page 28 above again provides that the attorneys shall be of the tribe's selection. Certainly such a provision is essential to a fair trial of the claims cases. The effect of such a judgment as Judge Waddy entered is to foist upon the Indians attorneys like Bingham whom they never met (65).

(i) The provision cited in the next pagraph (¶I on page 29 requires that the fees be approved by the Commission. None of the fees required to be paid to Mrs. Cohen were ever approved by the Commissioner. The Commission was never asked to approve any fees for Bingham or either of the two Cohens.

(j) As to the provisions of the Code of Federal Regulations mentioned in ¶J on page 29 above, it does not appear that Bingham or either of the two Cohens ever tried to comply with the procedure therein prescribed.

(k) In ¶K on page 29 above, I quote from the anti-assignment provisions of the original attorney contracts. In support of my defense based on thos clauses, I offered in evidence a copy of a typical contract (with the Hoonah Indians)(66). I also offered in evidence a copy of the contract with the Alaska Indians (67).

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65. Bingham deposition 11 24 69 page 114, R-111 filed 12 8 69, excluded as irrelevant, trial transcript 1 21 70 , page 806, R-151 filed 5 15 70.

66. Trial transcript 1 15 70 page 335 line 8 to 342 line 4, R-147 filed 5 15 70 also pages 656 line 2 to 661 line 27, R-170 filed 5 15 70.

67. Tlingit attorney contract 1 3 47, Def. Exh. 23, R-153 filed 6 5 70; trial transcript 1 21 70 page 735 line 19 to page 736 line 1, R-151 filed 5 15 70.

AS Mrs. Cohen's counsel recognized, I was prepared to offer another 26 similar contracts (68). The Hoonah contract (69) provided:

> It is...agreed that no assignment of the obligation of this contract in whole or in part shall be made without the consent previously obtained of the council of the association [tribe] and the commissioner of Indian Affairs.
>
> It is further agreed that no assignment or encumbrance of any interest in the compensation agreed to be paid in this contract shall be made without the approval of the Commissioner of Indian Affairs. Any assignment of the obligation of this contract and/or the assignment or encumbrance of any interest in the compensation agreed to be paid, made in violation of the provisions of this paragraph, shall operate to terminate this contract and in such event no attorney shall be entitled to any compensation whatever for any services rendered to the date of termination of the contract.

As a general rule the courts hold that the parties to a contract may expressly prohibit its assignment and the stipulation will be recognized and enforced by the courts (69a). In making such a provision the tribes were following the example of other municipal corporations. They were advancing the same public policy of self-defense against cheats and scoundrels that is incorporated in the federal laws above quoted.

A good example of such a stipulation is described in a New Jersey case(70) where the city had made a contract for trash collection with a man named Loprete. It contained a stipulation very like the one that the Hoonah Indians incorporated into their contract with me. Specifically, the provision was:

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68. Trial transcript 1 15 70 page 335 line 16-19, R-147 filed 5 15 70

69. Hoonah attorney contract, 6 12 47 page 3 lines 16-29, Def. Exh. 8, R-153 filed 6 5 70.

69a. Burck v. Taylor, 152 U.S. 684, 38 L. Ed. 578, 64 S. Ct. 696.

70. De Vita v. Loprete, 77 Atl. 536, 77 N.J. Eq. 533 (1910)

> No transfer or assignment of this contract or any part thereof or of any money due or to grow due thereon shall be made without the consent of the council of East Orange first obtained and expressed by resolution of the city council; and should any transfer or assignment be made, the city council of East Orange shall have the right at its option by resolution to terminate this contract.

Just as I have been sued by Congressman Bingham's assignee has sued me, so Loprete was sued by one De Vita. He showed that they had an agreement to share in the work and proceeds of the contract. But the court refused to enforce the agreement saying that:

> The importance of such provisions in municipal contracts is great. They are absolutely necessary for the protection of municipalities against extortion. The effect of granting to the complainant the relief sought by his bill would be to deprive the City of East Orange of the benefit of the provision in its contract.
>
> It may be thought that the city received all the benefit which could accrue to it from the provision when the bidding on the contract was closed and the contract itself was awarded. and therefore it cannot be harmed by enforcing the right of the complainant against the defendant under the agreement between them. But a moment's consideration will show that this is not so, for the provision would be no protection at all to the city if it could be violated as soon as the contract was signed. It is its enforcement which tends to discourage collusion of probably bidders and prevents extortionate contracts from being forced on a municipality.

Just as the New Jersey court protected East Orange from brokerage of service contracts by people like De Vita and Loprete, so should this court protect the Indians from "claims brokerage" by Bingham and the two Cohens. Mrs. Cohen may say that the alleged settlement ought to be enforced by execution against my general assets if not by payment out of the Indian fees held in escrow. However, this would be contrary to the general rule that every part of the consideration goes equally to the whole promise, that if any part of the alleged stipulation violates the law or public policy,

the whole promise fails (71).

In excluding the evidence of the Hoonah contract above quoted on page 45 Judge Waddy stated no justification, so far as I have found any in the record, except the following(72).

> The record shows that $400,000 in fees have been collected and held in escrow. This is a suit for an accounting of a partnership and that claim was for moneys that you had collected and could collect from your part of the partnership assets.

By the time he made the above remark, Judge Waddy seems to have forgotten that Mrs. Cohen had abandoned her suit for an accounting and was seeking only to recover on an alleged stipulation of settlement. At any rate, he was obviously wrong when he said that I had collected any part of the fees. Instead, they were turned over to other parties by order of the lower court. Now I am accused of having assigned my rights in them to Mrs. Cohen by a stipulation of May 23.

Even if Judge Waddy's statement above quoted were correct, however, I don't see how it justifies his exclusion of the evidence as to the Hoonah contract and others like it. They show that the tribes had forbidden any assignment of fees such as is effectuated by the alleged stipulation with Mrs. Cohen. Therefore I urge this court to respect and enforce said anti-assignment clauses and to reverse the judgment below.

* * * * * * * * *

So much for the federal provisions against exploitation of Indians by their attorneys. I will now argue that the alleged stipulation of settlement also violates laws which regulate the conduct of Congressmen and other public officials.

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71. Hazelton v. Sheckells, 202 U.S. 71, 51 L. Ed. 939, 26 S. Ct. 567, 6.Ann. Cas..217.

72. Trial transcript 1 15 70, page 336 lines 9-13, R-147, filed 5 15 70.

(l) The general federal anti-assignment law quoted in ¶L at page 30 above forbids the assignment, except under certain conditions of "claims against the United States or any part or share thereof or interest therein." The interest of Jonathan Bingham in these fees is obviously an interest in the claims of the Indians against the United States. Therefore its assignment, either by him to Mr. Henry Cohen, or by me to Mrs. Cohen under the alleged stipulation is also illegal.

The same section forbids <u>any</u> assignment of any claim "if it arises under a contract which forbids such assignment." The Hoonah contract and others like it forbid such assignment and therefore the assignments herein involved are illegal.

(m) The provision of the Criminal Code quoted at ¶M above at page 30 , which forbids federal employees to handle claims within two years after leaving the government, applies in this case especially to the situation of Felix S. Cohen. Like Jonathan Bingham, he was one of Mrs. Cohen's "assignors," as indicated in ¶"(4)" on page above. I testified(73)--and Mrs. Cohen did not deny--that he had been employed in the Department of the Interior on work related to Indian claims less than one year before the alleged work on my claims was done by him.

Therefore the quoted provision would have made Felix subject to fine and jail for doing the work. Obviously said illegality also taints his assignment to Henry and my alleged assignment to Ceil.

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73. Trial transcript 1 20 70 page 699-700, R-150 filed 5 15 70.

(n) The federal conflicts-of-interest law quoted in ¶"M" at page 31 above has special application in this case to the situation of Congressman Bingham. In view of the public policy considerations previously suggested herein and the importance of the Congressman's present powerful position in government (74) this court owes a special obligation to enforce the law, intended to protect the government against "bribery, graft and corruption." As shown in ¶"(4)" on page 39 above, Mrs. Cohen claims <u>through</u> Congressman Bingham. The conflict-of-interests law forbids the Congressman or any other public official to collect fees for past of future services in federal claims cases. In order to protect him from the temptation to aid such claims after he becomes a Congressman, it also forbids him to effect collection of his fees through some front man or assignee.

This is the effect of the decision of the Court of Appeals of the District of Columbia issued in 1933 (75) which I will discuss below at greater length. AS to contracts tainted with such conflict of interest, the Supreme Court of the United States said at a very early date (76) that "wherever the contamination reaches, it destroys." Not only is Bingham's assignment to Henry Cohen (mentioned in ¶"(3)", page above) so tainted. So is the alleged stipulation between me and Mrs. Cohen described in ¶"(7)" on page 40 above. Like a hereditary disease said taint pursues these fees all though the Indian Claims Commission Judge McGuire, Mr. Weissbrodt, etc. to the depositories which are now holding them in escrow.

During the trial below, I submitted a proper instruction citing

74. See page 31 <u>et. seq.</u>

75. Case v. Helwig, 65 F 2nd 186, 62 App. D.C. 98 (1933).

76. Coppell v. Hart, 74 U.S.(7 Wall) 542 (1868).

the conflict-of-interests laws(77). But it was rejected by Judge Waddy (78). My counsel also offered in evidence (79) an excerpt from Cnngressman Bingham's deposition(80). There Mr. Bingham swore that he made his assignment to Henry Cohen while he was entering the State Department as "First Assistant Director of the Office of International Security Affairs for non-NATO countries." He continued in the State Department from 1951 until 1953, also serving as Deputy ADministrator of the Technical Cooperation Administration. During that year, he returned to private practice in association with Henry Cohen and to a position as Secretary to then-Governor Averell Harriman of New York. In 1961, he reentered government employment as U.S. Representative on the Trusteeship Council of the United Nations. Later he became U.S. Representative on the Economic and Social Council of the United Nations. He resigned the latter position in 1964 to run for Congress. He has served as Congressman ever since.

All this evidence as to Bingham's connection with the govern-- ment was excluded by the lower court as irrelevant. The jury probably did not even know that Bingham was a Congressman. Clearly it knew nothing about the above laws intended to prevent graft and corruption on the part of Congressmen. Such exclusion of the evidence was clearly erroneous. Bingham's public employment clearly invalidated his own claim, also his asignment to Mr.. Cohen, and My alleged (but not admitted) assignment to Mrs. Cohen

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77. My proposed Instruction No. 12, R-136 filed 1 22 70; trial transcript 1 20 70 page 725, R-150 filed 5 15 70.

78. Trial transcript 1 21 70 page 829, R-151 filed 5 15 70.

79. Id, pages 804-5.

80. Bingham deposition 11 24 69 page 99 line 27 to page 100 line 23, R-111 filed 12 8 69.

Perhaps she will insist that the law does not apply because the money is being paid not directly to the Congressman but to her. The District Court of Appeals for the District of Columbia holds, however, that the statute likewise applies to her. This was decided in Case v. Helwig(81) above cited. The statute there construed was substantially similar to the one that I here invoke (82). From the opinion of Judge Robb for the court in that case, it appears that Ralph Case and Harry Helwig, attorneys of this city, had a contract to prosecute a claim against the United States, fees to be shared half-and-half. In January, 1925, they filed suit in the Court of Claims. In January 1928 Harry Helwig became a United States Attorney. Helwig's situation was clearly comparable to that of Congressman Bingham. The Indian Claims Act is under constant review by the Congress and obviously the members of that body have much more to do with the success or failure of Indian claims than do district attorneys with claims in the Court of Claims.

When Helwig went into the government, he and Ralph Case made a new arrangement as to fees, on a 60-40 basis. Then Harry assigned his rights to his brother George. In 1931, the claim was decided and Ralph Case collected the fee. George Helwig sued him for his 40% share. The lower court ordered the money deposited with receivers and Case complied.

Another lawyer, Clarence C. Calhoun, also intervened. He claimed that prior to Harry Helwig's association with Ralph Case he, Calhoun, had also been associated with Harry on the same case.. He asked for

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81 Case v. Helwig, 65 F 2nd 186, 62 App. D. C. 98,(1933).

82. §109 of the U.S. Criminal Code, quoted in Case v. Helwig supra, p. 188.

a "portion of the fee ultimately realized." The Court of Appeals rejected both Calhoun's claim and the claim of brother George Helwig.

First the court invalidated the 60-40 arrangment between Ralph Case and Harry Helwig, saying (83) that

> The statute contemplates the complete severance of interest by one who, during the prosecution of any claim against the United States, becomes an officer of the United States.

As to the assignment from Harry Helwig to his brother George, the Court said (84) that:

> The supplemental agreeement between the Helwig brothers violates the public policy of the United States expressed in [the conflict of interests laws] and is therefore void. By entering the government employ, [Harry] Helwig became incapacitated to perform further services in the prosecution of the claim and in the circumstanc of the case he must be held to have waived all claims to compensation for past services.

Regarding the earlier arrangment between Harry Helwig and Clarence Calhoun, the court said(85) that:

> Mr. Calhoun claims an equitable interest in Harry Helwig's fees. We have ruled that Helwig was not entitled to a fee. Inasmuch as Calhoun claims through Helwig, his claim must fail.

In every relevant way the Helwig decision is analogous to the case at bar. The old statute is substantially similar to the version now in effect(86). Surely the new law, like the old one, "contemplates the complete severance of interest of one who [like Bingham] during the prosecution of any claim against the United States becomes an officer of the United States." Certainly, like Harry Helwig, Bingham "by entering the government employ

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83. Case v. Helwig, supra., footnote 81.

84. Id.

85. Id.

86. The earlier law did not specifically refer to Members of Congress; but Bingham also served in the executive branch while these cases were pending.

must be held to have abandoned all compensation for past services." Just as Clarence Calhoun "claimed through " Harry Helwig, so Mrs. Cohen now claims through Jonathan Bingham. Therefore, like Calhoun's claim, Mrs. Cohen's claim also "must fail."

* * * * * * * * *

The lower court erred by excluding evidence and refusing instructions which would have tended to show violation of the provisions quoted in ¶¶ "(1)" to "(10) on pages 37-42 above. The court also erred by enforcing arrangements which were in clear violation of said sections and of the public policy therein set forth, one of seeking to prevent graft and corruption by Indian attorneys and by Congressmen and other officials of the United States. Therefore the judgment of the lower court should be reversed.

3. THE COURT ERRED BY DENYING ME LEAVE TO IMPLEAD CERTAIN ADDITIONAL PARTIES, ESPECIALLY MY SUCCESSOR AS ATTORNEY OF RECORD IN THE CLAIMS CASES, I.S. WEISSBRODT, WHO HAD PROMISED ME IN WRITING TO PAY, OUT OF HIS SHARE OF THE FEES, ANY SUCH CLAIMS AS ARE HEREIN SOUGHT TO BE ENFORCED.

I filed four motions to bring in additional parties (1). All of themwere denied. I contend that this was arbitrary especially in light of the rule (2) that the rules shall all be construed in such a way as to secure the just determination of every action.

Most clearly unjust was the refusal to permit me to make Mr. Weissbrodt a defendant. He had agreed with me, years before, (3) that I should receive a certain share of the fees for the work I had done. He also agreed that out of the balance received by him he would make distribution "to each of the attorneys entitled to a share thereof." This clearly included an obligation to pay off any lawyers like Congressman Bingham, Felix Cohen, or Henry Cohen,

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1. (a) The first was a motion of 11 14 69 to add I.S. Weissbrodt as party defendant. It is missing from the record in spite of Judge Waddy's order of 8 5 70. It seeks to hold Weissbrodt liable over to me pursuant to his agreement.

(b) The second was my motion of 11 24 69 to make various Indian tribes parties plaintiff,(R-98). It asked that any award for services of Bingham or Felix Cohen not be made to them through their assignee, Mrs. Cohen but be paid back to the Indians.

(c) The third was my motion of 11 24 69 to join Sher and Harris as defendants and make them liable over to me for any judgment because of their malpractice.(R-97)

(d) The fourth was my motion of 11 24 69 (R-99) to make Bingham a party plaintiff. It alleged that his assignment to Mrs. Cohen is void and if so he retains his rights if any.

2. Rule 1, Rules of Civil Procedure for U.S. District Courts as amended to 7 1 68.

3. Curry-Weissbrodt Agreement 7 22 66 attached to Mrs. Cohen's opposition 5 12 69, R-30 filed 5 12 69 (Also Def. Exh. 7, R-153 filed 6 5 70).

who might have any right to compensation for services rendered.

Mr. Weissbrodt, of course, had made no such distribution to the attorneys whose alleged rights Mrs. Cohen now seeks to enforce. Instead, she sued me alone. Now judgment has been entered for $150,000. The effect of its enforcement would be to pay out of my share of the fees the sums that Weissbrodt agreed to pay out of his share. This helps to explain why Weissbrodt, who was supposedly acting as my legal adviser, joined with Sher and changed sides at a critical stage of the case. But it also helps to explain why it was so unjust to deny me the right to implead him.

Presumably, I could sue Weissbrodt for the money paid in compliance with his obligation. But the record in this case is so badly bollixed up that my chances of success in such a suit would be very small. For one thing, Weissbrodt would surely insist that the settlement with Mrs. Cohen was for something other than any "share" to which the three assignors were "entitled." He would be supported by finding No. 1 of the jury (4). That finding was framed by Judge Waddy in complete disregard of the nature of Mrs. Cohen's claim and therefore does not even mention "services rendered."

Furthermore, in any suit by me against Weissbrodt, I might have to show that Bingham and the two Cohens were actually "entitled" to share in the fees. Since Weissbrodt is not a party to the present suit, probably nothing herein would be <u>res adjudicata</u> against him. This would put me in the almost impossible position of trying to prove that Bingham and the two Cohens did $150,000 worth of work.

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4. Special verdict, R-138 filed 1 22 70.

These problems would have been eliminated if the lower court had construed the rules in such a way as to secure the just determination of both Mrs. Cohen's action and mine. Weissbrodt's contract puts him within the classification described in the Third Party Practice Rule (5) i.e. "a person not a party to the action who is or may be liable to [the defending party] for all or part of the plaintiff's claim against him." That rule would therefore give me a right "at any time after commencement of the action" to issue summons and complaint"against Weissbrodt.

Weissbrodt's contract with me also brings him within the description contained in the Rule as to Permissive Joinder of Parties (6). It provides that defendants may be joined together "if there is asserted against them...any right to relief with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or of fact common to all of the defendants will arise in the action."

The saddest element in this case is that, if I had been sufficently familiar with the rules, I could have issued, under the recent revision, without permission of the court, a summons and complaint against Weissbrodt at any time prior to October 16, 1969, i.e. within ten days after filing my answer (7). But being preoccupied with various pressures exerted by my opponents (including my own former attorneys) and by the court, I lacked time to study them. So I

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5. Rule 14, Rules of Civil Procedure for U.S.District Courts as amended to 7 1 68.

6. Rule 20, Id.

7. My answer to Mrs. Cohen's motion for judgment, R-61, 10 6 69.

filed my motion to implead Weissbrodt almost a month later, namely November 14, 1969 (8).

It is true that because of this slight delay, I am required as a technical matter to obtain leave of court. But the court was not free, upon a mere whim, to refuse my request. However, that is exactly what occurred(9) Therefore I am asking this Honorable Court to reverse the lower court's action.

Mrs. Cohen's attorney filed no written opposition to my request. Neither did he at any time suggest a reason for denying it excepting that the pretrial examiner's report was "comprehensive and workmanlike. She did not omit a thing."(10). The court itself suggested no justification for refusing it excepting a statement in the pretrial report stating that my motion had been filed and that "The defendant objects. The examiner is today entering a recommendation that it be denied as untimely."(11)

Under the decisions of the federal courts, this reference to untimeliness is a flimsy justification for denying my motion. Professor Moore says (12) that the purpose of the rules is "to avoid circuity of action and to settle related matters in one litigation as far as possible." That purpose would have been served by im-

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8. See Footnote 1, above, ¶(a), p 54.

9. The motion was first submitted to the pretrial examiner who referred to it in her report, page 5 lines 16 and 17, R-86 filed 11 14 69. She also made a recommendation on it, R-87, 11 14 69. I filed objections, R-89, 11 19 69, page 8 lines 9-31. An argument was hald before Judge Curran, Hearing transcript 12 8 69, R-117 filed 12 9 69 and he overruled my objections by Order, R-R-109, 12 8 69.

10. Hearing Transcript, 12 8 69, filed 12 9 69.

11. Pretrial report page 5 lines 13-17, R-86, 11 14 69.

12. Moore, Federal Practice, 1968 ed. ¶14.05(1) above footnote 2.

pleading Mr. Weissbrodt. Moore also says (13) that when such permission was required "mere delay to the plaintiff was not given too much weight, since it was inescapable." He cites a case in which the impleader was allowed even though delayed for 9 1/2 months, and in face of a local rule requiring it to be filed in 6 months.(14). The thirty day delay in this case seems trivial by comparison. Again, Moore says that "the general purpose of Rule 14 is to avoid two actions which should be tried together to save the time and cost of a reduplication of evidence." (15) Mrs. Cohen's claim for a settlement allegedly based on "services rendered" involves the same kind of evidence that would be involved in a separate suit against Weissbrodt.

As to whether or not my request was "untimely" there can be no more emphatic precedent than a 1952 decision of the United States Supreme Court (16). That case was filed in the District Court for Alaska. It was tried in that court. It was decided in that court. It was appealed to the Ninth Circuit . It was briefed, argued and decided there. It was then taken to the Supreme Court. At that stage a motion was made in the Supreme Court and granted, permitting the addition of new parties. I don't know how long it took for the case to get all the way from Alaska to the U.S. Supreme Court. But it must have been a lot longer than the 30 days

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13. Same, p. 505 above footnote 7.

14. Phero v. City of Philadelphia, 4 F.R. Serv.2nd 14a132 case 1, page 209, E.D. Phila. 1961.

15. Moore's Federal Practice, 1968 ed. 1969 supp. vol. 3 page 65, ¶14.04.

16. Mullaney v. Anderson, 342 U.S. 415, 96 L. Ed. 458, 72 Sup. Ct. 428 (1951).

that I delayed in filing my motion. The decision of the high court puts its stamp of approval on the view of Professor Moore that "untimeliness" is not given much weight. But the lower court herein gave my thirty day delay tremendous weight and thereby abused its discretion.

There are other respects in which the trial examiner might have considered my motion "untimely." The pretrial proceedings were being held only one day after Judge Sirica had signed the order for them (16a) In the same order he had set the trial for November 10, less than a month later. The same order required me to file a certificate of readiness. (I considered this order preposterous and never did comply with it.)

The pretrial examiner must have been deeply impressed with Judge Sirica's extreme urgency. She must have known about Judge Holtzoff's opinion that the case must be settled without trial of the merits in order to avoid disgracing the legal profession. From this point of view, of course, any motion of mine might be considered untimely. But it is not a point of view to which this court should give any respect whatsoever.

The other three motions to bring in additional parties (17) are less important at this time. By them I tried to make Congressman Bingham, various Indian tribes, and my defecting attorneys, Sher and Harris, also parties to the lawsuit. My reasons are set forth in the motions which form a part of the record on appeal. Again no written opposition was filed by Mrs. Cohen's attorney.

16a. Judge Sirica's Order page 2, first paragrah, D-[illegible], 11 13 69.

17. Footnote 1 above, ¶¶ (b), (c), and (d), page 54.

The motions were treated in the same high-handed fashion as was my motion to implead Weissbrodt.

With these three motions I filed motions cards (18) as required by the rules (19) and asked for an oral argument. Such argument is provided for in the rules (20) but was never permitted. Neither were the motions referred to the pretrial examiner for consideration and recommendation as required by the rules (21). Instead, in an order on an entirely different subject (22) Judge McGuire inserted a paragraph saying that I had filed "diverse motions to implead numerous parties plaintiff," and that "these are all denied."

That is how the order read as originally entered and filed on December 2, 1969. I have a certified copy of the original order. Thereafter, someone inserted an asterisk at the place above quoted and a footnote reading "and third parties defendant." This was done without any notice to me. The change was initialled by Judge McGuire. The order was then stamped with the clerk's stamp to indicate that it was filed on December 18. It is at least obvious that Judge McGuire did not pay enough attention to my motions even to identify them properly.

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18. On 8 8 70 Judge Waddy ordered thse motions cards to be docketed and made part of the record. They are contained in a manila envelope in the back of the record in the Clerk's office.

19. Rule 9(b) third sentence, Local Rules of the United States District Court, D.C.

20. Rule 9(c), id.

21. Rule 9(d)(4), id.

22. Judge McGuire's order and memorandum, 12 2 69, R-115 filed first on 12 2 69 and again on 12 8 69.

Furthermore Judge McGuire has supplied this honorable Court with no justification at all for his action, not even the flimsy one supplied by the pretrial examiner in connnection with the motion to implead Weissbrodt. I had submitted them orally to the pretrial examiner (23) but she had omitted to pass on them as required by the rules(24).

* * * * * * * * *

From the above it appears that Judge Curran's refusal of my request to implead Weissbrodt and Judge McGuire's denial of my request to implead the other persons above mentioned were an arbitrary, capricious, unjust and illegal exercise of their discretion. Therefore they should be reversed along with the final judgment entered by Judge Waddy.

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23. My objections to the pretrial report, page 8 ¶¶23-24, R-89, 11 19 69.

24. Pretrial Instructions § IV-2, Local Rules of the U.S. District Court, D.C., Appendix.

4. THE COURT ERRED BY ENFORCING AN ALLEGED STIPULATION WHICH WAS AN ASSIGNMENT IN TRUST ALTHOUGH IT WAS NOT IN WRITING AND SIGNED BY THE PERSON GRANTING IT AS REQUIRED BY THE STATUTE OF FRAUDS

The Statute of Frauds of the District of Columbia (1) provides that:

> A grant or assignment of trust or confidence which is not in writing, signed by the party granting or assigning it, or by his last will, is void.

This provision has been held applicable to personal as well as real property by our Court of Appeals in 1924 (2) and by our Municipal Court of Apppeals in 1954 (3). The 1924 decision was under an earlier version of the statute:

> All grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same or by his last will or devise or else shall likewise be utterly void and of none [sic]effect.

The changes made in the present law serve only to confirm the opinion of the Court of Appeals that it applies to personal property--such as Indian claims fees.

Even without reference to testimony, the documents in the record of this case show that it was the purpose of the plaintiff herein by my alleged stipulation to effect an assignment in trust that was not signed by me. This is confirmed by the language of the judgment itself which should therefore be reversed.

The issue was raised by me first in my answer (4), then in my motion to dismiss for failure to state a cause of action (5) and

1. District of Columbia Code 1967 Ed. Title 28 §3503.

2. Chiswell v. Johnson, 299 F. 2nd681.

3. Thurm v. Wall, 104 A 2nd 835.

4. My answer to Mrs. Cohen's motion for judgment, ¶¶12 and 13, R-61, 10 6 69.

5. Same, ¶1.

in my argument thereon (6) and again in my counsel's motion for directed verdict(7) which was denied.

In the pretrial report (8) Mrs. Cohen describes the alleged stipulation as an agreement to the effect"that Defendant would pay the Plaintiff the sum of $150,000 for services rendered the payment of such sums to be made by I.S.Weissbrodt,Esq. from defendant's money held by him." This language would clearly bring Mr. Weissbrodt under the standard definition of a trustee, i.e. "one to whom property is conveyed to be held and managed for another." (9) The character of the alleged agreement as a trust, with Sher in the role of trustee, is confirmed by the following statement from the pretrial report (10):

> On May 23, 1969, Mr. Weissbrodt turned over $150,000 of Defendant's money to Mr. Sher, to hold and pay to plaintiff...

At another place in the same report (11) the arrangement is described as an "escrow," with Mr. Sher as "escrow agent."

> On June 23, 1969, Judge Holtzoff entered an order directing Robert E. Sher, Esq. to return and pay out the sum of $150,000 held by him as "escrow agent",pursuant to an agreement of the parties, reflected in an order of Judge McGuire dated February 11, 1969.

The above is a slightly inaccurate reference to the "escrow agreement." It named neither Sher nor Weissbrodt as "escrow agent."

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6. Trial transcript 1 13 70 page 6 et. seq. R-145 filed 5 15 70.

7. Trial transcript 1 20 70 page 918 lines 8-19, R-152 filed 5 28 70.

8. Pretrial report page 2 lines 6-9, R-86, 11 14 69

9. Bouvier's Law Dictionary, Third Revision, definition of "trustee."

10. Pretrial report page 2 lines 17-21, R-86, 11 14 69.

11. Id, page 1 lines 17-21.

Instead, the "escrow agents" were to be certain federally-guaranteed depositaries. Actually the use of the term "escrow" is very inartistic in this connection. That word is used to describe deeds etc. that are held "in escrow" pending payment of purchase price, etc. This is the sort of language that lawyers would use who would work out an oral stipulation and expect it to be valid in spite of Rule 3 of the District Court.

But there is no doubt what was meant by "escrow." It is held(12) with respect to true escrows (12) that "the depositary is not an agent at all but a trustee of an express trust with duties to perform for each of the parties, which duties neither can forbid without the consent of the other." Judge Holtzoff confirmed this view when he was discussing Mr. Sher's situation at the time he was holding $150,000 of the money(13):

> THE COURT: You are holding the money in escrow at this time?
>
> MR. SHER: Well Mr. Curry says I am not an escrow agent. I don't know what my title is. I know I have $150,000 worth of other people's money and I want to get rid of it.
>
> THE COURT: You are holding it in escrow or as trustee; you hold the money.
>
> Mr. SHER: Yes. Of course there is nothing unusual in funds being turned over to an attorney to hold until settlement papers are signed and so on.

Incidentally, my disagreement with Sher did not concern what was his proper title. It was rather (a) whether I had ever agreed to his taking the $150,000 for payment over to Mrs. Cohen, and (b) whether he did not thereby put himself in a grossly unethical po-

12. American Jurisprudence, Escrow, §13 and cases cited (footnote 19).

13. Hearing transcript 6 20 70 page 10 lines 12-18, Deft. Exh. 6, R-153 filed 6 5 70.

sition. But the colloquy above quoted shows that Judge Holtzoff clearly understood that the transaction purported to create a trust.

After Sher returned the money to Weissbrodt, Weissbrodt turned it over to Hal Witt, another of Mrs. Cohen's attorneys who deposited it in various savings and loan associations in "escrow" accounts, subject to withdrawal by persons other than myself. Like so many things in this record, it is not clear what were the exact terms or who was the trustee, whether Sher or Weissbrodt, or the depositaries or perhaps each of them at different times. But there is no doubt that a trust assignment was intended by the stipulation alleged by Mrs. Cohen (but not admitted by me.)

This also appears from the judgment of the court below (14) which provides no personal responsibility on my part but instead provides that:"

> FURTHER ORDERED AND ADJUDGED that this judgment shall be paid out of moneys held in escrow pursuant to the order of this court entered February 11, 1969...

Mrs. Cohen has contended that the Statute of Frauds does not apply so she has made no effort to prove compliance. But she has shown us a letter (15) from Frohlich to Weissbrodt, also signed by Sher, telling Weissbrodt to turn over $150,000 to Mr. Sher. I introduced into evidence Judge McGuire's order of February 11, 1969 with the

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14. Judgment, third paragraph, R-140, 2 18 70.

15. Frohlich letter, 5 23 69, Ptf. Exh. 2. attached to Mrs. Cohen's opposition, R-158, 6 17 70.

"agreeemnt of the parties " attached (16). Neither of these two documents contain my signature.

It may be that Mrs. Cohen will have doubts as to whether the Statute of Frauds applies and will want to show that it was complied with. If she does not, then under that Statute, the arrangements that constituted the alleged stipulation were clearly void and the judgment based thereon should be reversed.

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16. Judge McGuire's order with attached escrow agreement 2 11 69 Def. Exh. 12, R-153 filed 6 5 70; trialtranscript 1 16 70 page 521, R-148 filed 5 15 70.

5. THE COURT ERRED BY EXCLUDING LEGALLY ADMISSIBLE EVIDENCE TENDING TO PROVE PERJURY BY CONGRESSMAN BINGHAM'S ASSIGNEE, THE PLAINTIFF HEREIN.

All three of the witnesses against me, including Mrs. Cohen, my two defeding attorneys, I.S.Weissbrodt and Robert E. Sher, as well as Newton Frohlich, attorney for Mrs. Cohen, were guilty over and over and over again of what I would call sinborn lies. To catalogue them all would take more time and paper than the amount of which this Honorable Court will avail me.

In light of the jury's verdict, questions of veracity are more or less foreclosed to me on this appeal. But I have a right to complain vherever Judge Waddy improperly prevented me from contradicting, impeaching or discrediting these witnesses. Again there are more instances than I have words or paper to detail within the limitations of the rules. So I will limit myself to one instance, which I consider typical, and which I consider adequate grounds, standing alone, to justify reversal of Judge Waddy's judgment.

In impeaching witnesses I was, of course, entitled to show that facts on a relevant point were quite different from what she represented them under oath to be. (1) I will show below that in one instance she actually read silently from a document that the jury could not see, then represented to the jury that it said certain things; that the document actually said the contrary, yet Judge Waddy did not permit me to introduce the paper into evidence so that the jury could itself judge the credibility of Mrs. Cohen.

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1. American Jurisprudence, Witnesses §§674 and 782 and cases cited.

One issue raised by my answer (2) was whether the alleged stipulation had been approved by Judge Holtzoff. I was cross-examining Mrs. Cohen on this point (3). The following appears in the transcript of the testimony.

> Q. You agreed, as I understand your testimony, you agreed to dismiss this lawsuit if it was approved by the judge, didn't you? A. If--yes. (4)

I then examined her on other, related, topics, but returned later to the same issue:

> Q. Was it your intention to dismiss this lawsuit regardless whether the approval of the court was granted or not? A. That is conjecture, Mr. Curry--<u>the court did approve</u> of the settlement. It says so right there.
>
> Q. Where? A. I will read it to you if you give me the transcript (5)
>
> Q. Very Well
>
> THE COURT: Do you have a question pending?
>
> MR. CURRY: I asked her to show me.
>
> THE WITNESS: I am trying to find it, your Hnnor.
>
> BY MR. CURRY:
>
> Q. Where is the statement of Judge Holtzoff saying that he approved it? (6)

Mr. Frohlich then interposed an obvious attempt to coach his

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2. My answer to Mrs. Cohen's motion for judgment, R-61, 10 6 69.

3. Trial transcript 1 13 70 page 87 lines 17-21, R-145 filed 5 15 70

4. Where underlining appears in the passages that follow it is supplied by me.

5. Mrs. Cohen was referring to the transcript of the hearing of My 23, 1969, R-36 (also Ptf. Exh.1 attached to Mrs. Cohen's Opposition, R-158 filed 6 17 70.

6. Trial transcript 1 13 70 page 92 lines 15-29, R-145 filed 5 15 70.

client, which he succeeded in doing without interference from Judge Waddy:

MR.FROHLICH: Your Honor--I object to the question. We have read to the jury the very third sentence of that transcript in which Judge Holtzoff says; This court is happy to see--

THE COURT: Just a minute.

MR. CURRY: Happiness is one thing--

THE COURT: Just a minute gentlemen; the witness on the stand will testify in this case and at the present time neither counsel is sworn. Have you been able to find that portion?

THE WITNESS: Yes I have in part. Your Honor, Mr.Frohlich had said to Judge Holtzoff: "Your Honor, I am New [Newton] Frohlich representing the plaintiff in this case. He said "Mr. Sher and I are glad to report to the court that the parties have reached a settlement in this case" and Judge Holtzoff replied: "The Court is glad to hear that."(7) [This was the third sentence.]

Mrs. Cohen continued to read further irrelevant portions of the transcript, over my objection which Judge Waddy overruled. When I was permitted to do so, I continued the questioning:

Q. Now you said the statement that he was glad to hear about it-- A. Yes.

Q. --that was an order approving the agreement? A. Yes, the only thing-- (8)

I then began my line of questioning about what Judge Holtzoff had said on the same subject at the later hearing of June 20, 1969:

Q. Were you present in court on June 20, 1969 when this matter came up? A. Yes.

Q. For approval? A. Yes, Mr. Curry. (9)

At that time I tried to produce the transcript of the hearing of June 20 but I couldn't find the original and Mr. Frohlch objected to my using a duplicated copy. So I had to postpone the cross-

7. Same,page 93 lines 1-20.

8. Same, page 95 lines 7-9

9. Same page 98 lines 15-19.

examination until the following day. It then continued as follows:

> Q. Were you present at the hearing of June 20, 1969 at which Judge Holtzoff considered your petition for ratification of the settlement? (10)

Mrs. Cohen did not answer the question because Mr. Frohlich again objected. Thereafter there was a long bench conference (11) at which Judge Waddy examined each part of the transcript about which I wanted to question Mrs. Cohen. He then ruled:

> THE COURT: .....I will permit Mr. Curry to do this: namely to show Mrs. Cohen the particular portions of this transcript without reading them to her and without having her read them aloud in connection with her answer that it was an approved settlement, that the settlement was approved.
>
> After having her raad this and having her see if it refreshes her recollection, if she then says it does not refresh her recollection, that is the end of it. If it does refresh her recollection, then he can ask her whether or not it in any way affects her answer as to the judge's approval.
>
> If it does not affect her answer and he wants to use this part of it at the time he gets ready to put it in evidence I will rule on it at that time. (13)

After the bench conference, Judge Waddy personally continued the interrogation:

> THE COURT: Were you present in Judge Holtzoff's court on June the 20th at a hearing concerning this matter? A. I don't remember, your Honor.
>
> THE COURT: Proceed. THE WITNESS: I don't remember. (14)

This was the same question I had asked Mrs. Cohen the day before and she had answered affirmatively. It appeared to me that overnight

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10. Same, page 146 lines 10-12.

11. Trial transcript 1 13 70 page 216 lines 10-12, R-146 filed 5 16 70.

12. Same, page 216 line 15 to page 223 line 21.

13. Same page 221 line 3 to page 22 line 7.

14. Same page 224 line 3 to page 225 line 3.

she had received some Rosenmanian (15) advice. After recovering my self-possession, I continued: (16)

From January 14, 1970 transcript page 225 lines 16-26

BY MR. CURRY

Q. Now, would you examine this document (17) and indicate whether your recollection is refreshed as to whether you were in court on that date? A. I don't remember it now.

Q. Well, would you look at this and see if it refreshes your recollection? A. May I see it---yes the document does refresh my recollection.

Q. And you were present that day? A. Yes, I think I was--I think.

I then showed Mrs. Cohen the June 20 transcript, where it read:

> From the June 20, 1969 transcript, page 17 lines 17-20
>
> MR. FROHLICH: ...I just would say that not only was the settlement approved but the money was paid out.
>
> THE COURT [Judge Holtzoff]: I understand. I am not going to approve the settlement. Now I have ruled.

From the January 14, 1960 transcript, page 225 line 27 to page 226 line 13.

Q. Now, Mrs. Cohen I want to refer you to these lines and I will point them out to you if you don't mind, line 19 but it maybe is 18, 19 and 20 on page 17 and it is here --don't read it.

THE COURT: Don't read it out loud.. The WITNESS: Yes.

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15. It will be recalled that Judge Sam Rosenman was FDR's top speechwriter. During the '32 campaign Roosevelt promised cheering thousands at Forbes Field that he would balance the budget. Writing his '36 campaign speeches, this then-champion budget-buster asked Rosenman how to explain about the speech. Rosenman is said to have said: "Nothing to do, Mr. President, but just deny you were there."

16. In the following excerpts I have interspersed the segments of the June 20 transcript that Mrs. Cohen was reading silently before making each answer.

17. Hearing transcript, 6 20 69, Deft. Exh. 6, R-153 filed 6 5 70.

BY MR. CURRY: Q. And I ask you whether that refreshes your recollection as to whether the court approved the settlement.? A. From that sentence I would say no.

Q. That does not refresh your recollection as to whether the court approved the settlement? A. No.

I then showed Mrs. Cohen the June 20 transcript again:

> From the June 20, 1969 transcript, page 14, lines 5-7.
>
> THE COURT: The Court obviously under the circumstances should not approve the settlement. I will postpone any action on the settlement...

From the January 14, 1960 Transcript, page 226 line 14 to 227 line 7.

Q. Now I would like you to look at this page and excuse me for standing so close. A. That's allright.

Q. Page 14, lines 5, of the same transcript and I refer you to lines 5, 6, and 7, and ask you the same question regarding those lines. A. No, Mr. Curry.

Q. Does that refresh your recollection in any respect? ...Well I mean as to the question of whether the court approved it? THE WITNESS: not that sentence. It doesn't.

BY MR. CURRY: Q. Does it refresh your recollection. A. Well, I understand, yes, he did approve it.

Q. That makes you feel even more strongly, does it, that the court did approve the settlement--is that your contention? A. That Judge Holtzoff said so, yes.

I then showed Mrs. Cohen another passage fromtthe June 20 transcript.

> From the June 20, 1969, transcript p. 13, lines 11-14
>
> THE COURT [Judge Holtzoff] Of course the executrix has authority to settle the matter with the approval of the court, but of course the court would consider any objection on the part of the parties interested.

From the January 14, 1970 transcript, page 227 line 13 to page 228 line 2.

Q.. I ask you to look at page 13 line 11, and I will point it out to you exactly. A. This one?

Q. Yes, line 11 to 14 and ask you the same question as to whether it refreshes your recollection as to whether the court approved the settlement? A. Oh, yes, it refreshes my memory.

Q. Yes? A. Yes.

Q. And does it make you feel more strongly than ever that he did approve it? A. Yes, he did, Mr. Curry, because he said he wanted to sign it before he went to Europe which told me that he approved the settlement. We were only waiting for the approval from the other legatees. That is what I understood the approval to mean.

I then showed Mrs. Cohen another passage from the June 20 transcript:

From the June 20, 1969 transcript, page 11, lines 10-23.

THE COURT[Judge Holtzoff]: Of course,so far as this court is concerned, this settlement was subject to the Court's approval?

MR. SHER: Well, it was subject to the Court's approval, as I understand it, Your Honor, only because the matter is a case pending in probate and it needed the approval of the probate court.

THE COURT: Then the court finds itself in this position does it not: that before the settlement is comsummated the parties must agree to the settlement.

MR. SHER: That is correct.

THE COURT: That being so, I think the only course that the court can pursue is not to approve the settlement. I see nothing else for the Court to do: do you?

BY MR. CURRY:

Q. And next on page 11, line 9-20 and checking this I find that I am referring to lines 10 through 23. And I will ask you to read those lines and ask you again whether that refreshes your recollection as to the question whether the Court approved the settlement? A. That tells me right there in that sentence.

A. That the Court did approve the settlement? A. Yes. We were only waiting for the approval from the Probate Court.

THE COURT [Judge Waddy]: The question is: having read that, does that refresh your recollection?

THE WITNESS: Yes, it does, your Honor.

THE COURT: As to whether or not the court approved, is that right?

THE WITNESS: Yes, your Honor.

I then showed Mrs. Cohen another segment of the June 20,1969 transcript:

From the June 20, 1969 transcript, page 17 lines 1-5

> THE COURT: [Judge Holtzoff]: It certainly would be inappropriate for this Court to approve the settlement which the principal party repudiates. A party is entitled to repudiate an oral agreement; nevertheless the court will not approve it. I am sorry you are in this position.

From the January 14, 1970 transcript, page 228 line 26 to page 229 line 6.

> BY MR. CURRY: Q. Now I would like to refer lastly to page 17 line 3 or thereabouts. And I will ask you, and I find that I am referring to lines 1 through 5 of the transcript, and ask you whether the lines referred to refresh your recollection as to whether the court approved the settlement--that is the last one. What is your answer, lady? A. The same as before, Mr. Curry. It didn't change my understanding of it, that the Court did approve.

* * * * * * * * *

To appreciate the importance of Mrs. Cohen's misrepresentations, one must place himself in the position of a juror to whom a pleasant-looking and highly intelligent lady is explaining the contents of a document that he himself cannot see. Certainly such a juror would not only have been sorely deceived. He would also have gotten the impression that Mrs. Cohen was triumphantly vindicating her credibility as a witness against a rather unpleasant old man who was trying to make a liar out of her. The impression would have been very strong because the testimony came at the very close of Mrs. Cohen's appearance on the stand.

It is not easy to discredit a lady, but I felt certain that I could. I might have approached the bench and asked for a perjury citation but I felt that Mrs. Cohen's lies were less her fault than her counsel's. I waited, planning to put in the evidence of her perfidy at the close of my own case, and showing the transcript to the jury to demonstrate that the facts were diametrically

contrary to Mrs. Cohen's representation of them. I relied on my right, as above stated, to present such impeaching evidence.

But Judge Waddy did not recognize my right to do that. This error was a strategic one. For it if for no other, his judgment should be reversed. My counsel offered the June 20, 1969 transcript in evidence and there was a long argument about it (18) after which it was excluded . Mr. Dowdey offered separately the various parts above quoted but they were also excluded.

Judge Waddy said that the evidence of the true contents of the transcript was "not impeaching." He also had some idea to the effect that the June 20 proceeding was irrelevant or incompetent because the title on some of the pleadings considered at that hearing was not that of the present case but that of the probate case in which Mrs. Cohen had been appointed executrix of her husband's estate. He emphasized this (to me utterly irrelevant) point by cross-examining me personally in a very overbearing way about the matter. This occurred at the very end of my testimony and must have made a powerful adverse impression on the jury.

The other points made during the argument on this point seem to me insufficiently substantial to justify refuting. If Mr. Frohlich thinks they are, he can argue them in Mrs. Cohen's brief. If he does not so justify this exclusion of proper impeaching evidence, then the judgment of the lower court should be reversed.

18. Trial transcript 1 20 69 pages 753-788. R 150, filed 5 15 70.

6. THE COURT ERRED BY EXCLUDING COMPETENT EVIDENCE OF LITIGIOUS HARASSMENT AGAINST ME, INCLUDING VARIOUS PROCEDURAL STEPS, COURT ORDERS, ETC., WHICH TENDED TO PROVE DURESS IN THE FORM OF THREATS THAT I WOULD BE FORCED INTO TRIAL WITHOUT COUNSEL AND WITHOUT ADEQUATE OPPORTUNITY TO PREPARE.

Among the defenses put forward in my answer (1) was the following:

> During all the settlement negotiations...I was subjected to extreme harassment which has been described in part in other pleadings herein. Said harassment amounted to duress rendering the alleged agreement void.

The reference to "other pleadings" was mainly to an affidavit that I had filed on August 27, 1969 (2). It concerned various intimidations that I suffered between the time of the filing of the main suit on January 13, 1969 and the alleged date of settlement, May 23, 1969. It does not refer to the many other similar badgerings to which I have been subjected after that time.

I will not repeat the details. These hectorings took the form mainly of procedural steps taken by Mrs. Cohen's attorneys, or by mine in collaboration with them, orders obtained, etc., which so obstructed my preparation and so shortened the time in which it was required to be performed as to threaten me with trial, unprepared and without counsel, before an obviously impatient and unfriendly judge.

For instance, these annoyances began when Judge McGuire ordered me to finish all pretrial discovery of evidence (on matters involving more than twenty years of law practice) within only nine days after the filing of the complaint (3). This "rush act" continued

1. My answer to Mrs. Cohen's motion for judgment ¶15, R-61, 10 6 69.

2. My motion for separate trials of separable issues, ¶¶7-41, R-49, 8 27 69.

3. Judge McGuire's order, R-10, filed 1 16 69; hearing transcript 1 14 69 page 12 line 17 to page 13 line 2, R-68 filed 10 13 69

in various forms until May 21, when the case was set for trial. Judge Holtzoff urgently asked my attorney to negotiate a settlement out of my presence and report it back as a "fait accompli" for approval. (4) During the negotiations which followed, Sher quarrelled violently with me in the presence of our opponents, and threatened that if I did not settle he would quit the case, denounce me to the judge, and throw me, who had not tried a case for thirty or more years, on my own resources.

Even under these pressures, I did not agree to settle. But if I had, I contend that the agreement would have been void for duress. During the trial of the "supplementary proceedings," some of the evidence of duress was admitted by Judge Waddy. But the great bulk of it was excluded because he prevented me from using <u>any</u> such evidence if it involved "processes of the court." He said that "You are trying to impugn the integrity of the entire court and I am not going to permit it."(6)

In my opening statement (7) I had told the jury:

> I will show...that I was under great pressure to make some kind of settlement. My evidence will show, I hope, that the pressure came from many sources. It came from the fact that... the complaint was filed on January 21 [amended complaint] and that by order of this court, the time for taking depositions in preparation for the case was set for February 1, nine days later.

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4. Hearing transcript, 5 21 69 vol. A p. 7 line 10-22, R-35 filed 6 2 69. This transcript was admitted in evidence as Deft. Exh. 13b. This exhibit is not docketed or included as such in the record in spite of Judge Waddy's order that it be done (R-164, 8 5 70).

6. Trial transcript 1 15 70 page 342A lines 25 and 26, R-147 filed 5 15 70.

7. Trial transcript 1 13 70, page 44 line 8 to page 45 line 7, R-145 filed 5 15 70.

> The pressure came, I must say, from...the court because Judge Holtzoff said that if this case is brought to an open hearing it will lead to....

he and Judge Waddy
Mrs. Cohen's attorney interrupted me at this point and/kept me from telling the jury about how Judge Holtzoff had insisted that an open trial would scandalize the legal profession, how he had urged negotiations by my attorney out of my presence (8). At a later point, Judge Waddy also prevented me from telling the jury about the 181,000 documents that Mrs. Cohen's lawyer forced me, at tremendous inconvenience to dig up from my obsolete 20-year-old papers in the cellar of my house. (9).

My attorney, Mr. Sher, had changed sides in the case and had become star witness for the other side. ON direct examination, he insisted that I had made the alleged settlement. He denied that pressure was brought against me.(10) When cross-examining him, I essayed to show the contrary. I asked him the following very simple question: (11):

> What action was taken in the case after you came into it... what was the first action taken in the case after you came in?

Mrs. Cohen's attorney there objected and said, "I don't know what it has to do with the issue of whether or not the case was settled." Judge Waddy asked me to explain and I said;

> I was going to show the course of the litigation and the urgency I was under and that I was under duress.

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8. Hearing transcript, 5 21 69, vol. A, page 2 lines 5-8, page 4 lines 17-22 and page 7 lines 10-22, R-35 filed 6 2 61; also see footnote 4 above.

9. Trial transcript 1 13 70 page 50 line 11 to page 51 line 6, R-145 filed 5 15 70.

10. Trial transcript 1 15 70 page 277 line 25 to page 278 line 4, R-147 filed 5 15 70.

11. Same, page 342 A line 4 to page 345 inclusive.

His Honor replied that I was not entitled to show that the "ordinary processes of the court constituted duress." (12) He sustained Mr. FRohlich's objection. I then further explained (13) that:

> I would like to show that at the time he came into the case there was an order...which limited my taking depositions to February 1 in spite of the fact that the complaint had been filed on January 21 and that I have never been able to...

At this point the court interrupted me again and prevented me from saying that I had never been able to take any depositions up to the time that the case was called for trial; that meanwhile my opponents had taken voluminous testimony from me without regard to the deadline established by Judge McGuire. Judge Waddy said that "this would occur through routine court processes." After his Honor's interruption, I continued, saying that:

> I am sorry to say that Mr. Sher made no effort to correct it. I think he collaborated with all the parties involved in the litigation to use it as a means of bringing me under pressure to make a settlement and...I was under threat of immediate trial without preparation, and therefore the alleged settlement should not be enforced.

But my explanation did not serve to change Judge Waddy's decision forbidding me to ask: "what was the first action taken in the case after [Sher] entered into it."

This ruling prevented me from adducing many other important items of evidence as to misuse of court processes for purposes of duress. The jury was kept in ignorance of many facts of which those set forth in my affidavit of August 27, 1969 are examples. (14) If

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12. Same, page 342 line 9.

13. Same, pages 343-44.

14. My motion for separate trial of separable issues, ¶¶7-41, R-49, 8 27 69.

the jury had known these facts, it is quite possible they would have answered Judge Waddy's fourth interrogatory (15), about whether there was duress or undue influence, in the affirmative.

Judge WAddy was mistaken when he said that I was "trying to impugn the integrity of the entire court." To the contrary, I was trying to preserve that integrity (and also to win my case) by preventing judicial processss from being used to force me into an unfair, illegal and improper settlement of this case.

Of course it might have been hard for me to convince the jury that a lawyer of my age is so vulnerable and that other lawyers are so wicked as to trick and abuse me in this way. However, I was certainly entitled to present my evidence in an effort to prove that defense.

I am familiar with the general principle that it is not duress for a person to use the court to insist on what he thinks are his legal rights. But such duress may well exist (16) where the processes of the court are used to oppress the victim and cause him unnecessary hardship, where the coercive effect is enough to overcome the free will of the victim.

I have no notion on what theory Judge Waddy based his exclusion of this evidence. Perhaps in her brief Mrs. Cohen can supply a justification. If not, then the judgment of the lower court should be reversed.

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15. Special verdict, R- 138, filed 1 22 70.

16. Wise v. Midtown Motors, 42 N.W. 2nd 404; Morse v. Woodworth (Mass.) 29 N.E. 525.

7. THE COURT ERRED BY EXCLUDING COMPETENT EVIDENCE AND REFUSING JURY INSTRUCTIONS AND OMITTING FROM THE SPECIAL VERDICT ANY INTERROGATORY ABOUT MY DEFENSE THAT THE ALLEGED STIPULATION TO PAY FOR THE SERVICES OF CONGRESSMAN BINGHAM ET. AL. ON INDIAN CLAIMS CASES AT THE RATE OF $1500 PER HOUR WAS UNCONSCIONABLE AND SO UNENFORCEABLE.

One of my defenses was that the alleged stipulation providing payment of $150,000 (or at the rate of $1500 per hour) for services rendered by Bingham and his associates was unconscionable and therefore void. Unconscionableness is a traditional defense, especially to claims for attorneys' fees(1). Mrs. Cohen raised no objection to my making this defense. In fact, she herself submitted a proposed instruction on the subject.

Judge Waddy excluded a great deal of competent evidence tending to prove that the services of Bingham et. al. in the Indian cases were of trivial value compared to the amount claimed. His failure to instruct the jury about the question of unconscionableness was also erroneous(2). He erred when he refused to include in his form of special verdict (3) any interrogatory as to this issue (4). The effect of this omission actually was to deprive me of any trial on the issue, in violation of the Due Process Clause.

This court should be especially considerate of a plea of unconscionableness in this kind of case. The fee is unconscionable not only as to me but also as to the Indians. They are wards of the United States and the fee is to be paid out of trust funds still

1. Hume v. U.S. 132 U.S. 406, 33 L. Ed. 393, 10 S. Ct. 13; In re Greer, 380 P 2nd 482, 486, 61 Wash 2nd 741; McCoy v. Gas Engine and Power Co. 119 N.Y.S. 864, 135 App. Div. 771.

2. American Jurisprudence, Appeal and Error, §106 and cases cited (footnotes 14 and 15).

3. Special Verdict, R-138, filed 1 22 70.

4. Rule 49, Rules of Civil Procedure for the U.S. District Courts, as amended to July 1, 1968.

under control of the United States government. The duty of protecting those funds involves the highest possible considerations of public morality. As an agency of the United States, this duty falls directly upon this Honorable Court.

The allegations of my answer respecting unconscionableness (5) were:

> The settlement agreement as alleged in plaintiff's motion would require the payment by me of the sum of $150,000 to her for 100 hours of legal work allegedly performed in 1947 and 1948 on Indian claims cases filed by me between 1947 and 1951 and since then continuously prosecuted by me and my associates up to the present time, involving the expenditure of many man-years of legal work.
>
> I never promised, nor even suggested the possibility of promising, personally to pay the defendant any sum of money whatsoever in settlement of her claim but have continuously insisted that if any sum at all were paid it must be paid by the attorney of record in the Indian claims cases, I.S. Weissbrodt.
>
> The settlement contract alleged by plaintiff would have violated §34 of our Canons of Professional Ethics as to division of fees among lawyers. If the settlement had been made it would have been at the rate of $1500 per hour for the services allegedly rendered.
>
> The attorneys who claim to have done the work were never authorized under federal law to act as such. The work they did was of a kind that under my agreement with them they were not authorized to do.
>
> The division of these fees, therefore, would not have been "based on a division of services and responsibility" but to the contrary would have been a brokerage fee or split of commissions among dealers in Indian attorney contracts, an arrangement in which I never had taken any part nor agreed to take any part.
>
> Because said fee was so exorbitant, the alleged contract to pay it would have been unconscionable and in equity should not be enforced by this Honorable Court.

The reference to 100 hours of work is derived from an affidavit

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5. My answer to Mrs. Cohen's motion for judgment, ¶¶ 2, 3, 9 and 10, R-61, 10 6 69.

filed by Congressman Bingham a week or two before the date on which the alleged stipulation was made (6). In it he swore that:

> After the agreement was signed, Mr. Cohen and I rendered approximately 100-200 hours of work on Indian claims. I particularly remember working on the Tlingit and Haida case.

After the trial of the "supplementary proceedings" to enforce the stipulation began, my first question about my defense of unconscionableness was addressed to Mrs. Cohen: "Are you familiar with the work done by Mr. Cohen on the claims cases?" The evidence was excluded on grounds of irrelevancy (7). On the same grounds, Judge Waddy excluded excerpts from Congressman Bingham's deposition(8) to the effect that when the work was done, he was 33 years old, without experience in Indian law, and that the work he did on the claims was "not of any great value to the cases." Similarly excluded was his testimony that if he had charged for the work on a time basis the charge would have been at the rate of $30 per hour instead of $1500. (9).

After the seven days of testimony had been completed, on January 22, 1969, Mrs. Cohen's lawyer proposed to the court an instruction defining the term "unconscionability." (10). I submitted

6. Bingham affidavit, page 2 lines 5-8, attached to Mrs. Cohen's opposition to summary judgment, R-30, 5 12 69.

7. Trial transcript, 1 15 70, page 165 line 8 to page 170 line 1, also p. 177 line 4 to page 178 line 11, also at pages 192-204, also page 232 line 7 to page 240 line 17, R-146, filed 5 15 70

8. Bingham deposition, 11 5 69 page 6 line 13 to page 11 line 23, R-90 filed 11 20 69; offered but excluded, trial transcript 1 21 70 page 789 line 1 to page 794 line 1, R-151 filed 5 15 70.

9. Bingham deposition 11 19 69 page 38 line 1 to page 39 line 1, R-110 filed 12 8 69.

10. Mrs. Cohen's proposed instruction No. 3, R-135 filed 1 22 70

one defining "unconscionableness"(11). The two competing instructions were discussed at great length in chambers (12). The Judge said that he personally would"have to prepare instructions and present them on the question of unconscionability,both sides having asked for such an instruction."(13). A little later, Mr. Frohlich reminded the Judge of his promise and the judge replied that:(14) "the Court will work on its own instruction on duress as applicable to this case. The same goes for unconscionable conduct."

It was only after Mr. Frohlich and I had finished our closing addresses to the jury that we discovered that Judge Waddy was not complying with his commitment. Careful examination of his charge to the jury (15) discloses not a word on the subject of unconscionableness. My associate Mr. Dowdey objected to various errors in the charge. Among other things, he said that "we also object to the failure of the court to instruct on the cntract being unconscionable although both sides submitted instructions on that." (16). To this Judge Waddy replied only that "Your motion is denied and your objection is overruled." Dowdey also objected to the Judge's failure to include in the special verdict a question as to unconscionableness (17) and the judge overruled his

11. My proposed instruction No. 8, R-136 filed 1 22 70.

12. Trial transcript 1 21 70, page 822-23 and 828-29, R-151 filed 5 15 70.

13. Same, page 823.

14. Same, page 828 lines 22-26

15. Trial transcript 1 22 70, pages 896-926, R-152, filed 5 28 70.

16.. Same, page 921 line 26 to page 922 line 1.

17. Same, page 919 line 26. See also proposed interrogatories to Jury, Interrogatory No. 5, R-157 filed 1 22 70.

objection.

Judge Waddy's handling of this issue mystifies me. He seems to have been so confused by the time the case went to the jury that on this topic he was completely immobilized. I have a theory that may explain if it does not excuse his conduct. Throughout the argument on this topic, he kept insisting that, contrary to the statements of both parties, the claim was for profits of a partnership and not for "services rendered." He did this even with the cold print of the pleadings staring him in the face.

His refusal to recognize facts seems to have stemmed from experiences of the Judge's youth. It seems that before he went on the bench, he was a member of a law firm and that theraafter he drew some profits from some of the firm's cases without ever doing any work on them. He must have imagined a situation in which his former partners would object to these payments on the grounds he had not performed work on the cases. He seemed unable to believe that other prominent lawyers could possibly have entered into an arrangment either in 1947 or in 1969, providing for no more than an "adequate" payment for their services.

Thus when he heard evidence as to the value of the services, he could not believe that it could possibly be right. This explanation of his conduct, or rather theory about his conduct, is supported by colloquys between me and H[1]s Honor and between him and Dowdey. When I asked Mrs. Cohen whether she was familiar with the work that Cohen did on the cases, and Judge Waddy excluded the evidence (18). There

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18. Trial transcript 1 14 70 page 165 line 165 line 8 to page 166 line 1, R-146 filed 5 15 70.

followed a long discussion as to whether the alleged settlement was "for services rendered " or for the profits of a partnership. I asked his Honor whether I could submit any evidence as to the work done or not done by Bingham et. al. and he answered "No,Sir." (19) and explained:

> After all, Mr. Curry, if this is a suit for an accounting of a partnership, which it is alleged to be, many times an individual partner might never touch a case. I happen to have been a member of a partnership myself, before I came on the bench... And when I left that partnership there were arrangements that my interests in the partnership would be paid out even though in many of the cases I had never seen (sic)."

I then contended (20) that:

> In the pretrial statement, your Honor, there isn't a word that indicates that this is a settlement of a pa rtnership claim. This was a settlement for services rendered.

But Judge Waddy insisted that this did not appear in the pretrial statement (21) or in the pretrial report (22). So he said to me:(23)

> Where do you find that, sir, I don't say it isn't there, I am simply asking you to point it out to me.

Then the following exchange occurred. I have juxtaposed a part of it horizontally to show that Judge Waddy and I were reading the same text but that we disagreed about what the text said (23);

MR. CURRY: Shall I read it?

THE COURT: Yes, please.

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19. Trial transcript, 1 15 70, page 238, R-147, filed 5 15 70

20. Same, page 239.

21. Mrs. Cohen's pretrial statement, page 1, 11 12 69. This document was omitted from the record despite Judge Waddy's order that it be included (R-164, 8 5 69).

22. Pretrial report page 2 lines 4-9, R-86 11 14 69.

23. Trial transcript, 1 15 70 page 236 line 20 to page 237 line 9, R-147, filed 5 15 70

MR. CURRY: The first sentence says that: "

"The plaintiff asserts that the case was settled between the parties themselves, in the presence of their attorneys on May 23, 1969 by an agreement that the Defendant would pay to Plaintiff the sum of $150,000 for services rendered with the payment of such sum to be made to Plaintiff by I.S. Weissbrodt Esq. from Defendant's moneys held by him."

And I think I recollect the same language was used...

THE COURT: I dont find that language in the pretrial order of November 14. I find the following: "The plaintiff asserts that the case was settled between the parties themselves, in the presence of their attorneys on May 23, 1969 by an agreement that the Defendant would pay to Plaintiff the sum of $150,000 for services rendered with the payment of such sum to be made to Plaintiff by I.S. Weissbrodt Esq. from Defendant s moneys held by him ....

MR. CURRY: The language which your Honor first read is the language to which I refer. This was a basic element of the agreement --of the settlement agreement as alleged.

THE COURT: Gentlemen I have indicated what my ruling will be, that I will permit evidence as to the relationship of the parties out of which this claim grew.

MR. CURRY: AT the time?

THE COURT: You have indicated that you do not intend to show that the original relationship was unconscionable.

Mr. CURRY. The original agreement was unconscionable [?]

THE COURT: You do not intend to show that the original agreement was unconscionable. I will still permit evidence as to that relationship on your issue as to whether or not the settlement of the problems that grew out of that relationship was unconscionable, if you desire to present such evidence.

MR. CURRY: When your honor says that I may introduce evidence or cross-question about the relations between the parties, may I assume that your HOnor will permit questions as to the amount of work done...

THE COURT: No, sir.

Mr. CURRY: ...under the agreeement?

THE COURT: No,sir you may not make that assumption. The assumption of what I have said is that you can put in evidence of the agreement.

So it all ended up with the Judge excluding all evidence of

unconscionableness except the 1947 agreeement with Bingham and Henry Cohen. When he made this ruling he fully understood that I did not contend that the agreement was unconscionable. So I kindly thanked him for nothing and dropped the argument pending appeal. I could have argued further with Judge Waddy, as I have above,(24) that the original agreement between me and the New York lawyers was not a partnership at all but an agreement for the employment of legal help. But if he could not read and understand a brief passage in the pretrial report, I saw no use oftaking up with him any farther a complex document like the 1947 agreement.

* * * * * * * * *

I hope I have shown above that Judge Waddy was in error when he excluded competent evidence about my defense of unconscionableness, when he refused instructions on the same subject, and when he omitted all reference to this matter from his form of special verdict. If so, the judgment of the court below should be reversed.

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24. See page 37-38, IP"(2)."

8. THE COURT ERRED BY ADMITTING EVIDENCE OF MY FORMER ATTORNEYS, I.S. WEISSBRODT AND ROBERT E. SHER, CONCERNING PRIVILEGED COMMUNICATIONS BETWEEN ME AND THEM AND BY EXCLUDING EVIDENCE TENDING TO SHOW THE ETHICAL AND LEGAL IMPROPRIETY OF PREVIOUS DISCLOSURES OF SAID COMMUNICATIONS BY SHER.

Invoking as a client the privilege against disclosure of confidential communications to one's lawyer is like "taking the Fifth" because it is sometimes construed as an attempt to conceal unfavorable information. In invoking it, this was not my purpose which was rather to prevent the use of information intended to be confidential which in form and effect, rather than substance, was extremely prejudicial. Such evidence was given by I.S. Weissbrodt and Robert E. Sher, my attorneys who had changed sides at a critical stage of the case had appeared as witnesses against me. They testified to many matters of a privileged nature (1)

I duly raised an objection to this type of evidence, which I had a right to do (2). Judge Waddy overruled my objections on the ground that I had waived the privilege by my own previous disclosures to the court. He was wrong. I showed that my own disclosures were necessitated by the malicious disclosures made even before that by my attorney. Therefore my own disclosure should not have been treated as a waiver (3).

I then tried to discredit Sher's testimony by showing that his prior disclosure of my confidences was illegal and improper. Judge Waddy excluded this evidence. This was also wrong. It showed improp-

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1. Trial transcript 1 15 70, 1 16 70 and 1 19 70, from page 231 to page 636, R-147, 148 and 149 filed 5 15 70.

2. American Jurisprudence, Evidence, §460 and cases cited.

3. American Jurisprudence, Witnesses §395 and cases cited.

er conduct of a witness in connection with the case in which he was testifying and was admissible to impeach him(4). But Judge Waddy excluded it, saying that he would "not permit this jury to try Mr. Sher."

Judge Waddy's remark was comparable to what Judge Holtzoff had said when he objected to an open trial of the case because it it would injure the image of the bar in the eyes of the general public. The bench and bar do not constitute a herd, tribe or blood brotherhood whose members must at all costs defend against any attack on another member. The prime duty of judges is not to their fellow lawyers but to litigants whom these lawyers serve, sometimes very inadequately and unfaithfully. The foibles, faults and failings of lawyers should not be concealed at the expense of justice. In fact, lawyers are by no means saints and the sooner the public knows it the more it will serve their interest.

The piece of evidence most deadly to my case which was admitted by Judge Waddy in violation of the client-attorney privilege against disclosure was a letter of mine dated May 23, 1969 (5), the day on which the settlement stipulation is alleged to have been made. In that letter I used some extremely ill-advised language as follows:

> I agreed to the settlement of the Cohen case today not of my own volition nor of my own good judgment but because of tremendous pressure from you. I still consider the settlement unwise and very unfair to me. I wish I could devise some way to repudiate it now.

Obviously this letter was not written for public consumption nor

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4. Hunt v. Rumsey, 93 Mich. 47 N.W. 105, 106, 9 L.R.A. 674; American Jurisprudence, Witnesses $723.

5. My letter of 5 23 69, Ptf. Exh. 4, attached to my motion for correction of record, R-158, 6 17 70.

to be read by my enemies. If so, it would certainly have been written in different language. It contained words like "repudiate" and "devise a way" which have sinister connotations. But my principal mistake was to refer to the result of the negotiations of that day as a settlement without using the adjective "tentative." In the rest of the letter, I made clear that I considered it tentative and in Sher's letter of May 26, 1969 to me (6) he indicated that he also considered it tentative. HE said, for instance, that the stipulation "will state" that the deal was for services.

Why was I so careless? Because, in spite of my disagreements with him, I expected him to comply with the basic requirements of our Canons of Ethics. I did not expect that he would change sides completely and join with Frohlich and Weissbrodt to force me to accept the alleged stipulation as final before it was even put down on paper.

But that is exactly what Sher did, almost immediately. After his letter of June 26 he had said that he was writing up the settlement. But a few days later, on June 10, he filed a document in court (7) which, so far as I can see, had no purpose except to express his hostility to me and to serve my opponent's interests. He called the document a "Request of Escrow Agent for Instructions." But there was nothing about which he needed to ask instructions. It was purely a voluntary effort to prejudice me before the Court.

IN his document, Sher said that the settlement had been made. He did not say that it was being written up,as he had said after his

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6. Sher's letter of 5 26 69, page 3 last full paragraph, Ptf. Exh. 5. attached to Mrs. Cohen's response to my motion for correction of record, R-158, filed 6 17 70.

7. Sher's request for instructions, R-38, 6 10 69.

letter to me. He did not say that it was tentative. He then referred to my letter of May 23 and said:(7a)

> Petitioner [Sher] is in receipt of a letter from the defendant dated May 23, 1969 advising that defendant desires to repudiate the settlement, and instructing petitioner not to disburse any of the settlement money without defendant's written authorization.

The money to which this refers was the $150,000 that he had obtained from Weissbrodt and was holding, purporting (contrary to his trust relation with me) to hold in trust for my opponent. Sher's "request" did not mention the other parts of my letter in which I made clear that what I wanted to repudiate was not a final agreement but a tentative one. When he filed it, he knew well that Judge Holtzoff was very insistent on settlement of the case. He also knew, but did not reveal to me, the contents of a petition filed June 2 by Frohlich for approval of the settlement(8).

But I learned of the petition for approval from another source (an heir of Henry Cohen, his son Peter) and it was obvious that I must act promptly to prevent a put-up job in Judge Holtzoff's courtroom (a "fait accompli" if I may borrow Judge Holtzoff's phrase). So I filed an Answer (9) to Sher's "request" to which I attached a complete copy of my letter to Sher. This was necessary to overcome the effect of Sher's previous misrepresentation of my atti-

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7a. Id at page 2 line 26 to page 3 line 2.

8. Mrs. Cohen's notice to legatees and attached petition, R-37, 6 2 69; (also deft. exh. 30, R-153, filed 6 5 70). Though Mr. Frohlich knew I had dismissed Sher, he served this notice on him but not on me. And Sher did not let me know that the document existed.

9. My answer to Sher's request for instructions, R-39 6 18 69.

tude (10).

It was the above-mentioned disclosure by me to Judge Holtsoff that Judge Waddy invoked as a waiver of my privilege against disclosure of confidential information. But my disclosures were necessitated by Sher's action. As shown above, they should not be construed as a waiver of my privilege.

* * * * * * * * * *

The importance to Mrs. Cohen's case of this improper disclosure of my confidences is shown by a statement of her attorney at the start of his opening address to the jury (11):

> [A]fter we had appeared in court, and after the case was settled, he [Curry] decides he doesn't want to go ahead. You will see produced in evidence a letter that he wrote to his own attorney, Mr. Sher, saying, and I quote, "I wish I could figure out a way to repudiate that settlement."

When Frohlich made this statement, I objected and asked for a mistrial. My motion was denied (12). In my own opening statement to the jury, I tried at least partially to overcome the effect of Frohlich's statement by telling the jury that I could show that the letter was a confidential one (13). Immediately, in the presence of the jury, Judge Waddy took me severely to task (14) and

10. This strategy was at least temporarily successful. Judge Holtzoff was obviously displeased with me for not approving the "fait accompli" that he had recommended. But he said that I had a right to withdraw from an oral agreement. During a long argument he refused again and again to approve the stipulation (Hearing transcript 6 20 69, Def. Exh. 6, R-153, filed 6 5 70). He entered an order (R-42, 6 23 69) "authorizing Sher to return the money to Weissbrodt. Weissbrodt deposited it in the escrow account established by order of Judge McGuire.

11. Transcript, 1 13 70 page 36 line 2 to page 37 line 12, R-145, filed 5 15 70.

12. Same, page 40 line 13 to page 42 line 12.

13. Same, page 54 lines 4-7.

14. Same, page 54 lines 19-24.

called me to the bench to accuse me of contempt of court(15). This occurred at the very close of my opening statement. It must have served to discredit me in the eyes of the jury. It also set the tone for the entire trial.

After taking the witness stand, Mr. Sher made his first disclosure of privileged confidential information when he spoke of some not-too-important conversations between him and me (16). I objected to these, invoking the privilege. Judge Waddy overruled my objection (17), and said that:

> AS to attorney-client relationship, that's denied on the grounds, Number one, that the privilege has been waived by virtue of the fact that all the correspondence concerning these matters have been placed in the file by you; also there has been an attack here, or a claim by you, that your counsel did not properly represent you and was guilty of certain misconduct, and so on. Your objection will not be granted.
>
> Mr. CURRY: Would your Honor consider the fact that the privileged matters were originally put into the case by Mr. Sher, which necessitated my going further into them?
>
> THE COURT: I will consider it, but having considered it today, I will not change my ruling.

The comments of Judge Waddy above quoted contain two separate justifications for his ruiling. The first is that by my previous disclosure of the same confidences waived my privilege against having them disclosed to the jury. This is wrong, as above stated. As to Judge Waddy's second suggestion, that I waived the privilege by making charges against Sher, this might have some validity if I were suing Sher, or charging him with crime, or attempting to have him disbarred. But in this case it seems so flimsy that

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15. Same, page 55 lines 9-18.

16. Trial transcript, 1 15 70 page 245 lines 4 and 5, R-147 filed 5 15 70.

17. Same, page 245 lines 18-26

I will not even argue it unless Mrs. Cohen does so in her brief.

When the letter of May 23 was offered in evidence, I likewise objected and Judge Waddy overruled me again. Mr. Frohlich was permitted to read the letter aloud to the jury, with devastating effect on my defense.(18) Later I questionned Sher about the disclosuure of my secrets by him. At first he denied having made it (19) but later he admitted it (20). I also questioned him about the propriety of his having revealed this information. I asked him (21)

> Q. At the time you revealed the existence of this letter to the court, were you conscious of the principles of the Canons of Ethics with respect to the disclosure of privileged communications from clients?

An objection was made, no reason given. There followed a bench conference about various matters, during which the following(22) occurred:

> THE COURT: I am not going to let this jury try Mr. Sher.
>
> MR. DOWDEY: I certainly think it goes to the witness' veracity and certainly to the improprieties of the thing; ...
>
> THE COURT: I will sustain the objection. I think it is a proper one, and I will not permit any cross-examination with respect to the ethics of Mr. Sher in this connection.
>
> MR. CURRY: Would you permit cross-examination with respect to the propriety of the defendant's attorney's conduct as defined by law?
>
> THE COURT: No, No, that is irrelevant to the issues before me. I will not permit it.

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18. Same, page 267 line 4 to page 277 line 39.

19. Same, page 285 line 5-7.

20. Same, page 285 lines 25-27.

21. Trial transcript 1 16 70, pages 399-400, R-148, filed 5 15 70.

22. Same, page 405 line 2 to page 408 line 3.

For the reasons above stated, Judge Waddy erred first when he admitted over my objections privileged communications between me and Sher and Weissbrodt. He also erred by excluding my cross-examination with respect to Sher's improper and unethical conduct in connection with the litigation in which he was testifying. For that reason, the judgment below should be reversed.

9. THE COURT ERRED BY ADMITTING INCOMPETENT EVIDENCE ABOUT ALLEGED UNACCEPTED OFFERS OF SETTLEMENT PRIOR TO THE STIPULATION ALLEGEDLY ACCEPTED BY THE PLAINTIFF.

An excellent explanation of the verdict against me in the lower court may be that the opposing witnesses were permitted to testify not only about the alleged offer that Mrs. Cohen claims to have accepted but also as to other prior offers (which, of course I denied) that had not been accepted by her. The law seeks to encourage negotiations for settlement and therefore considers unaccepted offers to be made "without prejudice" and forbids their being used in evidence against the offeror. Judge Waddy disregarded this rule, to my severe prejudice, and therefore the judgment ought to be reversed.

The rule against admission of such evidence is part of the hearsay rule which generally excludes testimony about any oral statements made out of court. There is one exception to the hearsay rule which permits evidence of admissions of any party to the suit contrary to his contentions in the litigation.(1). Thus it was quite proper for Judge Waddy to admit testimony that I had orally admitted making (or had made) the offer that Mrs. Cohen claims to have accepted, forming the stipulation on which she sued.

But the same is not true of prior offers which she does not claim to have accepted. These fall under an exception to the exception to the hearsay rule. They are treated as oral statements made out of court and are excluded as hearsay. In fact, this rule also applies to written offers that are not accepted. The reason for the rule is stated as follows(2):

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1. 4 American Jurisprudence, Evidence §544, also § 453 and cases cited (footnote 11).

2. American Jurisprudence, Evidence §565.

> A sound principle of public policy favors settlement out of court and there is a general rule that a bare offer to compromise a disputed claim does not constitute an admission on the part of the person making it whether the offer was made orally or in writing or whether it was made directly to the opposing party or through his agent...

Therefore Judge Waddy made a serious error of law in admitting evidence about prior unaccepted offers and the judgment entered by him should be reversed.

* * * * * * * * * * *

All of the alleged offers were said to have been made during the period from May 19 to May 23, 1969. This was after action on my motion for summary judgment had been postponed and we were being rushed into an immediate trial. It was after my attorney and I had quarreled and he was talking about deserting the case. On the 21st Judge Holtzoff had indicated how anxious he was to see the case settled in order to avoid scandal to the legal profession. He had urged my attorney to negotiate a settlement out of my presence and to report back a settlement for approval as a "fait accompli." The case was set for trial on May 21 and postponed only for the purpose of negotiation.

So I could not be blamed for being, as I said "scared to death" that I would be forced into trial the next day without any lawyer to represent me, without any trial experience of my own for the past thirty or more years, before an unfriendly judge, and without advance preparation. Neither can I be blamed for permitting a certain amount of talk about settlement. But I made no actual offer. I contended that any figures that were discussed were intended to be paid not by me but by Weissbrodt who had agreed in writing to assume responsibility for any such claims as that of Mrs. Cohen

as Bingham's assignee. And Mrs. Cohen does not claim that any of these alleged prior offers were accepted. Furthermore it should have been understood by everyone that any such loose talk was "off the record," "without prejudice," and inadmissible in evidence under the rule of law above set forth.

However, due to Judge Waddy's error of law, Mrs. Cohen and my two former lawyers were allowed to testify that I had made several firm offers prior to the one she claims to have accepted, some being in even larger amounts than the $150,000 that she was asking the judge and jury to award. Mention of these large figures must have created a very adverse impression on the jury. They knew that her original claim was for more than a million dollars. In fact, under one interpretation of Mrs. Cohen's complaint, it was for more than five million! Of course anyone can sue for whatever amount he wants to name. The amount he writes into his complaint is no evidence of the true value of his claim. But the man-in-the street might have a very different impression. He might think that I had haggled and bickered and "beaten down" Mrs. Cohen and her lawyers to 1/7 or 1/35 of her original claim and, having recognized the validity of that claim by making several very large offers, that I ought to be happy to pay the mere $150,000 she was asking to be awarded.

This false impression is not limited to the man-in-the-street and the man-on-the-jury. It seems to have been shared by the honorable man-on-the-bench. Right after the opening statements to the jury, we got into an argument about whether or not the amount and quality of work done by Congressman Bingham, etc. had anything to do with the "unconscionableness" of the settlement.

Judge Waddy considered this irrelevant, contending: (3)

> It now appears to me that what is before me is whether a settlement of a million-dollar claim for $150,000 is un-- conscionable.

Mr. Dowdey then argued that:

> ...[T]he mere fact that it is a million dollar lawsuit... makes a $150,000 settlement sound reasonable. But if you look at what was basically involved then the $150,000 can't be reasonable or proper.

This argument of Dowdey's did not impress Judge Waddy. Instead, he was deeply impressed by the amount that Mrs. Cohen had claimed. The jury must likewise have been deeply impressed by it and by the supposed large offers made by me.

A few references to the record will show how the errors occurred and how damaging they were to my defense. Mr. Frohlich, representing Mrs. Cohen, mentioned a couple of the alleged prior offers in his opening statement to the jury (4). He described a luncheon conference between me and Sher and him and Mrs. Cohen at a hotel dining room. He said that an offer was made in the amount of $15,000 down plus about $275,000 in deferred payments. He also spoke of another alleged prior offer supposedly made on May 23, the day when the final alleged offer was made and the alleged stipulation made. This one was in a different amount, namely $90,000 cash(5). Neither of these alleged offers was the one he was seeking to enforce.

I objected to these remarks by Frohlich and moved for mistrial (6). I was overruled but Judge Waddy's justification had nothing to do with the principle here under discussion(7).

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3. Trial transcript, 1 15 70 pages 165 line 17 to 170 line 1, R-145 filed 5 15 70

4. Same p. 31 line 20 to page 32 line 26.

5. Same, page 34 lines 7-14.

6. Same, page 40 line 11 to page 41 line 12.

7. Same, page 41 lines 3-12.

Mrs. Cohen thereafter testified first to the offer of $290,000 in time payments (8) But before she said anything about it, I again objected(9). Judge Waddy again overruled me (10) and said:

> THE COURT: Well, the issue involved in this case is whether or not there was a settlement. It appears to me that in order to determine the issue, all of the circumstances surrounding the settlement become relevant. Therefore the usual rule of evidence concerning settlement negotiatios would not apply; otherwise you [Mrs. Cohen?] would not have a case at all, Mr. Curry. The objection is overruled.

Of course I do not agree that excluding the improper and inadmissible evidence about prior offers would completely deprive Mrs. Cohen of her case. But it was no proper function of the judge to guarantee that she would have an enforceable claim. And she still had a right to introduce competent and relevant evidence about the offer that she was actually seeking to enforce.

Mrs. Cohen also testified thereafter about an offer that she said was made on the night of May 21, 1969 by my attorney Mr. Sher by a phone call to her attorney(11). This was supposed to have been in the amount of $315,000 in time payments. She told about another offer of $90,000 in cash that was supposed to have been made on the morning of May 23, 1969(12). She did not claim that she accepted any of these figures.

Mr. Sher testified to both of the alleged offers that Frohlich had described in his opening statement, also to the three that Mrs.

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8. Same page 58 line 27.to page 63 line 14, especially page 61 line 9.

9. Same, page 59 line 24.

10. Same, page 60 lines 6-12.

11. Same, page 64 line 11 to page 67 line 3.

12. Same, page 67 line 1 to page 68 line 14.

Cohen had described and to still another in the amount of $60,000, all cash, supposedly made on May 19(13). I objected again but my objection was overruled on substantially the same grounds (14).

The unfairness of Judge Waddy's rulings admitting evidence of these former unaccepted offers is highlighted by his action excluding my own evidence of a prior offer (15). This was in the modest amount of $15,000, the estimated "nuisance value" of the claim. The offer was later withdrawn. Judge Waddy excluded this evidence. He said that so far as settlement offers were concerned, he would hold us to a "deadline" of January 1, 1969 (16).

Because Mrs. Cohen had "opened the door" Judge Waddy's exclusion of my evidence of a smaller offer was also clearly arbitrary. But this does not, of course, cure the error he commited when he allowed her to "open the door" in the first place with incompetent evidence of prior unaccepted offers.

The "sound principle of public policy" that is mentioned in the rule quoted on page 18 above must have contributed to the decision of the court early in the history of the District strictly to enforce the principle now set forth in Rule 3 of that court (17). As shown above at pages 12 to 22, that rule prevents introduction of evidence of any oral offers of settlement unless they are

13. Trial transcript 1 15 70, page 245 line 11 to page 257 line 8.

14. Same, page 245 lines 16-19.

15. Trial transcript 1 20 70 page 653 line 22 to page 656 line 11.

16. Same, page 656 lines 7-8, also see pages 669 line 16 60 page 670 line 11.

17. Rule 3, Local Rules of U.S. District Court, D.C.

recorded by the court reporter. Under the Best Evidence Rule (18) no evidence should be admissible/of any stipulation except the transcript of the proceedings where the stipulation was made.

The common law rule above quoted on page 98 seems also to have been enshrined by the Supreme Court in the rules governing practice before all District Courts (19). There it is provided that:

> An offer not accepted is to be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.

Thus the rule against admission into evidence of such testimony as Judge Waddy permitted as to prior offers not accepted is supported (a) by a general rule of the District Court and (b) by a rule of the Supreme Court governing practice in that court. Therefore Judge Waddy's action was erroneous and since it was very prejudicial to me his judgment should be reversed.

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18. Weatherhead v. Baskerville, 52 U.S. (11 How) 329, 13 L. Ed. 717.

19. Rule 69, Rules of Civil Procedure for the U.S. District Court as amended to July 1, 1968

10. THE COURT ERRED (A) BY FALSELY INFORMING THE JURY, IN HIS INSTRUCTIONS, THAT I HAD ADMITTED TO MY ATTORNEY'S HAVING MADE THE ALLEGED STIPULATION IN MY BEHALF AND (B) BY INSTRUCTING THE JURY THAT I HAD THE BURDEN OF DISPROVING SAID ATTORNEY'S AUTHORITY TO DO SO.

Judge Waddy's charge to the jury (1) included remarks about the making of the alleged stipulation by my attorney, Mr. Sher. His Honor said(2):

> The defendant also claims that...such agreement, as is claimed here, was entered into by his lawyer without his consent...

I never admitted that my lawyer ever made the alleged settlement stipulatin either with or without my consent. Unless Mrs. Cohen in her brief points out where I did, the judge in effect instructed the jury to find against me on this issue. He thus deprived me of my constitutional right to a jury trial on this issue. Therefore the judgment should be reversed.

* * * * * * * * *

Also, among Judge Waddy's instructions was the following(3):

> The burden of proof is upon the defendant to prove by a preponderance of the evidence that his attorneys settled the claim without authority from him.

Of course, there is no burden on me to prove that my attorneys settled the claim at all,whether with or without authority. Therefore, to a lawyer, the instruction quoted above is almost incredible. But the last few words clearly impose on me the burden to prove their lack of authority. Under the decisions, the burden is not on me

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1. Trial transcript, 1 22 70 page 914 line 20 to page 915 line 11, R-152, filed 5 28 70.

2. Same, page 914 lines 20-24.

3. Same, page 915 lines 8-11.

to prove that my attorney lacked authority. Contrariwise, the burden rested on Mrs. Cohen to show that he had such authority. For this error of law, also, the judgment must be reversed.

This question is generally discussed under the law of Agency. It is a general principle that one who has dealt with an agent (such as an attorney] or who has availed himself of the act of such agent must, in order to charge the principal (such as a client) prove the authority under which the agent (attorney) acted(4).

Of course I had given Mr. Sher authority to do certain things for me as my attorney. He was authorized to argue the case, to examine witnesses, to sign pleadings, etc., along with myself, since I was also appearing as my own attorney (5). Weissbrodt was also my attorney, but acted only as adviser..

Does Sher's general authority as an attorney include by implication the authority to settle the case for me? The cases are almost unanimously to the contrary. An article on the subject (6) states that:

> The almost unanimous rule, laid down by the courts of the United States, both federal and state, is that an attorney at law has no power, by virtue of his general retainer, to compromise his client's cause of action; but that precedent special authority or subsequent ratification is necessary to make such a compromise valid and binding on the client.

There being no presumption that Sher had authority to settle for me, Mrs. Cohen is governed by the general rule first above

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4. Brutinel v. Nygren, 17 Ariz. 491, 154 P. 1042, also American Jurisprudence Agency §442, and cases cited(footnote 11).

5. Judge McGuire's order of 2 11 69 and attached escrow agreement, (Def. Exh. 12, R-153, filed 6 5 70.

6. Annotation: Authority of Attorney to compromise suit, 66 American Law Reports 107 at 108, supp. 30 American Law Reports 2nd 944.

stated and had to prove specifically that Sher had authority from me. Indeed, Judge Waddy recognized this general principle in an earlier part of his charge to the jury (7) when he said:

> You are instructed that an attorney at law in the absence of authorization thereto, has no authority to compromise or settle a claim for his client.
>
> If you find from the evidence that the defendant's attorney compromised Ceil Bryson Cohen's claim against James E. Curry for the sum of $150,000 such transaction does not bind the defendant Curry unless you also find from the evidence that Curry authorized his attorney to make such settlement.

So far as I can see this was sound. But Judge Waddy than cancelled it out by giving the contrary instruction above quoted on page 104.

There was much ambivalence as to whether Mrs. Cohen even relied on an agreement made for me by Mr. Sher. She testified (8)that Sher had made the initial offer. Mr. Sher denied even having admitted the existence of the agreement before Judge Holtsoff on May 23(9). Under Rule 3 of the lower court, I have insisted (see pages 17 to 22 above) from the start that no settlement could be enforced that was not actually made in court. I didn't say a word during the court hearing at which the alleged stipulation was "reported." (10) Therefore plaintiff was required to show that Sher settled the case for me, if that was her contention.

Mrs. Cohen's attorney seems at the end to have assumed just

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7. Trial transcript 1 22 70, page 914 line 25 to page 915 line 6, R-152, filed 5 28 70.

8. Trial transcript 1 13 70, page 73 line 20 to page 74 line 1, R-145 filed 5 15 70.

9. Trial transcript 1 16 70, page 442 lines 19-26, R-148 filed 5 15 70.

10. Hearing transcript, 5 23 69, R-36,(also Ptf. Exh. 1, attached to Mrs. Cohen's response to my motion to coorect record, R-158, 6 17 70).

that position. In his closing address to the jury (11) he said:

> The judge will ask you four questions in the jury room: A. Was there such an agreement. We have the burden of proving that; the plaintiff always does.
>
> Here they are: here is the check, the letter, here is the transcript which was in your minds with the parties standing there. I submit that we have satisfied our burden of proof.

The above excerpt is copied exactly as it appears in the transcript. Again, it is not easy to tell exactly what Frohlich meant. But he did not mention any offer of settlement made by me. He seemed to be relying on the transcript and therefore on an offer or acceptance by Sher, while I stood by. He does not suggest that silence gave consent so I will not argue the point unless he raises it in his brief.

Thus it appears that Judge Waddy's erroneous instruction was of extreme importance and very prejudicial to me. We submitted a proposed instruction (12) as to Sher's authority. Judge Waddy suggested that it be "enlarged" to show tha an attorney may be specifically authorized to settle a case. Mr. Dowdey indicated assent "provided it were also stated that the burden of showing such authority was on the plaintiff." Overnight Judge Waddy came to an opposite--and grossly erroneous--conclusion. He did give a standard instruction, seemingly, but then added his own very non-standard idea that the burden of proof was on me. After the charge to the jury had been coppleted, Mr. Dowdey made objection to the parts

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11. Trial transcript, 1 22 70, page 856 lines 20-27, R-152 filed 5 28 70.

12. My proposed instruction No. 2, R-136, filed 1 22 70.

13. Trial transcript, 1 21 70, page 825 line 15 to page 827 line 3, R-151, filed 5 15 70.

of it that are mentioned above but his objections were overruled (14).

* * * * * * * * * * * * *

It therefore appears that Judge Waddy falsely informed the jury that I had admitted the settlement stipulation asserted by Mrs. Cohen and that he erroneously informed the jury that the burden was on me to disprove my lawyers' authority to settle. Therefore, for this and other reasons set forth in this brief, the lower court judgment should be reversed.

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14. Trial transcript 1 22 70 page 924 lines, 6-23, R-152 filed 5 28 70.

11. THE COURT ERRED BY SUBMITTING INTERROGATORIES 2, 3 AND 4, ABOUT THE REQUIREMENT FOR A WRITING, ABOUT THE REQUIREMENT FOR COURT APPROVAL, AND ABOUT DURESS TO THE JURY IN A WAY THAT SUGGESTED OR INTIMATED THE ANSWER EXPECTED OR DESIRED BY JUDGE WADDY.

Where, as here, a special verdict is used, the verdict and judgment are invalid if the interrogatories suggest or intimate the answer expected or desired(1) From a mere inspection of the special verdict (2) and the instructions concerning it (3) it appears that Questions 2, 3 and 4 do contain such intimations or suggestions. Therefore the judgment should be reversed.

Question No. 1 asks in general whether the parties had "entered into an agreement" etc. The form of verdict then states that if the answer to No. 1 is no, "You do not go any further but will then return the verdict to the Court." Only if the answer to No. 1 was yes was the jury to even read Questions 2, 3 or 4.

The jury answered No. 1 in the affirmative. Whether this was right or wrong is here irelevant (I discuss that at pages 172 to 173 below.) It was presumably answered (affirmatively) before the jury answered the other three interrogatories. When the jury came, then, to considering the other three, they must have been governed to some degree by the desire for consistency that inspires (or afflicts) literate mankind almost universally. They also respected the judge and must have thought that he expected or desired that they be consistent. However, an affirmative answer to Question No. 2/, 3 or 4 would have indicated that there was no binding contract and

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1. Romms v. Thew, 120 N.W. 629, 142 Ia. 89.

2. Special Verdict, R-138, 1 22 70.

3. Trial transcript, 1 22 70, page 915 line 12 to page 917 line 17, R-152 filed 5 28 70

would have been blatantly inconsistent with their yes answer to Question No. 1.(4).

While in ordinary conversation or in a letter to one's lawyer(5) one might refer to a tentative agreement or one that is not finally binding, certainly one would not expect that kind of language to be used in a verdict drafted by a judge. So the jury must have assumed that the judge's word "agreement" meant final and binding agreeemnt. Therefore for them to find that conditions had not been complied with or that duress had been practiced would have been utterly inconsistent with their answer to No. 1.

Special considerations might be mentioned with respect to Finding No. 4 which had to do with duress. The judge had expressly made clear that in case of duress, there would be no agreement (6). So it appears that affirmative answers to any of the last three questions would have directly contradicted the affirmative answer to Question No.1.

As to Questions 2 and 3 (about a possible condition requiring approval and another requiring reduction to writing) the jury could also very well have been influenced by Judge Waddy's instruction

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4. Special Verdict, R-138, 1 22 70. Questions No. 2 and 3 are in double negative form. But when we meet a double negative, English grammare regards the two negatives as cancelling each other and producing an affirmative (Fowler's Modern English 2nd Ed. 1965, page 384 "Negative Mishanlding." Therefore the jury should have answered the question the same (yes or no) as if the question had been framed more grammatically, as in our proposed interrogatories (R-137, 1 22 70 Question No. 1)

5. My letter of 5 23 69, Ptf. Exh.4, attached to Mrs. Cohen's response to my motion for correction of record, R-158, filed 6 17 70.

6. Trial transcript 1 22 70 page 913 line 4 to page 914 line 19, R-152 filed 5 28 70

that "once an offer to compromise has been accepted, even if certain formalities remain to be performed, the offerer is bound by the terms of the compromise..." (7). I don't know what Judge Waddy meant here by the term "formality" but Bouvier defines it as "the conditions which must be observed in making contracts." (8) By thus brushing aside "conditions" Judge Waddy emphasized the suggestion or intimation that he did not desire an answer to Questions 2 and 3 that would invalidate the alleged contract.

Careful examination of the original form of verdict as it appears in the record will show that affirmative answers to the last 3 questions would have engendered certain mechanical inconvenience for the jury. The "yes" answer to No. 1 seems to have been written in ink, as were the other answers. If they had answered yes to Questions 2, 3 and 4, then to restore consistency they would have had to cancel their answer No. 1 in pen and ink, and insert a new negative answer.

If they did that they would surely have been questioned about possible indecisiveness. They would have explanations to make. They knew not but what the verdict would be void and they would be responsible for wasting seven days of the court's time. They might have been taken to task for violating Judge Waddy's order that they not go further after answering No. 1 in the negative.

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7. Same, page 910 lines 4-18.

8. Bouvier's Law Dictionary, 3rd Revision.

The people who sat on this jury were probably in a new mileu. It was their first case, at least for this sitting.(9). They must have been reluctant to make a holy mess of their first verdict, to possibly incur sharp questions from the lawyers, to incur the judge's wrath which they had already seen vented on me, and above all, to be made to look a little foolish. Nobody likes that.

Certainly, once the jury had answered No. 1 in the affirmative, they would have hesitated very much to make inconsistent affirmative replies to Questions 2, 3 or 4. This was because of the clear intimations and suggestions in the form of verdict submitted to them by Judge Waddy. By them he made crystal clear that he "expected" or "desired" a negative reply to Questions 2, 3, and 4. Therefore the verdict was invalid. Therefore it was not a proper basis for a valid judgment. Therefore the judgment should be reversed.

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9. Trial transcript 1 13 70, page 23 line 15-23, R-145 filed 5 15 70.

12. THE COURT ERRED BY SUBMITTING (AND BY BASING ITS FINAL JUDGMENT UPON A SPECIAL VERDICT THREE OF WHOSE FINDINGS WERE FLAGRANTLY CONTRARY TO THE PLEADINGS AND THE EVIDENCE.

As a general rule courts of appeals hold (1) that while they hesitate to set aside a verdict on grounds of insufficiency of evidence, still if it is flagrantly contrary to the evidence and the court is convinced that injustice has been done, it will and should set it aside. They also hold (2) that if the verdict varies from the issues in a substantial respect it is a nullity and the court cannot properly render a judgment on it.(2).

(a) The finding that court approval was not necessary to the finality of the alleged stipulation.

Surely this court will determine that the finding above designated was flagrantly contrary to the findings and the evidence. It read (3)

> At the time of the making of the agreement, did the parties contemplate that the agreement would not be binding upon them unless approved by the Court? Answer "Yes" or "No." No.

What was the evidence on this subject? The best evidence (and in the light of lower court rules about oral stipulations(4)/the only evidence that the court really should consider) is contained in the five page transcript of the proceedings of May 23, 1969 (5). Mr.

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1. Beindorf v. Thorpe 126 Okla 157, 259 P. 242, also American Jurisprudence Appeal and Error § 890, and cases cite (footnote 6.)

2. Paterson v. U.S. , 15 U.S. (2 Wheat) 221, 4 L. Ed. 224.

3. Special Verdict, R-138, 1 22 70, Question No. 3.

4. Rule 3, Local Rules of U.S. District Court, D.C.

5. Hearing transcript, 5 23 69, page 9 line 18 (also Ptf. Exh. 1, attached to Mrs. Cohen's response to my motion for correction of the record, R-158, 6 17 70.)

Frohlich said that "we are compromising a claim." This expresses either continuous action or future non-continous action. It does not express completed action; it expresses progressive action(5a).

At that point, Mr. Frohlich did not specify whether the stipulation that he was in the process of making was subject to the approval of the court. However, the court then asked: "What do you propose to do, Mr. Frohlich?" Frohlich replied (6);

> ...[W]e propose that we file a peition by the executrix for approval of the $150,000 settlement and serve the other legatees, give them notice of a certain time by certified mail, and then present an order to your honor at the end of that time.

Did he mean that the alleged stipulation was effective and binding immediately without regard to what kind of order the court entered? Obviously, he did not. Judge Holtzoff suggested that the case be dismissed immediately, whereupon Mr. Frohlich said(7):

> There is presently...a court order that ties up all these Indian claim funds...There is presently $400,000 in that escrow fund, we understand, therefore we would not like that disbursed .... WE would prefer that money stay there and the case remain open until we receive our $150,000.
>
> THE COURT: I think that is reasonable. I cannot insist on your dismissing the case until the settlment is approved.

If the alleged settlement was for $150,000 and if was to be binding regardless of court approval, Mr. Frohlich certainly would not have insisted that "all those Indian claim funds" in the amount of $400,000 be tied up until after approval. Neither would he have insisted on the case "remaining open" until after approval. Obviously, he

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5a. Webster's Third New International Dictionary, definition of "be" as verbal auxiliary.

6. Hearing transcript, 5 23 69, page 10 lines 11-17. See footnoge 5 above.

7. Same, page 11 line 11 line 12 to page 12 line 19.

considered the alleged settlement tentative just as I did.. He was keeping his hands free, if the settlment were not approved, to pursue the litigation against me and perhaps recover more than the $150,000.

I see no ambiguity in the transcript of May 23, 1969. It surely indicates that the alleged settlement, if it existed at all, was subject to approval of the court. If there were any ambiguity in this respect, it is certainly resolved by, among other things, the testimony of Mrs. Cohen's two principal witnesses, herself and my former attorney, Mr. Sher.

I have already cited Mrs. Cohen's statement that she had agreed to dismiss the lawsuit if the judge approved the settlement(8). She also testified (9) as follows:

> Q. If this settlement had not been approved by the court as requested by you, did you plan to go ahead--did you feel that the agreement permitted you to go ahead with the lawsuit anyway? A. Oh, Yes.
>
> Q. You did? A. Oh Yes.
>
> Q. Now I was paying you, as I understand your testimony, $150,000 for dismissal of the lawsuit--is that your testimony about it? A. It was--it was--Yes, it was in exchange for a complete absolving of all legal differences between us.
>
> Q. But I think you have just stated that if the settlement was not approved you were free to go ahead with the lawsuit --you still say that, do you? A. Yes.
>
> * * *
>
> Q. Did the agreement between us, Mrs. Cohen, anticipate any time limit period during which you would have obtained the approval of the court in order to collect the $150,000?

At this stage, Mr. FRohlich interrupted the witness for the obvious purpose of again coaching her:

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8. Trial transcript 1 13 70 page 87 lines 18-21, R-145 filed 5 15 70.

9. Same, page 109 line 10 to page 112 line 19.

MR. FROHLICH: I object because this witness has not testified that she had to obtain approval--she had to give notice to the heirs, she testified.

Frohlich was misrepresenting what she said in order to get her to change her story. But it did not help. She had already made clear that the alleged stipulation was not complete without court approval. Later she also testified that the main case was "still pending" at the time she was testifying(10)

Her other principal witness, Mr. Sher, was either inadequately coached or refused to be coached. He confirmed what Mrs. Cohen had said. When he took the stand two days later, he testified that just after the alleged stipulation was made, he was holding the $150,000 that he obtained from Mr. Weissbrodt "until Judge Holtzoff held his hearing on June the 20th at which time I was going to disburse it in accordance with whateverorder he entered at that time." The following examination ensued(11):

> Q. You understood the agreement allegedly made between me and Mrs. Cohen was subject to approval by the Court? A. It was subject to approval by the Probate Court.
>
> Q. If the court had approved it, then the money would have become payable by you, is that right? A. Well, at that time there was pending my request for instructions as to what to do with the money.
>
> Q. I am talking about the agreement that was entered into on May 23. Was that intended to be subject to approval by the court? A. That agreement was--well it was subject to the approval of the Probate Court.
>
> Q. Allright. That was Judge Holtzoff,wasn't it? A. Judge Holtzoff was sitting in the Probate Court.at that time.
>
> Q. And he was also sitting in the District Court, was he not? A. I assume he was; Yes I think he probably was.

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10. Trial transcript, 1 14 70, page 41, R-146 filed 5 15 70.

11. Trial transcript 1 15 70 page 354 line 1 to page 355 line 22, R-147, filed 5 15 70.

Later Sher testified as follows,(12):

> Q. Didn't the agreement provide that it had to be approved by the Court? A. It required that it be approved by the Probate Court.

That the alleged stipulation was not intended to be binding unless and until it was approved by the Court is also indicated by Mrs. Cohen's petition for approval thereof filed on June 2, 1969(13) It requested from the court an order "that, upon her receipt of said proceeds she be authorized to file a Praecipe dismissing said lawsuit...." She clearly had no intention of dismissing the lawsuit unless the court entered said order.

It appears, therefore, that under the undisputed evidence, the alleged agreement was clearly not binding until approved by the court. The jury held that it was. If the finding was not based upon evidence, upon what was it actually based? It seems to have been based upon the desires of Judge Waddy. I have already shown how he incorporated suggestions and hints expressing those desires in the form of verdict that he gave to the jury. See pages 109 to 117 above. But he also expressed those desires in his closing vigorous personal cross-examination of me. In it he tried to suggest that the proceedings for approval of the agreement were somehow separate from, distinct and apart from, the lawsuit that the jury was deciding and therefore ought not to be considered. He asserted these ideas in the form of leading questions to which he demanded categorical answers without permitting me any explanation. The following examination took

12. Same, page 363 lines 10-12.

13. Mrs. Cohen's notice to legatees and attached petition, page 4 of petition, R-37, 6 2 69 (Also Def. Exh. 30, R-153, filed 6 5 70).

place at the end of the Judge's cross-examination of me(14):

THE COURT: So as a matter of fact there were two proceedings going on in this court at the same time, is that correct?

THE WITNESS: That is a legal question but I am sure--

THE COURT: Don't make any comment on the question. Just answer the question--one was a proceeding which was a probate proceeding, is that correct?

THE WITNESS: I guess so, yes.

THE COURT: And the other was a proceeding in the suit that Mrs. Cohen had brought against you?

THE WITNESS: Yes.

THE COURT: Very well.

The Witness: May I make any explanation at all?

THE COURT: Well, no--you may not....

I think the jury got the point. If they did not, then Mr. Frohlich in making his closigg statement to the jury made it quite clear. In that argumentt (15), he said:

HIs honor, if you will notice, did something very important yesterday. He asked Mr. Curry questions: Weren't there two courts involved here, Mr. Curry? You are dreaming up that approval thing. You said it needed to be approved but there is a difference there, isn't there? Aren't there two courts involved here? One is the trial of Cohen v. Curry, a fight over a partnership, and a settlement has been reached. No approvals necessary there. The case is over.

* * *

Smoke screen number one; dream number one; Maybe I can say that it had to be approved by the Court; since it hadn't been approved by the court maybe I can wiggle out out and put it over until the summer and start the whole game over again. So the questions were asked yesterday by His Honor and the answers were made louder and clearer.

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14. Trial transcript 1 20 70, page 777 line 22 to page 780 line 27, R-150 filed 5 15 70.

15. Trial transcript, 1 22 70 page 852 line 3 to page 853 line 5, R-152, filed 5 28 70.

And again he returned to Judge Waddy's cross-examination (16):

> The next question: Did they contemplate that the agreement would not be binding unless it was approved by the Court? Obviously the answer is "No." That is dream Number Two which was so nicely pierced yesterday, dramatizing two different cases going on.

I agree with Mr. FRohlich that Judge Waddy was suggesting to the jury that there was a "difference there" because the approval was to be obtained in Judge Holtzoff's capacity as a probate judge. But he never suggested what that difference was. Neither did Mr. Frohlich. Perhaps in his brief Mr. Frohlich can answer that question. At any rate, sensibly or not, the jury took its lead from the judge and found, quite contrary to the undisputed evidence, that the approval was not a prerequisite to finality of the alleged stipulation. Therefore the judgment based on said findings should be reversed.

(b) The finding that reduction to writing was not necessary to the finality of the alleged stipulation.

I also contend that the verdict is contrary to the evidence as respect the following finding(17):

> At the time of the making of the agreement, did the parties contemplate that the agreement would not become binding upon them until reduced to writing? Answer Yes or No. No.

It has been my contention that there were many aspects of the negotiations that needed to be reduced to writing before any final agreement would exist. For instance, I contended that provision would be made for payment not by me but by Weissbrodt, as was

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16. Same, page 857 lines 8-13.

17. Special Verdict, Question No. 2, R-138 , 1 22 70.

done in both drafts prepared by the parties on May 22, 1969 (17a) which would have carried into effect his previous agreement with me. I also anticipated provision for Mrs. Cohen's specifically assuming responsibility for taxes on the money. I also expected that the understanding would be written down and signed to the effect that the payment was for "services rendered." As to our agreement on this aspect, there is no conflict in the evidence and certainly it is not the kind of understanding that would be made orally. At the time of the negotiations I doubted that the stipulation could be carried out in the light of all the various laws cited above at pages 29 to 31. But to do so would certainly require a writing of some kind, probably with the approval of government and/or tribal officials.

From my point of view, there were many problems that had to be worked out which would require a complex written agreement. In fact I doubted very much that such an agreement was possible. This was my view, but the plaintiff has submitted evidence to the contrary so I will not argue the matter at this point. But as to the incorporation of one provision into a written agreement there is no conflict in the evidence. This is the provision for final dismissal of the case. From the record it is clear that the intention of all parties and of the court was that the dismissal should be effected by written "stipulation" of both parties. So that in this respect at least the finding above quoted is contrary to the undisputed evidence.

17a. Frohlich draft of consent judgment, 5 21 69, Defendant's Exh. 18, R-153, filed 6 5 70; also Sher Draft of proposed judgment, 5 21 69, Def. Exh. 3, R-153, filed 6 5 70.

At the hearing of May 23, 1969(18) Judge Holtzoff said:

> I suggest in the meantime that you file a praecipe dismissing the action so that it will clear the docket.

What did he mean? Did he refer to an oral praecipe? Not at all. Did he mean a praecipe signed only by the plaintiff? Under the rule on Dismissal of Actions (19) a plaintiff cannot dismiss a case after answer is filed except by special order of court. It is obvious that what Judge Holtzoff meant was the other method provided therein, towit a "stipulation of dismissal signed by all parties."

When Judge Holtzoff made this suggestion, my counsel did not object. Neither did Mr. Frohlich, although he did indicate that the stipulation should be delayed (20) until the required court approval was obtained and the money was paid. It was therefore clear that, as all the parties intended, no final agreement would exist until the simultaneous signing by both parties of a "stipulation of dismissal." That is what Mrs. Cohen referred to, also, when in her petition of June 2, 1969 (21) she asked for authority to file a "praecipe" of dismissal.

For this reason, it is clear that there was a writing required before the alleged stipulation would become final and binding.

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18. Hearing transcript, 5 23 69, page 11 lines 11-14, see footnote 5 above.

19. Rule 41, Rules of Civil Procedure for the U.S. District Courts as amended to July 1, 1968.

20. Hearing transcript, 5 23 69 page 11 lines 15-22, see footnote 5 above.

21. Mrs. Cohen's notice to legatees and attached petition, R-37, page 4 of petition, 6 2 69,(Also Def. Exh. 30, R-153, filed 6 5 70.

Therefore, in this respect, the above mentioned finding is also flagrantly contrary to the evidence.

(c) The finding that the parties "entered into" a certain agreement on May 23, 1969.

I have shown above that Findings No. 2 and 3 were flagrantly contrary to the undisputed evidence and therefore void. This being so, the agreement was not binding until (a) approved by the Court and (b) reduced to writing. Therefore the following finding is also clearly contrary to the evidence and pleadings (22).

> Did the plaintiff and Defendant on May 23, 1969 enter into an agreement whereby the defendant agreed to pay the plaintiff the sum of $150,000 and the plaintiff agreed to relinquish her claims against the defendant and dismiss the pending lawsuit? Answer Yes or No. Yes.

But in another important respect, the finding above quoted is clearly contrary to the evidence and to the pleadings. This is because it omits one of the terms of the alleged agreement as to which all the parties and the witnesses agreed was to form part of any settlement. As shown above at pages 40-85 to 84 it was understood between the parties that any payment was to be "for services rendered" and this was even included in the plaintiff's allegation. Therefore the parties could not possibly have made an agreement which, like the finding above quoted, made no reference to "services rendered."

I insisted upon the inclusion of such a provision in any final understanding. For one thing I wanted to make sure that I could hold

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22. Special Verdict, Question No. 1, R-138, 1 22 70.

Weissbrodt responsible under his agreement with me even though settlement money might initially be paid out of the escrow fund established by Judge McGuire. His agreement was to pay off any claims for "shares" in the fees to which Bingham and Cohen might be "entitled." Therefore there must be a clear record that the payment, if made out of the escrow, was for "services rendered." This provision was also of substantial importance because of the implications with respect to income tax. Its reduction to writing would eliminate any dispute as to whether Mrs. Cohen (on the one hand) or Weissbrodt (on the other) would be responsible for the tax on the settlement money.

But there was no dispute, anyway, among the witnesses that the clause about "services rendered" was agreed on. Therefore the finding that an agreement was made which did not include that clause was clearly contrary to the evidence and pleadings.

* * * * * * * *

I have shown above that with respect to Findings 1, 2 and 3 the verdict in this case was flagrantly contrary to the evidence and the pleadings and therefore void. NO valid judgment could have been based upon it and the judgment entered by Judge Waddy should be reversed.

13. THE COURT ERRED BY NOT GRANTING OUR MOTION FOR SUMMARY JUDGMENT BASED ON THE 21 YEAR DELAY OF CONGRESSMAN BINGHAM, HIS ASSOCIATES AND ASSIGNEE, IN FILING THE ORIGINAL COMPLAINT IN THIS CASE.

In the lower court, my then-attorney, Mr. Sher, filed a motion for summary judgment(1). It referred not to the cause of action on the alleged stipulation for settlement but to the cause of action set forth in the original complaint (2), based on my 1947 agreement with Cohen and Bingham(3). Especially if this Court decides, on the basis of my other contentions, to reverse the judgment entered by Judge Waddy, I ask that it review the order denying our motion for summary Judgment. If there is discretion in this regard, I believe it should be exercised in my favor to avoid continuation of the harassments to which I have already been subjected (4).

An opposition was filed by Mrs. Cohen(5). An argument was held thereon (6). Judge Gesell denied the motion subject to the

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1. My motion for summary judgment with attachments, R-22, 4 17 69.

2. Amended complaint, R-13, 1 21 69 (also Def. Exh. 4, R-153 filed 6 5 70)

3. Bingham-Curry-Cohen agreement, 9 1 47, R-8, filed 1 14 69, (also Def. Exh. 17, R-153, filed 6 5 70).

4. In requesting review I rely on the general rule that "of course prejudicial errors in interlocutory orders may ordinarily be reached on appeal from the final judgment. Palmer v. Forbes, 228 F. 2nd 604. If Mrs. Cohen's reply brief contests this principle, I will meet her objections when they are made.

5. Mrs. Cohen's opposition to motion for summary judgment, 5 12 69, R-30.

6. Hearing transcript, 5 15 69, R-33 filed May 23, 1969, pp. 1-33.

taking of evidence (7) In his order Judge Gesell stated:(8)

> I feel that there is sufficient here to create factual questions as to the status of the partnership under the agreement. I do not believe that under these facts the court can find that the statute has run.

The question whether or not there really was a ""partnership under the agreement" was very important. In Mrs. Cohen's opposition to my motion, she had insisted that (9):

> The partner or partners who retain the dissolved firm's assets, whether by agreement or otherwise, and collect, invest or manage the former firm's property, do so as trustees for the other partners since the property with which they deal is not their own.

She further contended (10)

> ...(T]he statute of limitations is not ordinarily tolled with respect to controversies among partners over the right to share in the partnership assets until those assets have been reduced to money and distributed.

I shall not discuss the basic validity of this argument but only insist that if Judge Gesell had realized that there was no partnership he would surely have granted our motion. While a superficial reading of the 1947 agreement might create a first impression that it created a partnership between me and the two New Yorkers, a more careful examination will clearly indicate the contrary. It was not Judge Gesell's fault that he did not get this point. The difficulty arose at least in part from the fact that my attorney didn't understand it either. At several points he actually referred to my relations with Cohen and Bingham

7. Order of Judge Gesell, 5 15 69, pp. 1-6, R- 35, filed 5 23 69.
8. Id,
8. Id, page 2 line 22 to page 3 line 1.

9. Mrs. Cohen's opposition to motion for summary judgment, page 13 lines 6-11, 5 12 69, R-30.

10. Id, page 9 lines 15-19.

as a "partnership"(11).

It is not surprising, then, that Judge Gesell was misled. He was also misled as to the time at which Bingham's cause of action arose by the following colloquy: (12)

> Mr. SHER: ... Now it is our position that the claim arose in 1948 at the time the contract was terminated.
>
> THE COURT: Assuming that it did, for a moment...[w]hat would you claim under the contract.... I mean how could any claim be stated within three years after 1948?
>
> MR. SHER: They could ask the court for a declaratory judgment as to their rights.
>
> THE COURT: They had them in a contract; they didn't need them. Their rights are in the contract.

Judge Gesell was again under the impression that I was liquidating a partnership and that no right of action would accrue until there were profits on the Indian business. My lawyer did not correct this impression. His reply was entirely wrong. Because the same question may arise in the mind of this Honorable Court, I will try to give the correct reply.

What could they ask for in 1948? They could have asked for the same kind of relief that they asked for in 1969, namely an accounting. It would not be an accounting of a partnership because no partnership ever existed. But they could have asked for an accounting of the trust obligation that I assumed (a continuing obligation) to deposit <u>all</u> my revenues from whatever source in

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11. Hearing transcript 5 15 69 page 2 lines 22-23 and page 9 line 15-19 etc., R-33 filed May 23,1969.

12. Id, pages 30-31

a Washington bank account for their benefit(13). If Sher had given this answer, I also believe that Judge Gesell would have ruled otherwise.

In 1948, as my motion for summary judgment showed, and as was not denied, there was an exchange of letters between me and Cohen and Bingham(14) by which they repudiated their obligations. AT that time, I closed out the trust account and transferred the funds to my personal name(15). If they felt, in spite of their own defaults, that they still had a claim against me, they should have sued me then instead of waiting until January 13,1969. I further showed, and the other side did not deny, that in 1950, I refused to arbitrate and suggested they go to court(16). But they waited for another 19 years until the claims were decided favorably. By abandoning both their obligations and their rights for so long they are barred either by the Statute of limitations or by the doctrine of laches.

In the court below, Mr. Sher filed a 16 page memorandum of law in support of the motion for summary judgment. I will not burden this brief to any such extent. He relied primarily on the Statute of

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13. Bingham-Curry-Cohen agreement 9 1 47 ¶¶ 5, 6 and 20 R-8 filed 1 14 69 (Also Def. Exh. 17, R-153 filed 6 5 70). Note that while the obligation is defined as that of the "WAshington firm" that term is defined in ¶2 as referring only to me unless Felix Cohen should become my partner, which never happened.

14. Letters from "Henry", September 10, 1948(2 letters) and September 16, 1948, being Exhibits 1,2, and 3 of my Motion for summary judgment, R-22, 4 17 69.

15. Curry affidavit, page 6 lines 3-5, attached to our motion for summary judgment, R-22, 4 17 69.

16. Id, page 10 lines 1-8 and Bingham letter of 3 31 50 being exhibit 4 of our motion for summary judgment, R-22, 4 17

Limitations(17). That statute makes no reference to a distinction between law and equity cases. But I feel that there may be such a distinction and therefore would rely primarily on the doctrine of laches. If the court is inclined to rule under the Statute, it might consider a 1927 D.C. Appeals decision (18) which involved a suit for accounting for misappropriation of corporate funds in which the court said:

> it is a case where there is concurrent jurisdiction at common law and in equity. A plea of the statute of limitations would undoubtedly be a bar to the demand at common law. This statute must be equally held in equity as a bar to this proceeding.

In spite of the above language, it may be that the court was applying the statute by analogy rather than by its terms. Therefore I insist that Bingham's claim is barred by the doctrine of laches. This is based on a long line of decisions wherein the doctrine is very strictly applied especially in cases which involve speculative enterprises. That the pursuit of Indian claims by lawyers is undoubtedly speculative. The reasons are explained in my affidavit (19). Lawyers have been known to pursue them for a lifetime without result, which almost happened to me. It is not fair for these men, who claim to have done 100 hours work that they never reported to me in 1948 should come in 21 years later and demand a share.

A good case on the general principle is one decided in the Supreme Court of the United States in 1882, one that presumably involved the property on which the vast Van Ness apartment complex

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17. District of Columbia Code, 1967 Ed. §12-301.

18. Anglo-Colombian Development Co. v. Stapleton, 57 App. D.C. 209, 19 F. 2nd 683 (1927)

19. Curry affidavit, page 4 lines 3-16, attached to motion for summary judgment, R-22, 4 17 69.

is now located, on Connecticut Avenue in Washington(20). The plaintiff/held a 's decedent 90 year lease. The owner repossessed it for default in the payment of rent. The lease contained a provision for redemption after default without any limitation as to time. 45 years after default, the heirs of the lessee sought to redeem by paying back rent. The court refused to permit the redemption, saying:

> It has been a recognized doctrine of courts in equity, from the beginning of their jurisdiction, to withhold relief from those who have delayed for an unreasonble length of time in asserting their claims. [citing cases.]....
>
> The case is plainly one of gross laches on the part of Stinchcomb and those claiming under him. His right under the deed of 1818 to repossess himself of the premises by paying rents and charges in arrears, accrued the moment Van Ness reentered in 1833 or 1834. But this right could not last forever. The peace of society and the security of property demand that the presumption of right arising from a great lapse of time without assertion of an adverse claim should not be disturbed.

I don't know how speculative the Van Ness property was in 1833. Furthermore the Stinchcomb heirs did wait twice as long as did Bingham, Cohen et al. In cases clearly involving speculative enterprises, the courts are much stricter.

The Supreme Court in 1892 refused relief because of a delay of only two years(21). It was very like the case under consideration here. It involved a share of a land grant that was of speculative value because it was involved in title litigation. The trustee (wrongfully) bought it himself and distributed the money. The beneficiaries sued him two years later, after the title suit was favorably decided and the court dismissed their claim. The court said: (under-

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20. Lansdale v. Smith, 106 U.S. 391 (1882).

21. Hoyt v. Lathan, 143 U.S. 553,(1892).

lining added):

> Under the circumstances, we think the plaintiffs should have taken immediate action. They were fully informed of the fact of the transfer or at least they were informed of enough to put them on the necessity for further inquiry and they must have known that delay, even for a year or two, might work a very great change in the value of their brother's interest.
>
> If the syndicate were successful in their litigation with respect to these lands, they would undoubtedly largely increas in value; on the other hand , if they were unsuccessful their interest might be comparatively worthless.

The value of the interest, if any, of Bingham in the Indian claims also hinged on the outcome of litigation. He cannot wait for that value to increase tremendously, without any help from him, and then come in to claim his share.

Many of this long line of cases have to do with mineral lands. In an 1904 United States Supreme Court case (22) a group of gold mining prospectors agreed to settle certain differences between them by having title to the ground taken in the name of one of them for the benefit of all. Later, when the plaintiff asked the trustee for a deed to his interest in the property, the trustee refused. Eight years later, after gold had been found on the property, suit was filed for recovery of a 1/8 interest. The applicable statute of limitations was ten years. But relief was denied on grounds of laches. The court said:

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22. Patterson v. Hewitt, 195 U.S. 309 (1904).

> Whether the refusal of Hewitt to make the deeds was right or wrong is not material here. There is no doubt from the findings that appellants had no share in the subsequent development of the mine or the discovery of ore in 1890. It was through the efforts and perseverance of defendants and the aid they received from Ferguson that they were put in possession of this valuable property. If the appellants had expected a share in this property, they should either have brought a bill promptly to enforce their rights, or at least contributed their proportionate share to the subsequent work and labor, and the expenses then incurred....
>
> Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them. There is no class of cases in which the doctrine of laches has been more relentlesly enforced.

I urge this court to follow the example of the highest court and not relent in this case. Bingham, like Paterson, had no share in the development of the claims. Just as Hewitt repudiated his obligation as trustee, so did I, with reasons that I thought were sound. Bingham has no right to wait in the weeds till the work is done, then come in and demand his share. The doctrine of these is the same that we learn at our mothers' knees in the Fable of the Little Red Hen. It is obviously sound law.

Additional cases to the same effect are cited in the footnote (23)

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For the reasons stated, the order denying our motion for summary judgment, like the final judgment of Judge Waddy, should be reversed.

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23. Starkweather v. Jenner, 216 U.S. 524, 1910; Ward v. Sherman, 192 U.S. 168, 1904; Weitzel v. Minnesota Railway Transfer Co., 169 U.S. 237, 1898; Johnston v. Standard Mining Co., 148 U.S.360, 1893; Felix v. Patrick, 145 U.S. 317 , 1892, Hayward v. Eliot National Bank, 96 U.S. 611, 1878; Twin-Lick Oil Co. v. Marbury, 91 U.S. 578, 1876; Home-stake Mining Co. v. Mid-Continent Exploration Co., 282 F. 2nd 787, 10th Circ. 1960; Hunt v. Pick 240 F. 2nd 182, 10th Circ. 1957; Pfister v. Cow Gulch Oil Co., 189 F 2nd 311, 10th Circ., 1951.

CONCLUSION

For the reasons stated, the judgment of the lower court should be reversed. The order denying my motion for summary judgment should also be reversed or in the alternative this Honorable Court should enter the summary judgment requested by me. If in its wisdom this court should remand the case for further proceedings, it should be done with instructions to grant me leave to implead the parties mentioned in my four motions for that purpose; or in the alternative, this court should grant said motions.

Respectfully submitted

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