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

Utah Supreme Court

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IN THE SUPREME COURT FOR THE STATE OF UTAH

MAX W. YOUNG, et. al.,	)	
Plaintiffs and Appellants,	)	
vs.	)	CASE NO. 14488
WYCOFF COMPANY, INC., et. al.,	)	
Defendants and Respondents.	)	

BRIEF OF APPELLANTS

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

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NATURE OF THE CASE

Plaintiffs-Appellants, MAX W. YOUNG, AUDREY L. YOUNG, and ROGER CLARK YOUNG [YOUNG] are all minority shareholders in the four (4) defendant companies and commenced this action against WYCOFF COMPANY, INC. [COMPANY]; WYCOFF WAREHOUSE, INC. [WAREHOUSE]; WYCOFF CORPORATION [CORPORATION]; MOUNTAIN SERVICE, INC. [MOUNTAIN SERVICE]; and ZIONS FIRST NATIONAL BANK [ZIONS], as Executor of the estate of M. S. Wycoff, deceased, and as Trustee under the Last Will and Testament of Milton Stanley "Slim" Wycoff, seeking relief on two separate claims. The first claim sought

(1) an order directing defendant Zions to transfer certain securities to the other defendants as required by an agreement of April 26, 1965 among Max W. Young, M. S. Wycoff and others, (2) an accounting by defendant Zions with respect to its dividend, distribution and debt relationships with the other defendants, (3) the appointment of a receiver for defendants Company, Warehouse, Corporation, and Mountain Service, and (4) judgment that defendants Company, Warehouse, Corporation and Mountain Service be dissolved, wound up and their assets distributed. The second claim sought judgment against the defendants because of their wrongful discharge and removal of plaintiff Max Young from the management and board of directors of the defendant Wycoff corporations, and damages in the amount of $120,000 by way of lost compensation.

DISPOSITION IN THE TRIAL COURT

The case was tried before the Honorable James S. Sawaya, District Judge, who entered 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 both claims, and such other relief as this court deems proper.

STATEMENT OF FACTS

The four defendant companies other than Zions collectively hereinafter referred to as the "Wycoff Companies" are all closely held Utah corporations engaged in the trucking, transportation and warehousing business. Company operates a trucking business in Utah and portions of Idaho and Colorado providing handling of specialty items such as film and mail. Mountain Service owns trucks and equipment which it leases principally to Company. Warehouse owns an office building and three warehouses. Corporation owns four warehouses and also owns, and leases to Company, a shop building, dock, garage and terminal area. The Wycoff Companies have interrelated business operations and have common members on their respective boards of directors.

Appellants own approximately twenty-five percent of the outstanding voting stock in defendants Company, Warehouse, and Corporation. Mountain Service is wholly owned and controlled (99.99%) by Company. Legal title to and the right to vote the controlling majority stock of Company, Warehouse, and Corporation is held, and at all times material hereto, was held, by defendant Zions as executor of the estate of M. S. Wycoff and trustee under the last will and testament of Milton Stanley ("Slim") Wycoff.

Appellant Max Young was first employed by Company in January of 1950 as a clerk, and in time was promoted to the office of business manager. He was also business manager of Corporation from the time of its inception and generally developed and managed both Mountain Service and Warehouse as general manager. During his tenure with the Wycoff Companies, Mr. Young sat on their boards of directors as executive vice-president of all four boards. The other members of the boards consisted of C. Leland Clayton, M. S. Wycoff and Earl Lewis who were all stockholders directly involved in the daily operations of the Wycoff Companies.

Appellants acquired their 25 percent interest in the Wycoff companies through a combination of gifts from M. S. Wycoff and purchases from the corporation. The gifts were given primarily to appellant Young as compensation for his service to the corporations and as an inducement to insure Young's continued service in the business. Max Young worked hard and faithfully for the corporations during his employment to enhance the value of his interest and that of the other shareholders.

M. S. Wycoff, the princiapl founder of the Wycoff Companies died testate on March 3, 1966, and all of his controlling stock in the Wycoff Companies was distributed to

Zions under two trusts established by M. S. Wycoff's will. Upon the death of M. S. Wycoff, Max Young became the chief executive officer of each of the companies, a position he maintained with the acquiescence of Zions until February 1, 1968.

During Max Young's association with the Wycoff Companies they had a history of continued growth and expansion into new commodities and geographic localities ("authorities"). To accomplish this expansion the companies had followed a policy of tight financial management: operating on a low profit margin, and reinvesting profits into the firms (Tr. 34-35, 39-40) [Exhibits P-22, P-23, D-10]. When Max Young assumed operational control of the Companies after M. S. Wycoff's death, it was his objective to continue these historical policies and expand the Companies' territory to include the West Coast. (Tr. 34-35) Acquisition of new routes required additional equipment and added facilities which, of course, cost money.

At the time of his death, M. S. Wycoff's principal asset consisted of stock and debentures in the Wycoff Companies [Exhibits D-42, D-43]. The total asset value of his estate was approximately $501,841.50 (Tr. 246) and was subject to approximately $78,177.75 federal and $65,000 state estate taxes (Tr. 299-300), as well as widow's allowances. Zions wanted immediate cash to satisfy these estate liabilities and sought to utilize the Wycoff Companies as vehicles for generating funds [e.g. Exhibits D-50, D-51]. As Zion's principal trust executive, Claron Spencer testified that Zions viewed the interests of the estate and the companies as "parallel." (Tr. 256-57)

From March, 1966, until September, 1967, Zions did not take an active interest in the daily operations of the Wycoff companies although it was interested in obtaining funds from them. Max Young operated the companies during this period and they were more profitable than ever before but, as Mr. Young informed Claron Spencer, there were seldom any funds available for the estate in light of the companies needs for growth [Exhibit D-10]. Even prior to the death of M. S. Wycoff, the companies had never maintained a regular dividend policy. Nevertheless, the directors of the Wycoff Companies made every effort to assist the estate in satisfying its liabilities. As a result of their conflicting objectives, however, relationships between Max Young and Zions became strained.

On September 1, 1967, a meeting was held at the request of Claron Spencer for the purpose of expanding the boards of directors of each corporation from four to nine [Exhibits D-11, D-12]. The estate was in need of funds, and rather than sell some of the estate assets to satisfy these obligations, Zions sought to obtain managerial control of the Wycoff companies so that it could channel funds from the companies into the estate. Appellant Max Young attended this meeting and protested the proposed change for the reason that the corporations had always operated with internal boards of directors who were familiar with the needs of the companies [Exhibit D-12]. Zions voted its controlling stock at the meeting including certain shares of Mountain Service, the ownership of which was at that time a matter of dispute, and the boards of directors of each company were increased from four to nine. Thereafter, Zions nominated and elected five additional members to each board. Four of these new directors were employees of Zions and the fifth was the attorney representing the estate. None of the new directors had any experience in the transportation industry (Tr. 261). As Claron Spencer testified, the purpose of this board reorganization was to facilitate a preconceived plan for the redemption of stock and debentures and to slow down the growth of the companies which would materially advance the interests of the estate (Tr. 260-263).

During November, 1967, the new boards passed resolutions limiting managements' ability to bid on new contracts or routes, setting a $10,000 ceiling on expenditures and creating an Executive Committee to oversee all company spending. [See e.g. Exhibits P-41 and P-30 to -32] By the terms of these resolutions, a limitation on management was necessitated by "certain financial commitments . . . placed on the corporation in the near future due to the death of the founder." Again, as Claron Spencer testified, the purpose of these and subsequent acts discussed below "was to slow down the growth of the companies so that there would be greater use of the income and assets available to the trustee or executor" (Tr. 262).

During December, 1967, Spencer and other Zion board members discussed plans with William Shea for the creation of a new position of "comptroller." Young and the other board members were not consulted with respect to these plans because Zions did not want Young's opposition (Tr. 265). Mr. Shea was permitted to draft his own job description (Tr. 336-37) [Exhibit P-5] which gave him direct financial control over the operations of the Wycoff companies. Shea took his instructions from Claron Spencer (Tr. 341) and understood his job as building up corporate assets, keeping expenses low, and getting as much money as possible out of the Wycoff Companies and into the hands of Zions (Tr. 334, 341-42). Pursuant to a request by Zions, a meeting of the board of Company was held on January 30, 1968, and a resolution was passed, over the objection of Max Young, creating the position of vice-president and comptroller [Exhibit D-13]. Young objected to the resolution for the reason that it would, in effect, take the control of the companies out of management's hands by limiting its ability to control employees, expenditures, income and other important items. Shea was introduced to the board as the man who would assume the new position. The position gave Zions the control it desired to satisfy the needs of the estate at the expense of the companies' normal business objectives and goals.

By letter dated February 1, 1968 [Exhibit P-2], directed to Mr. Spencer, Young outlined his objections to the appointment of the comptroller and said that the appointment <u>had the effect</u> of relieving appellant of all his duties with the companies. At a meeting of the board of Company held on February 13, 1968, the board, over Mr. Young's objection and negative vote, decided to treat the letter as a resignation [Exhibit D-49]. At trial, Spencer testified that there was no language of resignation in the letter (Tr. 273), and that

Young wasn't discharged for his failure to maintain profits for the companies (Tr. 274). On the other hand, Spencer testified that Young's resistance with respect to Zions plans for taking company funds to satisfy estate liabilities was seen as a reflection of Young's poor "moral fibre." Mr. Roger Andrus, a driver foreman for the Company, who had no experience in management, was elected president and general manager to replace Young at the February 13, 1968, meeting.

Appellant Young continued to serve on the boards of directors of the Wycoff companies until October, 1968, when he was dismissed therefrom.

On November 6, 1968, the board of directors of Company directed a stock dividend of 1800 shares of a new class of recently created preferred stock having an aggregate par value of $180,000.00. Appellant received 450 shares of this preferred stock dividend [Exhibit D-50]. Just fifteen days later and on November 21, 1968, the board called the preferred stock for redemption [Exhibit P-64] at its par value of $100.00 per share. As reflected in the minutes, the purpose for the call was to generate funds for the estate. The redemption right was to expire at 5:00 p.m. on December 2, 1968, and according to the board's resolution, stock not so redeemed was to remain outstanding on the books of the corporation. There was no indication that unredeemed stock would ever be subject to another call. The redemption scheme was part of a preconceived plan to satisfy liabilities of the Wycoff estate and was not part of an ongoing business procedure. Appellants were forced to redeem their stock for $45,000, upon which they were forced to pay $15,000 in taxes. The estate, however, received approximately $110,196.00 but paid no taxes on this income because of an exemption provided in §303 of the Internal Revenue Code, 26 U.S.C. §303. There was no apparent business purpose for this action, and it did not advance the financial position of the corporations.

On December 2, 1968, debentures of Company totaling $50,000.00 were redeemed from the estate at a par value and the funds were again used to pay taxes. These debentures were not due until April 1, 1978, and bore interest at the rate of 7 percent per annum.

According to Mr. Shea, vice-president and comptroller, the funds used for these redemptions were borrowed by Company from Mountain Service which in turn borrowed $300,000 from Zions bank at 7 percent interest and secured the loan with Mountain Service equipment [Exhibit P-70, P-64]. The redemption alternative was chosen as the least expensive way to pay off the needs of the estate because it had less tax consequences to the estate than a dividend (Tr. 379-80) and because the company would not have to pay any dividends to minority shareholders (Tr. 405). None of the funds were used to retire other outstanding loans of the Company, but the funds were obtained for the sole purpose of retiring the debentures and redeeming the preferred stock (Tr. 343-44, 406). Again, the debenture retirement was done at the request of Zions (Tr. 346). More important, the redemption was effectuated during a period of decreasing earnings (Tr. 344) [Exhibits P-58 through 63] and poor profits (Tr. 383). As a result of this scheme, the companies were placed in a poor credit position and had difficulty obtaining regular business loans from lending institutions, other than Zions, who offered better credit terms [See e.g. Exhibit P-53].

Mr. Spencer testified that the redemption tax exemption was seen as the best alternative for acquiring funds for the estate if the minority did not resist (Tr. 246). Spencer was aware that the companies would have to borrow funds to accomplish the redemption (Tr. 255), that the Company was, at that time, in a "short cash" position (Tr. 256), and that any funds received by minority shareholders would have to be treated as ordinary income (Tr. 247-48). However, despite the fact that sale of the debentures would have satisfied a large protion of the estate's tax liabilities, Zions was unwilling to market the debentures because they were unsecured and would have had to be sold at a discount (Tr. 253). Neither Mr. Spencer or Mr. Shea could articulate any busines motive for these redemptions.

Although the debentures bore interest at 7 percent per annum, their premature redemption resulted in an increased burden on the companies because the $300,000 note to Mountain Service was a demand not [illegible] lly renewed at rates ranging on an a[illegible] o 2 percent over the prime rate [Exhi[illegible] the estate was unwilling to sell the [illegible] ng to cause the company to incr[illegible] there-after to pay interest to [illegible] ds at rates in excess of the pri[illegible]

Zions also caused oth[illegible] uce Wycoff trust to be redeeme[illegible] February 11, 1971; $5,000 on April [illegible] 1, 1971; $10,000 on October 11, 197[illegible] 1972; and $4,000 on September 6, [illegible] P-38] (Tr. 345, 357) Zions redee[illegible] in debentures as testamentary [illegible] 72. All of these debentures matured [illegible] e interest at 7 percent. There was no apparent business purpose for any of these redemptions. Moreover, these redemptions were effectuated during a period of financial difficulty when the companies had other pressing business needs for the funds [See e.g. Exhibits P-37, P-38, P-39]

A review of the books and records of the Wycoff Companies conducted by Mr. Jackson, a certified public accountant for these firms, for the years 1965 through 1969 [Exhibit P-29] concluded that as of February 1970:

> "A The working capital and cash balances of the companies in total has decreased substantially since December 31, 1967.
>
> B. Accounts receivable in total has increased substantially since December 31, 1967.
>
> C. The companies' over-all indebtedness under long-term financing has increased substantially without any appreciable increase in assets since December 31, 1967."

Certain accounting adjustments should be considered to determine the real financial position of the Wycoff companies in the years after Mr. Young's dismissal and during Zions' control. For example, substantial insurance rebates, earned by the companies before 1968, were attributed as income in years after 1968. The same is true with respect to rate increases due to the companies during 1966 and 1967. The depreciation schedule of the companies equipment was changed after 1968 from a double-declining balance method to a straight line method (Tr. 358), resulting in an apparent increase in company income after 1968 of approximately $185,000.00 to $200,000.00, while the real asset value of the older fleet was substantially decreased. According to Mr. Shea the increased income before taxes of the companies was "directly attributable" to the depreciation method used currently as compared to the method used previously. (Tr. 360) [Exhibit P-58] Finally, for certain years, items of extraordinary income were included in calculating gross income, such as $32,504 from the sale of the Freeport Warehouse in 1972 [Exhibit P-58] These adjustments caused an unrealistic inflation of income during the years of Zions' control resulting in an even worse financial picture than Mr. Jackson had painted.

During the period 1967 through 1973 the growth of the four companies had been 65.4 percent or 11 percent per year [Exhibit D-71]. Appellants evidence, prepared from the financial statements received in evidence, [proposed Exhibits P-54 through P-57] indicated that for the period 1965 through 1973, the average annual growth rate had been 10.89 percent per year since 1967, but from 1965 through 1967 the total growth was 46.17 percent, or 23.09 percent per year. This latter evidence comports with Mr. Spencer's own testimony as to Zions purpose for taking control of the companies which was "to slow down growth so that greater use of the income and assets would be available to the trustee and executor" (Tr. 262). A comparison of the ratios of net income to total income for the period 1965 through 1973 reveals that this ratio fell from an annual average of 5.56 percent during 1965 through 1967, to the highest percentage of 3.92 percent in 1968 and as low as 0.29 percent in 1967. Again these figures further illustrate the success of Zions' announced purpose in managing the Wycoff companies.

Perhaps one of the major problems with Zion's control of the Wycoff Companies was its failure to provide skilled, competent, and qualified management. As Mr. Shea testified "we floundered around with a management team in a situation for which we were totally unprepared;" "We had a management team that didn't know how to get rate increases;" (Tr. 393, 413)" "I have never been a manager for a company. I was not hired to manage the Wycoff Company. I have never attempted to manage the Wycoff Company or any of its affiliates." (Tr. 375). Mr. Andrus was elected president and general manager but he had no previous managerial experience.

Thus, while the Wycoff Companies labored under poor management, decreasing earnings, and increasing debt, all to the disadvantage of the minority shareholders, Zions and the estate reaped a harvest of corporate assets.

A related dispute between appellants and respondents concerning the management of corporate affairs after the death of M. S. Wycoff centered around the interpretation of Milton Stanley Wycoff's will. Mr. Wycoff's intention on the matter of succession in management clearly appears in his will. It was his desire that the trustee operate the business but that, if business conditions did not permit operation, it was within the trustee's discretion not to operate and preserve them. If they were operated, control was to be transferred to Bruce Wycoff gradually through the distribution of stock or otherwise at such time as the businesses could be properly managed and controlled by him. [Exhibit P-1 p. 4].

The direction in the will relating to Mr. Young is much more emphatic. If the trustee elected to operate any business...

> "...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 were occupying similar positions in said corporations or businesses at the time of my death, including directors and other corporate officers. However, <u>I direct my Trustee to</u>

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..." [Exhibit P-1 pp5 & 6]. (Emphasis added)

The books and records of the four companies certainly show that they were operated profitably by Mr. Young from the time of Mr. Wycoff's death until his removal by the bank, as was recognized by Mr. Spencer (Tr. 274). Apparently the only reason for Mr. Young's removal by Zions was his refusal to assist the trustee in his plan to drain off Company assets for the exclusive benefit of the Wycoff estate.

The final area of disagreement between the parties concerns the transfer of corporate stock after the death of M. S. Wycoff. An agreement dated April 26, 1965, was executed by M. S. Wycoff and his wife LaPearl, Max W. Young and his wife Audrey, and C. Leland Clayton and his wife Eugenia. The agreement recited that Mr. Wycoff, Mr. Young and Mr. Clayton were each insured by a life insurance policy with Mountain Service as the beneficiary. It was agreed that upon the death of any of the insured parties the proceeds of the policy received by Mountain Service would be used to their full extent to redeem stock owned by the deceased.

Upon Mr. Wycoff's death Mountain Service received $48,000.00 from the insurance policy. Pursuant to the agreement, Mountain Service tendered the funds to Zions as executor and demanded voting stock of Wycoff Company at book value. Zions interpreted the agreement of April 26, 1965, differently than the appellants and insisted that only non-voting stock of Wycoff Company could be transferred to Mountain Service under the agreement [Exhibit D-71]. Despite this dispute as to what stock should be transferred, Mountain Service, by letter dated May 31, 1966 [Exhibit P-40], sent the $48,000.00 in insurance proceeds to Zions Bank because the bank had indicated that it was urgently needed by the estate. The bank held the $48,000.00 without tendering any stock to Mountain Service for a year and three months before returning the money to Mountain Service [Exhibits D-4]. The money was returned by Mountain Service to Zions as required by the agreement but was again sent back on November 14, 1967 [Exhibit D-46]. Finally, after Zions had gained control of the board of Mountain Service, the money was deposited in its account [Exhibit P-41] and was eventually used in its operations. Zions never has transferred any stock to Mountain Service pursuant to the agreement of April 26, 1965, although the agreement clearly contemplated the transfer of some stock.

Before his death, M. S. Wycoff indicated his intention that Max Young receive sufficient stockholder control to insure his continued management of the Wycoff Companies, so that if and when his son, Bruce Wycoff, should elect to continue the business, he would inherit a viable, profitable and on-going enterprise. A tax protest prepared in 1962, and signed by Mr. & Mrs. Wycoff clearly shows this intention [Exhibit P-30].

> "The redemption of the Class B stock which had been purchased was determined to be necessary in order to avoid problems with respect to the succession of management. Max Young had been employed by the company for several years and had demonstrated management ability. He stated that he would prefer to start a business of his own unless he was given the opportunity to acquire an equity interest in the operations. <u>Since he was a young man, he was selected to assume management of the operations on the retirement or death of Mr. Wycoff and arrangements were made to sell or give Mr. Young sufficient stock for him, together with trustees of Wycoff's estate, to control the corporation</u>. To accomplish this, it became apparent that the Class B stock should be held in the same proportion as the Class A stock. It was agreed that the Class B stock which had been issued for cash should be redeemed in order to provide the balance required to insure the management succession program determined to be in the best interest of the companies. This adjustment chould not have been accomplished by dividend distribution." (Emphasis added)

Appellant always operated the Wycoff business with the intention of fulfilling the wishes of M. S. Wycoff and preserving a successful business for Bruce Wycoff.

At the time of his dismissal, Mr. Young was earning between $30,000.00 and $35,000.00 per year from the companies plus other benefits, including car expenses. A portion of his income was attributable to Eagle Moving Company which he had acquired in 1960. After his dismissal, he earned approximately $19,500.00 in 1968, $20,907.00 in 1969, $20,760.00 in 1970. $13,080.00 in 1971, $9,780.00 in 1972, and $13,000.00 in 1973. [Exhibit D-79].

In August of 1971, William Shea, vice-president and comptroller of the companies, offered $275,000.00 for the plaintiffs' stock interest in the Wycoff companies. The total was to be paid in annual installments of $25,000.00, with nothing down. As of December 31, 1970, the book value of the appellant's stock was $348,882.00, and as of December 31, 1971, it was $376,665.00. Taking into consideration the operating rights of the Wycoff companies, which both Mr. Young and Mr. Shea testified were the most valuable assets, appellant's interest in the companies was easily worth between $600,000 and $1,000,000. In light of these facts, Mr. Shea's offer of August, 1971, was rejected.

The only disbursements from the companies since Mr. Young's departure in 1968 have been the redemption of preferred stock for $180,000.00 in November, 1968, and

$124,439.00 in dividends paid by Company, Warehouse and Corporation in May, 1973 [Exhibits D-85, D-86 and D-87]. The occasion for each such distribution was a tax liability which the estate or trust desired to cover.

At the present time there is no policy regarding the payment of dividends by the companies. If past performance is any indication, dividends will be paid if and when Zions Bank determines that funds are required for the trust which it controls and only after all other methods of getting money from the companies to the bank have been exhausted. No consideration will be given to the needs of the minority, who have no control over an investment with a book value of at least $560,000. Appellant Max Young has invested a substantial protion of his adult life in four closely held corporations and is now locked in with no hope of either selling his minority interest at what it is worth or of having any voice in corporate affairs.

ARGUMENT

I

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE AND REPRESENT A WHOLESALE ADOPTION OF DEFENDANTS' PROPOSED FINDINGS AND CONCLUSIONS WITHOUT THE EXERCISE OF INDEPENDENT JUDGMENT.

As the record shows, the trial court's Findings of Fact and Conclusions of Law and the Judgment were prepared by defendants' counsel and were adopted, without alteration, by the court as its own. Rule 52(a), U.R.C.P., provides:

> In all actions tried upon the facts without a jury... the court shall find the facts specially and state separately its conclusions of law thereon... (Emphasis added)

It is the unquestioned duty of the trial court to make findings on all material issues raised by the pleadings, Piper v. Hatch, 86 Utah 292, 43 P.2d 700, 701 (1935), and such findings must be in conformity with the evidence presented at trial, Hathaway v. United Tintic Mines Co., 42 Utah 520, 132 P. 388, 389 (1913). While the court may seek the assistance of counsel in preparing its findings and conclusions, ultimate responsibility lies with the court which must exercise its independent judgment to evaluate all the facts without prejudice or bias. The findings must be objective, and, in equity cases, this Court retains the power to review the record and pass on the weight and sufficiency of the findings if it is debatable whether the record supports the lower court. The findings and conclusions in this case represent only one side of the evidence and are a wholesale adoption of the defendants' point of view. This court should exercise an independent review of the evidence and make its judgment on the basis of the record.

II

IT WAS ERROR FOR THE COURT TO HOLD THAT THE ACTS OF RESPONDENTS WERE NOT "OPPRESSIVE" AND A MISAPPLICATION OR WASTE OF CORPORATE ASSETS WITHIN THE MEANING OF 16-10-92 UTAH CODE ANNOTATED 1953.

Section 16-10-92 U.C.A. 1953, enacted in 1961, was taken verbatim from the Model Business Corporations Act prepared by a committee of the American Bar Association. This section provides, in part:

> 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 director or those in control of the corporation are illegal, oppressive or fraudulent; or
>
> * * *
>
> (4) that the corporate assets are being misapplied or wasted.

To the best of appellants' knowledge, there are no Utah decisions interpreting the meaning of the above quoted statute, but in light of the fact that several other states also have adopted this section of the Model Business Corporations Act, the decisions of those jurisdictions are illustrative in interpreting the meaning of this legislation.

The most ambiguous portion of this statute is the term "oppressive." In determining the legislative intent underlying this term, several concepts have been deemed important. First, the relationship between the shareholders of a closely held corporation is similar to that of partners in a partnership. All shareholders generally are engaged in the active pursuit of corporate business, the success of the business depends on maintaining a harmonious relationship among shareholders, and usually there is no recognized market for an individual shareholder's interest. See Comment, Rights of the Minority Shareholders to Dissolve the Closely Held Corporation, 43 Calif. L.Rev. 514 (1955). The meaning of "oppression" when considered in the context of a closely held corporation must be different from its meaning in the context of a publicly held corporation. The court must be free to exercise greater liberality in dissolving closely held corporations where the harm to the general public is minimal and where a "frozen" minority shareholder may not easily withdraw his investment as in a partnership.

Second, the directors and majority shareholders of a corporation owe a fiduciary duty to all shareholders and the "fiduciary relationship" among shareholders is an important element of oppression in an action under the Utah statute. See Note, Oppression as a Statutory Ground for Corporate Dissolution, 1965 Duke.L.J. 128, 132-33.

> "The devolution of unlimited power imposes on the holders of the majority of the stock a correlative duty, the duty of a fiduciary or agent, to the holders of the minority of the stock, who can act only through them --the duty to exercise good faith, care, and diligence to make the property of the corporation produce the largest possible amount, to protect the interests of the holders of the minority of the stock, and to secure and pay over to them their just proportion of the income and of the proceeds of the corporate property. A dominant or controlling stockholder is declared to be a fiduciary. 18 Am.Jur.2d, Corporations §497

See also, Tower Hill-Connellsville Coke Co. v. Piedmont Coal Co., 64 F.2d 817 (4 Cir. 1933). A reviewing court must carefully evaluate the exercise of these fiduciary duties in deciding whether certain conduct is "oppressive."

Third, all the shareholders of a corporation have a right to be treated equally and fairly; benefits accruing to some stockholders, and not to others, can be grounds for dissolution. As one commentator states, "[t]he 'oppression' required by [the Model Act] has normally been read to mean abuse of corporate position for private financial gain at the expense of other stockholders." Note, Dissolution--Denial of Right to Participate in Management of Close Corporation Entitles Shareholder to Liquidation, 74 Harv.L.Rev. 1461, 1462 (1961); Long v. Wilson Stove & Mfg. Co., 277 Ill.App. 57 (1934). Where a minority shareholder has lost any effective voice in corporate affairs, the integrity of his investment will be in jeopardy unless the majority shareholders operate the business with fairness and equal concern for all shareholders.

Finally, this statute was intended to provide remedial relief for abused shareholders. Even before these statutes were enacted, courts frequently exercised their equitable power to dissolve corporations in which the majority shareholders had taken advantage of the minority. See, Hornstein, A Remedy for Corporate Abuse--Judicial Power to Wind Up a

Corporation at the Suit of a Minority Stockholder, 40 Colum. L.Rev. 220 (1940); Anno., "Inherent power of equity, at instance of a stockholder, to appoint a receiver for, or to wind up a solvent, going corporation, on ground of fraud, mismanagement or dissensions," 43 A.L.R. 288 (1926); 61 A.L.R. 1212 (1929); 91 A.L.R. 665 (1934). The remedial, equitable nature of this action forms the basis for the current statute and should be considered when seeking legislative intent.

While the definition of "oppressive" conduct is inherently flexible and permits substantial judicial latitude, the cases have fleshed out the meaning of this term.

> ...[S]ome substance has been injected into these terms [oppression, misconduct, gross mismanagement] by decisions which have held that majority actions such as plundering the corporation, siphoning off profits through excessive salaries to themselves as officers, and running the corporation for the sole benefit of the majority, constitute misconduct or gross mismanagement justifying dissolution.

Note, Oppression as a Statutory Ground for Dissolution, supra at 131 & n. 18. See Tri-City Elec. Service Co. v. Jarvis, 206 Ind. 5, 185 N.E. 136 (1933) (majority shareholder misappropriated assets, refused to pay dividends, excluded minority from management); Klugh v. Coronula Mining Co., 66

S.C. 100, 44 S.E. 566 (1902) (majority shareholder paid himself large dividend, neglected the corporation, lost customers for the corporation); Hampton v. Buchanan, 51 Wash.155, 98 P. 374 (1908) (majority shareholder raised own salary to absorb profit, deprived minority of a voice in management). The Commonwealth cases take a very liberal view of a minority shareholder's rights and only require a showing of "justifiable lack of confidence" to support a decree of dissolution. E.g. Lock v. John Blackwood, Ltd., [1924] A.C. 783. The very purpose of a corporation is to make a profit (§ 16-10-2(a), U.C.A. (1953) and, when the majority stockholders use the corporation as a vehicle for any other purpose, the minority have justifiable grounds for seeking dissolution.

The most commonly used definition of "oppressive" conduct was provided by the Illinois Supreme Court in Central Standard Life Insurance Company v. Davis, 10 Ill.2d 566, 141 N.E. 2d 45 (1957):

> "The word 'oppressive' does not carry an essential inference of imminent disaster; it can, we think, contemplate a continuing course of conduct.
>
> "Plaintiff argues that the word 'oppressive' does not necessarily savor of fraud, and that the absence of 'mismanagement, or misapplication of assets' does not prevent a finding that the conduct

> of the defendants has been oppressive. We agree with that interpretation, and we reject defendants' argument that the word is substantially synonymous with 'illegal' and 'fraudulent.' Misapplication of assets or mismanagement of funds are not, as we read the statute, indispensable ingredients of 'oppressive' conduct." 141 N.E. 2d at p. 50.

Mere continued corporate existence in the absence of prospective profitable operation might in an appropriate case constitute oppression. The overall emphasis seems to be on the "cumulative effects of . . . many acts and incidents, and their . . . continuing nature", Gidwitz v. Lanzit Corrugated Box Co., 20 Ill.2d 208, 221, 170 N.E.2d 131, 138 (1960). The recital of numerous acts of misconduct involving the sole asset of the corporation, coupled with disproportionate loss to the minority, may constitute a claim of "oppression." "Thus, an abuse of corporate position for private gain at the expense of the stockholders is 'oppressive' conduct. . . . [A]s to authorize the dissolution of the corporation. . . ." Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 394 (Ore. 1973)

In White v. Perkins, 213 Va. 129, 189 S.E.2d 315 (1972), the Virginia Supreme Court upheld a lower court finding that the acts of a majority stockholder were oppressive. White owned 55% of the stock of P & W Oil Company and Perkins owned the remaining 45%. The corporation had filed a Subchapter

S election and thus its profits were attributed directly to the shareholders for federal tax purposes. During fiscal 1968-69 the corporation showed earnings of $10,000.00 for federal tax purposes and White & Perkins were each required to report their portion thereof. White, however, refused to pay a dividend despite the fact that Perkins was forced to pay federal tax on the income. White also owned a service station which purchased supplies from the corporation on open account. He allowed the outstanding balance owed by the service station to the corporation to go from nothing to over $12,000.00 apparently after Perkins had indicated that he would attempt to dissolve it. Although White had initially agreed to lease his service station to the corporation, he later refused to do so, but at the time that Perkins sought dissolution, White billed the corporation for rental on the service station. The Virginia Supreme Court agreed with the lower court that these acts were oppressive and indicated that the corporation should either be dissolved or a custodian appointed, these being the two alternatives provided for by Virginia's statute.

The United States Court of Appeals for the Fourth Circuit held that unfair treatment of minority preferred shareholders was grounds for the appointment of a receiver in Tower Hill Connellsville Coke Co. v. Piedmont Coal Co., 33 F.2d 703 (4 Cir. 1929), and eventually ordered dissolution and liquidation because of the activities of the majority. Tower Hill Connellsville Coke Co. v. Piedmont Coal Co., 64 F.2d 817 (4 Cir. 1933). The action was brought by the holders of preferred stock, entitled to a 6 percent cumulative annual dividend which had not been paid for a number of years. No dividend could be paid to the common stockholders until the preferred dividend had been paid or set aside. Of course, in liquidation the preferred stock was entitled to be paid at par plus any cumulative dividends which were in arrears. Although the preferred stock had the right to vote, the amount of issued and outstanding common stock prevented the preferred shareholders from having any voice in operating the company.

The only asset of the corporation was stock in a Pennsylvania corporation which owned and operated a coal mine and coke plant.

Two considerations led the court to hold that the minority preferred shareholders were not being treated "fairly": first, the purchase of preferred shares at very low prices and retirement thereof while dividends thereon were greatly in arrears, and second, the contention by the company that all of the assets of the subsidiary were necessary to improve the coke plant rather than pay dividends. Additional borrowing was also required for this purpose. The court said that if the company had funds with which to purchase preferred shares at a very low price and retire the same, it should have funds with which to pay the 6 percent cumulative dividend. Under these circumstances the court authorized the appointment of receivers to go into the Pennsylvania courts and ...bring all necessary and proper actions to protect the interests of the plaintiffs...". F.2d at p. 709.

By the time the second Tower Hill case reached the court, the corporation had dissolved the Pennsylvania subsidiary and distributed its assets to Tower Hill. Both before and after this transfer the Pennsylvania corporation and Tower Hill exchanged and sold properties to corporations controlled by the "Hillman interests," which also controlled Tower HIll and the Pennsylvania corporation. According to the court all of these enterprises had interlocking directors and this "board apparently had no independent judgment of its own and was merely used by J. H. Hillman, Jr., as a willing instrument to carry out whatever he dictated." 64 F.2d at p. 820.

Referring to the minority stockholders the court said:

> "We have here no desire of stockolders to escape the consequence of their stock purchase nor desire to withdraw from a bad bargain, but an earnest effort by these plaintiffs to rescue at least some part of their investment from an arbitrary, unjust, and tyrannical domination by a ruthless majority - a majority that acts entirely without regard to that trust relationship that exists between a controlling majority and a minority in a stock company. While the controlling majority are not to be deemed trustees in any technical sense, they have a real duty to protect the interests of the minority when they undertake to run a corporation without giving them (the minority) a voice in its management. The law governing the control of corporations by a majority of stockholders is based upon fair dealing and a proper conduct of the affairs of a corporation with due respect to the rights of the minority by those in control. These elements of justice we do not find in this case." 64 F.2d at p. 824.

The Court went on to say:

> "When several persons have a common interest in property, equity will not allow one to appropriate it exclusively to himself, or to impair its value to the others. Community of interest involves mutual obligation. <u>Persons occupying this relation towards each other are under an obligation to make the property or fund productive of the most that can be obtained from it for all who are interested in it, at the expense of those whose rights in it are the same as their own, are unfaithful to the relation they have assumed, and are guilty, at least, of constructive fraud</u>." 64 F.2d at p. 826. [Emphasis added].

See also, <u>Compton v. Paul K. Harding Realty Co.</u>, 6 Ill.App.3d 488, 285 N.E.2d 574 (1972); <u>Gray v. Hall</u>, 10 Ill.App.3d 1030, 205 N.E.2d 506, 509 (1973).

Henn, in his treatise on Corporations sums up the relationship between fiduciary duty and minority oppression as follows:

> Since directors, with respect to their exercies of their management functions, owe fiduciary duties to the corporation to exercise unbiased judgment in the best interests of the corporation as a whole, any attempt by directors to favor one intracorporate group to the detriment of another breaches such duties to the corporation and, in a sense, violates the implied terms in the share contract between the corporation and any oppressed shareholder to the effect that corporate affairs will be managed in the best interests of the corporation.
>
> Controlling shareholders, especially when approving extraordinary corporate matters requiring shareholder approval, are usually subjected to fiduciary duties. Such fiduciary duties preclude "fraud on the minority" or "oppression of the minority", or fraudulent, bad faith, or unfair results. In close corporations, some fiduciary duties among the shareholders, possibly analogous to those among partners, have been recognized. Henn, Law of Corporations, §240, (West,2d ed. 1970) (Emphasis added)

The above mentioned principals should guide this court in its interpretation of the statute and in its evaluation of the evidence. The trial court, however, concluded that:

> Defendant Wycoff corporations and their Board of Directors did not act in an improper or oppressive manner in violation of the rights of the plaintiffs as minority stockholders under Section 16-10-92 Utah Code Annotated 1953, as amended, or at all. [Findings of Fact and Conclusions of Law, Conclusion No. 1]

It cannot seriously be contested, as the record in this matter illustrates, that Zions Bank directed the operations of the Wycoff companies with two principal objectives in mind: first, to obtain funds from the companies whenever such funds were required by Zions as trustee to satisfy estate liabilities, and second, to preserve the ownership of the corporations for future transfer to Bruce Wycoff. While the latter objective was mentioned in M.S. Wycoff's will, the bank never gave any serious consideration to the other provisions of the will which directed that Max Young was to remain as chief executive and that the businesses were to be continued in their historical manner.

As controlling shareholder and director of these companies, Zions clearly abdicated its primary obligation, namely, to maximize profits for <u>all</u> shareholders and distribute those profits in the form of regular dividends. In all its actions, Zions operated the corporations without regard to the interests of the minority shareholders, and instead, used the corporations as a vehicle for siphoning off assets for the sole and exclusive benefit of the Wycoff estate. Respondents' conduct is analogous to those cases where controlling shareholders and/or directors pay themselves excessive salaries, waste corporate assets, or otherwise deal in corporate affairs for their own self interest and in violation of the interests of the other corporate owners. These cases have almost uniformly held that such conduct constitutes oppression, misconduct, gross mismanagement, and, in some cases even fraud, justifying dissolution of the corporations at the request of the abused minority shareholders. The instant case is the same.

On various occasions, Zions compelled the premature redemption of debentures held by majority shareholders and further redeemed preferred stock to generate income for the estate. Zions also compelled the corporation to borrow funds at higher than normal interest rates to effectuate these redemptions. Under 16-10-5 U.C.A. 1953, the repurchase of shares by a corporation is permitted "only to the extent of unreserved and unrestricted earned surplus" without a two-thirds vote of all shares. And 16-10-44 U.C.A. 1953 further restricts the payment dividends to "unrestricted earned surplus." The intent of these sections is to prohibit distributions of corporate assets which would damage the corporation's financial position to the detriment of corporate creditors and non-distributee owners. The distributions and purchases made at the direction of Zions were contrary to the spirit and intent of these statutes. Even if there was some earned surplus on the books to justify the stock dividend, redemption of debentures and repurchase of stock, these earnings were needed to enable the corporations to obtain credit and satisfy the needs of growth. Moreover, Zions distributions were not intended to benefit all shareholders, but were designed for the estate's exclusive benefit.

Perhaps if Zions was the <u>sole</u> owner of these corporations its conduct would have been excusable, since, in that event, only their own interests would have been risked. In this case, however, appellants made substantial investments of time, money and ability in these businesses over a period of 20 years, they owned 25 percent of the corporations and had a right, as partial owners, to have the corporations managed in such a way as would increase the value of thier investments. They had the right to see the corporations grow and prosper. Instead, Zions operated these businesses as if it were the only owner; as if the interests of the estate and the corporations were "parallel"; as if corporate assets were its exclusive property; as if the minority shareholders were non-existent. It was Zion's announced purpose to "slow the growth" of the corporations so that it could drain off assets to satisfy its own needs. Clearly this is the kind of "oppressive" conduct contemplated in 16-10-92 U.C.A. 1953 and against which the statute was enacted as a form of relief.

The largest distribution from the companies ($180,000.00 in 1968) had disastrous tax consequences for the minority. From 1968 until 1973 (5 years) nothing was paid the minority and the companies obviously suffered financially from the large 1968 payment. Furthermore, $50,000.00 in long-term debentures bearing a low rate of interest were prematurely redeemed from the estate in December, 1968; another $56,000.00 in those same kind of debentures were prematurely redeemed by the companies between 1968 and 1973. These transactions occured without any apparent business justification while the minority received no dividends, other corporate debt was not satisfied in the same manner, and the companies were forced to incur additional debt at higher interest rates. Only when the bank was in need of tax money, was a distribution declared which again had adverse tax concequences for the minority. Moreover, as the record indicates, Zions had other non-oppressive alternatives for satisfying the estate's tax liabilities, but it steadfastly refused to exercise these alternatives.

The grossly inadequate offer of $275,000.00 by William Shea to Mr. Young for the plaintiffs' stock in the companies in 1961 evidences an attempt to squeeze out the minority. The offer included no down payment and small annual payments. It was well below the book value of the stock and both men were well aware that the most valuable asset of Wycoff Company, its operating authorities, were hardly ever reflected in the book value of the stock.

The failure of the bank to transfer any stock to Mountain Service pursuant to the April 26, 1965, agreement demonstrates its determination to run the Wycoff companies as it saw fit regardless of contractual or legal obligations imposed upon it. This is to say nothing of its failure to comply with the duty imposed upon it by M. S. Wycoff's will to employ Mr. Young.

In close corporations, not only do the normal fiduciary duties of controlling shareholders apply, but, because of the partnership-like relationship among the owner-director-manager shareholders, a higher, more carefully scrutinized standard of fiduciary responsibility is required. While such fiduciary duties of controlling shareholders do not disqualify them from exercising their voting rights with respect to various matters, they must do so with fairness, equality and due regard to the rights and interests of the minority. The evidence in this case demonstrates that respondents have not only flagrantly abused and violated their fiduciary duties, but are likely to continue to do so in the future. As a result, appellants are entitled to reestablish the integrity of their ownership interest through a dissolution of the Wycoff corporations.

III

IT WAS ERROR FOR THE COURT TO REFUSE TO ENFORCE THE PROVISIONS OF THE M. S. WYCOFF WILL WITH RESPECT TO THE RETENTION OF MAX YOUNG.

Respondents argue that the control of the corporation is vested in the board of directors whose right and duty to appoint or discharge supersedes any wish or direction expressed in the will of M. S. Wycoff. Such a contention is contrary to the law as established in those few cases where this issue has been adjudicated. In the case of In re Pittock's Will, 102 Ore. 159, 199 P. 633 (1921), a majority shareholder of a newspaper corporation bequeathed his stock to trustees for a period of years, during which period it should be held intact and none sold. The will expressly provided that the trustees should vote the stock in favor of themselves as directors of the corporation and that Marden should be retained as manager and Piper as editor. The court in reference to the testator's right to make the above provisions in his will, stated:

"The testator was the owner in his individual right of a majority of the stock of the corporation. He had a right, as an attribute of property exercised in testamentary form, to direct how and for whom the stock should be voted. No one can rightly say that, if Pittock living had announced his intention steadily for 20 years to vote for certain directors who would in turn carry out certain policies as to employees, he could have been enjoined from the consummation of his purpose. <u>How, then, can it be said that he cannot direct his trustees to do that same thing after his death, for a limited period</u>?

* * *

In this instance, during his lifetime the testator could and probably did vote his stock so as to secure the election of directors to his liking. From the testimony it is plain that Mr. Pittock desired to perpetuate, for a time, at least, the existing personnel of the editorial and managerial departments of his corporation, the Oregonian Publishing Company, of which he was the principal owner, and to maintain the standing of the Oregonia, which under his direction had attained wide influence in the newspaper world.... It was certainly lawful for the living owner of two-thirds of the stock so to shape the directorate as to accomplish this purpose. <u>Equally after his death, so far as he lawfully could direct by testamentary disposition of his property, it was competent to promote the same end by the same means</u>." [Emphasis added]

The argument was then made that to give effect to the intention of the testator would be in conflict with the trustees' obligations as directors to carry out the real interests of the corporation. The court considered whether the words "desire" and "request," as used in the will directing the trustees to retain the employees, were precatory but indicated that even if mandatory the provision was not thereby illegal. The court stated:

> "More than all that, it is not shown or intimated that the agreement, if there was one, to employ Morden and Piper, would be harmful to the best interests of the corporation or hurtful to the interests of the other stockholders, or that it was based upon any benefit private or personal to Pittock. Their long retention in the service of the corporation attests their ability and faithfulness, and in the light of the best authorities it was legitimate for the controlling stockholder so to shape the direction of his property and his testamentary instructions to his trustees as to express his best judgment and give it effect in corporate operation through the regular channel of a board of directors elected by that stock." [Emphasis added]

M. S. Wycoff's shareholdings in each of the four subject corporations represents a clear majority of the voting stock which, had he been alive, would undoubtedly be the basis for sufficient voting power to carry out his wishes. When the stock of Max Young and his family are coupled with that of the trustee, they hold between 80 percent and 86 percent of the stock in the four subject corporations.

For similar holdings, see In Re Peinston's Estate, 196 Misc. 590, 92 N.Y.S.2d 87 (1949); and Myers v. Pink, 42 Ill.App.2d 230, 191 N.E.2d 659 (1963).

Although it would be impractical for Max Young to reassume office as the chief executive of the Wycoff companies, the conduct of the bank in disregarding its legal duty to employ him further demonstrates its determination to run these companies for the sole and exclusive benefit of the trusts which it controls and to preserve them for Bruce Wycoff. The interests of minority shareholders play no part in bank decisions.

IV

IN WAS ERROR FOR THE TRIAL COURT TO FAIL TO ENFORCE OR GIVE ANY EFFECT TO THE APRIL 26, 1965, AGREEMENT CONCERNING THE TRANSFER OF STOCK TO MOUNTAIN SERVICE CORPORATION THROUGH THE USE OF INSURANCE PROCEEDS.

On April 26, 1965, M. S. Wycoff, Max Young, C. Leland Clayton, their wives, and Bruce Wycoff executed an agreement whereby the life insurance proceeds from a Group Life Insurance Policy on the lives of M. S. Wycoff, Max Young, C. Leland Clayton and Bruce Wycoff would be paid to Mountain Service, Inc., as beneficiary, upon the death of any one of the insureds and "said proceeds will be used to redeem, to the extent of such proceeds, <u>the stock</u> that each deceased ...owned in said Four Corporations at the time of his death." [Emphasis added] The agreement, by its terms, was binding on the parties successors in interest, including without limitation, any decedent's estate. [Exhibit P-3] The agreement further recited that "[t]he purpose and consideration for this action is well known, understood and mutually agreed to by the parties hereto, the receipt, sufficiency and validity of said consideration being expressly acknowledged by each and all of the parties hereto."

After M. S. Wycoff's death, $48,000 in insurance proceeds were paid to Mountain Service, Inc. None of these proceeds have ever been used for the redemption or purchase of <u>any</u> stock. A dispute arose between appellants and respondents concerning the <u>kind</u> of stock which should be redeemed; respondents contended that it was preferred and voting stock in the ratio of 14:1, and appellants contended that only voting stock should be redeemed. Admittedly, the agreement is ambiguous with respect to the <u>kind</u> of stock contemplated for the redemption, and parol evidence was admitted on this question. There is no dispute, however, that the redemption of <u>some</u> stock was contemplated by the parties to the agreement. The agreement has never been modified or recinded by the parties thereto.

Generally, an agreement among shareholders to combine in the exercise of their shareholder functions is valid on the ground that shareholders may do collectively what they can do individually so long as there is an absence of fraud or some other illegal objective. See, Henn, <u>The Law of</u>

Corporations, §267 (West, 2d ed. 1970); 19 Am.Jur.2d Corporations §684. These agreements may be judicially enforced as contracts by a party thereto. The only exception to this general rule is where shareholders attempt to interfere with the direction of the board of directors concerning the proper management of the corporation, but even in these cases where the interference is slight, there is no damage to the corporation or to the public, and the shareholders are also the directors of the corporation, the agreements have been recognized as valid and enforceable in many jurisdictions. See e.g., Clark v. Dodge, 269 N.Y. 410, 199 N.E. 641 (1939). Henn, *supra* at p. 532, summarizes the subject as follows:

> Agreements by shareholders *qua* shareholders (absent fraud on the minority or other illegal object) involve no impingement on the "statutory norms" and are valid. Agreements which go beyond this and only slightly impinge on the "statutory norms" are, under the "no damage" test valid if they do not injure creditors, the public, or the shareholders; the public is not damaged by slight impingements on the "statutory norms"; shareholders clearly are not damaged if they *all* are parties to the agreement, and possibly are not damaged even when less than all of the shareholders are parties.

In the instant case, the parties to the April 26, 1965, agreement dealt only with the transfer of their individually owned property. They elected to use Mountain Service as a vehicle to effectuate the desired transfer but also provided Mountain Service with sufficient funds (the insurance proceeds) to effectuate this transfer. The parties were also directors of Mountain Service, and there would have been no damage whatsoever to Mountain Service in complying with the terms of the agreement. Each of the parties transferred their right to select a beneficiary in consideration for compliance with the agreement and each party has a right to demand that the agreement be enforced according to its terms. If those terms are ambiguous, then this court should seek the intent of the parties and enforce the agreement according to that intention, or remand to the trial court for a finding on that issue.

V

LIQUIDATION AND DISSOLUTION OF THE WYCOFF COMPANIES IS AN APPROPRIATE REMEDY TO REDRESS THE OPPRESSIVE CONDUCT OF THE RESPONDENTS.

In determining whether dissolution and liquidation is an appropriate remedy to rectify oppressive conduct on the part of majority shareholders, this court should first, look to the facts existing at the time the complaint was filed; Sullivan v. Central Land Co., 173 Ala. 426, 55 So. 612 (1911); second, determine whether dissolution will provide effective relief to the minority stockholders; and lastly consider whether there is some alternative solution which will be as effective for the minority. Using this analysis, dissolution of the Wycoff companies appears to be the most effective remedy for the appellants.

Mr. Shea testified that the primary purpose of organizing four independent corporations was to achieve tax advantages and that this multi-purpose tax advantage had been dissipated as of the end of 1974 (Tr. 364). Mr. Shea further testified that the business and operations of Wycoff Warehouse and Wycoff Corporation are somewhat autonomous in that they are not closely connected with the business of Wycoff Company and Mountain Service, except for the common use of facilities, and that, with proper lease arrangements, the operations could be severed from one another in such a way as to permit their continued operation without too much upset (Tr. 364-65). Mr. Young's testimony also supports this conclusion (Tr. 429-31). In fact, at one time Shea attempted to sell the warehousing corporations to generate needed captial but had limited success because of the high corporate debt burden (Tr. 261). A dissolution arrangement could easily be formulated to sever the control of the four corporations and distribute the assets from one or more of these corporations to appellants in exchange for their stock in the remaining corporations. Of course, any additional boot would have to be paid by the respective parties.

A second alternative would be to liquidate the assets of all the corporations and distribute these assets to the shareholders in exchange for their stock. This remedy is less advantageous since it would result in the discontinuation of four on-going businesses but it would result in the most equitable apportionment of interests and could be designed to minimize any adverse consequences. Finally, the court could appoint an independent accountant to appraise the worth of appellant's stock and then make arrangements to compel the purchase of appellants stock by the four companies at its true value.

If none of these alternatives is chosen, appellants will be left without any way of protecting their investment in these corporations; an investment which represents appellants' contribution of time, energy, money, and ability to the corporate business over a period of more than 20 years. Appellants are not donee beneficiaries of their stock; they earned and paid for this interest through hard work, fidelity to corporate affairs, and the forebearance of alternative investments and employment. Appellants' close association with these companies served to protect and enhance their investment as well as the investments of the other shareholders. Now appellants have been ousted from corporate management, have lost any effective voice in corporate affairs, and are victims of a single-minded majority who seek only to use the corporations to further the interests of the majority.

Appellants have no reasonable expectation of future dividends; they must look forward to continued mismanagement of corporate affairs, disinterest on the part of management with the pursuit of profits, and unjustified drains on corporate revenues. The minority are locked in to a corporate structure over which they have no control, which is not interested in enhancing the value of their investment, and which refuses to purchase their otherwise unmarketable stock at its true value. If appellants have no remendy, they will be forced to helplessly watch the value of their 20 year investment dwindle. Thus, an appropriate remedy in this situation would be to break up these four corporations, allow appellants to operate one or more of the corporations at a profit to protect their interests, and allow the majority shareholders to operate the remaining companies for whatever purpose they desire. In this manner, the interests of both parties will be satisfied.

RELIEF TO WHICH APPELLANTS ARE ENTITLED

As admitted by respondents, no stock has ever been transferred to Mountain Service pursuant to the agreement of April 26, 1965. The court should exercise its power to reverse the district court and order respondents to comply with the terms of that contract and further direct the purchase of such stock as this court, or the district court, finds was contemplated in the agreement by Mountain Service.

Because of the breach of their duty under the will of M. S. Wycoff to employ Max Young, this court should reverse the district court and award Young the actual damages suffered by him. These damages should be measured by the difference between his income while an employee of the companies and his income after his discharge.

Finally, this court should reverse the district court and, pursuant to 16-10-93 U.C.A. 1953 appoint a liquidating receiver with authority to collect the assets of the corporations, and, under the direction of the district court, distribute the assets in cash or in kind as set for in 16-10-93.

CONCLUSION

The manifest injustice imposed upon the appellants by the continued operation of the Wycoff companies under the direction of their boards of directors controlled by respondent Zions can only be remedied by the intervention of this court pursuant to the equitable powers vested in it by the provisions of 16-10-92 U.C.A. 1953. This provision was enacted to protect minority shareholders from oppressive acts of those in control of corporations. There is no requirement that it be shown that irreparable injury is being suffered by the corporation because of the acts of those in control, but merely that their actions are prejudicial to the interests of the minority. The actions of the respondents clearly are not directed at obtaining the best possible profit for the corporations and thus the largest return to their shareholders. Rather, the companies are being operated for the sole and exclusive benefit of the trusts controlled by Zions First National Bank. Any income received by appellants from the corporations is merely an incidental result of the cash requirements of the trusts--and such income comes only after the bank has exhausted all other available avenues of draining funds from the corporations.

Unless this court intervenes in this situation, the appellants will never have any voice in the manner in which the companies are operated. As such they will have no control over their most valuable asset, and because of the closed nature of the corporations they will never be able to dispose of their stock at any reasonable price.

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MAILING CERTIFICATE

Mailed two copies of the foregoing this 24 day of September, 1976, to J. Thomas Greene, Esq., Callister, Greene & Nebeker, 800 Kennecott Building, Salt Lake City, Utah 84133, and to Harry D. Pugsley, Esq., Watkiss & Campbell, Suite 400, 315 East Second South, Salt Lake City, Utah 84111, respondents' attorneys, postage prepaid.

/S/ R. MONT McDOWELL