Clerk of Superior Court,
Seminole, Oklahoma.

Re: Canteal, Admx. vs. Tourtellotte,
Superior Court No. 1909.

Dear Sir:

Herewith I hand you for filing the brief which Judge Cutlip on the 15th inst., gave me fifteen days to prepare and file. I will thank you to present the same to him. I am also mailing copy of this letter to Judge Cutlip and am sending copy of brief to Pryor and Wallace, attorneys for plaintiff, at Wewoka.

Will appreciate your advising in the usual manner the receipt and filing of this instrument.

Yours very truly,

CLAUD BRIGGS,
Attorney for Defendants.

IN THE SUPERIOR COURT WITHIN AND FOR SEMINOLE COUNTY, STATE OF OKLAHOMA

Ida Centell, Administratrix of the Estate of Joe Centeel, Deceased, - - Plaintiff,	
--vs--	No. 1909
E.E.Tourtellotte and Mrs. E.E.Tourtellotte, - - - - - - - Defendants.	

BRIEF OF DEFENDANTS IN SUPPORT OF MOTIONS TO QUASH SUMMONS

In the outset it will be my purpose to briefly review the situation as it stands presented on the record and proofs in support of the motions herein filed. In brief this is what we have:

Plaintiff commenced this action by filing her petition against the defendants, alleging joint liability in that E.E.Tourtellotte as driver and operator of the motor vehicle negligently caused injury to and resulting death of Joe Centell and coupled Mrs. Tourtellotte under the following broad allegation:

> "that at the time of said injury the said E.E.Tourtellotte was on business for the said defendant Mrs. E.E.Tourtellotte and was acting as her agent."

There is no other allegation contained in the petition to connect Mrs. Tourtellotte with the matter in any manner. Summons was issued to the sheriff of Seminole County and was served upon Mrs. Tourtellotte in Wewoka, while she was in Seminole County on a mission of business in connection with another matter entirely. Summons was t en issued to Sheriff of Latimer County for service upon the defendant E.E.Tourtellotte. No return of the summons from Latimer County appears to have been filed with the clerk of this court.

Within the time specified in the summons served on Mrs. T. she filed her motion herein challenging the venue and jurisdiction of the court. Mr. T. also filed a separate motion setting up in substance the same grounds and we respectfully request the court to examine these motions carefully as to the grounds and allegations thereof.

Proof was taken and has been introduced in support of these motions to quash. This evidence, if examined by the court will be found to establish conclusively the following facts:

> (a). That both Mr. and Mrs. Tourtellotte reside and have for many years in Latimer County, Oklahoma, and did not then nor never have either resided in Seminole County, Oklahoma; that Mrs. T. was in Wewoka on the occasion summons was served upon her and was there at the invitation of one of the attorneys for plaintiff to attend to a matter

business with Mr. Mainard and that her presence there was at the suggestion of Mr. C.O. Wallace, who was acting as attorney for Mr. Mainard; that this is the same C.O.Wallace attorney for the plaintiff in this case; that upon her arrival in Wewoka on the morning the summons was served upon her she immediately called by telephone the office of Mr. Wallace and advised his office where she was in Wewoka and in a very short time thereafter she was delivered copy of summons by a man who assumed to be deputy sheriff; that Wallace had advised both she and Mr. Mainard concerning the matters and that she was acting pursuant to his advice in coming to Wewoka on said date.

(b). That Mrs. Tourtellotte has and had no interest whatever in the mission or business connected with the mission upon which Mr. Tourtellotte was at the time of the accident; that she did not even know he was on a mission of the character; that he was not her agent or in any wise acting for or in her behalf; that he was in fact on mission in which Mr. Tourtellotte and Mr. Centel were jointly interested and which was primarily the performance of a mission resulting solely from an arrangement under which Centell was the only interested or benefitted party, in that they were traveling to the vicinity of Sasakwa to get an "underreamer" which Centell had been using and which had been borrowed from a lease in Hughes county; that Mr. T. went at the suggestion of Centell.

(c). That there was no connection whatever between Mrs. Tourtellotte and the operation of the drilling machinery in Hughes County; that the machinery was separately and independently owned by Mr. T. and that the drilling operations were being conducted in a manner that made the drilling contractor (Mr. E.E.Tourtellotte) an independent contractor; that Mrs. T's. only interest was a contingent interest which would vest only when certain conditions were met and a certain escrow contract complied with and then the only interest she would have would be as owner of one-fourth of the net proceeds from production, while Mr. Mainard would own the other 3/4ths---in short she was to own, under such contemplated plans, an undivided 1/4th interest in production, but that this did not even vest until long after the accident---in fact it became vested on the date the summons was served herein; that she had no control whatever over the lease at time of this accident; that sole control,was vested in M.F.Mainard, Jr; that Mainard contracted with Mr. T. and that Mrs. T. was not connected with the management, control or operation of the lease or drilling machinery.

All the foregoing facts are undisputed and unquestioned as the record stands. It now remains for the court to determine whether or not this matter should be settled here by sustaining the motions, or whether it should wait the determination as an issue to be tried at the time the action is tried to a jury. We take the position that the very nature of the matter requires that it be disposed of here, and in support thereof we cite the following authorities and reasoning, to-wit:

The case of Fisher vs. Fiske, 96 Oklahoma 36, 219 Pac. 683, in an opinion very much in point in this case, the court there had the following to say:

> " There is a valid distinction between a suit against tort-feasors when they are attempted to be held jointly, and against them when they are attempted to be held severally and individually. In the former the statute permits the nonresident to be brought in as a necessarily proper party; in the latter, the non-resident cannot be forcibly made a party to the suit. Therefore, should it be determined, at any time, that the resident defendant is not properly a party, is not connected with the alleged liability of the non-resident, the nonresident cannot be held upon his several or individual liability outside the county of his residence."

and, in discussing the matter further our court adopted the rule of Ohio, in the

case of Gorey v. Black 125 N.E. 126, and held this to be a "jurisdictional" question. It was said therein:

> " 'In order to give the court jurisdiction over joint defendants who are nonresidents of the county where suit is brought and for whom summons has been issued to another county, the averements of the petition and the proof on the trial must show that the plaintiff has a valid joint cause of action against the defendants on whom valid service is had as well as against the non-resident defendants
>
> 'The defendant Black is entitled to make every defense which he would have been entitled to make in that case. He is entitled to show that he was not a joint tort-feasor with the defendant Clark. And, if, in the case in Licking County he can, on the other hand, demonstrate that the defendant Clark had no part in the committing of the wrong, that would oust the jurisdiction against him, even if the proof showed that he had wrongfully injured theplaintiff, because the esential basis of the right to proceed against Black in Licking county is that a joint tort-feasor has been joined in that case and properly served there. A plaintiff cannot compel persons residing out of the county where suit is brought to defend there by simply joining t em with another person or persons against whom there is no joint right of action. In order to give the court jurisdiction over defendants non-resident of the county where the suit is brought and for whom summons has been issued to another county, those against whom service is had in the former county must have a real and substantial interest in the ~~xxxxxxxxxxx~~ proceeding adverse to the plaintiff and against whom a substantial relief is sought. The law does not permit the important matter of jurisdiction to be determined by joining colorable or dummy defendants in the case.'"

It is the contention of defendants in this action that the plaintiff Ida Centell, has in fact joined Mrs. Tourtellotte as a defendant in this action in order to get service upon her, knowing that they will not be able to get service upon Mr. Tourtellotte in Seminole County, and that Mrs. Tourtellotte was joined as "colorable or dummy" defendant. The foregoing decision is followed by several ot ers equally as pointed, but not possibly as near on all-fours as this one. I refer the court to and request that following Oklahoma decisions be read:

> Tuloma Oil Co. v. Johnatgen, 107 Okla. 92; 230 Pac. 884.
> Bilby v. Gibson 153 Okla. 196; 271 Pac. 1026.
> Ada-Konawa Bridge Co. v. Cargo, 163 Okla. 122; 21Pac. (2d) 1.

In all of these cases i is clearly is determined to be a jurisdictional question. In the last case cited above, Ada-Konawa Bridge Co. v. Cargo, supra, it was there held:

> " uestion of the court's jurisdiction over d fendant not resid nt of the county must be presented at earliest stage of proceedings and is waived by proceeding to trial without properly resenting the uestion."

The uestion then presents itself as to whether the defendants here have "properly presented the question" for determination by this court at the "earliest stage of the proceedings." In the case of Guaranty State Bank of Tishomingo vs. First National Bank of Ardmore 127 Okla. 293, 260 Pac. 508, the proceedure outlined therein as the "proper procedure" was adopted and has b en followed by us in presenting and raising this uestion here. In discussing and deciding that the case the Supreme Court, at the close of the

opinion had the following to say:

> "The right of the party to be sued in the county where the cause of action arises, or where it is summoned, is a substantial ~~right~~ one. The district court of Carter county never obtained jurisdiction over the person of the defendant. The defendant at every stage of the proceedings objected to the jurisdiction of the court, and the original motion should have been sustained."

The last case above quoted from is one presenting the same and identical question of jurisdiction and I desire to urge the court to read and study it carefully. It is clear from that decision and the one above quoted from, wherein the court said the "question of the court's jurisdiction over defendant not a resident of the county must be presented at the earliest stage of the proceedings" shows conclusively that when it is thus presented the court should, upon proper showing, sustain and bring to an end litigation over which there is no jurisdiction vested in the court.

It has always been the duty of the court, and not a jury, to pass upon questions of jurisdiction. The court must determine its jurisdiction and there is no occasion to await the determination of a question of fact by a jury..

In this case the plaintiff alleged a state of facts which, if true, would vest this court with jurisdiction and venue, BUT defendants have challenged that allegation in a manner which our own Supreme Court says was the timely and proper manner of doing so. We served notice and took evidence. That evidence is now before this court undisputed. In other words, upon this question an issue was raised by our special appearance and motion to quash the summons. a hearing has been had upon that issue and proof submitted and plaintiff, at that hearing did not even offer to submit any evidence or proof to meet or in any manner rebut or discredit the proof we submitted. That issue is before the court on the issue of fact raised, and it is thus before this court for determination on that issue, supported by an abundance of proof and undisputed. Now, is it the duty of the court to brush that aside and await a trial of the case upon the merits to a jury. Evidently if that is the correct procedure then the Supreme court was wrong when it said it must be presented and determined at the earliest stage of the proceedings.

Then, too, let us see whether that question should be determined now or later. All the leadinga uthorities on the question are agreed and the Oklahoma Supreme Court has repeately held that "Determination of question whether district court has jurisdiction is for court, notjury." See Dolese Bros. v. Tollett, 19 Pac. (2nd) 570; 162 Okla. 158. The general rule in such matters

as are here presented, seems to be well stated in 15 C.J. 858, where it is said:

> "When at any time, in any manner it is in good faith represented to the court by a party or an amicus curiae that it has not jurisdiction, the cort will examine the grounds of its jurisdiction before proceeding further. The court may receive testimony on a preliminary question to determine its jurisdiction, and is not bound to dismiss the suit on a mere allegation of lack of jurisdiction, but may inquire into the correctness of the averment."

This is very clear. The court would not be bound to dismiss a suit "merely on an allegation of lack of jurisdiction;" but in this case there is undisputed proof, heard by the court, which was presented under the general powers of the court, and in this proceeding the court has inquired "into the correctness of the averment" and having thus inquired, with the proof before it, it is the duty of the court to enter such order as is supported by the averment and proof offered in support thereof.

There is good reason for this rule. To determine such matters "at the earliest stage of the proceeding" as required under the announced doctrine of our Supreme Court, will eliminate much needless waste of time and expense and filing of pleadings and trial of issues to a jury when there is nothing to be gained thereby. The courts will and can be kept more than busy trying cases where the venue and jurisdiction is properly vested without impaneling a jury and hearing testimony and taking evidence in a case where there is, as in this case, no actual question of fact as to the issue of jurisdiction. I assume the plaintiff in this case is not a wealthy person and I know the defendants are not. I amwell informed as to the relationship between both Mr. and Mrs. Tourtellotte and the drilling arrangements made under which Tourtellotte was drilling a well for M.F.Mainard, Jr., in Hughes County, Oklahoma, at the time this [illegible] accident occurred, and, upon my honor I feel that to require the plaintiff and defendants to pursue this action further in Seminole County Superior Court will operate as a grave injustice to both sides. It will entail the expense of preparing for trial and bringing numerous witnesses into court, take the time of the court from other business and as I know and view the matter it cannot result in but one finality and that will be a denial of jurisdiction.

In conclusion permit me to urge that plaintiff, through her counsel had an opportunity to present evidence in supprt of their contention upon the issue of jurisdiction raised by our [illegible] motions to quash and dismiss for want of jurisdiction. They chose not to do so, and the matter now being

before this court on the issue raised and supported by an abundance of proof, I feel that it is the duty of the court, as stated in the case of Guaranty State Bank vs. First National Bank, supra, to sustain the "original" motion. We have shown that we have raised the issue at the time and in the manner required by the decisions of our own court of last resort and the facts being undisputed we respectfully urge that the motions, and each of them, should be sustained in order that the rights of the parties may be determined in a court having unquestioned jurisdiction of the parties, as well as the subject matter.

Respectfully submitted,

CLAUD BRIGGS,
Attorney for Defendants.

AL G. NICHOLS,
Attorney for Defendants.