

2000

Max W. Young, et al. v. Wycoff Company, Inc., et al. : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Young v. Wycoff Co*, No. 14488.00 (Utah Supreme Court, 2000).
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UTAH SUPREME COURT

BRIEF

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THE STATE OF UTAH

13 JUN 1977

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MAX W. YOUNG, et al.,

Plaintiffs and Appellants,

vs.

WYCOFF COMPANY, INC., et al.,

Defendants and Respondents.

CASE NO. 14488

BRIEF OF RESPONDENTS

Appeal from a Judgment of the Third Judicial
District Court of Salt Lake County
Honorable James S. Sawaya, Judge

**J. Thomas Greene
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and Appellants

FILED

JAN 19 1977

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Mountain Service; (d) judgment that defendants Company , Warehouse, Corporation and Mountain Service be dissolved, wound up and their assets distributed; and (e) judgment against the defendants because of alleged wrongful discharge and removal of plaintiff Max Young from the management and board of directors of the various Wycoff corporations, together with damages in the amount of \$120,000.00 for alleged lost compensation.

DISPOSITION IN THE TRIAL COURT

The case was tried before the Honorable James S. Sawaya, District Judge, who entered Findings of Fact and Judgment on January 26, 1976, in favor of defendants and against plaintiffs, "no cause of action" on all claims; and awarded defendants their costs.

RELIEF SOUGHT ON APPEAL

Plaintiffs-Appellants seek reversal of the judgment of the District Court, entry of judgment in favor of plaintiffs on their claims, and such other and relief as this court deems proper. Defendants-Respondents urge that the Findings are all supported by competent evidence and that the Judgment be affirmed.

STATEMENT OF FACTS

The transcript of the trial below was abstracted by order of this Court, and references hereinafter where possible are to both the original transcript (Tr.) and the abstract thereof (Ab.). It is believed that the Statement of Facts set forth in Appellants' brief is incomplete and inadequate, so this expanded recitation of facts is offered as foundational for purposes of meaningful legal analysis.

M. S. Wycoff founded the defendant Wycoff corporations and served as their President and General Manager until his death in 1966. From a single half-ton truck operation starting in Helper, Utah, in 1953 (Tr. 450, Ab. 147), Wycoff created four integrally connected companies which conducted business the basic aspects of which consisted of hauling commodities, express service, warehousing, and sales of dynamite supplies, as follows:

1. Wycoff Company, Incorporated (Company) conducted an interstate and intrastate motor carrier service involving the states of Utah, Idaho, Colorado, Montana, Nevada, Oregon, Wyoming and Arizona, with a supplies division engaged in marketing mining supplies.

2. Mountain Service, Inc. (Mountain Service) was a wholly owned subsidiary of Company. Its function was to own, repair and maintain the trucks, tractors and trailers operated by Company under lease. Some 450 such units were in service by Company at the time of trial. Since the trial, this subsidiary has been merged into Company.

3. Wycoff Warehouse, Inc. (Warehouse) owned and operated three warehouses and an office building in Salt Lake City, Utah, including delivery services from the warehouses.

4. Wycoff Corporation (Corporation) owned and maintained realty in Salt Lake City, Utah, including four warehouses and the office building on South 300 West, where Company has its offices.

Max W. Young was hired as a stenographer in January 1950, by Mr. Wycoff, and subsequently advanced to other responsibilities. As the years went along,

Mr. Wycoff gave to Mr. Young and members of his family almost all of the 25% of the voting stock in Company, Warehouse, and Corporation, which was acquired by plaintiffs, and one qualifying share in Mountain Service. Mr. Wycoff developed terminal leukemia (Tr. 490, Ab. 161). During the last three years of his life, Mr. Wycoff gave more executive responsibilities to Mr. Young, but Mr. Wycoff remained active in the daily operations of the business, as President of all four companies, until very shortly prior to his demise in 1966.

Mr. Wycoff's Will was duly admitted to probate in the District Court of Salt Lake County, and Zions was appointed as Executor. The Will provided for distribution of the estate to Zions as Trustee for Mr. Wycoff's widow and son. Mrs. Wycoff was not active in the business, and for the most part non-voting stock and debentures issued by Company, Corporation and Warehouse were assigned to the Martial Trust for her benefit. The Will provided for distribution by Zions, as Trustee, to Mr. Wycoff's son, Bruce Wycoff, of the controlling voting stock of the corporations in stated increments as he reached the ages specified. The Will of Mr. Wycoff also provided that Zions, as Executor and as Trustee, should engage Max W. Young as chief executive officer of the companies until Bruce Wycoff was able and willing to assume such role. In 1966, at the date of death of his father, Bruce Wycoff was attending college in the East, and in 1967 entered Harvard Business College to prepare himself to enter the business. Since prior to the trial and continuously to the present, Bruce Wycoff has served as general manager and chief executive officer of all of the corporations.

For purposes of convenience in reference, further factual data is marshalled herein within categories pertinent to the legal arguments discussed in appellants' and respondents' briefs:

Testamentary Intention of M. S. Wycoff

It was M. S. Wycoff's main purpose to build and keep the companies which he founded in order to provide a business opportunity for his son, Bruce Wycoff. (Tr. 297, Ab. 93) He wanted his son to become involved in the management of the companies if that was Bruce's desire. (Tr. 237, Ab. 70) As to ownership and control of the corporations, it was M. S. Wycoff's clear intention, expressed in his Will, that his son, Bruce Wycoff, be the fundamental beneficiary of all of his business interests, and that the trustee (Zions First National Bank) should ". . . gradually transfer to him control of any corporations or businesses which I may control at the time of my death; said gradual transfer or control may be either by stock transfer or otherwise, and shall take place as rapidly as is prudent in the best business judgment and sole discretion of my Trustee." (Article VII - Third - D. Exhibit P-1; Cf. Tr. 258, Ab. 78)

In contradiction to the above expressed intention, plaintiff Max W. Young testified that the only way Bruce Wycoff could ever obtain control of the companies was to "prove himself" to Max Young. (Tr. 182, Ab. 51) Young admitted that indeed M. S. Wycoff had control of all of the companies up to the date of his death (Tr. 184, Ab. 52), but that an Agreement executed in 1965 relating to insurance proceeds (Exhibit P-3) which Young interpreted as relating only to redemption of voting stock (even though the document was silent as to the point), also took effect upon Wycoff's death and superceded the Will. (Tr. 184, Ab. 52) As a

result, Max Young's conception of things was that Bruce Wycoff's position of control of any of the businesses depended entirely upon Max Young as the sole arbitrator. (Tr. 183, Ab. 51) Inconsistently, for purposes of admission of Bruce Wycoff to Stanford University, at a time after M. S. Wycoff's death, Max Young revealed the true situation and overriding intent of M. S. Wycoff as to his son Bruce's position in the business. Max Young wrote as follows:

Bruce Wycoff would make an outstanding graduate student. He has a tremendous business opportunity ahead of him, in that he has available the administrative and financial control of a motor carrier organization serving eight states in the Intermountain area which his father developed, and as the only heir, Bruce will eventually receive.
(Exhibit D-21)

Position of Bruce Wycoff

Bruce Wycoff worked from time to time in his father's business while he was growing up. (Tr. 459, Ab. 150) At the time of termination of employment of Max Young, on or about February 1, 1968, Bruce Wycoff was attending graduate courses in the Harvard Business School, but this event caused him to come home, and he has assumed continuous responsibility and worked full time in the business ever since. He testified:

Q. Did you quit Harvard Business School?

A. Not at that time. I took a leave of absence while I was finding out exactly what was happening.

Q. Did you ever go back to Harvard Business School?

A. Only to pick up my car and belongings.

Q. Have you been working in the business ever since that time?

A. Yes.

Q. Have you made an election to be with the business and to retain your ownership or prospective ownership rights in the business?

A. Yes. (Tr. 461, Ab. 151)

Bruce Wycoff further testified that he intends to remain active in the business:

Q. Now, have you been attending the meetings of the Board of Directors since that time?

A. Of our companies?

Q. Companies, yes.

A. Yes.

Q. And the stockholders' meetings also?

A. Yes.

Q. And it is your intention to continue on actively in the business that your father founded?

A. You bet.

Position of Max Young and Attitude After the Death of M. S. Wycoff

In the period immediately following the death of M. S. Wycoff, Zions First National Bank, as Executor, had confidence in the existing management team, but such confidence was "lost quite rapidly." (Tr. 243, Ab. 72) Mr. Young took the position from the outset that regardless of the needs of the estate, "There is no money and there won't be," and that the matter "was not any concern of the company. That was [the Bank's] worry." (Tr. 256, Ab. 78) Mr. Young testified that he had been helpful to Mr. Wycoff's widow by arranging to pay off her home mortgage:

. . . I knew that we had been positive in . . . trying to support the estate's position because we had gone down and paid off the mortgage on the home. . . . (Tr. 39, Ab. 8)

However, Mrs. LaPearl Wycoff testified that in fact the mortgage was paid off by the proceeds of an insurance policy on Mr. Wycoff as to which she had been paying premiums for a number of years, which covered the mortgage. (Tr. 452, Ab. 148) Arrangements for the payoff were made by the Bank as Executor, not by Mr. Young. (Tr. 453, Ab. 148) After some months, it became apparent to the Executor that Mr. Young was attempting "to take the business from his former employer without investing any of his own money," and that such evidenced a lack of "moral fibre" in Mr. Young. (Tr. 306, Ab. 95)

Mr. Young claimed that by virtue of a 1965 agreement which provided for redemption of stock (Exhibit P-3), an obligation came into being to redeem only the Wycoff estate's voting shares, thereby resulting in the passage of control to Young. Zions First National Bank as Executor rejected this interpretation. The Executor offered to redeem on a 14 to 1 ratio, voting and non-voting stock (Tr. 289 Ab. 90); which was consistent with the prior ratio set up by Mr. Wycoff. (Exhibit P-28, p. 4) This was rejected by Young. As a result, the \$48,000.00 proceeds of the insurance policy in question were sent back and forth several times, accompanied by claims of the respective positions taken. (Tr. 60-62, 126, Ab. 15, 33) Accordingly, the proceeds in fact have never been applied in redemption of any stock, and have been banked and retained by Mountain Service, the beneficiary of the policy. (Such have not ever been banked or used by Zions First National Bank.)

The ultimate interpretation by Max Young was that the stock redemption agreement gave to him the absolute election and right to call for whatever stock, in whatever companies, he wanted to. (Tr. 187, Ab. 52) Young admitted that there was nothing in the agreement about voting stock, non-voting stock or transfer of control, and following an observation by the court that the agreement failed to indicate which of the two classes of stock were to be transferred, he testified that nonetheless he believed that he was given the right to call for the voting stock. (Tr. 187, Ab. 52) The net extravagant claim: that Young had a right to elect, and in fact did elect, to call for the voting stock in Wycoff Company. (Tr. 187, 196, 206, Ab. 52, 60)

Position of Zions First National Bank as Executor

All acts performed by Zions First National Bank in connection with any and all aspects of this case were done so in its capacity of Executor and/or Trustee, for the benefit of the Wycoff Companies. Accordingly, this Court entered a prior Order in effect eliminating all claims against Zions First National Bank individually or as an institution. (R. 29)

As Executor of the estate, Zions was faced with an almost immediate need for the generation of cash. Claron O. Spencer, formerly chief trust officer at Zions, and after M. S. Wycoff's death a director of the various companies, testified that the matter was discussed with Max Young in the early stages of the estate proceeding. (Tr. 255, Ab. 77) Mr. Spencer testified that Young made no attempt to find out what the needs of the estate would be, but rather stressed "very often" the needs of the company for cash. (Tr. 256, Ab. 77, 78) Much of the press for funds by Max Young "was occasioned by a desire to expand," and it was

intimated to Mr. Young that such might have to be "temporarily postponed" to "take care of the widow and the needs of the estate." (Tr. 256, Ab. 78) In this regard, death taxes imposed upon the estate were very substantial. By June of 1967, the first of several installments of \$6,371.49 was paid to the federal government, as was \$14,462.98 not available for installment treatment. (Tr. 299, Ab. 93, Cf. Exhibit D-43) This was part of the total federal tax imposed in the amount of \$78,177.75 (Tr. 300, Ab. 93), but excluded a deficiency of \$57,458.30 which was contested. (Tr. 301, Ab. 93, Cf. Exhibit D-43) Utah Inheritance Taxes amounted to \$65,008.78. (Tr. 302, Ab. 94, Exhibit 45)

Several alternatives were considered by the Executor as to how funds might be generated to meet the needs of the estate, take care of the widow, and at the same time interfere as little as possible with the affairs of the companies. (Tr. 246, Ab. 74) It was determined that having accepted the appointment under the Will it was not appropriate to sell the companies' stock, but rather "to do our best to preserve the companies for the eventual transfer to the son as expressed in the Will." (Tr. 257, 258, Ab. 78, 79) It was considered that basically the interests of the estate and those of the companies were "parallel." (Tr. 256, Ab. 78) However, there was stonewall opposition by Max Young and "no cooperation" with respect to suggested alternatives for proceeding to raise necessary funds. (Tr. 260, Ab. 79)

Decision of Executor to Become Active in Management as Representative of Majority Shareholder

A matter of immediate concern to Zions First National Bank as Executor of the Estate of M. S. Wycoff was that the companies be managed properly. (Tr.

243, Ab. 72) M. S. Wycoff had developed a management team, headed by Max Young, which he hoped could carry on the businesses after his death. In discussing his assets and business interests with Claron Spencer, then Head of the Trust Department of Zions First National Bank, which was to be the Executor of his estate and Testamentary Trustee, Mr. Wycoff had expressed the desire that the Bank as Executor work with existing management where possible:

He was very much concerned at what would happen to his business when he died and discussed with me on a number of occasions, stating among other things that he had developed a management team there which would in his opinion be quite helpful and effective to the Bank as an Executor and expressed much the same wish that he does in the Will that we consider their employment. (Tr. 297, Ab. 93, Cf. Exhibit P-1)

In view of the foregoing, and also because it was the clear policy of the Bank to avoid involving itself in management of companies, for approximately 18 months following the death of Mr. Wycoff, Zions avoided playing an active part in management. (Tr. 307, Ab. 95) It became apparent, however, that the interests of the majority shareholder were not being furthered by existing management. Accordingly, at a shareholders' meeting on September 1, 1967, the Executor did exercise its rights and voted to expand the Board of Directors from 5 to 9. (Tr. 260, 310, Ab. 79, 96) A stenographer's transcript was made of the meeting in which Bylaws were adopted to permit Board expansion, and the establishment of the nine man board occurred. (Exhibit D-12) Thereafter, an Executive Committee was created, consisting of three persons, i.e., two nominees of the majority stockholder's interest and Max Young. (Tr. 262, Ab. 80) One of the purposes of the Executive Committee was to restrict management as to spending. (Tr. 262, Ab. 80) Another purpose was to require approval by the majority interests

as to new contracts and major decisions. (Tr. 262, Ab. 80)

The need for "reliable information" and the absolute necessity "to find out what was going on" was deeply felt. (Tr. 266, Ab. 81)

Suspensions as to Max Young - Discharge of Duties "With Fidelity"?

M. S. Wycoff's recommendation to his Executor, Zions First National Bank, that Max Young be continued on in management was not without qualification. The restriction which Mr. Wycoff recognized was that continuation of management must be equated with absolute honesty and fidelity. Hence, M. S. Wycoff's will provided that Max Young be named as the Chief Executive of his business only "so long as he discharges his office or offices with fidelity . . ." (Article VIII - Exhibit P-1)

In February 1967, Claron O. Spencer had a confrontation with Max Young as to what Spencer believed was an unconscionable and improper attempt by Young to take over control of the Companies, revealing a lack of "moral fibre." (Tr. 306, Ab. 95) By the summer it became apparent that Young would not cooperate in connection with any alternative which would permit the release of funds to the majority stockholder, and that active policy involvement by Zions on the Board of Directors was necessary. (Tr. 260, 308, Ab. 79) The need for employment of a trusted comptroller became evident in the fall of 1967. (Tr. 264, 266, Ab. 80, 81) Representatives of the Executor had reason to believe that information being received from the Max Young management was neither "factual nor complete at all." (Tr. 312, Ab. 97) Independent auditors were contracted to check records as to cash flow projection and availability of funds, but Max Young announced that he wouldn't allow them on the premises without a court order. (Tr. 312, Ab. 97)

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At a meeting of the Board of Directors on November 29, 1967 (Exhibit D-48), there was direct discussion of a situation involving use of Wycoff Company funds in connection with the acquisition of properties and construction of a building by Freeport Enterprises, a company controlled by Max Young. At that meeting, Mr. Spencer brought to the attention of the Board that title to property occupied by Freeport had been transferred from Wycoff Warehouse on October 23, 1967, and that a mortgage for \$200,000.00 was recorded the same date as the deed. (Tr. 313, Ab. 98) Prior to this meeting, Mr. Young had talked to Mr. Spencer about the newly constructed building and its purposes:

. . . we had been led to believe by statements from Mr. Young that this was a joint enterprise of Wycoff Corporation, Wycoff Company or Mountain Service . . . and then we discovered to our surprise that that was not the case. (Tr. 314, Ab. 98)

Mr. Spencer further testified in response to questions from Mr. Roe:

Q. You said you received information from the management that wasn't factual.

A. Yeah.

Q. What information was that?

A. Well, the first thing I recall is a letter which Max wrote in which he said that Freeport was a joint enterprise of Mountain Service as I recall it and Wycoff Corporation, and it never was such. It wasn't until we began to dig into things that we found out that it was a wholly independent operation. (Tr. 329, Ab. 103)

On December 19, 1967, a formal demand was made by the Executor to Mr. Young for reconveyance of the property in question. (Exhibit D-16) Mr. Young admitted that an appraisal of the building showed a substantially larger value, but that he and others had transferred it to Freeport at 15% above book value, less than

\$40,000.00. (Tr. 153, Ab. 41) Fred Thurgood, Secretary-Treasurer of Wycoff, testified that Young knew of an appraisal at \$68,700.00 at the time that he arranged transfer of the building to Freeport for only \$37,000.00. (Tr. 517, Ab. 172) As a result of Zions demand, the property was conveyed back. (Tr. 152, Ab. 40)

Termination of Max Young - Hiring New Controller

On January 30, 1968, a resolution defining duties was presented and adopted in connection with hiring a new Controller, William Shea. (Exhibit P-5, Tr. 264, 336, 337, Ab. 80, 106, 107) The Minutes of the meeting reflect the context in which the action was taken. (Exhibit D-13) Employment of Mr. Shea was resisted by Max Young, because he felt that the employment took control away from him. (Tr. 49, Ab. 10)

On January 31, 1968, Max Young presented a letter dated February 1, 1968, to Claron O. Spencer. (Exhibit P-2, Tr. 272, Ab. 84) Young told Spencer that he was resigning as both Manager and Director. (Tr. 273, Ab. 84) Bruce Wycoff, summoned home from Boston, Massachusetts where at Harvard he was in the graduate business school, testified that he approached Max Young several days later to encourage him to reconsider and come back. Max Young's response was a firm, "No." (Tr. 462, Ab. 152) Max Young told Bruce that "he wanted to quit. He had quit." (Tr. 492, Ab. 162) William Shea observed Max Young collecting his personal effects and leaving the office on February 1, 1968, after which he left the office and never returned. (Tr. 384, Ab. 127) Shea further testified that Young wasn't working for the Wycoff Companies after January 31, 1968, that he didn't represent himself as an employee of Wycoff thereafter, that

reports reflected termination on that date, and that Young was not paid from that date on. (Tr. 385, Ab. 128)

On February 13, 1968, the Board of Directors accepted the February 1, 1968, letter of Max Young as a letter of resignation, and regarded it as such, notwithstanding the then protestations by Young that he had not intended to resign. (Tr. 274, Ab. 84) Mr. Spencer testified that even though there were "adequate grounds for discharging" Young, the Directors had been "long suffering." (Tr. 274, Ab. 84) He further testified that the evident failure by Max Young to serve "with fidelity" was a prime consideration in the Board's accepting the letter as termination of Young's services. (Tr. 275, Ab. 84)

Financial Actions By Companies for Generation of Income

- Creation of New Class of Stock and Redemption Thereof

A legal opinion was sought by the new Board of Directors and obtained by tax counsel at Fabian and Clendenin in the summer of 1968. (Tr. 317, Ab. 99) As a result of the opinion, which approved the contemplated procedure, a declaration of stock dividend was promulgated November 6, 1968 (Exhibit 50-D) and a call for redemption of preferred shares occurred November 21, 1968 (Exhibit 51-P) Max Young received the notices relating to this matter (Tr. 54, Ab. 13) and participated in the stock redemption. He received the stock in question in the fall of 1968, and \$45,000.00 in redemption thereof. (Tr. 176, Ab. 49) Young received the same tax treatment as to the receipt of the \$45,000.00 he elected to receive as if it were a cash dividend. (Tr. 176, Ab. 49) Although he claimed "very severe" treatment by the IRS, the money received was simply treated as ordinary income, and he paid about one-third in taxes. (Tr. 55, Ab. 13)

The entire stock redemption was for \$180,000.00, and the estate as majority stockholder received approximately \$100,000.00 thereof, under a provision of law which permitted favorable tax treatment. (Tr. 248, 250, Ab. 75, 76) The distribution for the estate permitted it to pay federal taxes and other claims then due. (Tr. 249, Ab. 75) The \$180,000.00 (part of a larger loan) was borrowed from Zions First National Bank at 7% interest. (Tr. 343, Ab. 110) This rate was very favorable and competitive with any other available money or institution. (Tr. 496, Ab. 164)

- Dividend Payment

A dividend of \$105,000.00 was declared and paid to shareholders in 1973. (Tr. 360, Ab. 115) This was the first payment of a dividend since the stockholders dividend in 1968. (Exhibit D-71) No dividends were declared or paid while Max Young was manager. (March 1, 1966 to February 1, 1968) All shareholders of record, including Max Young, shared proportionately in receipt of the declared cash dividend.

- Debenture Retirement

Mr. Shea had noted prior action by the Wycoff Board of Directors, participated in and actively advocated by Max Young, in the discussion of and affirmative action approving intended early redemption of debentures which represented funds loaned to the Companies by M. S. Wycoff. (Tr. 379, 388, 389, Ab. 125, 128, 129, Exhibits 72-D and 73-D) Such debenture retirement hence became a matter of consideration in terms of previously approved and recognized Board discussions, for the generation of needed income to the majority shareholder's estate.

As part of the "desperate endeavor to acquire funds to pay taxes and the widow's allowance," Wycoff management utilized \$50,000.00 borrowed from Zions First National Bank for an equal term at 7% to retire \$50,000.00 in outstanding 7% debentures due in 1978. (Tr. 255, 277, Ab. 77, 85) Given the need and desirability to generate funds for the majority shareholder, on an equitable basis, this was of "substantial financial advantage to the Companies," as opposed to dividend declaration, because it "allowed the companies to retain more working capital." (Tr. 378, Ab. 124) As to this \$50,000.00 redemption, the net effect to the balance sheet was the same whether the debentures were paid off early or at maturity, since the borrowed money was at the same interest rate, and with a slightly more liberal due date than the debentures. (Tr. 346, 380, Ab. 111, 126)

Additional debentures totalling \$60,000.00 were likewise redeemed, but as to that redemption there was no need for additional borrowings, since redemption was made from available funds. (Tr. 346, Ab. 111)

All debenture holders were treated equally in the proffered redemptions, although certain holders (Bruce Wycoff and Leland Clayton) elected not to redeem. (Tr. 390, Ab. 129) Since Max Young had not loaned any money to the Companies, he had no debentures to redeem. (Tr. 390, Ab. 129)

Mountain Service had a continuing revolving line of credit with Zions First National Bank dating back to 1960, arranged for by M. S. Wycoff, for working capital. As a part of the continuing working capital needs, and in furtherance of pre-existing arrangements, Mountain Service borrowed

\$300,000.00 in November 1968. (Exhibit D-82) Thereafter, further extensions were made under this credit line, and payments in reduction thereof have been made. Over the years the balance has fluctuated depending upon amounts of funds extended and repayments made as dictated by capital needs from time to time. The credit arrangement has been and is that afforded preferred customers of Zions First National Bank, namely a tie in of interest rates to a percentage over the prevailing prime rate as such might fluctuate from time to time. This loan was and is collateralized by Wycoff trucks. It is unrelated and irrelevant to the matter of debenture retirement.

Operation of the Companies by New Board of Directors

The policy of the new Board, which assumed active participation in management commencing September 1, 1967, was to "build assets, keep expenses low, keep income high and retain as much money for the business as possible." (Tr. 341, Ab. 109) There was stress upon the need to meet crucial financial needs of the majority shareholder, but there was no pointed emphasis for non-growth. (Tr. 341, 342, Ab. 109)

The fundamental "acts of oppression" which plaintiffs appear to complain about are detailed above. In addition thereto, certain other alleged "oppressive acts" are claimed, and the following miscellaneous activities and policies concerning operation of the companies are responsive to what plaintiff testified were such alleged other "oppressive acts" by and on the part of Zions First National Bank and the Wycoff Companies:

- Rates of Growth

The fundamental exhibit presented in connection with operation of the Wycoff Companies from and after the time Max Young left on February 1, 1968, was a three page summary exhibit showing growth. (Exhibit 71-D) This factual summary shows a rise in total equity from about \$1.5 million in 1967 to about \$2.25 million in 1973. The book value increase over that period of time amounted to \$703,055.00, or 45.6% growth over that period of time. It should be noted, however, that in addition, \$304,439.00 was actually paid in dividends over the same period, so the real growth was \$1,007,494.00, being 65.4% or about 11% per annum. These growth patterns were shown as to each of the four companies in question. (Exhibit 71-D, pages 2 and 3; Cf. all year end audit reports - Exhibits 54-57; Tr. 354, Ab. 113)

Counsel for appellants recognize that the rate of growth between the years 1967 and 1973 was 11% per year, but claim that since the growth rate was higher in the short period after the death of M. S. Wycoff it should be concluded that Zions' sole purpose was to slow down the growth rate. (App. Brief, p. 16) However, there is reason to question as illusory the allegedly dramatically higher growth rates for the previous period. Using the lower comparative bases in the strictly % comparisons, plaintiffs' accountant at first blush seemed to show an adverse comparison between the "Max Young years" of 1965 to 1967 as compared with the "post Max Young years" of 1967 to 1973. (Exhibit 29-P, Tr. 220, 235, 236, Ab. 65, 69, 70) But such percentage comparisons are not fair because of substantial differences in the bases of comparison (use of the lower beginning base of just over \$1 million in 1965 for the "Max Young years" as compared with the higher starting base of over \$1.5 million in 1967 for the "post Max Young

years"), and the need for adjustments due to distortions. In this regard, Mr. Shea pointed out the existence of some distortions in connection with the percentage rate comparisons identified by Mr. Jackson, Max Young's accountant. (Tr. 400, 407, 408, Ab. 134, 137) According to Mr. Shea, these distortions would require adjustments amounting to \$116,000.00 as to asset values, necessitating income adjustments in excess of \$50,000.00. (Tr. 410, 411, Ab. 138, 139) The net effect of such adjustments would be to place into later years income attributed to the "Max Young years" of 1966 and 1967. This is contrary to the claim of appellants that adjustments should have been made which "caused an unrealistic inflation of income during the years of Zions control." (App. Brief, p. 15) Mr. Shea pointed out a threefold explanation for the dip in income shown for 1968 in the Wycoff books, i.e., reduction of business by loss of the Libby McNiel contract, illusory assets, including many non-existent pallets, which had to be written off to the tune of over \$17,000.00, and a considerable wage and salary increase. (Tr. 382, 383, Ab. 126) Accordingly, Mr. Shea testified that the use of 1968 as a part of the averaging for "post Max Young" years tends to mislead since it reflects problems which really were inherited from the prior period.

All exhibits submitted by both sides agree on one thing: the actual dollar rise and increase of real assets over the entire period of time. Translated into the average dollar amount per annum, the increase during the "Max Young years" is really similar to the increase during the "post Max Young years." The admitted dollar increase over the "post Max Young years" (the six year period 1968-73) would amount to an annual average income of \$167,915.00.

The average dollar increase per annum for the "Max Young years" (the two year period 1966 and 1967) would be \$184,542.00.

- Banking Connections

At meetings of the "new" Board of Directors, management was admonished to attempt to make contacts with banks other than Zions First National Bank in the area in order to seek out, if possible, more competitive interest rates, and things of that nature. (Tr. 391, Ab. 130) This resulted in substantial efforts by William Shea to obtain financing at other banks. In this regard, Mr. Shea testified with respect to contacts at First Security Bank, Tracy-Collins, Commercial Security, Continental Bank, Walker Bank & Trust, Idaho First National, Beehive State Bank and others. (Tr. 391, 392, Ab. 130) Mr. Shea found interest rates to be comparable to, but certainly no better than, Zions First National Bank. At Walker he found that the rates were the same. (Tr. 393, Ab. 131) Regardless of interest rates, however, it was discovered that loans at these institutions were not available to the Wycoff companies. The limiting factor discovered was a reluctance by any bank to extend large sums when the Wycoff properties were already encumbered at another institution. Mr. Shea testified:

Q. As you have indicated, the source of the funds to borrow is dependent sometimes on where you maintain the checking accounts?

A. Well, I think it is even deeper than that. I think where you borrow funds is dependent somewhat on where you have your property mortgaged.

Q. And the mortgages of the Wycoff Companies that they have are held by Zions First National Bank, too?

A. A good many of them. They were--most of them were when I came into the company and still are. I couldn't get loans from other banks because of the mortgages that existed on the property in the name of Zions and Walker Bank. (Tr. 350, Ab. 112; Cf. Tr. 415, Ab. 140)

Mr. Shea pointed out that substantial borrowings in fact were obtained where possible from institutions other than Zions. (Tr. 350, Ab. 112) John Langeland, Senior Vice President of Zions First National Bank in charge of commercial loans, testified that he had assisted Wycoff management to obtain a large loan in Idaho at favorable rates. (Tr. 498, Ab. 164) Mr. Shea testified that the percentage of loans with Zions when he was employed was about 56%, and that it rose only to 62% during the "post Max Young" period. (Tr. 394, 414, Ab. 131, 140) The banking connections of Wycoff with Zions were pointed out as being not only competitive with other institutions, but particularly favorable and even bordering upon preferential. (Tr. 496-498, Ab. 164)

- Supplying Information and Notices to Max Young

The record of minutes indicates that Max Young attended Board meetings over the period of time in question. He was provided all notices given to any other director. A request by Max Young for analysis of salary structure resulted in supplying such information to Mr. Young. (Tr. 386, Ab. 128, Exhibit 34-D) Mr. Young in fact was never denied access to any books and records at reasonable times and upon reasonable notice. Mr. Young's accountant, Mr. Jackson, was granted full access to all books and records, in order to make an accounting analysis.

- Expansion - Operating Authorities

During the period following termination of Max Young, there was

a substantial extension within the operating area with reference to ICC operational authority. (Tr. 399, Ab. 133) Bruce Wycoff testified at length by way of comparison of the attempted expansion while Max Young was Chief Executive Officer with expansion thereafter. He pointed out that some 24 applications for permits before the ICC were submitted since 1968, plus additional expansion activity in surrounding states, including Idaho, Wyoming, Colorado and Arizona. (Tr. 472, Ab. 156; Tr. 489, Ab. 161) While Max Young was in charge, over a period of 698 days, only seven (7) "subs" were filed; since then, over a period of 2,466 days, 24 "subs" were filed, which Mr. Bruce Wycoff testified constituted a much better rate of expansion activity. (Tr. 475, Ab. 157)

- Rate Increases

When Max Young left, there was a low rate level and this resulted in a substantial lag and delay before the management team was able to go forward with procedural requirements to accomplish an increase to realistic levels.

(Tr. 413, Ab. 140)

- Minutes: Inaccuracies?

Max Young was critical of the minutes of Board of Directors meetings, kept by Robert Barnes, a trust officer at Zions and secretary of the corporation. (Tr. 143, 144, Ab. 37) However, Young could point to no specific errors, and could not relate a single instance where there was failure accurately to report passage of resolutions or other action by the Board, and Young had no notes of his own or records to show inaccuracies. (Tr. 143, Ab. 37) On the other hand, Robert Barnes testified that in fact all of the minutes he took were accurate and faithful recitations of the substance of what was said and done, although

not purporting to be verbatim. (Tr. 505-507, Ab. 167) All of the minutes in question were presented to the court and admitted as evidence.

- Accounting Practices

At page 14 of Appellants' Brief there is reference to the claim of Max Young that changes in accounting methods resulted in questionable allocations of income, speaking of insurance rebates, sale of a warehouse and depreciation methods. However, the Internal Revenue Service audited the companies, and changes which were made as to depreciation were required by IRS (Tr. 358, Ab. 114) Accordingly, any changes in methods of depreciation of equipment or other depreciable assets since 1968 were made solely for the purpose of conforming to the requirements of the Internal Revenue Service. As to the other alleged changes, the evidence was that adjustments such as liability insurance rebates, and U.S. Post Office contracts since 1968 were handled exactly the same as they were prior to that time - on a "cash" basis, and any change in accounting methods as to such items would be inconsistent with the requirements of the Internal Revenue Service.

Oppressive Acts by Max Young

The evidence adduced at trial made it abundantly clear that appellant Max Young is in no position to allege and assert oppression on the part of any of the defendants. In several respects, and through the auspices of several companies owned or controlled by himself, Max Young engaged in direct and indirect competition against Wycoff interests while an employee and/or director of the Wycoff Companies. While a director of Wycoff, Young "was doing everything he could to take business" for himself as to air freight at a time when Wycoff

was actively engaged in solicitation and efforts to increase its air freight business. (Tr. 464, 465, Ab. 152) Young actively solicited Wycoff customers engaged in the transportation of air freight on behalf of Pickering Transfer, his wholly owned company. (Tr. 72, Ab. 17) In another corporation, named ABC, Young assisted it in application for mail contracts in competition with Wycoff. (Tr. 79, Ab. 19) While with Wycoff, Young surreptitiously outbid Wycoff for a mail route to Reno on behalf of his company, Eagle Moving. (Tr. 80, Ab. 19) Bruce Wycoff identified exhibits to document competitive acts by Young for Eagle Transfer in the field of air freight, during the period he was on the Board of Directors of Wycoff, although terminated as to management. (Tr. 464, 465, 467, Ab. 153, 154)

A major and aggravated situation which demonstrated that Mr. Young did not come to the court with "clean hands" on the issue of "oppression" or wrongful conduct, was his activities relative to Freeport Enterprises, a company controlled by him. The record reveals that in August 1967, when Young was representing to the majority shareholders that there were "no cash funds" available to assist the estate, he paid from Wycoff funds to the U.P. Railroad over \$18,000.00 for a railroad spur for Freeport. (Exhibit 26-D; Tr. 202, Ab. 58) Also, without any authority to do so, Young borrowed for the sole benefit of Freeport, \$120,000.00 from Walker Bank on the strength of Wycoff security. (Tr. 199, 200, Ab. 58)

Another unconscionable fact situation relative to Eagle Moving Company came to light after Max Young left the management of Wycoff. Eagle Moving was owned 51% by Max Young and he operated it. (Tr. 76, Ab. 18; Tr. 162, Ab. 45)

Young admitted that Wycoff employees and trucks were used for the delivery service of Eagle Moving. (Tr. 91, Ab. 23; Tr. 97, Ab. 26) An outside audit of records of Eagle customers, that is customers billed by Eagle, but the service as to which was performed by Wycoff, showed a loss to Wycoff Company, Incorporated in the amount of \$33,800.00 for the years 1965, 1966 and 1967. (Tr. 409, Ab. 137, 138)

When Young left on or about February 1, 1968, he helped himself to \$5,000.00, declaring a bonus for himself without benefit of any authorization by the Board of Directors or the newly formed Executive Committee of the Board. (Tr. 83, 84, Ab. 20)

ARGUMENT

POINT I.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE LOWER COURT SHOULD BE AFFIRMED

Appellant apparently is claiming an abuse of discretion by the trial court, and requests this court to "exercise an independent review of the evidence and make its judgment on the basis of the record." (App. Brief, p. 24) Counsel then reviews various points and matters as though attempting to persuade a fact finder as to the preponderance of evidence. It must be remembered, however, that the trial judge heard all of the evidence, observed the conduct of the witnesses, reviewed the exhibits, heard extensive arguments, and has entered Findings based upon the totality of the record. Those Findings represent the considered judgment of the trial court, and should not be disregarded. It is submitted that in every instance such are based upon substantial evidence presented at trial and should not be overturned by this Court.

Respondent agrees that it is well established that an appellate court may review the evidence in an equity case. Pagano v. Walker, ___ Utah ___, 539 P.2d 451 (Utah 1975) However, it is equally well established that the Supreme Court of Utah will not upset the finding of the trial court in an equity case without good reason:

Even though our constitutional provision, Section 9 of Article VIII, states that in equity cases this court may review the facts, we nevertheless take into account the advantaged position of the trial judge. Accordingly, we recognize that it is his prerogative to judge the credibility of the witnesses, and in case of conflict, we assume that the trial court believed the evidence which supports the findings. We review the whole evidence in the light most favorable to them; and we will not disturb them merely because this court might have viewed the matter differently, but only if the evidence clearly preponderates against the findings. Stone v. Stone, 19 Utah 2d 378, 380, 431 P.2d 802, 803 (1967) [Emphasis added.]

Accord: Corbet v. Corbet, 24 Utah 2d 378, 472 P.2d 430 (1970) [Action for settlement of partnership accounts]. See also Pagano v. Walker, supra.

This principle has also been applied by other courts in cases similar to this one. In White v. Perkins, 213 Va. 129, 189 S.E.2d 315 (1972), a case in which a minority shareholder sought dissolution of a corporation on the basis of allegedly "oppressive" conduct of the majority stockholder, the Supreme Court of Virginia stated:

. . . a finding of fact by the chancellor hearing evidence ore tenus carries the weight of a jury verdict, and cannot be disturbed by us unless plainly wrong or without evidence to support it.

Id. at 319. See Liddell v. Smith, 65 Ill. App. 2d 352, 213 N.E.2d 604 (1965).

Thus, although it is clear that this Court may review the evidence in this case, it is equally clear that due deference must be given to the Findings and

Conclusions of the trial court. Obviously, a trial court may accept one party's version of the evidence over that offered by the other party. To do so is the role of the judge sitting without a jury in an equity case. Therefore, after according appropriate deference to the Findings of the trial judge and reviewing the evidence in the light most favorable to those Findings, unless it can be shown that the evidence clearly preponderates against those Findings, the trial court must be affirmed. Stone v. Stone, supra. This principle has been enunciated many times by this court, most recently in Eastman v. Eastman. (Case No. 14394 - decided December 20, 1976.)

POINT II.
THE ACTS OF RESPONDENTS DID NOT CONSTITUTE
"OPPRESSIVE" ACTS, OR OTHERWISE VIOLATE
§ 16-10-92, UTAH CODE ANNOTATED 1953

Section 16-10-92, U.C.A. 1953, provides:

The district court shall have full power to liquidate the assets and business of a corporation;

(a) In an action by a shareholder when it is established:

* * *

(2) That the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent; . . .

No claim is made here of acts of illegality or fraud. The entire case is based upon alleged acts of oppression.

We have found no Utah case interpreting the meaning of "oppressive," either in the context of the involuntary dissolution statute or otherwise. The ordinary meaning, however, is set forth in Corpus Juris Secundum as:

Harsh, rigorous or severe. Tested by ordinary definition and by common understanding, the word "oppressive," as applied to conduct, means conduct that is unjustly burdensome, harsh or merciless. 67 C.J.S. 509, 510.

In Eureka Building & Loan Association v. Meyers, 147 Kan 609, 78 P.2d 68, the court equated "oppressive" with "harsh, vigorous or severe." (Held, action by County Board of Equality in failing to grant application of Building & Loan Co. for correction of alleged error as to value of realty did not constitute oppressive act.) Similarly, in Domus Realty Corp. v. 3440 Realty Co., 40 NYS 2d 69, 73, the court defined "oppressive" as "unjustly burdensome, harsh or merciless." (In discussing oppressive conduct on part of mortgagee as bearing upon court's equitable power to deny remedy.)

The quoted statute was taken verbatim from the Model Business Corporation Act. That Act, drafted by the Committee of Corporate Laws of the Section of Corporation, Banking and Business Law of the American Bar Association, has become the foundation of the corporate laws of most states, including Utah. The same committee which originally drafted the Model Business Corporation Act, provided the following commentary relative to the section allowing involuntary dissolution in an action by a shareholder:

The Model Act provides rules to cover involuntary dissolutions by shareholders by defining four factual situations in which the courts have the power to liquidate the assets and business of the corporation. . . . Second, the controlling directors or managers acting in an illegal, oppressive or fraudulent manner. While the terms "illegal," "oppressive" or "fraudulent" are subject to judicial interpretation, they have somewhat limited definitions within all jurisdictions. [Emphasis added.] Model Bus. Corp. Act Ann. 2d § 97 TT 2 at 554.

Although Utah has no cases construing this provision, other jurisdictions have decided cases which generally indicate limits on the scope of activity which will be held to be "oppressive" under the Act. See Central Standard Life Insurance Company v. Davis, 10 Ill. 2d 566, 141 N.E.2d 45 (1957); Gidwitz v. Lanzit Corrugated Box Co., 20 Ill. 2d 208, 170 N.E.2d 131 (1960); White v. Perkins, supra. It must be kept in mind that a closely held corporation is not like a partnership, i.e., a minority stockholder of a close corporation does not have the right to demand dissolution of a corporation upon substantially the same showing as might be sufficient for dissolution of a partnership. Baker v. Commercial Body Builders, Inc., ___ Ore. ___, 507 P.2d 387 (1973). Additionally, and particularly relevant to the argument of Appellants, is the simple fact that:

. . . the management is controlled by the stockholders acting through their elected directors, and it is contemplated that the corporation is to be controlled by the majority stockholders. Gidwitz v. Lanzit Corrugated Box Co., supra at 135.

In the instant case, Max Young was never denied the right or opportunity to participate in management decisions to the extent of his stock ownership (25%). His claim seems to arise from the fact that he disagreed with the way in which the majority stockholders desired the company to be run. However, given the limited extent of his stock ownership, Mr. Young could not expect that the company would be run according to his wishes. Thus, the real question seems to be whether the majority stockholders breached any duty owed to the minority stockholders, and if they did, whether dissolution is an appropriate remedy for the breach.

To say that majority stockholders owe a duty to minority stockholders is only a starting point. The nature and scope of the duty owed must be examined. The assertion that majority stockholders are fiduciaries (Appellants' Brief at 26) is open to question:

Controlling shareholders are not regarded as fiduciaries, in the classic sense, at common law or under the statutes; but general concepts of fiduciary law are frequently used in characterizing conduct by the majority that entitles the minority to relief. Comment, Oppression as a Statutory Ground for Corporate Dissolution, Duke L.J. 128, 133, 133 (1965).

Thus, the question still remains as to what duties respondents owed appellants and whether any of those duties were breached.

Appellants argue that numerous continuing acts by the majority may amount to "oppressive" conduct, even though the acts taken individually would not necessarily be "oppressive." It appears to be admitted that no single grievance or alleged act of oppression adduced at trial would under any definition constitute "oppressive" conduct on the part of Zions First National Bank or those in control of the Wycoff boards. Rather, the argument seems to be that cumulatively the various circumstances add up to "oppressive." That is to say, that acts which in and of themselves are not oppressive, when taken together additively, amount to oppression. This is something like the new mathematics in which it is proclaimed that two plus two equals five. In any event, the authority cited for the "cumulative effect" proposition, Gidwitz v. Lanzit Corrugated Box Co., supra, involved much different circumstances than are present in this case. In Gidwitz the allegedly "oppressive" behavior had continued for a period of 10 years, and the oppressing party was not a majority stockholder, stock

ownership being split 50-50 between two families. The oppressing party had used his office as president of the corporation to gain his advantage and had denied plaintiffs the opportunity to participate in corporate affairs, including the election of directors. The facts of this case are not even remotely similar to those in Gidwitz. In the case at bar, Mr. Young was never denied his right to participate in meetings or vote for directors. By way of contrast with Gidwitz, the major act of alleged oppression in this case is the alleged fact that the majority decided to make a temporary change in corporate policy to accommodate the needs of the estate of the founder and principal stockholder.

As to other acts of the majority, Appellants cite several as either being oppressive or tending to be oppressive in cumulative effect. Appellant seems to place special weight on the allegation that respondents' course of conduct deprived the corporation of some profits which could have been made. However, the fact that a corporation did not make as great a profit as was possible is not evidence of oppression:

. . . courts of equity will not undertake to control the policy or business methods of a corporation, although it may seem that a wiser policy might be adopted, and the business more successful if other methods were pursued. [Emphasis added.] Polikoff v. Dale and Clark Building Corporation, 37 Ill. App. 2d 29, 184 N.E.2d 792, 795 (1962), citing Wheeler v. Pullman Iron and Steel Co., 143 Ill. 197, 32 N.E. 420.

Accord, Central Standard Life Insurance Co. v. Davis, *supra*. It must be remembered that the corporations in question continued to make a substantial profit during the period of the dispute, with an admitted healthy rate of growth at 11% per annum and an average annual income of over \$167,000.00.

With regard to certain allegedly oppressive acts, the Appellants take inconsistent positions. They assert that part of the primary obligation of Respondents as controlling shareholders was to "distribute those profits." (Appellants' Brief, p. 36) However, it is later argued that distributions which were made were oppressive because they caused an unfortunate tax consequence for Appellants.

The test and context within which any claim of oppression must be evaluated is set forth in Polikoff v. Dale and Clark Building Corporation:

It is, however, fundamental in the law of corporations that the majority of its stockholders shall control the policy of the corporation, and regulate and govern the lawful exercise of its franchise and business * * * Everyone purchasing or subscribing for stock in a corporation impliedly agrees that he will be bound by the acts and proceedings done or sanctioned by a majority of the shareholders, or by the agents of the corporation duly chosen by such majority, within the scope of the powers conferred by the charter. And courts of equity will not undertake to control the policy or business methods of a corporation, although it may be seen that a wiser policy might be adopted, and the business more successful if other methods were pursued. The majority of shares of its stock, or the agents by the holders thereof lawfully chosen, must be permitted to control the business of the corporation in their discretion, when not in violation of its charter, or some public law, or completely and fraudulently subversive of the rights and interests of the corporation or of a shareholder. *Id.* at 795.

Every minority stockholder must respect this framework which is the basis of any corporation.

Appellant Max Young and counsel for plaintiffs seem to question the propriety of Zions First National Bank in assuming an active part in the management of the companies, as somehow amounting to "oppressive" action. In this regard, it is manifest that M. S. Wycoff contemplated that control of the corporation in

question should be reposed in Zions First National Bank as Trustee, if the said Trustee should elect to operate the businesses. The "Residuary Trust," which contained all of the decedent's shares of voting stock in the corporations in question and therefore majority control, provides that in the discretion of the Trustee such corporations may be "operated and preserved by my said Trustee until said corporations or businesses can be properly managed and controlled by my said son." (Article VII - Third - D) Furthermore, the Testator-Settlor made it plain that the Trustee, in its discretion, might "elect to operate and preserve any corporations or businesses which I may control at the time of my death" (Article VIII) Even the direction that the Trustee should name Max W. Young as an executive of such corporations or businesses contemplates as a pre-condition thereof the assumption of control by the Trustee. Accordingly, it is submitted that the basic intent of the Testator-Settlor in substance was to repose control of the corporations in the Trustee, else how could the Trustee be charged with the duty to "operate" and "preserve" the corporations in question?

Assumption of an active role on the Board of Directors by Zions was a natural and very usual thing to occur. As is stated in Volume 2, Scott on Trusts, Section 170 at page 904:

It not infrequently happens that a trustee holding shares of a corporation as a part of the trust estate is or becomes an officer or director of the corporation.

* * *

Where the trustee holds all the shares of a corporation or a sufficient number of shares to give him substantial power of control over the election of directors and ultimately over the administration of the affairs of the corporation, he has wide discretion in the exercise of

his powers; and in accordance with the general principle applicable to the exercise of discretionary powers, the Court will not interfere with the exercise of the power unless he is guilty of an abuse of discretion. [Citations, Section 193.2 at page 1049]

When Zions finally voted the majority stock to elect directors who would reflect the majority interest (after about 18 months of operations by Max Young after M. S. Wycoff's death and absolute control by the minority interests to the detriment of majority interests), the purpose was to "build assets, keep expenses low, keep income high and retain as much income for the business as possible." (Tr. 341, 342, Ab. 109) It was of particular concern to the bank as holder of the majority stock that the corporations be managed properly. (Tr. 243, Ab. 72) Since the businesses had been built up over the years and represented the life blood and reinvested capital of M. S. Wycoff, the needs of his widow and the payment of debts and taxes necessary to preserve the companies intact for his son and heir, Bruce Wycoff, were of course taken into consideration. Testimony at trial was clear that the basic interests of the estate and the companies were parallel. (Tr. 256, Ab. 78) There was no abandonment of the interests of the companies in connection with the operation thereof after Zions assumed active involvement on the Board of Directors. To the contrary, there was a carefully programmed operation for reasonable profit and growth, not mere preservation of the companies. It certainly was a part of the bank's purpose to honor the desire and will of M. S. Wycoff to preserve profitable companies for eventual passage of ownership to Bruce Wycoff. (Tr. 258, Ab. 79) Is that oppression? Max Young would seem to be arguing that the objective of management should have been to preserve the corporations for him. Young obtained benefits during his lifetime, and the investment which he acquired amounting to a 25% interest

came to him by way of gift from M. S. Wycoff. M. S. Wycoff, on the other hand, built up the business and reinvested and kept his money and capital in the businesses. The debentures which were redeemed were his loans to the companies. No such loans were ever made by Max Young. Was it the intent of M. S. Wycoff to reinvest everything so as to preserve the benefits of ownership for Max Young? Certainly not. Of course, it was an objective to preserve the businesses for the son and heir, Bruce Wycoff.

In the instant case, Respondents have done nothing inappropriate or oppressive, but have merely exercised their discretion in a manner inconsistent with and contrary to the selfish desires and plans of Appellant Young.

POINT III.
IN ANY EVENT LIQUIDATION AND DISSOLUTION OF THE
WYCOFF COMPANIES WOULD NOT CONSTITUTE
APPROPRIATE REMEDIES

Appellants argue that the alleged "oppressive" actions of the Respondents warrant dissolution of the corporations involved. After full review of all of the evidence, the trial court found that Respondents were not guilty of any "oppressive" conduct within the meaning of Section 16-10-92. This conclusion and finding is entitled to substantial weight. Stone v. Stone, supra. White v. Perkins, supra.

The conclusion of the trial court in rejecting dissolution evidences the appropriate caution exercised by courts hearing arguments in favor of the dissolution of corporations. The Illinois Court has cautioned:

The Business Corporation Act has given to the courts the power to relieve minority shareholders from oppressive acts of the majority, but the remedy of liquidation is so drastic that it must be invoked with extreme caution. The ends of justice would not be served by too broad an application of the statute, for that would merely eliminate one

evil by substituting a greater one - Oppression of the majority by the minority. Polikoff v. Dale and Clark Building Corporation, supra, id. at p. 795.

Even if certain acts were "oppressive" within the meaning of the Act, arguendo, since there is no evidence that such acts would continue, dissolution would be inappropriate within the holding of Baker v. Commercial Body Builders, Inc., supra. Manifestly, remedies alternative to dissolution would be within the power and discretion of the court. In this regard, it would certainly be the furthest thing from the expressed desire of the decedent Milton Stanley Wycoff for the companies which he founded and built up as a family business to now be liquidated and dissolved.

In substance and effect, the claimed acts of oppression by Respondents consisted of the exercise of their best business judgment under the circumstances. In spite of the fact that Appellants disagree with the exercise of that judgment, Respondents' conduct does not amount to oppression warranting dissolution.

POINT IV.

LAST WILL OF M. S. WYCOFF DID NOT GIVE MAX YOUNG AN ENFORCEABLE AND CONTINUOUS RIGHT TO BE CHIEF EXECUTIVE OFFICER OF THE COMPANIES

Article VIII of the Last Will and Testament of Milton Stanley Wycoff, deceased, under which the defendant Zions is acting as executor and trustee provides in part as follows:

In the event my trustee should elect to operate and preserve any corporations or businesses which I may control at the time of my death as permitted under the terms of any trust created hereby, then and in that event I direct my trustee to continue the operation of such corporations or businesses by continuing as executive officers and directors those persons who occupy similar positions in said corporations or businesses at the time

of my death, including directors and other corporate officers. However, I direct my trustee to name Max W. Young, if he is then living and is then serving as an executive of any such corporations or businesses, as the chief executive of said corporations or businesses, so long as he discharges his office or offices with fidelity and so long as said corporations or businesses are operated at a profit. . . [Emphasis added.] (Exh. P-1)

Appellants in their brief argue in essence that the terms of the Will supersede the rights and duties of the corporate directors in the management of the business affairs of the companies. In essence, Max Young asserts that the dead hand of Mr. Wycoff was still at the helm of the corporations, guiding their affairs and dictating to the four Boards of Directors the identity of who should be employed in management.

Such is not the law in Utah, nor sound corporate law at all. For the purpose of this brief (but not as a matter of admission of ultimate fact), it will be assumed that Max W. Young was acting as the chief executive officer of the four defendant corporations which were operated at a profit. The matter becomes a basic legal issue to be resolved by the court as to whether or not the directions of Mr. Wycoff, as extended through the terms of his Last Will and Testament, supersedes the powers of the Boards of Directors of the four corporations in which he was a stockholder. The record will show that Mr. Wycoff was a majority stockholder in three of the said corporations, namely Wycoff Company, Incorporated, Wycoff Warehouse, Inc., and Wycoff Corporation, and further that, though he had only one share of stock in Mountain Service, Inc., such corporation was otherwise a wholly-owned subsidiary of Wycoff Company, Incorporated. Thus for all practical purposes Mr. Wycoff was a majority stockholder in the four corpora-

tions, a member of the Board of Directors and President of such corporations at time of his demise.

The language of Article VIII of Mr. Wycoff's Will makes no bequest of any stock to the plaintiff Max W. Young, but constitutes a directive to his trustees, should they elect to operate and preserve any corporations or businesses "which I may control at the time of my death." The critical language involved is:

However, I direct my trustee to name Max W. Young, if he is then living and is then serving as an executive of said corporations or businesses, as the chief executive of said corporations or businesses so long as he discharges his office or offices with fidelity and so long as said corporations or businesses are operated at a profit.

The stock in said corporations was first under the control of Zions, as the executor of the estate, and then was distributed to it as trustee under the Will of Mr. Wycoff. In that capacity it still holds the stock. However, at the time of the termination of employment of plaintiff Max W. Young, there were nine members of the Board of Directors of each of the corporations, and the management and control of the corporations were vested in the said Board of Directors. Zions, as Trustee, had no vote on the Board of Directors, though four of its employees were members of said Board. Zions, as Trustee, was a stockholder, and the rights of majority as well as minority stockholders are subject to the control and direction of the daily business by the Board of Directors.

The basic issue then comes before the court as to whether or not the control of the corporation is in the Board of Directors, or whether the wishes expressed in the Will of a majority stockholder supersede that right and duty of control vested in the Board of Directors. Initially we must look at the Utah statute relating

to corporations and their management. Section 16-10-33 U.C.A. 1953, as amended, reads:

The business and affairs of a corporation shall be managed by the board of directors.

This has been affirmed by Utah cases over a long period of time, typical of which is the decision in Anderson v. Grantsville North Willow Irrigation Co., 51

Utah 137, 169 Pac. 168:

Authority to manage and control corporation and conduct its business was left exclusively to board of directors and not to stockholders as such.

This has never been changed by our Utah statutes nor changed by the decisions of the Supreme Court of the State of Utah.

Section 16-10-44 imposes certain liabilities upon directors in certain cases, which reflects that the responsibility is that of the directors to determine the course of events within the corporation, including the hiring and firing of personnel and the management of the affairs. The next section, 16-10-45, relates to officers, and prescribes that such:

. . . shall be elected by the board of directors at such time and in such manner as may be prescribed by the by-laws . . . Such other officers and assistant officers and agents deemed necessary may be appointed by the board of directors or chosen in such manner as may be prescribed by the by-laws . . . All officers and agents of the corporation as between themselves and the corporation shall have such authority and perform such duties in the management of the corporation as may be provided in the by-laws or as may be determined by resolution of the board of directors, not inconsistent with the by-laws.

The following section, 16-10-46, reads:

Any officer may be removed by the board of directors or by a committee, if any, if so authorized by the board of directors, whenever in its best judgment the best interest of the corporation will be served thereby, but such removal shall be without prejudice to the contract rights, if any, of the person so removed.

It is significant to observe that at no place in the Complaint nor in the evidence is there any allegation that Mr. Young had a contract with the company. He has been appointed as the President of the company, following the demise of Mr. M. S. Wycoff. His position as President made him the chief executive officer of the companies, but, as stated in Section 16-10-46, U.C.A. 1953:

Any officer may be removed by the board of directors or by a committee, if any, if so authorized by the board of directors, whenever in its judgment the best interests of the corporation will be served thereby.

Were we to engage in a fantasy as to whether or not the Last Will of Mr. Wycoff created a contract for the benefit of Mr. Young, we believe that the very recitation of the same shows the complete fallacy thereof. A Will is not a contract in the circumstances here involved, where it is the single act of a living person that becomes effective as of the time of his demise. Thus it is merely a testamentary declaration by the then living person as to the descent of his property following his demise. It cannot be considered to be a third-party beneficiary contract for the advantage of Mr. Young, because it was not a contract. There is nothing in the record to show that Mr. Young was aware of the contents of the Will and did anything to alter his circumstances in reliance thereon.

Mr. Young has intermixed his claims and assertions, apparently erroneously assuming that the power of appointment and the power of removal of an officer or employee of the corporation are lodged in Zions as Trustee of the Will of M.

S. Wycoff. That power of appointment and of removal are vested solely in the Boards of Directors of the corporations, and regardless of the wishes or pleas of a stockholder, the Board has the sole discretionary right and power to appoint or to discharge. We have carefully researched the cases in Utah relating to these matters and we find no case that goes against the statutes, or that interprets the statutes in such a way as to diminish the power of the Board of Directors to perform this vital and universally accepted function, namely of appointment and discharge of officers and employees.

The issue of whether Mr. Young quit his positions or was discharged has been treated supra. Assuming solely for consideration of the issue claimed under Mr. Wycoff's Will, that he was discharged by the Board of Directors, does Max Young then have an actionable cause against the corporations or against Zions? What would be the legal foundation of such an action? No estoppel is alleged and no contract is alleged or proven.

The case cited by appellants to sustain the contention that Max Young had an ongoing right of employment as chief executive officer of the defendant companies is In re Pittock's Will, 102 Ore. 159, 199 Pac. 633 (1921). This was decided under facts and statutes different than those in Utah. Apparently the trustees named in that Will were also Directors. Zions, as Trustee under Mr. Wycoff's Will, was not a Director of any of the corporations. Only four out of the nine directors were employed by Zions. The affirmative and unrelenting dictate of the Utah statute imposing responsibility solely in the Board of Directors negatives any validity of the Oregon or other cases in our present situation.

There are only two ways by which Max W. Young could continue on as the chief executive officer of the corporations, and those are -

(a) By reason of a contract or Articles of Incorporation that accorded to him such a right, or

(b) By reason of the affirmative action of the Board of Directors annually electing him to such an office.

Neither of these basic and fundamental grounds exists and none has been alleged. The Board of Directors, by affirmative vote, has terminated his employment as chief executive officer, by accepting his de facto resignation, and this was by the unanimous vote of the Boards.

The strong and unequivocal language in the Utah statutes vests the Board of Directors with full management powers, including the right to discharge any officer or employee, subject to his contract rights. No Utah case apparently exists that involves the issue of whether or not one, such as Max W. Young, named in the Will to be chief executive officer, would have any recourse if discharged. However, a parallel situation was decided in D'Arcangelo v. D'Arcangelo, 137 N.J. Eq. 63, 43 A(2d) 1969, adverse to Mr. Young's contentions.

In the D'Arcangelo case, decedent's Will directed that his brother Federico be employed by the bus company so long as he was able to work. Decedent owned 90% of the capital stock. There was no contract between the corporation and Federico, and the decision reads in part:

A contract by the two sons, acting by virtue of their ownership of a majority of the outstanding stock, with Federico, would not bind the corporation, since our corporation law gives to the board of directors the power and duty of managing the business of the corporation.

R.S. 14: 7-1, N.J.S.A. Clement v. Young, etc., Co., 70 N.J. Eq. 677, 67 A. 82, 118 Am. St. Rep. 747; Reed v. Trenton, 80 N.J. Eq. 503, 85 A. 270. In order to reach the conclusion that the testamentary clause which is under consideration is enforceable, I would have to hold that it imposes a continuing obligation on Samuel and Gilbert to vote for directors who will promise to engage Federico at the stated salary, whether or not the directors deem his employment to be advantageous to the corporation. Such an obligation, whether created by will or contract, is contrary to public policy, and therefore it cannot be enforced.

In Page "The Law of Wills", Vol. I, ¶16.2, we find:

It has been held that a will provision that a corporation, the stock of which belongs to the testator, shall continue to employ A, does not bind such corporation.

As stated in Fletcher on Corporations, Vol. II ¶353:

If the term of an officer is not fixed by any contract binding upon the corporation, nor by the charter or general law, he may be removed at any time, with or without cause, at the pleasure of the body appointing him, and no specific cause need be assigned therefor. Thus a board of directors may remove the secretary-treasurer elected by the board, where it holds for no fixed term, provided he was elected or appointed by the board of directors. The power of removal extends to all officers of the corporation, including the president, treasurer and general manager or superintendent.

Mr. Young was elected by the Board as President, following Mr. Wycoff's demise, but for no fixed term. He has not asserted or alleged that he was discharged in violation of any provision of the Articles of Incorporation of the four Wycoff corporations, as no such provisions exist. Also, he has not asserted any contract or statutory right for continued employment as chief executive officer in defiance of the Board of Directors. He must succeed, if at all, only if the law in Utah takes away from the Boards of Directors the management of the corporations and the right to discharge, as set forth in Section 16-10-46, ". . . whenever

in its judgment the best interests of the corporation will be served thereby."

To place the wishes of Mr. Wycoff, as expressed by his Will in Article III, above the statutory rights and duties of the Board of Directors, would be in direct contravention of corporate law for the orderly operations under the statutes of Utah.

Finally, as shown by the evidence, Max Young, in a fit of anger over appointment of a Controller, resigned his position as chief executive officer of the four companies. At page 43 of Appellants' Brief it is conceded, "it would be impractical for Max Young to resume office as the chief executive of the Wycoff companies." This is a realistic recognition that Mr. Wycoff by his Will made his only son, Bruce Wycoff, the sole beneficiary of the trust as to all voting stock owned by Mr. Wycoff, and that now Bruce Wycoff is the General Manager of the companies. Thus the issues raised on appeal by this point have become moot.

Based upon the evidence presented and the Findings of Fact, the trial court then made its Conclusions of Law. No. 36 reads:

Based upon the facts presented, all attendant circumstances and a review of all of the evidence, the court finds that Max W. Young was not wrongfully discharged, and plaintiffs failed to sustain their burden of proof in establishing this claim.

Such Findings and Conclusions were based upon competent evidence and this Court should not disturb the same.

POINT V.

THE AGREEMENT OF APRIL 26, 1965 RELATING TO "REDEMPTION" OF STOCK WAS UNENFORCEABLE AS TO VOTING STOCK AND OTHERWISE

Appellants assert that it was error for the trial court not to enforce an Agreement of April 26, 1965, as asserted by Appellants. The said Agreement

is a document drafted largely by Max Young in an effort by him to obtain control over the Wycoff companies. This is Exhibit 3-P, which relates to a policy of group life insurance which also covered Mr. M. S. Wycoff. The policy was taken after Mr. Wycoff was afflicted by leukemia and the Agreement was sponsored by Max Young with foreknowledge of that fact.

The face amount of the policy, \$48,000.00 was paid to Mountain Service, Inc., its beneficiary. However, Mountain Service was not a party to the April 26, 1965 Agreement. It was signed by the three main stockholders, M. S. Wycoff, Max Young and C. Leland Clayton, and their wives. Mr. Wycoff signed for Bruce Wycoff, who was absent from the state and a minor at that time. It provides for use of insurance proceeds "to redeem, to the extent of such proceeds, the stock that each deceased First Party (M. S. Wycoff, Max Young and L. Leland Clayton) owned in said four corporations at the time of his death."

The problem which arose developed from the assertion by Max Young that the \$48,000.00 paid by the insurance company to Mountain Service must be used to purchase voting stock in Wycoff Company, Incorporated from Zions as Executor and as Trustee. No mention of voting stock is made in the Agreement. At the time of his demise, M. S. Wycoff owned 6,122 shares of voting stock and 85,708 shares of non-voting stock in Wycoff Company, Incorporated.

The devious impact of redemption of only voting stock would be to leave Max Young as the majority stockholder. As Appellants say in their brief (p. 45): "Admittedly, the agreement is ambiguous with respect to the kind of stock contemplated for redemption." Zions, as Trustee under the M. S. Wycoff Will,

offered to exchange shares of stock, both voting and non-voting, on a pro-rata basis, but refused to deliver up all of the voting stock as demanded by Max Young.

There are a number of reasons why this Agreement is not enforceable, and why the trial court, in Finding No. 37, said:

37. Based upon the facts presented, all attendant circumstances and a review of all of the evidence, the court finds that the agreement of April 26, 1965, did not contemplate the transfer of "voting stock," and plaintiffs failed to sustain their burden of proof in establishing this claim.

It then made its Conclusion as to the April 26, 1965 Agreement, that it "was unenforceable and did not require the application of the insurance proceeds paid to Mountain Service, Inc. to redemption of voting stock of Wycoff Company, Incorporated. . . ."

Some of the compelling reasons why voting stock only should not be redeemed are:

- (a) The Agreement does not mention "voting" stock at any place;
- (b) If that makes it ambiguous, then it must be construed against Max Young, who prepared it;
- (c) The Agreement is testamentary in character and has not been executed in conformance with Utah law;
- (d) Mountain Service is not a party to the Agreement and the \$48,000.00 was paid to it;
- (e) "Redemption" of stock contemplates an act by the issuer of the stock. M. S. Wycoff had only one share in Mountain Service which it might redeem;

(f) This demand of Max Young for transfer of the estate's voting stock and his refusal to allow a pro-rata acquisition of both voting and non-voting stock would thwart the explicit provisions of the Will of M. S. Wycoff, wherein Trustee is directed to distribute voting stock to his son, Bruce;

(g) The obvious advantage which Max Young sought to take of his benefactor, M. S. Wycoff, who was ill with leukemia, to the total disadvantage of Bruce Wycoff, makes the scheme inequitable;

(h) Max Young was in a position of trust and confidence as to the Wycoffs and had betrayed his fiduciary responsibilities, if this scheme of taking the voting stock away from them is allowed to stand;

(i) When Max Young went to Mrs. Wycoff after her husband's demise to seek her signature on Exhibit P-4 (a directive to Zions to turn over the voting stock), she refused to sign such, as she testified (Tr. 452, Ab. 148):

I could see without any great deal of study and certainly no hesitation, that what Mr. Young was proposing to do was -- is exactly an opposite to the intent in my husband's expressed will.

Q. Did you communicate this understanding and your position to Mr. Young?

A. I called him the next morning and told him that I would not and could not sign the paper because it was not my husband's intention.

Appellants' brief would lull the Court into accepting their proposal for redemption of voting stock by the innocuous assertion that Mountain Service was merely a handy vehicle to assist the individuals. This veils the real thrust

of the selfish scheme being projected. Mountain Service is a wholly-owned subsidiary of Wycoff Company. If the Wycoff family's voting stock were purchased or "redeemed" by Mountain Service, then such stock would be under control of Max Young, because he would be left with a majority of the remaining voting stock in the parent corporation. We feel certain that this court will not be so misled. The trial Court, after seeing and hearing the witnesses, did not "buy" this outrageous plan to divest the Trust and in turn Mr. Wycoff's son, Bruce, of the prime asset of the whole estate for \$48,000.00 of insurance money and not one cent from Max Young. It was Mr. Wycoff's intent to pass control to his son, Bruce, as stated in his Will. The provisions of the Will for voting stock control to be passed on to Mr. Wycoff's only child, Bruce Wycoff, are clear and unambiguous.

Max Young, who was a donee of his stock from Mr. Wycoff, has sought by this redemption scheme to subvert the basic intention of the man who gave him an opportunity in business, trained him in management, gave 25% of the stock to him in the three Wycoff companies and trusted him to be the interim manager until Bruce should come of age and be able to take over corporate responsibilities. Max Young had the effrontery to testify to this court that if he got control he might let Bruce come back in at some unspecified future time, and if Bruce measured up to the "expectations" and unspecified standards to be set solely by Max Young. What Bruce Wycoff would have to pay to buy from Max Young his way back into the family business is likewise unspecified.

As is usual in matters of this kind, machinations such as Mr. Young proposes at a later date do not coincide with the true intent of earlier years. Bruce Wycoff wanted to go to a graduate business school to prepare himself for the return to

the companies built by his father. He applied to three schools, Stanford, Harvard and Yale. Stanford did not accept him and he decided on Harvard because it has classes in transportation. Obviously he was thinking of taking over the control of the transportation businesses built by his then-deceased father.

The application to Stanford University required a letter of recommendation. His father had just died, so Bruce turned to Max Young for such a letter. Bruce Wycoff testified that when he came back to Salt Lake City at the end of his regular school term, he went to the office of Max Young to find out what sort of a letter had been written to Stanford. He there received a copy. (Exhibit D-21) As quoted above, Max Young wrote:

Bruce Wycoff . . . has a tremendous business opportunity ahead of him, in that he has available the administrative and financial control of a motor carrier organization serving eight states in the Intermountain area which his father developed, and as the only heir, Bruce will eventually receive.

This letter was written at a time when apparently the greedy idea of subverting the intentions of his benefactor, M. S. Wycoff, was not uppermost in the mind of Max Young. Nothing more need be said on this, as the Stanford letter clearly reflects the intent. Max Young had no right to demand that the estate surrender its voting stock in Wycoff Company, Incorporated so as to hand control of the companies to Max Young.

Max Young takes diverse and inconsistent positions from time to time. In dealing with his purportedly improper discharge and oppressive conduct phases, he says that the shareholdings of the estate of M. S. Wycoff represented by Zions as Executor represented a clear majority of the stock of the companies.

Without such assertion, there could be no "oppression" by the majority shareholders as against the minority, Max Young. Later he asserts that the April 26, 1965 Agreement automatically divested Zions, as Executor, of the majority of the stock of Wycoff Company, Incorporated, thus leaving Max Young as the majority shareholder.

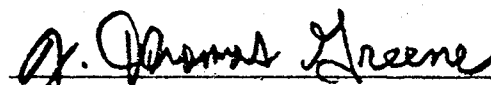
It is submitted that the 1965 Agreement is a testamentary document and hence unenforceable. In all event, it is not self executing. Further, it is ambiguous as to the subject matter of "stock" embraced therein, and such ambiguity must be construed against the extreme self-serving interpretation of Max Young (the author of the document) that it embraces only voting stock. The agreement fails as unenforceable for this reason also. The Agreement did not divest the Executor and the estate of any stock, and it is so drafted that it cannot be enforced by this court as against Mountain Service, which received the insurance proceeds, or against Zions as Executor, This phase of the appellants' lawsuit must fail completely.

CONCLUSION

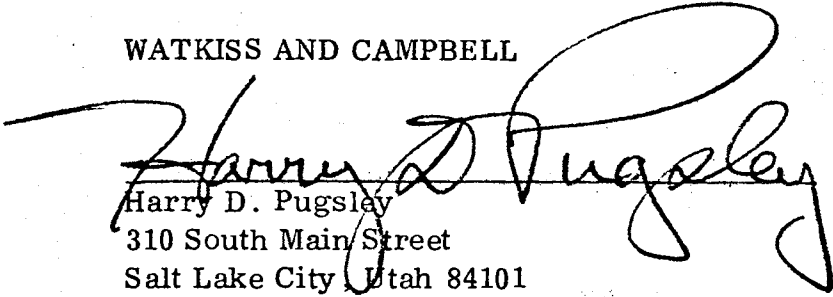
Appellants, who were recipients of minority shares of stock, mostly by gifts from M. S. Wycoff, have been treated fairly at all times. Max Young received every consideration from the Wycoff organizations and from the Wycoff estate, and he received his proportionate share of all stock distributions. The trial of this matter involved much testimony and the introduction of many exhibits. The trial judge, after due consideration and having the case under advisement

for several months, resolved the issues against Appellants. Every Finding and Conclusion of the court below is supported by competent and substantial evidence, and is founded in said principles of law. It is submitted that the judgment of the lower court in all particulars should be affirmed.

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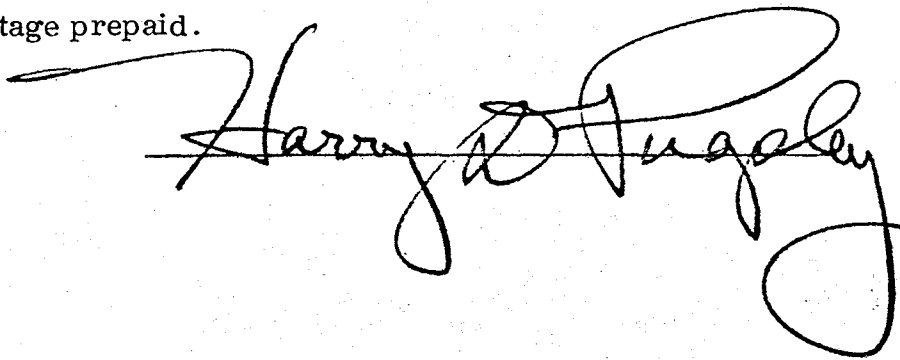
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MAILING CERTIFICATE

Mailed two copies of the foregoing this 18th day of January 1977, to Bryce E. Roe, Roe and Fowler, 340 East Fourth South, Salt Lake City, Utah, 84111, attorneys for appellants, postage prepaid.



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