Utah Supreme Court Review — 1967

Utah Supreme Court Review — 1967 will offer critical analyses of recent noteworthy cases.[1] Prior to this issue, the *Utah Law Review* annually has surveyed decisions rendered by noting significant developments within a topical framework.[2] Such an approach, which presented the most important opinions under each heading, demanded a broad, cursory treatment of supreme court case law. The *Utah Supreme Court Review* provides a more restrictive selection, but greater in-depth analysis of decisions representing timely legal problems and illustrating applications of the court's methods of reasoning which may bear on analogous cases arising in the future. Thus, a narrower focus has been substituted for an attempt to marshal the court's work into a survey.[3]

The discursive process employed in structuring the *Review* was to outline the contexts in which the selected cases developed, to explore the problems they created, and to indicate what problems the court claimed to, and did, solve and the import of the solutions advanced. Comments on Utah decisions utilizing a similarly expanded problem approach, which were formerly grouped separately as case notes appearing in each issue of the *Utah Law Review*, will hereafter be included in the annual *Utah Supreme Court Review*. A comprehensive, inclusive review of Utah law will now be presented in one issue.

[1] The court decided a total of 170 cases during 1967, compared with 127 cases in 1966. This increase in opinions handed down departs from the trend during the past two years, when the court decided fewer cases than in each previous year.

[2] The *Survey of Utah Law — 1966* treated decisions of federal courts having some impact on Utah law. 1967 UTAH L. REV. 408, 419, 431. No such decisions were found for 1967.

[3] Tables indicating the court's work load, which were previously included in the survey, are omitted this year, because these tables did not appear to be particularly useful to the Utah practitioner.

Unavoidable Accident — Jousting With Windmills?

In backing out of a friend's driveway, the defendant in *Woodhouse v. Johnson*[1] observed a little girl, heard a cry, and stopped her car. Defendant then drove forward approximately the same distance as she had backed, stepped from the car, and discovered plaintiff's infant son lying in the gutter portion of the street to the rear of the car. Alleging defendant's negligence in running over his son twice, plaintiff brought suit to recover for the injuries suffered by the child. Defendant requested and received an instruction on unavoidable accident, and the jury returned a verdict of no cause of action. On appeal, the Utah Supreme Court held that the giving of an unavoidable

[1] 20 Utah 2d 210, 436 P.2d 442 (1968). Defendant drove into the friend's driveway, stopped and conversed with the friend for about five minutes. Record at 216. After the friend left the car, defendant looked over both her right (*Id.* at 220) and left (*Id.* at 219) shoulders, although she did not glance in the left exterior rear view mirror (*Id.* at 219), and, seeing nothing, started to back her car out of the driveway.

accident instruction does not constitute prejudicial error per se and is appropriate in those "unusual and unexpected occurrences" where the element of negligence is absent, provided the parties have had the issues of fact and law presented to the jury in a clear and understandable manner.

Originating as an exception to the theory of strict liability at common law,[2] unavoidable accident[3] has not only remained a part of the law in spite of the decline of strict liability and the attendant rise of liability founded upon fault,[4] but its scope of application has also been expanded.[5] In con-

[2] *See* Weaver v. Ward, 80 Eng. Rep. 284 (K.B. 1617).

[3] An unavoidable accident has been defined as "an occurrence which was not intended, and which, under all the circumstances, could not have been foreseen or prevented by the exercise of reasonable precautions." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 29 (3d ed. 1964) (footnote omitted). The definition, however, does not indicate which party or parties must be determined to be free of negligence. A majority holds that the requirement of unavoidability is satisfied only if none of the parties to the accident are found negligent. *E.g.*, Wright v. Lincoln City Lines, 163 Neb. 679, 81 N.W.2d 170 (1957). A minority rules that only the defendant need be free of negligence. *E.g.*, State v. Greaves, 191 Md. 712, 62 A.2d 630 (1948).

[4] The industrial revolution was a major factor contributing to the decline of strict liability and the rise of fault. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 12.2 (1956).

Lack of negligence, as a defense, first succeeded in England after passage of the Supreme Court of Judicature Act of 1873, 36 & 37 Vict., c. 66, in the case of Holmes v. Mather, L.R. 10 Ex. 261 (1875). A landmark case in English law was Stanley v. Powell, [1891] 1 Q.B. 86, involving a hunting accident in which defendant's shot glanced off a tree and struck plaintiff. The jury determined that defendant has acted reasonably in firing at a pheasant, and the court attached no liability to his act.

The strict liability theory came to America with the colonists; and its pattern of development roughly paralleled that of England, although here the shift to a fault theory occurred somewhat earlier. *See* Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850). The ramifications of the shifts are indicated by comparing Lambert v. Bessey, T. Ray. 421 (1681) with *Brown*.

In *Lambert*, the court stated:

> In all civil acts the law doth not so much regard the intent of the act or, as the loss and damage of the party suffering. . . . If a man assault me and I lift up my staff to defend myself and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason is because he that is damaged ought to be recompensed.

quoted in Ames, *Law and Morals*, 22 HARV. L. REV. 97, 98 (1908).

Brown arose when the defendant, who had interfered in a dog fight by raising a stick to ward off the dogs, accidentally struck a man. The court decided that there was no liability. *Brown* is now uniformly followed throughout the United States.

[5] Originally, the scope of the exception was restricted to accidents that were absolutely unavoidable. With the advent of the fault theory, the scope of the exception was broadened to include accidents that were unavoidable although due care was exercised. The initial development of unavoidable accident explains why, on occasion, several other terms have been used and are held to be synonymous with unavoidable accident. "Inevitable accident." *E.g.*, Hunt v. Whitlock's Adm'r, 259 Ky. 286, 290, 82 S.W.2d 364, 366 (1935). "Mere accident." *E.g.*, Knox v. Barnard, 181 Kan. 943, 951–52, 317 P.2d 452, 458 (1957). "Pure accident." *E.g.*, *id.* Unavoidable or inevitable accident and the expression "act of God" have sometimes been used interchangeably. Two early New York decisions would distinguish the terms:

> The expressions "act of God" and "inevitable accident" have sometimes been used in a similar sense, and as equivalent terms; but there is a distinction. That may be an "inevitable accident" which no foresight or precaution of the carrier could prevent; but the phrase "act of God" denotes natural accidents, that could not happen by the intervention of man — as storms, lightning and tempest; the expression excludes all human agency.

Merritt v. Earle, 29 N.Y. 115, 117, 86 Am. Dec. 292, 293–94 (1864); *accord*, Redpath v. Vaughan, 52 Bar. 489, 499 (1868).

Arguably, the extension of the exception to include accidents unavoidable by the exercise of care is unwise, because an accident avoidable by the use of a high degree of care is not really an unavoidable accident. Rees, *Unavoidable Accident — A Misunder-*

temporary tort law, unavoidable accident is primarily significant as a jury instruction,[6] but has some importance as a matter of pleading[7] and proof.[8] The instruction currently meets with a mixed reception. One group of jurisdictions — sixteen in number — approves the instruction[9] as simplifying the negligence instructions and pointing out to the jury that not all accidents involve negligence. A second group — ten in number — approves with reservation.[10] A third group disapproves the instruction as duplicating the negli-

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stood Concept, 5 ARIZ. L. REV. 225, 228 (1964); *see* notes 48 & 49 *infra* and accompanying text.

[6] For a discussion of unavoidable accident as a jury instruction see Annot., 65 A.L.R.2d 12 (1959).

[7] Neither rule 8(c) of the Federal Rules of Civil Procedure nor rule 8(c) of the Utah Rules of Civil Procedure definitively indicates whether unavoidable accident must be affirmatively pled. If a plea of unavoidable accident is equated with a plea of non-negligence, apparently a general denial would be sufficient to put the matter in issue. *Cf.* 2 F. HARPER & F. JAMES, *supra* note 4, at 748 & n.11. If, on the other hand, a plea of unavoidable accident is interpreted as setting up an affirmative defense, the matter would have to be pled in order to raise the issue, as the following language in rule 8(c) of the Utah Rules of Civil Procedure would seem to suggest: "In pleading to a preceding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense. . . ." *See* Rees, *supra* note 5, at 234.

[8] *See* 10C BLASHFIELD'S CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 6698 (perm. ed. P. Matthews 1957).

[9] *E.g.*, Dietz v. Mead, 52 Del. 481, 160 A.2d 372 (1960); Retty v. Troy, 188 So. 2d 568 (Fla. Dist Ct. App. 1966); Ware v. Alston, 112 Ga. App. 627, 145 S.E.2d 721 (1965); Knox v. Barnard, 181 Kan. 943, 317 P.2d 452 (1957); Owen v. Moore, 166 Neb. 226, 88 N.W.2d 759 (1958); Grubb v. Wolfe, 75 N.M. 601, 408 P.2d 756 (1965); Carvel v. Underwood, 51 Misc. 2d 863, 273 N.Y.S.2d 918 (Sup. Ct. 1966); Reuter v. Olson, 79 N.D. 834, 59 N.W.2d 830 (1953); Ashworth v. Morrison, 26 Ohio Op. 2d 25, 196 N.E.2d 465 (Ct. App. 1963); Peterson v. Sapp, 385 P.2d 498 (Okla. 1963); La Posta v. Himmer, 358 Pa. 69, 55 A.2d 751 (1947); Bourne v. Barlar, 17 Tenn. App. 375, 67 S.W.2d 751 (1933); Foremost Dairies, Inc. v. McClung, 421 S.W.2d 178 (Tex. Civ. App. 1967); Flaks v. McCurdy, 64 Wash. 2d 49, 390 P.2d 545 (1964); Bolling v. Clay, 150 W. Va. 249, 144 S.E.2d 682 (1965); Friesen v. Schmelzel, 78 Wyo. 1, 318 P.2d 368 (1957).

Those jurisdictions approving the instruction point out two advantages. First, it simplifies:

> Inasmuch as the term is affirmatively, completely, and yet briefly, descriptive of that which has actually happened (the accident with ensuing injury, without actionable fault), it is easier to comprehend than is a negative qualification relating to the *causes* of that which has happened and leaving unsatisfied the groping of the mind for a positive concept consistent with the negative.

Butigan v. Yellow Cab Co., 49 Cal. 2d 652, 662, 320 P.2d 500, 507 (1958) (dissenting opinion) (emphasis in original). Second, it helps to underscore for the jury the reality that not all accidents are caused by negligence. *Id.* at 664–65, 320 P.2d at 508. The latter advantage appears to have increasing significance because of the noticeable tendency in negligence cases to equate the happening of an accident with evidence of negligence. An unavoidable accident instruction may help to avoid that erroneous assumption by the jurors.

[10] *E.g.*, Sadorus v. Wood, 230 A.2d 478 (D.C. Ct. App. 1967); Seney v. Trowbridge, 127 Conn. 284, 16 A.2d 573 (1940); Guanzon v. Kalamau, 48 Hawaii 330, 402 P.2d 289 (1965); Hackworth v. Davis, 87 Idaho 98, 390 P.2d 422 (1964); Lloyd v. Yellow Cab Co., 220 Md. 488, 154 A.2d 906 (1959); Ronningen v. Sonterre, 274 Minn. 138, 143 N.W.2d 53 (1966); Truckee-Carson Irrigation Dist. v. Baber, 80 Nev. 263, 392 P.2d 46 (1964); Grier v. Cornelius, 247 S.C. 521, 148 S.E.2d 338 (1966); Cordell v. Scott, 79 S.D. 316, 111 N.W.2d 594 (1961); Abbott v. Truck Ins. Exch. Co., 33 Wis. 2d 671, 148 N.W.2d 116 (1967).

Although the distinction between jurisdictions approving the instruction and those approving it with reservation may appear arbitrary, the following language from Hackworth v. Davis, *supra*, illustrates the reservations held by some courts in spite of their approval:

> Judged in the light of the factual patterns of the cases . . . the giving

gence instructions[11] and creating the belief that unavoidability is a separate defense.[12] Although early expression of this dissatisfaction can be found in a series of cases beginning in 1918,[13] the landmark decision disapproving the instruction except in "special" situations, *Butigan v. Yellow Cab Co.*,[14] was

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of such an instruction was not error, although it must be recognized that where the trial court has capably and fairly instructed the jury as to negligence, causation and the burden of proof, the giving of such an instruction is merely a reiteration of applicable principles of law from the defendant's viewpoint; the inherent danger of such an instruction lies in the overemphasis of the defendant's case.

87 Idaho at 108, 390 P.2d at 428.

[11] One disadvantage is that the instruction duplicates:

> In the modern negligence action the plaintiff must prove that the injury complained of was proximately caused by the defendant's negligence, and the defendant under a general denial may show any circumstance which militates against his negligence or its causal effect. The so-called defense of inevitable accident is nothing more than a denial by the defendant of negligence, or a contention that his negligence, if any, was not the proximate cause of the injury. . . . Since the ordinary instructions on negligence and proximate cause sufficiently show that the plaintiff must sustain his burden of proof on these issues in order to recover, the instruction on unavoidable accident serves no useful purpose.

Butigan v. Yellow Cab Co., 49 Cal. 2d 652, 658–59, 320 P.2d 500, 504 (1958); *accord*, Lewis v. Buckskin Joe's, Inc., 156 Colo. 46, 61, 396 P.2d 933, 941 (1964).

[12] Another disadvantage is that the instruction tends to confuse:

> The instruction is not only unnecessary, but it is also confusing. . . . The rules concerning negligence and proximate causation which must be explained to the jury are in themselves complicated and difficult to understand. The further complication resulting from the unnecessary concept of unavoidability or inevitability and its problematic relation to negligence and proximate cause can lead only to misunderstanding.

Butigan v. Yellow Cab Co., 49 Cal. 2d 652, 660, 320 P.2d 500, 505 (1958); *accord*, Graham v. Rolandson, 435 P.2d 263 (Mont. 1967).

The Montana court explained:

> The giving of an instruction on "unavoidable accident" unnecessarily injects a "straw issue" in the case, diverts the attention of the jury from the primary issue of negligence, and necessarily creates the impression in the minds of the jurors of a second hurdle that plaintiff must overcome if he is to prevail. It is difficult to see how such an instruction adds anything but confusion in the minds of the jurors in understanding the principles of negligence. The particular vice of an unavoidable accident instruction in any case is that it tends to mislead the jury by creating a spurious additional issue in the case when in fact the sole issue is the presence or absence of negligence proximately causing the accident.

Id. at 273.

[13] *E.g.*, Larrow v. Martell, 92 Vt. 435, 104 A. 826 (1918) (the instruction is unnecessary because the ordinary instructions on negligence and proximate cause are sufficient); Hogan v. Kansas City Pub. Serv. Co., 322 Mo. 1103, 19 S.W.2d 707 (1929) (any sort of accident instruction is virtually excluded by the requirement that the casualty result from an unknown cause); Bonacci v. Cerra, 134 Neb. 476, 279 N.W. 173 (1938) (the issue of unavoidable accident is sufficiently submitted where the jury is instructed as to negligence and proximate cause); Conner v. Foregger, 242 Ala. 275, 7 So. 2d 856 (1942) (the "better practice" is to refuse the instruction); La Duke v. Lord, 97 N.H. 122, 83 A.2d 138 (1951) (the term "pure accident" should be given a restrictive application, but the giving or refusing of the instruction is left to the discretion of the presiding judge); Van Matre v. Milwaukee Elec. Ry. & Transp. Co., 268 Wis. 399, 67 N.W.2d 831 (1955) (the instruction is objectionable because it tends to confuse and mislead).

[14] 49 Cal. 2d 652, 320 P.2d 500 (1958). *Butigan's* significance rests not so much in its summarization of the advantages and disadvantages of the instruction as in the court's decision to disregard not only the majority view approving the instruction, but also a long line of California cases expressly supporting that view. *Id.* at 660, 320

handed down by the California Supreme Court in 1958. Following *Butigan*, an increasing number of jurisdictions — currently twelve in number — have responded to the California court's lead.[15] On the basis of two prior cases in which the propriety of the instruction was at issue, Utah's position was unclear. *Porter v. Price*[16] simply held that no prejudicial error obtained when the instruction was given in connection with instructions on negligence and proximate causation; *Wellman v. Noble*[17] ruled that failure to give the instruction did not constitute prejudicial error.

Responding to plaintiff's assertion that " 'the law in the State of Utah no longer recognizes unavoidable accident,' " [18] the court in *Woodhouse* declared

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P.2d at 505. Although the decision has since been interpreted as an across-the-board disapproval, the court in fact acknowledged that there are "special" situations in which the instruction would have to be retained. *Id.* at 660–61, 320 P.2d at 505–06. One such "special" situation, according to the court, was § 602 of the California Vehicle Code, declaring that a person's driving certain vehicles for more than a specified number of hours is a misdemeanor, except that the "section does not apply in any case of . . . unavoidable accident . . . ." The Vehicle Code was amended in 1959, but the exception was retained. CAL. VEHICLE CODE § 21702 (West 1960).

An exhaustive listing of what constitutes "special" situations has never been attempted either by the California court or by those courts that have chosen to follow its lead, but the term certainly covers statutorily defined circumstances and has been construed to include the following: Act of God. *E.g.*, Fish v. Chapman, 2 Ga. 349, 356–57, 46 Am. Dec. 393, 399 (1847). Heart attack. *E.g.*, Houston v. Adams, 239 Ark. 346, 351, 389 S.W.2d 872, 875 (1965). Mechanical misfunction. *E.g.*, Guanzon v. Kalamau, 48 Hawaii 330, 343–44, 402 P.2d 289, 297 (1965). Blowout. *E.g.*, Fenton v. Aleshire, 238 Ore. 24, 32–33, 393 P.2d 217, 221 (1964).

[15] *E.g.*, Alaska Brick Co. v. McCoy, 400 P.2d 454 (Alas. 1965); City of Phoenix v. Camfield, 97 Ariz. 316, 400 P.2d 115 (1965); Houston v. Adams, 239 Ark. 346, 389 S.W.2d 872 (1965); Lewis v. Buckskin Joe's, Inc., 156 Colo. 46, 396 P.2d 933 (1964); McNealy v. Illinois Cent. R.R., 43 Ill. App. 2d 460, 193 N.E.2d 879 (1963); Miller v. Alvey, 246 Ind. 560, 207 N.E.2d 633 (1965); Sloan v. Iverson, 385 S.W.2d 178 (Ky. 1964); Lober v. Sklar, 357 Mich. 166, 97 N.W.2d 617 (1959); Graham v. Rolandson, 435 P.2d 263 (Mont. 1967); Vespe v. DiMarco, 43 N.J. 430, 204 A.2d 874 (1964); Fenton v. Aleshire, 238 Ore. 24, 393 P.2d 217 (1964); Camaras v. Moran, 219 A.2d 487 (R.I. 1966).

The decisions tend to restate disadvantages mentioned in *Butigan*, (*see* notes 11 & 12 *supra*), but some of them have pointed out, in addition, that the instruction is archaic:

> In fact the term "unavoidable accident" appears to be an obsolete relic or remnant carrying over from a time when damages could be recovered in an action for trespass and strict liability imposed unless the defendant proved the injury was caused by an "inevitable or unavoidable accident." "Unavoidable accident" was then an affirmative defense to be pleaded and proved by the defendant. . . . The expression "unavoidable accident" or "pure accident" is not an affirmative defense and has no particular connotation in modern pleading of negligence cases.

Miller v. Alvey, 246 Ind. 560, 566, 207 N.E.2d 633, 636–37 (1965).

Four jurisdictions have adopted more or less unique approaches. In Alabama, the "better practice" is to refuse to give the instruction. Barnes v. Haney, 280 Ala. 39, 189 So. 2d 779 (1966). Missouri has held that when the accident results from known actions of known persons and things, it was error to give the instruction. Hogan v. Kansas City Pub. Serv. Co., 322 Mo. 1103, 19 S.W.2d 707 (1929). Virginia apparently subscribes to the Missouri approach. *See* Matthews v. Hicks, 197 Va. 112, 87 S.E.2d 629 (1955). In New Hampshire, the presiding judge's discretion regulates the use of the instruction. La Duke v. Lord, 97 N.H. 122, 83 A.2d 138 (1951).

[16] 11 Utah 2d 80, 355 P.2d 66 (1960).

[17] 12 Utah 2d 350, 366 P.2d 701 (1961).

[18] 20 Utah 2d at 212–13, 436 P.2d at 444.

The court was critical of both the manner and form of the objection to the instruction as made in the trial court. Under the mandate of rule 51 of the Utah Rules of Civil Procedure, which requires that the party "must state distinctly the matter to

that accidents do occur without negligence on the part of any of the parties and that these accidents are properly classified as unavoidable. The court characterized an unavoidable accident as an "unusual and unexpected" occurrence, making clear that its recognition of the existence of unavoidable accident should not be interpreted as encouraging widespread use of the instruction, but rather as limiting its use to those cases in which there is supporting evidence. In the alternative, plaintiff contended that no basis existed, either in fact or in law, for giving an instruction on unavoidable accident in *Woodhouse*. As to the factual issue, the court found that the accident was unavoidable because defendant had done everything possible to avoid it in the reasonable exercise of her duty of care. Reasoning that few instructions could withstand the challenge of duplication, the court dismissed the legal argument that the instruction duplicates instructions on negligence and proximate causation.[19] It dealt with the contention that the instruction runs counter to the recent trend[20] by focusing its attention on Utah precedent. No Utah decision had ever ruled that the giving of an instruction on unavoidable accident was prejudicial, so the court determined that it would not be prejudicial to plaintiff to permit the instruction, but it would be to defendant to deny it.[21]

The opinion in *Woodhouse* unequivocally retains the unavoidable accident instruction in Utah. The propriety of that decision is subject to question on the basis of interpretation of law, analysis of fact, and sufficiency of standard. One aspect of the legal problem is that the result is discordant

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which he objects and grounds of the objection," plaintiff's objection was found to be both belated and uncertain. *Id.* Counsel for plaintiff had also declined to take advantage of an offered delay in order to ascertain the legal accuracy of his challenge to the instruction.

[19] *See* note 11 *supra.*

[20] *See* notes 11–15 *supra* and accompanying text.

[21] On appeal, plaintiff also contended that the trial court had commited prejudicial error by failing to give his requested instruction on second injury. The court did not respond directly to this point, but merely indicated its satisfaction that the instructions adequately presented all the issues to the jury. *See* notes 44 & 45 *infra* and accompanying text.

The court's decision sparked a sharp and extensive dissent by Mr. Justice Ellett. Initially, he argued that the fact situation precluded the use of an instruction on unavoidable accident. 20 Utah 2d at 217, 436 P.2d at 447–48 (dissenting opinion). In support of the argument, Mr. Justice Ellett made use of two definitions. The first defined an unavoidable accident as " '[a] event *from* an unknown cause, or an unusual and unexpected event *from* an unknown cause. . . .' " 30 Utah 2d at 217, 436 P.2d at 447 (quoting 1 C.J.S. *Accident*, at 442 (1952) (emphasis added)). The dissent reasoned that the accident was not unavoidable because it resulted from a known cause. Such an approach appears to confuse causation and fault and may explain why only Missouri and, apparently, Virginia, have chosen to formulate their definitions of unavoidable accident in precisely these terms. *See, e.g.*, Hogan v. Kansas City Public Serv. Co., 322 Mo. 1103, 19 S.W.2d 707 (1929); Matthews v. Hicks, 197 Va. 112, 87 S.E.2d 629 (1955) (dictum). The second definition explained that " '[a]n accident is inevitable if the person by whom it occurs neither has, nor is legally bound to have, sufficient power to avoid it, or prevent its acting so as to injure others. . . .' " 20 Utah 2d at 217–18, 436 P.2d at 447–48 (quoting 38 AM. JUR. *Negligence* § 6, at 647–48 (1941)). By an overly restrictive reading, Mr. Justice Ellett interprets this definition as saying that if "the defendant had the power to avoid the harm," the accident was not inevitable. The definition, however, covers both accidents that are absolutely unavoidable and accidents unavoidable by the exercise of reasonable care. For a dis-

with the better-reasoned cases representing the emerging trend[22] and contrary to decisions rendered by the courts of neighboring states.[23] While a survey of all jurisdictions that have considered the question of unavoidable accident[24] reveals that the majority either approve the instruction or approve it with reservation,[25] a contrary result is reached by comparing only those jurisdictions that have considered *Butigan* before reaching their decision.[26]

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cussion of the difference between the two measures of unavoidability, see note 5 *supra*.

The dissent further contended that the decision ran counter to recent precedent. *Id.* at 219–22, 436 P.2d at 449–451 (dissenting opinion). *See* notes 11–15 *supra* and accompanying text. Mr. Justice Ellett then maintained that the decision was not supported by Utah precedent. *Id.* at 222–23, 436 P.2d at 451–452 (dissenting opinion). *See* notes 27–33 infra and accompanying text. Finally, he argued that the instruction was archaic and overly-burdensome. The instruction is archaic because it is an exception to an outmoded theory of liability. Moreover, the instruction doubly burdens the plaintiff: he must not only persuade the jury that the defendant was negligent, but also that the event was not an unavoidable accident. *Id.* at 224–25, 436 P.2d at 452–53 (dissenting opinion).

Mr. Justice Tuckett's dissent would restrict the instruction to those "rare and unusual cases" in which the usual instructions are inadequate. *Id.* at 225, 436 P.2d at 453 (dissenting opinion).

[22] *See* notes 11–15 *supra* and accompanying text.

[23] Geographic uniformity is relevant to stare decisis:

> The second principle of precedent, less often discussed because it is rarely mooted, concerns the effect which the lower courts are expected to give to appellate decisions on the same or similar points. The doctrine can be stated simply: there is an *absolute* duty to apply the law as last pronounced by superior judicial authority. The importance of uniformity of law throughout the geographical jurisdiction is thought not to be outweighed by any competing consideration; hence the inflexible terms in which the command is cast.

Kelman, *The Force of Precedent in the Lower Courts*, 14 WAYNE L. REV. 3, 4 (1967) (emphasis in original).

In dealing with cases where the decision of one state court is cited before the court of another state that has neither ruled on the point in issue nor ruled to the contrary, a slightly different situation arises. Uniformity of law throughout the geographic area remains a factor to be considered, but the element of superior judicial authority is missing. The net effect is that the decision of one state court is merely persuasive authority in the court of another state. Obviously, the degree of persuasiveness varies in direct proportion to the reputation of the court in question. Among Western states, the California Supreme Court is accorded a position of preeminence, although state courts can and do disregard the decisions of that court. Unavoidable accident is a case in point: Montana and Idaho initially refused to follow *Butigan*. Since that time, however, several other state courts have responded to the California court's lead on unavoidability, causing Montana and Idaho to reconsider their position. *See* note 26 *infra*. In fact, most of Utah's neighboring states tend to approve *Butigan*. *Id.*

[24] Forty-four jurisdictions have considered the question of unavoidable accident. *See* notes 9, 10 & 15 *supra*.

[25] Twenty-six jurisdictions either approve or approve with reservation. *See* notes 9 & 10 *supra*.

[26] Under the influence of *Butigan*, nine of the jurisdictions disapproved the instruction. Alaska Brick Co. v. McCoy, 400 P.2d 454 (Alas. 1965); City of Phoenix v. Camfield, 97 Ariz. 316, 400 P.2d 115 (1965); Houston v. Adams, 239 Ark. 346, 389 S.W.2d 872 (1965); Lewis v. Buckskin Joe's, Inc., 156 Colo. 46, 396 P.2d 933 (1964); Miller v. Alvey, 246 Ind. 560, 207 N.E.2d 633 (1965); Graham v. Rolandson, 435 P.2d 263 (Mont. 1967); Vespe v. DiMarco, 43 N.J. 430, 204 A.2d 874 (1964); Fenton v. Aleshire, 238 Ore. 24, 393 P.2d 217 (1964); Camaras v. Moran, 219 A.2d 487 (R.I. 1966). Seven approved with varying degrees of reservation. Sadorus v. Wood, 230 A.2d 478 (D.C. Ct. App. 1967); Guanzon v. Kalamau, 48 Hawaii 330, 402 P.2d 289 (1965); Hackworth v. Davis, 87 Idaho 98, 390 P.2d 422 (1964); Ronningen v. Sonterre, 274 Minn. 138, 143 N.W.2d 53 (1966); Duran v. Mueller, 79 Nev. 453, 386 P.2d 733 (1963), and Truckee-Carson Irrigation Dist. v. Baber, 80 Nev. 263, 392 P.2d 46 (1964); Cordell v. Scott, 79 S.D. 316, 111 N.W.2d 594 (1961); Abbott v. Truck Ins. Exch. Co., 33 Wis. 2d 671, 148 N.W.2d 116 (1967). Two approved. Dietz v.

Another aspect of the legal problem is the court's interpretation of Utah precedent. The accident in *Porter v. Price*[27] resulted when defendant, who had been a well-regulated diabetic for seventeen years, suddenly suffered a severe insulin reaction, lost control of his car, and struck the plaintiff. On review, plaintiff urged error in instructing the jury on unavoidable accident. In holding that the unavoidable accident instruction did not constitute prejudicial error when read in conjunction with instructions on negligence and proximate causation,[28] the court stressed the unusual nature of the fact situation[29] and emphasized that the instruction served no useful purpose in most cases.[30] In *Wellman v. Noble*,[31] Adams, the driver of defendant's trailer-truck, had been following a truck, a Studebaker, and a Cadillac in which plaintiff was riding for approximately five miles through the rolling country of Nebraska. Shortly after coming over the crest of a hill, the truck

Mead, 52 Del. 481, 160 A.2d 372 (1960); Lucero v. Torres, 67 N.M. 10, 350 P.2d 1028 (1960), and Grubb v. Wolfe, 75 N.M. 601, 408 P.2d 756 (1965).

Of those disapproving, five — Arizona, California, Colorado, Montana, and Oregon — are neighboring states. Montana has particular significance because its court first rejected *Butigan*, Rodoni v. Haskin, 138 Mont. 164, 355 P.2d 296 (1960), and then accepted it, Graham v. Rolandson, 435 P.2d 263 (Mont. 1967).

Two neighboring states — Idaho and Nevada — approve, but do so with reservation. Idaho refused to follow *Butigan* in Lallatin v. Terry, 81 Idaho 238, 340 P.2d 112 (1959), but the language from Hackworth v. Davis, 87 Idaho 98, 108, 390 P.2d 422, 428 (1964), quoted at note 10 *supra*, would indicate that the initial rejection has been tempered. In Duran v. Meuller, 79 Nev. 453, 386 P.2d 733 (1963), the court declined to rule on appellant's contention that giving the instruction constituted reversible error, because that argument had not been preserved on appeal. The Court in Truckee-Carson Irrigation Dist. v. Baber, 80 Nev. 263, 392 P.2d 46 (1964), found no error in denying the instruction where its substance had been covered by other instructions.

New Mexico is apparently the only neighboring state to fully sanction the instruction. Lucero v. Torres, 67 N.M. 10, 350 P.2d 1028 (1960), rejected *Butigan*. Horrock v. Rounds, 70 N.M. 73, 370 P.2d 799 (1962), apparently mitigated that rejection and led one writer to conclude that the New Mexico court manifested a tendency to disapprove the instruction. *See* Comment, *Unavoidable Accident — Instruction*, 3 NAT. RES. J. 204, 207 (1963). Grubb v. Wolfe, 75 N.M. 601, 408 P.2d 756 (1965), makes clear, however, that the court continues to approve the instruction.

[27] 11 Utah 2d 80, 355 P.2d 66 (1960).

[28] Plaintiff in *Porter* drew the court's attention to *Butigan*, but the court, declining to follow the California court, pointed out that even California had refrained from disaproving the instruction in all cases. The court viewed *Porter* and *Butigan* as distinguishable on two grounds. *Butigan* involved a case where there was substantial evidence of negligence, whereas *Porter* exhibited evidence tending to show circumstances beyond the control of a reasonable man. The *Butigan* instructions confused the issue by suggesting that unavoidable accident should be considered a separate question, whereas the *Porter* court avoided such confusion by explaining at the outset what an unavoidable accident was and what would constitute negligence in the given situation.

[29] The following language gives some indication of the emphasis placed on the unusual facts in *Porter*:

> There was sufficient evidence to the effect that Mr. Price was a well-regulated diabetic, that his routine on the day of the accident was no different than usual, that his prior insulin reactions were of a mild degree, and had never incapacitated him, and were always preceded by warning symptoms, that the severe reaction which occurred on the day of the accident had never happened to him before, that he had no reason to think it would happen to him, that it happened without warning, that it is a rare occurrence generally and that its likelihood of happening to him was therefore not great enough to cause a reasonable man to act any differently than he acted.

11 Utah 2d at 82, 355 P.2d at 67.

[30] *Id.* at 84, 355 P.2d at 68. The *Porter* court objected that the instruction duplicates the instructions on negligence and proximate causation.

[31] 12 Utah 2d 350, 366 P.2d 701 (1961).

ran out of gas and stopped on the side of the road. The Studebaker passed; the Cadillac stopped, signalling its action, and was struck by Adam's trailer-truck as he came over the crest of the hill. Defendant contended on review that the trial court had erred in refusing an instruction on unavoidable accident. Observing that "the issue of unavoidable accident is not involved [here] any more than in practically any other accident case," [32] the court rejected defendant's argument and held that instructions on the questions of negligence and proximate causation were sufficient.[33]

Given the rather obvious lack of enthusiasm for the instruction manifested by the *Porter* and *Wellman* opinions, there is considerable doubt whether those courts would have reached the same conclusions as the court in *Woodhouse*. In *Porter*, the court approved the instruction because of an unusual fact situation; this element was lacking in *Wellman* where the court found no error in the trial court's refusal to give the instruction. Under an "unusualness" rationale, the circumstances of *Woodhouse* place it closer to *Wellman* than to *Porter*: an accident where a motorist who is backing strikes a child is more similar to an accident where a driver rear-ends a car he has been following for some distance than to an accident where a well-regulated diabetic suffers a severe insulin reaction. Whether the approving *Porter* court would have reached the same conclusion as the court in *Woodhouse* is also unlikely because the unavoidable accident instruction submitted in *Woodhouse*, contrary to the instructions in *Porter*,[34] tends to confuse. The confusion could result either from *Woodhouse's* combination of Utah's Jury In-

[32] *Id.* at 352, 366 P.2d at 703. The court reasoned that evidence indicating "that Adams should have seen the stopped vehicle when he was much farther away" precluded unavoidability. *Id.* at 351, 366 P.2d at 702.

[33] Id. at 352, 366 P.2d at 702. The court's views on the sufficiency of the instruction were essentially those voiced in *Porter*. *See* note 30 *supra*.

[34] *See* note 35 *infra*. The instructions in *Porter* read:

Instruction No. 8:

> "The law recognizes unavoidable accidents. An unavoidable accident is one which occurs in such a manner that it cannot justly be said to have been proximately caused by negligence as those terms are herein defined. In the event a party is damaged by an unavoidable accident, he has no right to recover, since the law requires that a person be injured by the fault or negligence of another as a prerequisite to any right to recover damages."

Instruction No. 9:

> "A driver of an automobile who is stricken by paralysis, seized by a fit or otherwise rendered unconscious and who still continues to drive while unconscious and causes damages or injury to another cannot be held responsible therefor unless he was reasonably aware that he was about to lose consciousness to the extent that a person of ordinary prudence would not attempt to continue driving."

Instruction No. 10:

> "You are instructed that fainting or loss of consciousness while driving is a complete defense to an action based on negligence if such loss of consciousness was not foreseeable. If you find that defendant Hyrum Price was suffering from an unforeseen insulin reaction, resulting in a fainting spell or loss of consciousness at the time of this accident, then you must return a verdict in favor of the defendant and against the plaintiffs.
>
> "On the other hand, if the insulin shock that defendant suffered was foreseeable and he could have done something about it, and thereby avoided the accident, then and in that event he would be changed with negligence proximately causing the accident."

Id. at 83, 355 P.2d at 68.

structions 16.1 and 16.6[35] — the net effect of which could easily lead a juror to conclude that unavoidability is a separate and distinct defense — or from the court's failure to explain, as it had explained in *Porter*,[36] what would constitute negligence in the instant case.

What emerges from a careful reading of *Porter* and *Wellman* is the conclusion that no interpretation of precedent is possible without reference to the fact situation: Does the fact situation establish a case of unavoidable accident? Arguably, the facts in *Woodhouse* do not warrant a finding of unavoidability. If, as is presently the case, a finding of unavoidable accident is appropriate where the element of negligence is absent (an unavoidable accident is an unintentional occurrence that was not foreseen and could not have been prevented by the exercise of reasonable care), then the presence of negligence automatically excludes any question of unavoidability. In exercising his duty of reasonable care, a motorist must normally maintain a proper lookout and anticipate unexpected conduct by pedestrians. Special circumstances, such as those present in *Woodhouse*, often necessitate even greater care. Defendant was backing her car and had to compensate for a decreased field of vision.[37] Moreover, there were children present, which is itself a warning[38] because of their unpredictable nature.[39] After she had conversed for several minutes with her friend, who then stepped from the car, reasonable care[40] required that the defendant ask the friend to walk behind the car and check for children.

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[35] The unavoidable accident instruction in *Woodhouse* combined instructions 16.1 and 16.6 of the Jury Instructions for Utah:

> The law recognizes unavoidable accidents. An unavoidable accident is one which occurs in such a manner that it cannot justly be said to have been proximately caused by negligence as those terms are herein defined. In the event a party is damaged by an unavoidable accident, he has no right to recover, since the law requires that a person be injured by the fault or negligence of another as a prerequisite to any right to recover damages. [JIFU 16.1].
>
> The mere fact that an accident happened is not evidence of negligence on anyone's part. [JIFU 16.6] [paraphrase].

Record at 90. Instruction 16.6 suffices by making clear to the jury that not all accidents are the result of negligence. When the two instructions are combined and read as one, the hearer is left with the distinct impression that unavoidability is a separate and distinct issue.

[36] *See* note 34 *supra*.

[37] *See* Eichmann v. Dennis, 225 F. Supp. 531, 533 (E.D. Pa. 1963); Hronis v. Wissinger, 412 Pa. 434, 436, 194 A.2d 885, 886 (1963); 2A BLASHFIELD'S CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 1496 (perm. ed. 1951).

[38] *See, e.g.*, Fowler v. Midstate Hauling Co., 162 So. 2d 278, 280 (Fla. Ct. App. 1964); Bloodworth v. Hutchinson, 150 So. 2d 877, 878–79 (La. Ct. App. 1963).

[39] *See, e.g.*, Stowers v. Carp, 29 Ill. App. 2d 52, 64, 172 N.E.2d 370, 376 (1961); Herring v. Boyd, 245 S.C. 284, 290–91, 140 S.E.2d 246, 249 (1965).

Both the case law and statutes of Utah recognize that extra caution is demanded when dealing with children. *See* Rivas v. Pacific Fin. Co., 16 Utah 2d 183, 185, 397 P.2d 990, 991–92 (1964). "[E]very driver of a vehicle shall *exercise due care* to avoid colliding with any pedestrian upon any roadway . . . and shall *exercise proper precaution* upon observing on a roadway any child . . . ." UTAH CODE ANN. § 41-6-80 (Supp. 1967) (emphasis added).

Defendant was on notice of the proximity of children, both, because she knew a number of small children lived in the neighborhood (Record at 214), and because she had just seen two older children riding bicycles. (20 Utah 2d at 211, 436 P.2d at 443).

[40] "Reasonable care" is an elusive term. For example, a motorist, who is or should be cognizant of the proximity of a person must exercise ordinary care to discover his

In its treatment of the element of knowledge, *Callahan v. Disorda*,[41] a Vermont decision, illustrates one court's approach to that element in an analogous fact situation. Defendant in *Callahan* stopped her car in front of a driveway while her companion entered a house. After five minutes, the companion returned and suggested that defendant park near the curb, whereupon defendant backed her car and struck a three year old boy. Defendant testified that her companion, who was standing on the curb-side of the car, responded affirmatively when she asked him whether she could back safely and that she looked in her rear-view mirror and out of the left-hand window before backing. In affirming plaintiff's judgment, the court stressed that defendant knew or should have known of the presence of the child, although the court did not indicate how the duty of care could have been satisfied under the circumstances. By comparing *Callahan* with *Woodhouse*, an even stronger argument can be made that defendant in *Woodhouse* failed to exercise reasonable care on the basis of her knowledge. Defendant had both observed a small girl[42] and heard a child's cry.[43] Even if she only had constructive knowledge before, after backing she possessed actual knowledge as to the proximity of a child and the likelihood of a mishap. Reasonable care required that defendant, after backing out, should step out and check around her car before moving forward. Thus, plaintiff's theory was that even if defendant's conduct in backing could be found reasonable and if the first injury was unavoidable, defendant could not avoid liability for the second injury, and possibly for the cumulative consequences. Defendant was culpable because by exercising reasonable care the second injury could have been prevented: the accident was, therefore, not unavoidable. Although plaintiff's request for an instruction on the second injury was denied by the trial court and raised on appeal, the supreme court did not respond to the merits of plaintiff's theory, but based its holding on the unavoidability of the entire transaction. The failure of the court to isolate the second injury can be faulted not only because it seems to belie the court's announced receptiveness to instructions framed on the parties' respective theories of the case,[44] but also because the evidence that the child had been run over twice was uncontradicted.[45]

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presence on or near the motorist's vehicle. *E.g.*, McClenahan v. Des Moines Transit Co., 257 Iowa 293, 297–98, 132 N.W.2d 471, 474 (1965). Ordinarily, however, the motorist has no legal obligation to search under his vehicle, although his duty will depend on the particular fact situation. *See* Wright v. Kelly, 203 Va. 135, 140–41, 122 S.E.2d 670, 673 (1961); 2A BLASHFIELD'S CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 1509 n.42 (perm. ed. 1951).

[41] 111 Vt. 331, 16 A.2d 179 (1940).

[42] Record at 219, 226.

[43] *Id.* at 219.

[44] 20 Utah 2d at 214, 436 P.2d at 446.

[45] There was no question that the child had suffered a fractured skull as a result of being struck by the car. There was, however, some dispute whether the abrasions on the abdomen and back of the child had been caused by the car passing over the child's body.

Dr. Bernson, the child's attending physician, gave the following testimony on cross-examination:

> Q. These (tire marks or what appeared to be tire marks) were indentations on the back and stomach that you saw at the time?

The propriety of the decision is also subject to question because of the court's failure to articulate discriminating standards governing use of the unavoidable accident instruction. The court approved the instruction, but coupled its approval with a clause restricting the instruction's scope.[46] Although the court obviously wanted to avoid making unavoidability a stock issue in all negligence actions,[47] it failed to indicate what evidentiary groundwork must be laid in order to justify the instruction or to specify instances in which the instruction would be inapplicable. In addition to establishing an ambiguous standard, the decision also destroys a category of accident between negligence and unavoidability — non-negligence.[48] Without non-negligence to act as a buffer, the fact-finder in a negligence action is left with only two alternatives: the mishap is either avoidable or unavoidable. There are, however, numerous accidents that are non-negligent, but avoidable. Assuming, arguendo, that defendant in *Woodhouse* had no duty under the circumstances to ask her friend to check behind the car for children, defendant's actions in backing her car were non-negligent. They were non-negligent because defendant was exercising reasonable care; but the mishap was avoidable because it would not have occurred had defendant exercised a higher degree of care. As the court's failure to recognize non-negligence suggests, such accidents have had diminishing significance with the extension of the unavoidable accident exception to include mishaps avoidable by the use of reasonable care.[49] The growing dissatisfaction with an instruction on unavoidable accident[50] may, however, be at least partially attributable to a

A. Yes. They were minor abrasions and you could differentiate the marks of the tire in the skin. (indicating) It wasn't a deep imprint.
Q. That is what I —
A. You could see the markings of a tire and the discoloration of the tread was demonstrable.

Record at 251. *See also* the Cottonwood Hospital records, Exhibit P. 24, at 2: "tire marks on back and [abdomen]."

On the basis of this testimony, plaintiff requested the following instruction:

> Should you determine the evidence to be that the minor child, Gregory Woodhouse, sustained an injury which was caused through no fault of the defendant but sustained a second injury which was caused through some act of negligence of defendant, as defined in these instructions, then you should award only such damages for injuries that the plaintiff may have sustained as a result of the second act.

Record at 54. Although plaintiff sought apportionment of the damages, there is authority supporting the proposition that defendant was liable for the combined consequences. *Cf.* Newbury v. Vogel, 151 Colo. 520, 524, 379 P.2d 811, 813 (1963); Carlburg v. Wesley Hosp. & Nurse Training School, 182 Kan. 634, 323 P.2d 638 (1958).

[46] The court stated that "to declare categorically that there is no such thing as an unavoidable accident . . . does not square up with the law nor with the practical realities of life," but qualified the assertion by adding that "such an instruction should be given with caution and *only* where the evidence would justify it." 20 Utah 2d at 213, 436 P.2d at 445 (emphasis in original).

[47] For example, reliance on the instruction in Oklahoma has reached the point where the instruction is now one of the three elements making up defendant's stock reply to plaintiff's petition. Comment, *Torts: Unavoidable Accident in Oklahoma,* 14 OKLA. L. REV. 227 (1961). The Utah court specifically refused to defend "the practice sometimes followed by defense counsel of tossing a requested instruction on unavoidable accident into the hopper with numerous other form defense instructions in practically any type of negligence case." 20 Utah 2d 213, 436 P.2d at 445.

[48] *See* Rees, *supra* note 5.

[49] *See* note 5 *supra.*

[50] *See* notes 11–15 *supra* and accompanying text.

realization that the inclusion of accidents unavoidable by the use of reasonable care was unwise and that the instruction, if retained at all, should be restricted to those occurrences that are absolutely unavoidable. The court's decision not only denies non-negligence, but also tends to blur the distinctions between negligence and unavoidability so that a putatively negligent act — defendant's decision to drive her car forward — becomes an unavoidable accident.

In fairness to the court, the theoretical differences between the *Butigan* approach — imposition of liability with a "special" situations exception — and the *Woodhouse* approach — immunity from liability with an "unusual" cases exception — are minimal. Both approaches recognize that there are unavoidable accidents, that the instruction may be legitimately given when that kind of accident occurs, but that the instruction is subject to abuse and must, therefore, be used restrictively. Arguably, the approach in *Woodhouse* is the more desirable of the two because a court is better equipped to deal with legal questions (who, if anyone, is liable) than with matters of policy (where should liability be imposed). But, while the theoretical differences in the two approaches may be inconsequential, the practical differences are considerable. Rather than destroying the instruction, disapproval except in special situations preserves it; disapproval also tends to check indiscriminate application, thereby curbing abuse. For example, counsel for a party, knowing that unavoidable accident is generally disapproved, would refrain from requesting the instruction unless thoroughly convinced of its appropriateness in the particular case.

The argument that courts are not well-equipped to deal with matters of policy over-emphasizes the difficulties courts would encounter in determining whether the special situations exception should apply to a given category of accidents. In fact, *Butigan* basically advocates a narrowing of the scope of the exception to include only those occurrences that are absolutely unavoidable. Since the unavoidable accident exception was originally formulated in precisely these terms,[51] no major difficulties under a special situations analysis should be anticipated because courts can fall back on the existing common law tradition to furnish criteria for a finding of absolute unavoidability.

Unavoidable accidents do occur, but an instruction on unavoidable accident should be restricted to those unusual cases that warrant its use.[52] The Utah Supreme Court would have pursued a more justifiable course had it held that instructing the jury on unavoidable accident in *Woodhouse* was prejudicial error. To have ruled against the instruction would have clarified, while affirming, Utah precedent and would have placed Utah in a position consistent with the current trend exemplified by *Butigan* and its progeny.

S.G.W.

[51] *See* note 5 *supra.*

[52] Alvarez v. Paulus, 8 Utah 2d 283, 333 P.2d 633 (1959), arose under circumstances substantially identical to those in *Woodhouse* and demonstrates how the court could have effectively dealt with the fact situation without introducing an extraneous element. The defendant in *Alvarez*, who was backing a truck, struck and killed plaintiff's 22 month-old daughter. Plaintiff brought suit, alleging negligence. The usual instructions on negligence and prooximate causation were given, and the case was handled without resort to unavoidable accident.

State Preemption and the Exercise of Municipal General Welfare Powers: A City's Anti-Prostitution Ordinance

In *Salt Lake City v. Allred*,[1] defendant was convicted in both a city and district court[2] for violating a municipal ordinance[3] by directing a police officer to a certain apartment to obtain sexual intercourse for hire. On appeal to the Utah Supreme Court, the case was initially overturned,[4] but on rehearing the court reversed itself. The later decision held that the ordinance was within the police power of the city under the general welfare clause and was not preempted by state sexual offense statutes.[5]

Pursuant to Dillon's Rule,[6] municipalities are generally considered to possess no inherent powers, but only those expressly granted either by state constitution or statute.[7] Since the constitution of Utah expressly grants powers only to charter cities,[8] Salt Lake City, which is unchartered, derives its powers solely from statutory enactment. State statutes authorize Utah municipalities to prohibit the maintenance of houses of prostitution,[9] to punish pros-

[1] 19 Utah 2d 254, 430 P.2d 371 (1967), *rev'd on rehearing*, 437 P.2d 434 (Utah 1968).

[2] Defendant in a criminal action has a right of appeal from a city court to a district court. UTAH CODE ANN. §§ 78-3-5, 78-4-17 (1953). If the appeal is taken, the defendant is entitled to de novo review. *Cf.* Moss v. Taylor, 73 Utah 277, 289, 273 P. 515, 520 (1928); Schramm-Johnson Drugs v. Kleeb, 51 Utah 159, 164, 169 P. 161, 163 (1917).

[3] The ordinance in part provides:

> It shall be unlawful for any person to:
>
> . . . .
>
> (7) Direct or offer to direct any person to any place or building for the purpose of committing any lewd act or act of sexual intercourse for hire or moral perversion.
>
> (8) Aid, abet, allow, permit, or participate in the commission of any of the acts prohibited in sub-sections (1) through (7) above.

SALT LAKE CITY, UTAH, REV. ORDINANCES § 32-2-1 (1965).

[4] 19 Utah 2d 254, 430 P.2d 371 (1967).

[5] 437 P.2d 434 (Utah 1968).

[6] This rule, which has been widely adopted in the United States, was originally framed by John Dillon in his treatise on municipal corporations:

> It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers, and no others*: First, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation, — not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied . . . .

1 J. DILLON, MUNICIPAL CORPORATIONS § 237 (5th ed. 1911) (emphasis in original).

[7] *E.g.*, Nance v. Mayflower Tavern, Inc., 106 Utah 517, 150 P.2d 773 (1944); Salt Lake City v. Sutter, 61 Utah 533, 216 P. 234 (1923); 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 5.01 (1967); 1 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 1.93 (3d ed. 1949).

[8] UTAH CONST. art. XI, § 5:

> Each city forming its charter under this section shall have, and is hereby granted, the authority to exercise all powers relating to municipal affairs, and to adopt and enforce within its limits, local police, sanitary and similar regulations not in conflict with general law . . . .

See Salt Lake City v. Sutter, 61 Utah 533, 540, 216 P. 234, 237 (1923).

[9] UTAH CODE ANN. § 10-8-41 (Repl. vol. 1962):

> [Cities] . . . may suppress or prohibit the keeping of disorderly houses, houses of ill fame or assignation, or houses kept by, maintained for, or resorted to or used by, one or more females for lewdness or prostitution within

titutes,[10] and, generally, to improve the morals of the city.[11] Therefore, a primary issue raised in *Allred* was whether the ordinance fell within these powers vested in the city by statute.

In addition to restrictive enabling legislation, a city's powers may be limited by state statutes covering the same subject matter as municipal ordinances. It is often held that such statutes preempt and therefore invalidate city ordinances.[12] *Allred* thus presented as a second issue the question whether the ordinance was prempted by the state statutes dealing with sexual offenses.

In its initial disposition of the case, the court declared that since the state statutes dealing with sexual offenses were comprehensive, the Utah legislature did not intend that municipalities deal with sexual offenses under the general welfare clause, but only in those areas in which the legislature had made specific grants of authority.[13] Since no statutory provision expressly authorized municipalities to legislate on the subject matter of the ordinance, the court concluded that the ordinance was invalid as *ultra vires*.[14]

On rehearing,[15] the court held that the ordinance was a proper exercise of police power under the general welfare clause. In the court's view, the protection of public morals traditionally has been a local concern. Moreover, the court reasoned, a city is entitled under its general police powers to legislate on matters covered by state statutes, provided that the ordinances enacted are not prohibited by the statutes or inconsistent with them.[16] The court con-

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the limits of the city and within three miles of the outer boundaries thereof, and may prohibit resorting thereto for any of the purposes aforesaid....

[10] UTAH CODE ANN. § 10-8-51 (Repl. vol. 1962):

> [Cities]... may provide for the punishment of tramps, street beggars, *prostitutes*, habitual disturbers of the peace, pickpockets, gamblers and thieves, or persons who practice any game, trick or device with intent to swindle.

(emphasis added).

[11] UTAH CODE ANN. § 10-8-84 (Repl. vol. 1962):

> [Cities]... may pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, *and such as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort and convenience of the city and the inhabitants thereof*, and for the protection of property therein; and may enforce obedience to such ordinances with such fines or penalties as they may deem proper; provided, that the punishment of any offense shall be by fine in any sum less $300 or by imprisonment not to exceed six months, or by both such fine and imprisonment.

(emphasis added). The italicized portion of this statute is usually denoted as the "general welfare clause."

[12] *E.g.*, *In re* Portnoy, 21 Cal. 2d 237, 131 P.2d 1 (1942) (ordinance invalid to the extent it duplicated state statute); People v. Commons, 64 Cal. App. 2d 925, 148 P.2d 724 (1944) (ordinance invalid to the extent state statute occupied the field); Shelton v. City of Shelton, 111 Conn. 433, 150 A. 811 (1930) (ordinance invalid because in conflict with state policy); Bartels v. Miles City, 145 Mont. 116, 399 P.2d 768 (1965) (ordinance invalid because in conflict with state statute). 1 C. ANTIEAU, *supra* note 7 §§ 5.34, 5.36–38.

[13] 19 Utah 2d at 257, 430 P.2d at 372–73.

[14] *Id.*

[15] A curious aspect of these decisions is that in both the court was split 3–2. In the first opinion Justices Tuckett, Callister, and Henriod were in the majority while Chief Justice Crockett and Justice Ellett dissented. The reversal resulted from the appointment of a district court judge by the chief justice to replace Justice Callister who did not participate in the rehearing. *See* Respondent's Brief for Rehearing at 15.

[16] 437 P.2d at 435–36.

cluded that there was no preemption because the state statutes evidenced no legislative intent to prohibit ordinances dealing with sexual offenses and because the city and state enactments, both having a common purpose of defeating prostitution, were not inconsistent.[17]

The two issues raised in the context of the *Allred* opinion provide suitable criteria for examining Utah's current and prospective attitude toward a municipality's exercise of its general welfare powers and state preemption of ordinances dealing with the same subject matter as state statutes. The position of the court on rehearing concerning the general welfare issue was diametrically opposed to its initial disposition of the issue. Yet the court made no attempt to reconcile these conflicting views or to consider in depth the state precedent bearing on the question. An examination of Utah precedent offers a tentative reconciliation of the two positions. The court has stated that a municipality's general welfare powers are to be construed

[17] Another issue raised in both hearings, and the focal point of Justice Henriod's dissent in the second opinion, was whether the ordinance was so vague as to unconstitutionally violate due process. 437 P.2d at 441. The language of the ordinance to which Justice Henriod addressed himself was subsection 8 which made it a crime to "aid, abet, allow, permit, or participate" in "directing or offering to direct." The majority opinion dismissed this matter as not relevant to the vagueness question. 437 P.2d at 437.

The applicable Utah standard relating to the issue of vagueness is:

> If the statute is so designed that persons of ordinary intelligence, who would be law abiding, can tell what their conduct must be to conform to its requirements, and it is susceptible of uniform interpretation and application by those charged with the responsibility of enforcing it, it is invulnerable to an attack for vagueness.

Kent Club v. Toronto, 6 Utah 2d 67, 72, 305 P.2d 870, 874 (1957); *see* State v. Packard, 122 Utah, 369, 376, 250 P.2d 561, 564 (1952); Henrie v. Rocky Mountain Packing Corp., 113 Utah 444, 448, 202 P.2d 727, 729 (1949). *See also* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (the federal standard is substantially identical to the Utah state standard). A further consideration is that legislation enjoys a presumption of constitutionality. *See, e.g.*, Donahue v. Warner Bros. Pictures Distrib. Corp., 2 Utah 2d 256, 266, 272 P.2d 177, 184 (1954); Newcomb v. Ogden City Pub. School Teacher Retirement Comm'n, 121 Utah 503, 517, 243 P.2d 941, 947–48 (1952).

Considering first the term "directing," it would appear to imply the offering of specific instructions concerning the availability and location of a prostitute at a particular time. Under such a construction of the term, there is little question that it would satisfy the constitutional requirement. Moreover, courts in other jurisdictions have upheld provisions similar to the language in question. *E.g.*, Hawkins v. United States, 105 A.2d 250 (D.C. Mun. Ct. App. 1954) (statute declaring it a crime "to invite, entice, persuade . . . any person . . . for purpose of prostitution"); Vasquez v. State, 311 S.W.2d 246 (Tex. Crim. App. 1958) (statute forbidding, *inter alia*, directing any male to house of prostitution to obtain unlawful sexual intercourse).

Concerning the aiding and abetting mentioned in the ordinance, courts generally uphold such provisions, but impose certain requirements which the prosecution must demonstrate to sustain a conviction. Thus the alleged aider or abettor must share the criminal intent of the principal and associate himself with the venture. *E.g.*, Nye & Nissen v. United States, 336 U.S. 613 (1949); United States v. Alexander, 219 F.2d 225 (7th Cir. 1955); Johnson v. United States, 195 F.2d 673 (8th Cir. 1952). This standard would require more than, "See the taxi driver, the bellhop, the bartender, the upstairs maid, or somebody, — I'm not sure," suggested by the dissent. 437 P.2d 441. The application of such standards to the ordinance's aiding and abetting provision would likely satisfy the constitutional requirement.

Two additional phrases in the ordinance, "lewd act" and "moral perversion," appear on their face susceptible to an attack for vagueness. *See* SALT LAKE CITY, UTAH, REV. ORDINANCES § 32-2-1(7)(1965). In the second hearing the court dismissed a void-for-vagueness attack against these phrases by finding the two phrases severable from the phrase "sexual intercourse for hire," the language under which the charge was brought. 437 P.2d 437. Nevertheless, the phrases present a continued threat to the vitality of the ordinance.

narrowly in harmony with Dillon's Rule,[18] since these powers merely implement the express powers granted the city[19] and are limited by them.[20] Some cases reflect a strict reliance on this policy, while others do not. The court has struck down as *ultra vires* ordinances enacted under the general welfare powers that sought to prohibit keeping pin ball machines,[21] playing pool,[22] advertising prescription eye glasses,[23] fixing barbershops' closing hours,[24] and possessing alcohol without authorization.[25] Other ordinances that proscribe driving while under the influence of alcohol,[26] maintaining restaurant booths of certain dimensions that might be used for rendezvous between prostitutes and their clients,[27] and operating places where alcohol might be sold[28] have, however, been upheld. Although the court has never enunciated a basis for distinguishing these cases, it has suggested that the test of validity under the general welfare clause, apart from Dillon's Rule, is whether an ordinance is reasonably and substantially related to the protection of the public interest in health, safety, or morals.[29] In retrospect, the court's decisions appear compatible with a reasonable relationship standard, since only those ordinances immediately affecting general welfare interests have been upheld.[30] Driving under the influence of alcohol, for example, is a greater threat to public safety than merely possessing alcohol without authorization; maintaining rendezvous for prostitutes and their clients is more injurious to public morals than keeping pin ball machines or playing pool. When the state legislature authorizes municipalities to prohibit the sale of alcohol, the maintenance of a place to sell alcohol is more clearly antagonistic to the state-sanctioned policy than unlawful possession of alcohol.

Consequently, validation of the ordinance in *Allred* is in harmony with Utah precedent, since the ordinance has a reasonable and substantial relationship with the improvement of public morals. Forbidding the direction of

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[18] *See, e.g.*, Stevenson v. Salt Lake City, 7 Utah 2d 28, 317 P.2d 597 (1957); American Fork City v. Robinson, 77 Utah 168, 292 P. 249 (1930). See note 7 *supra.*

[19] American Fork City v. Robinson, 77 Utah 168, 171, 292 P. 249, 250 (1930).

[20] Salt Lake City v. Sutter, 61 Utah 533, 538, 216 P. 234, 236 (1923).

[21] Stevenson v. Salt Lake City, 7 Utah 2d 28, 317 P.2d 597 (1957).

[22] American Fork City v. Robinson, 77 Utah 168, 292 P. 249 (1930).

[23] Ritholz v. City of Salt Lake, 3 Utah 2d 385, 284 P.2d 702 (1955).

[24] Salt Lake City v. Revene, 101 Utah 504, 124 P.2d 537 (1942).

[25] Salt Lake City v. Sutter, 61 Utah 533, 216 P. 234 (1923).

[26] Salt Lake City v. Kusse, 97 Utah 113, 93 P.2d 671 (1939).

[27] Ogden City v. Leo, 54 Utah 556, 182 P. 530 (1919).

[28] Tooele City v. Hoffman, 42 Utah 596, 134 P. 558 (1913).

[29] In Salt Lake City v. Revene, 101 Utah 504, 124 P.2d 537 (1942), an ordinance fixing the hours barbershops could remain open was invalidated as not reasonably related to the protection of public health. Similarly, the court, in Ritholz v. City of Salt Lake, 3 Utah 2d 385, 284 P.2d 702 (1955), while holding invalid an ordinance prohibiting advertising of prescription eye glasses, declared that the test for the validity of ordinances purporting to protect public health under the general welfare clause was whether they were "reasonably and substantially related to safeguarding . . . public health." *Id.* at 104.

[30] It is conceded that though a rational basis for distinguishing the court's general welfare cases can be synthesized, the court may not have made any effort at such a reconciliation. It is more likely that the court reached an ad hoc decision in each case by reacting to the overriding interests involved without significant reliance on state precedent.

parties to a place where they can obtain sexual intercourse for hire does inhibit the practice of prostitution. In addition, the ordinance protects the public from exposure to persons seeking to interest others in illicit sexual relations.

On the preemption issue, the court again took inconsistent positions in the two opinions. Neither opinion, however, strictly followed the state precedent nor enunciated any basis for departure. Prior to *Allred*, the court consistently held that if a municipality has enacting power, an ordinance promulgated pursuant to that power is void by preemption only if it directly conflicts with state statutes.[31] Thus, the court has declared that an ordinance is invalid if the " 'ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.' "[32] Accordingly, an ordinance is not void merely because a state statute treats the same subject matter, even though the state and local enactments are identical except for penalties[33] or additional regulations imposed by the ordinance.[34] Under a strict application of this test, there was no preemption since the ordinance in *Allred* did not conflict directly with a state sexual offense statute.

Instead of applying the direct conflict standard, the initial *Allred* opinion, noting that the state statutes were comprehensive, apparently reasoned that the ordinance was thus preempted by implication.[35] In the later opinion, the court adopted as its test language which enunciated the direct conflict standard,[36] but suggested that an ordinance could be preempted if the state legislature intended to preclude municipalities from legislating in the field or if the ordinance were inconsistent with state law.[37] Despite both opinions'

[31] *See, e.g.*, Salt Lake City v. Kusse, 97 Utah 113, 93 P.2d 671 (1939); American Fork City v. Charlier, 43 Utah 231, 134 P. 739 (1913); Tooele City v. Hoffman, 42 Utah 596, 134 P. 558 (1913).

[32] Salt Lake City v. Kusse, 97 Utah 113, 119, 93 P.2d 671, 673 (1939), *quoting headnote in* Village of Struthers v. Sokol, 140 N.E. 519 (Ohio 1923).

[33] *See* note 31 *supra*.

[34] Salt Lake City v. Doran, 42 Utah 401, 131 P. 636 (1913). The court upheld a city ordinance prohibiting, *inter alia*, the operation of any card machine based on chance upon which anything of value was staked which was enacted under general statutory language that permitted cities to prohibit "any other game played with cards, dice, or any other device." It declared that " 'there may be different regulations without conflict,' covering the same subject matter, one for the cities and another for the state at large.... *'Additional regulation by ordinance does not render it void.'* " *Id.* at 640. (emphasis added) (citation omitted).

[35] The court appears to have applied the doctrine of preemption by occupation which will be treated in detail, notes 40–46 *infra* and accompanying text. However, it makes no express recognition of this doctrine, nor concerns itself with the operative policy considerations relied upon by jurisdictions employing the doctrine. This invocation of preemption by occupation without formal recognition, analysis, or resulting guidelines coupled with reversal of the decision upon rehearing effectively deprives the doctrine of any vitality in Utah.

[36] 437 P.2d 434, 436. The language adopted was from Salt Lake City v. Kusse, 97 Utah 113, 93 P.2d 671 (1939), which declared an ordinance dealing with the same subject as a statute to be invalid only if "prohibited by the statute or inconsistent therewith." *Id.* at 117, 93 P.2d at 673. Under this general principle, the court in *Kusse* stated the direct conflict standard as "whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa," and further interpreted the standard to mean that "an ordinance is in conflict if it forbids that which the statute permits." *Id.* at 119, 93 P.2d at 673.

[37] The argument propounded in *Allred*, which the court rejected, was that the ordinance was inconsistent with state sexual offense statutes and therefore preempted simply because the act in the ordinance was not denounced as a crime in the statute.

indications that preemption can result short of direct conflict with state statutes, in the second opinion the court apparently relied primarily on the direct conflict standard.

The direct conflict standard, however, is not soundly grounded insofar as it was extrapolated from a jurisdiction in which the state constitution granted municipalities all residual powers to enact ordinances not in conflict with state law.[38] In contrast to this jurisdiction, Utah's unchartered municipalities have no power independent of express grants made by the legislature. Therefore, a municipality could logically be prohibited from enacting an ordinance by a state statute evidencing an intent to restrict municipal legislation, although the statute's language or plain meaning did not directly conflict with the ordinance. A more tenable approach for the court in the second opinion would have been to expressly reject reliance on the direct conflict standard and expressly hold that preemption occurs when either direct conflict is apparent or the state legislature, through comprehensive statutory enactments, "occupies" a field.

Preemption by occupation has been widely adopted in other jurisdictions[39] and is consistent with the Utah court's restricted view of municipal powers.[40] Courts employing the preemption-by-occupation doctrine resolve cases such as *Allred*, in which an ordinance imposes regulations additional to those in a state statute, by determining whether the ordinance furthers the purpose of the statute by supplementing it with more detailed or specific provisions, or whether it conflicts with the statute's purpose or is excluded by the statutory scheme and is therefore invalidated.[41] Such a determination is generally

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437 P.2d at 436. Nevertheless, in contrast to the direct conflict standard which requires that an ordinance expressly permit what a statute forbids and vice versa, the court suggested that an ordinance which forbids something which no statute expressly covers, but from a consideration of related state statutes is repugnant to or inconsistent with state law, is preempted notwithstanding. *Id.*

[38] The court quoted an Ohio decision in framing the direct conflict standard. The Ohio decision, however, grounded its rule on the state constitution. Quoting from an earlier case, the Ohio court declared:

> 'By virtue of authority conferred upon municipalities by section 3, article XVIII, of the Ohio Constitution, to adopt and enforce within their limits such local police regulations as are not in conflict with general laws, municipalities may enact and enforce ordinances, the provisions of which are not inconsistent with the general laws of the state . . . .'

Village of Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519, 521 (1923), *quoting* Heppel v. City of Columbus, 106 Ohio St. 107, 140 N.E. 169 (1922).

[39] *See, e.g., In re* Lane, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962) (state sexual offense statutes preempted ordinance prohibiting resorting to a place to have sexual intercourse); Department of Licenses v. Weber, 394 Pa. 466, 147 A.2d 326 (1959) (state statutes requiring a state license held not to preempt city ordinance requiring a city license for beauty operators); 1 C. ANTIEAU, *supra* note 7, § 5.38.

[40] See notes 18–20 *supra* and accompanying text and note 61 *infra* and accompanying text.

[41] One writer observed:

> The courts have had the most difficulty in determining the validity of ordinances which impose *greater or stricter* conditions than those imposed by the general laws of the state. In some instances an ordinance of this type will be held to be *in aid and furtherance of* the policy of the general law and in other cases it will be held to be *in conflict* with the general law . . . .

Comment, *The State v. The City: A Study in Pre-emption*, 36 U. So. CAL. L. REV. 430, 434 (1963) (emphasis in original). *See* 1 C. ANTIEAU, *supra* note 7 §§ 5.35, 5.38.

veiwed as a question of legislative intent.[42] Apart from the language of the statute itself, two considerations, both of which could have been applied to evaluate the ordinance in *Allred*, are frequently deemed to bear on whether the legislature intended to preempt a field by occupation. One consideration is the state policy behind the statutes. The relevant questions are whether the local ordinance conflicts with state policy[43] and whether the purpose and scope of the legislative scheme indicates that the state intended to preempt the field.[44] The other consideration, based on the assumption that the legislature intended to preempt the field only if it had a strong interest in uniform legislation on the matter throughout the state, is the state's interest in uniformity.[45]

The Utah court, not surprisingly, has declared that the policy of the state is strongly opposed to prostitution.[46] Making illegal the direction of persons to places where sexual intercourse for hire is available comes within the scope of this policy, since such a ban would inhibit solicitation and, thus, discourage parties who practice or exploit prostitution.

Next, concerning the reach of the state statutory scheme, the state apparently has not assumed the entire burden of implementing its policy regarding

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[42] The rule, extrapolated from cases decided in several jurisdictions, has been expressed: "Courts are generally agreed that the problem [of determining whether a field has been occupied] is one of capturing the legislative intent." 1 C. ANTIEAU, *supra* note 7 § 5.38, at 292.35.

[43] The test to determine whether the municipal ordinance conflicts with the state policy has been expressed by one court as follows:

> Certainly it is the law that a conflict may exist and the state will be deemed to have occupied the field, not only where the ordinance and statute are in direct conflict but also where, realistically, the effect of the ordinance would defeat the basic objectives of the state legislation....

Chavez v. Sargent, 329 P.2d 579, 584 (Dist. Ct. App. 1958), *aff'd*, 52 Cal. 2d 162, 339 P.2d 801 (1959). The rule that a municipal ordinance is invalid if it is inconsistent with general state policy has been widely adopted. *See, e.g.*, Shelton v. City of Shelton, 111 Conn. 433, 150 A. 811 (1930); Town of Cicero v. Weilander, 35 Ill. App. 2d 456, 183 N.E.2d 40 (1962); City of Harlan v. Scott, 290 Ky. 585, 162 S.W.2d 8 (1942); 1 C. ANTIEAU, *supra* note 7 § 5.36. In contrast to the above language in *Chavez*, however, courts do not generally cast the rule in terms of preemption by occupation, but instead regard the consistency of the municipal ordinance with state statutes as a separate question. *Id.* Nevertheless, since state policy as well as exclusiveness of statutory scheme are matters of legislative intention which must be inferred indirectly from basically the same legislative enactments, and since both considerations are unavoidably interrelated, a logical approach is to treat both questions as two parts of the same inquiry.

[44] The state statutory scheme test has been formulated:

> Where the Legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the field to the exclusion of all local regulation is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme.

Abbott v. City of Los Angeles, 53 Cal. 2d 674, 349 P.2d 974, 981, 3 Cal. Rptr. 158, 165 (1960), quoting Tolman v. Underhill, 39 Cal. 2d 708, 712, 249 P.2d 280, 283 (1952).

[45] The California Supreme Court has frequently examined the state's interest in uniformity as a factor in determining whether an ordinance had been preempted. *E.g.*, Abbott v. City of Los Angeles, 53 Cal. 2d 674, 349 P.2d 974, 3 Cal. Rptr. 158 (1960); Chavez v. Sargent, 52 Cal. 2d 162, 177, 339 P.2d 801, 810 (1959); Tolman v. Underhill, 39 Cal. 2d 708, 713, 249 P.2d 280, 283 (1952). The Utah court, in Salt Lake City v. Kusse, 97 Utah 113, 93 P.2d 671 (1939), raised but rejected application of the uniformity test.

[46] The court has characterized the state policy regarding prostitution as "discourag[ing] the nefarious activities of persons who seek to foster immorality and prostitution." State v. Gates, 118 Utah 182, 186, 221 P.2d 878, 880 (1950).

prostitution. State statutes do not deal with the substantive crime of prostitution itself, but only with the status of prostitutes and with the conduct of parties who indirectly profit from it.[47] The ordinance at issue in *Allred* deals directly with prostitution.[48] Moreover, the state has delegated to municipalities the authority to punish prostitutes and prohibit keeping houses of prostitution.[49] Since the statutory scheme does not deal with the crime of prostitution nor imply an intention to occupy the field, the ordinance would not appear to be preempted.

Finally, the state's interest in uniformity is to protect the public from subjection to a checkerboard of varying local regulations that pertain to matters of general concern.[50] Although prostitution has been declared of general rather than local concern,[51] municipal ordinances dealing with prostitution usually have not been preempted by state statutes dealing with the same subject.[52] Recently, however, such considerations as modern transportation and large concentrations of population in contiguous municipalities with artificial boundaries have generated pressures to alter this practice.[53] Thus, the concurring opinion in a recent California decision, *In re Lane*,[54] regarded the state's interest in uniformity the most compelling argument for preempting by occupation a city ordinance that prohibited "resorting" to a place for

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[47] UTAH CODE ANN. §§ 76-53-8 to -12 (1953). These provisions forbid pandering, placing one's wife in a house of prostitution, profiting by earnings of fallen women, detaining a female in a house of prostitution for debt, and transporting females for prostitution. In another chapter, UTAH CODE ANN. § 76-61-1(10) (1953), prostitutes are defined as vagrants.

[48] The ordinance at issue in *Allred* was evidently intended to prevent prostitution without requiring proof of the elements generally considered to constitute prostitution. This is implied from a statement of the Salt Lake City Attorney noting the difficulty of dealing with prostitution in the absence of the ordinance struck down by the court's first decision. Salt Lake Tribune, July 26, 1967, at 17, cols. 5–6.

To successfully obtain a conviction for the express crime of prostitution, several problems must be surmounted. Since prostitution carries social opprobrium and is between consenting parties, the likelihood of a male testifying to having paid for receiving sexual intercourse from a defendant is slight. A law enforcement officer, then, must secure inculpating evidence. This requires the officer either to observe a prostitute receiving consideration for committing the act or to lead a suspected girl to a point uncomfortably short of consummating the offense. While the officer cannot entrap her into offering her services or indulge in any sex play with her, he must go far enough for her to take the consideration. Thus the officer is charged with an onerous burden of discretion and care. *See* J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY 100–09 (Science ed. 1967).

[49] *See* notes 9–10 *supra.*

[50] *In re* Lane, 58 Cal. 2d 99, 372 P.2d 897, 904, 22 Cal. Rptr. 857, 864 (1962) (concurring opinion); Helmer v. Superior Court, 48 Cal. App. 140, 191 P. 1001, 1002–03 (1920); *see* Salt Lake City v. Kusse, 97 Utah 113, 121–22, 93 P.2d 671, 674 (1939).

[51] Kelley v. Clark County, 61 Nev. 293, 127 P.2d 221, 223–24 (1942). The court, citing cases from several jurisdictions, declared:

> [T]he laws against... prostitution are general and intended to operate throughout the entire state, and such statutes are public regulations necessary for the maintenance of the public peace and good order of society, and are matters in which every citizen of the state has an interest, and are not local and confined to the municipality....

[52] *See, e.g.*, Billingslea v. Flynt, 222 Ga. 444, 150 S.E.2d 678 (1966) (ordinance prohibiting inviting to place for immoral purposes sustained).

[53] *In re* Lane, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962) (concurring opinion).

[54] 372 P.2d at 904, 22 Cal. Rptr. at 864 (concurring opinion).

sexual intercourse.[55] The factors compelling the opinion in *Lane*, however, were not present in *Allred*. Under the Salt Lake City ordinance, the entire act of directing must take place within the city, while resorting under the Los Angeles ordinance need not.[56] Moreover, directing must be connected with prostitution,[57] whereas resorting could have applied to fornication or cohabitation. This was particularly damning to the validity of the ordinance in *Lane* because fornication and cohabitation are not crimes under the California statutes.[58] Another consideration supporting the *Lane* decision was the close proximity of municipalities in the Los Angeles area which produce uncertain boundaries that offer little warning as to when a person becomes subject to a particular municipality's ordinances.[59] In Utah there is less likelihood of such confusion because Utah's population density is substantially less than California's and fewer municipalities are adjacent. Also, the entire prohibited act under the Salt Lake City ordinance must be executed within the municipality's boundaries to subject the actor to prosecution. It would appear, therefore, that Utah's interest in protecting its citizens from improper subjection to checkerboard local ordinances is substantially less regarding the ordinance in *Allred* than California's in *Lane*. Consequently, there are likely to be insufficient grounds for the court to reach the same result as in *Lane*. Thus the state interest in uniformity would not appear to compel the conclusion that the state intended to preempt the field by occupation.

In its treatment of both the general welfare and preemption issues, the court failed to enunciate standards for judicial reception of future cases in which a municipality's legislation may be contested. Moreover, the court's reversal of itself on rehearing resulted from the substitution of a district court judge for a member of the court who had voted with the majority in the first opinion.[60] Consequently, it is possible that under customary court membership, the views expressed in the first opinion regarding both general welfare powers and preemption may represent the court's real position.

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[55] The ordinance provided:

> No person shall resort to any ... apartment house ... for the purpose of having sexual intercourse with a person to whom he or she is not married, or for the purpose of performing or participating in any lewd act with any such person.

LOS ANGELES, CAL., MUNICIPAL CODE § 41.07 (1955).

[56] Since "directing" would appear to be a single visual or vocal communication between parties, the entire act apparently could be completed either within or without the city, subjecting only those parties "directing" within the city to prosecution under the ordinance. In contrast, "resorting" could be conceived and initiated in one municipality and consummated in another. For example, a couple might decide in Santa Monica to have intercourse and drive to Los Angeles to find a motel where their intentions could be accomplished. Though passing across the Los Angeles city limit would be only a continuation of the act of resorting, the parties would be in violation of the law in Los Angeles but not in Santa Monica.

[57] The ordinance in *Allred* prohibits "moral perversion" and "lewd acts" as well as "sexual intercourse for hire," but for purposes of this survey the ordinance is presumed to raise only questions presented in the case. This limits discussion to "sexual intercourse for hire." *See* note 8 *supra*.

[58] 372 P.2d at 900, 22 Cal. Rptr. at 860.

[59] *See id.* at 904, 22 Cal. Rptr. at 864 (concurring opinion).

[60] *See* note 15 *supra*.

In treating the general welfare issue, neither opinion gave proper recognition to or made any effort to reconcile conflicting precedent, thereby leaving two independent lines of precedent. This failure leaves the court's likely course in future cases uncertain. One consideration is that, apart from general welfare clause cases, the court has maintained an extremely restricted view of municipal powers.[61] Furthermore, cases upholding municipal exercise of general welfare powers are usually older than cases striking them down.[62] These factors point toward a restrictive view of such powers. On the other hand, the court has of late expressed a more liberal policy when dealing with a municipality's exercise of general powers.[63] The reasonable-relationship test provides a consistent synthesis of earlier cases and has been applied in some recent cases,[64] but no concrete guidelines exist to indicate whether it will be employed and if so, how strictly. Apparently, ordinances not closely associated with the protection of health, safety, or morals will be invalidated while ordinances closely related to these public interests and reasonably related to specific enabling statutes will be sustained.

In its treatment of preemption, the court should have expressly recognized the preemption-by-occupation doctrine and evaluated the state's policy, statutory scheme, and interest in uniformity to resolve the preemption issue. Absent such an approach, only those ordinances directly in conflict with either the language or plain meaning of the statutes are clearly preempted.

W.B.B.

[61] *See, e.g.*, Carter v. Beaver County Serv. Area No. One, 16 Utah 2d 280, 399 P.2d 440 (1965) (special hospital service area established by county was held unconstitutional); Utah Rapid Transit Co. v. Ogden City, 89 Utah 546, 58 P.2d 1 (1936) (establishment of motor bus common carrier system within city held beyond city's powers); Bohn v. Salt Lake City, 79 Utah 121, 8 P.2d 591 (1932) (city construction contract stipulations were prohibited as beyond city's authority to make).

[62] *See* notes 21–28 *supra* and accompanying text.

[63] In striking down an ordinance proscribing excavation of sand and gravel as an invalid exercise of general welfare powers the court stated:

> We find less need to invoke the delegation doctrine in this case where the state has conferred upon this city the power to make ordinances necessary to protect the health, morals and safety of the community, since our concept of representative government is satisfied where the city council who has received the delegation is an elected body. That is the nature of home rule.

Gibbons & Reed Co. v. North Salt Lake City, 19 Utah 2d 329, 339, 431 P.2d 559, 566 (1967).

[64] *See* note 30 *supra* and accompanying text.

Statutory Dower and Inheritance Tax: The Widow's Election Law

In *In re Estate of Paxman*,[1] a testator gave his wife all of his property in fee without indicating whether his will provisions were in lieu of or in addition to the one-third interest in her husband's real property to which she was entitled under the Utah dower statute.[2] The widow accepted the provisions

[1] 19 Utah 2d 56, 426 P.2d 6 (1967).

[2] The will was relatively simple. Prior to nominating the wife as executrix and intentionally disinheriting the children, it provided: "I hereby give, devise and

of the will, but, claiming that her husband had not intended that she relinquish the statutory share,[3] she did not renounce her statutory dower. Despite the State Tax Commission's contention that the wife had waived her statutory interest by electing to take under the will,[4] the Supreme Court of Utah held that the provisions of the will were in addition to the statutory share and that because of an earlier decision, the statutory share was exempt from the inheritance tax.[5]

The Utah dower statute[6] grants a surviving wife one-third in value of all real property possessed by her husband during marriage.[7] A complementary

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bequeath unto my beloved wife, Vivian T. Paxman, all my property and estate, both real and personal, of whatsoever nature or wheresoever situated, to have and to hold the same absolutely." 19 Utah 2d at 57, 426 P.2d at 7.

[3] 19 Utah 2d at 58, 426 P.2d at 7.

[4] A question might arise why the Commission was interpreting a will. The Commission's brief explains the procedural context of the case:

> After the death of the testator, executrix for the estate ... filed a document [with the district court] entitled Acceptance of Testamentary Provisions ... by which she purported to claim under the statutory provisions ....
>
> ....
>
> On September 22, 1965, another unusual document was filed by the executrix ... entitled Petition for Order Approving Inheritance Tax Return and Fixing Inheritance Tax .... The provision of this document out of the ordinary was that part thereof petitioning the District Court to pass on the accuracy and propriety of the inheritance tax return which had been filed by the executrix with the State Tax Commission, without giving the Commission the preliminary right to make an initial determination of the appropriateness of such a return on the basis of its experience and expertise in this area. Counsel for the Tax Commission in his appearance on October 4, 1965, submitted to the court that petitioner-executrix had failed to exhaust her administrative remedies and that a Commission review prior to the court's assuming jurisdiction would be in the best interests of all.
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> The court, however, determined to take primary jurisdiction of the case and decided the case upon its merits, which would appear to be within its authority under the provisions of Section 59-12-35, Utah Code Annotated, 1953, even though it is at variance with the administrative pattern of judicial review subsequent to Commission determination usually adhered to in state tax cases.

Brief for Appellant at 5–6.

The Tax Commission objected to the interpretation given the will because it exempted one-third of the husband's real estate from his gross estate, a $40,000 wife's exemption from the inheritance tax under UTAH CODE ANN. § 59-12-2 (Repl. vol. 1963), and a $23,450.88 joint tenancy exclusion under UTAH CODE ANN. § 59-12-5 (Repl. vol. 1963). The claim was that by allowing the wife's exemption and the joint tenancy exclusion, "[t]he public policy behind dower — the protection of a widow against a thankless, arbitrary husband — has been well served." Brief for Appellant at 19. This argument is not persuasive since according to the Commission's own admission, if the will states "clearly and unambiguously" that its provisions are in addition to the statutory share, the dower interest would not be included in the husband's estate and thus would not be subject to the inheritance tax. *Id.* at 9–10. The Commission's argument then is essentially a very technical distinction: the public policy behind dower is served if certain words are used in the will, but is not served if those words are absent. *See* text accompanying notes 38 & 39 *infra.*

[5] 19 Utah 2d at 59, 426 P.2d at 8. The earlier decision was *In re* Bullen's Estate, 47 Utah 96, 151 P. 533 (1915). See text at notes 9 & 11 *infra.*

[6] Although common law dower has been abolished in Utah and many other states, statutory provisions for the wife are still commonly referred to as "dower." *See, e.g.*, Durbin v. Redman, 140 Ind. 694, 40 N.E. 133 (1895); 1 AMERICAN LAW OF PROPERTY § 5.5, at 632–33 (A.J. Casner ed. 1952); 25 AM. JUR. 2d *Dower & Curtesy* § 1 (1966).

[7] The Utah dower statute provides:

> One-third in value of all the legal and equitable estates in real property possessed by the husband at any time during the marriage, to which the wife

statute, the "widow's election" law,[8] provides that if "it shall *appear from the will*" of the husband that his testamentary gifts to the wife are in addition to the statutory share, she is presumed to have accepted both. If, on the other hand, the will limits the wife's share to its own provisions, the wife is presumed to have renounced the will and taken her statutory share unless she formally accepts the will provision. In *In re Bullen's Estate*,[9] an early decision by the Utah Supreme Court, it was held that when the widow takes under the dower statute instead of under the will, the statutory interest belongs to her absolutely in her own right and is not subject to the inheritance tax assessed on her deceased husband's estate.[10] By combining the election statute and the *Bullen* decision, an anomaly is created. A surviving wife will receive a "substantial tax break" if a will giving all the husband's property to her in fee states that the will provision is in addition to the statutory share.[11]

In reaching its decision in *Paxman*, the court apparently construed the phrase "appear from the will" in the election statute to mean that the will as a whole, not merely the words alone, should be considered in determining the husband's intent.[12] Upon examining the will, the court found that by disinheriting the children and leaving all the property to the wife, the husband had

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has made no relinquishment of her rights, shall be set apart as her property in fee simple, if she survives him . . . .

UTAH CODE ANN. § 74-4-3 (1953). A complementary provision states that "a married man shall not devise away from his wife more than two-thirds in value of his legal or equitable estates in real property without her consent in writing." *Id.* § 74-1-1.

[8] The election statute reads in pertinent part:

> If the husband shall make any provision by will for the widow, such provision shall be deemed to be in lieu of the distributive share . . . unless it shall appear from the will that the decedent designed the testamentary provisions to be additional to such distributive share, in which case the widow shall be presumed to have accepted both such testamentary provisions and such distributive share. If, however, it does not appear from the will that its provision for the widow is additional, then the widow shall be conclusively presumed to have renounced such provision and to have accepted her distributive share, unless . . . she shall . . . accept the testamentary provision, which acceptance shall be construed to be a renunciation of her distributive share.

Id. § 74-4-4.

[9] 47 Utah 96, 151 P. 533 (1915), *noted in* 4 J. HENDERSON, BANCROFT'S PROBATE PRACTICE § 1067 n.10 (2d ed. 1950).

[10] The Utah inheritance tax is assessed on property of the deceased "which shall pass to any person . . . by testamentary disposition or by law of inheritance or succession . . . or by [transfer] made in contemplation of . . . death . . . or intended to take effect in possession or enjoyment at or after his death." UTAH CODE ANN § 59-12-3 (Repl. vol. 1963). Since there is no transfer by the husband of the wife's dower, the above section does not apply.

A minority of states hold that the dower interest is not subject to the inheritance tax, following reasoning similar to that in *Bullen*. A majority of states subject the interest to the inheritance tax. In the absence of a statute clearly including dower as taxable, the rationale supporting the majority view is that the statutory share passes by the intestate succession laws. Ten states have statutes which expressly subject the dower interest to the inheritance tax, as does the federal estate tax law. *See* Note, *Inheritance Taxation of Dower and Other Marital Interests*, 99 U. PA. L. REV. 979, 982–87 (1951).

[11] Brief for Appellant at 9–10. *In re* Estate of Paxman, 19 Utah 2d 56, 426 P.2d 6 (1967).

[12] A fundamental principle of will interpretation is that the testator's intent is to be derived from the "four corners of the instrument." *See, e.g.*, Park v. Powledge, 198 Ala. 172, 73 So. 483 (1916); Hanks v. McDanell, 307 Ky. 243, 210 S.W.2d 784 (1948).

intended that his wife should not have to forfeit her statutory share or the accompanying tax benefit which arises upon receipt of both testamentary and statutory interests.[13] The court reasoned that if a testator's will makes no attempt to dispose of his wife's statutory interest to a third party, gifts to the wife under the will are in addition to her statutory share. By his silence the testator acknowledges that the wife's statutory rights are independent of his rights in the real property. In effect, the will of the husband merely devises his remaining two-thirds interest in the real property.[14]

The common law arbitrarily presumed that a testamentary disposition in favor of the wife was in addition to her dower interest unless the will provided otherwise.[15] This presumption is justified on the grounds that the testator "may easily put his intention in the matter beyond all dispute."[16] Statutory enactments replacing dower have generally reversed the common law by creating a presumption that unless the will of the husband provides that she is to receive the dower, the wife takes only under the will.[17] No justification is advanced for this statutory presumption, and like its common law predecessor, it appears to be an arbitrary rule.

Although the Utah election statute employs the statutory presumption,[18] the court in *Paxman* apparently used the common law presumption to support its finding that it "appeared from the will" that the testator intended his gifts to be in addition to the statutory share. Such reliance becomes obvious when language of the will is considered; it contains no reference — explicit or implicit — to the wife's statutory interest.[19] This use of the common law is somewhat confusing in light of the election statute, but such use, as subsequent discussion will illustrate, may have created a just result countering the anomaly created by the *Bullen* case and the election statute.

In order to establish an expression of intent that the wife take both the statutory dower and the testamentary gift, other courts have required more evidence than the *Paxman* court. The requisite intent has been found lacking when a wife was given a life estate in all the husband's property,[20] a life

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[13] The taxpayer-widow argued on appeal that the testator clearly intended her to take *all* his devisable property, especially since he expressly disinherited his children. Brief for Respondent and Cross-Appellant at 6.

[14] 19 Utah 2d at 59, 426 P.2d at 8.

[15] *See, e.g.*, McDermid v. Bourhill, 101 Ore. 305, 199 P. 610 (1921); *In re* Cooper's Estate, 32 Wash. 2d 444, 202 P.2d 439 (1949); 5 W. BOWE & D. PARKER, PAGE ON WILLS § 47.5 (1962) [hereinafter cited as PAGE]; Oberschelp, *When Are Provisions for Widow in Will in Lieu of Her Right Under Law?*, 9 ST. LOUIS L. REV. 157 (1924).

The intent to make the gift in lieu of dower had to be clear, McDermid v. Bourhill, *supra*, as determined either by the specific provisions of the will or the "will as a whole." 5 PAGE § 47.6.

[16] 25 AM. JUR. 2d *Dower & Curtesy* § 156 (1966); *see, e.g.*, Phillips v. Northfield Trust Co., 107 Vt. 243, 179 A. 154 (1935).

[17] *E.g.*, IOWA CODE ANN. § 633.237 (1964); WIS. STAT. ANN. § 233.14 (1957); *see* 5 PAGE § 47.7.

[18] UTAH CODE ANN. § 74-4-4 (1953) (quoted in note 8 *supra*).

[19] The will is described in note 2 *supra*.

[20] United States Fidelity & Guar. Co. v. Edmondson, 187 Ark. 257, 59 S.W.2d 488 (1933); *In re* Evans, 145 Minn. 252, 177 N.W. 126 (1920).

estate in all his property unless she should remarry,[21] a life estate in all his real property with remainder to the children,[22] or everything in fee subject to payment of her husband's debts.[23] On the other hand, intent that both the statutory share and the testamentary provision should be taken has been found when the will, which gave the wife a life estate in real property and absolute gifts of personal property, gave the residue to the children after the widow "has taken her portion according as the law provides."[24] The necessary intent has also been found in other cases, but only when the dower interest was expressly referred to in the will.[25] The foregoing cases all involve spousal testamentary gifts exceeding the wife's dower and illustrate that without some clear provision, a will giving the wife more than her dower interest does not allow the inference that the husband intended such gifts to be in addition to the statutory share. To the contrary, such a disposition would seem to indicate that the husband desired all property to pass by the will. The above decisions, however, were not made in a tax context, as was the *Paxman* case.

The court in *Paxman* failed to refer to three earlier Utah cases, also decided in a tax context, which reached an opposite result on similar or more convincing evidence.[26] Since two of these decisions were referred to in the briefs,[27] the court should have discussed them in the *Paxman* opinion. If the cases were not in point, the grounds of distinction should have been mentioned. If they were bad law, they should have been overruled. Failure to examine these decisions leaves the practitioner, as well as the Tax Commission, without adequate guidelines to handle future problems.[28]

The first case, *In re Little*,[29] held without discussion that a will disposing of all the testator's property in fee without mentioning the wife's dower interest evinced an intent that the gifts to the wife were in lieu of her statutory share. Unlike *Paxman*, *Little* involved substantial gifts to the children in addition to a gift to the wife of less than her statutory share. Under the reasoning of *Paxman*, the gifts to the children should be considered an attempt to give the wife's statutory interest to a third party.[30] The rationale of *Paxman* would seem to apply when the husband attempts to give his wife less than her statutory interest by disposing of his property to third persons, and consequently, *Little* would appear to be good law. Under the above

[21] Luigart v. Ripley, 19 Ohio St. 24 (1869).

[22] Bristow v. Jennings, 105 Ore. 1, 207 P. 863 (1922).

[23] Schuette v. Bowers, 40 F.2d 208 (2d Cir. 1930); Melms v. Pabst Brewing Co., 93 Wis. 140, 66 N.W. 244 (1896).

[24] Burkhalter v. Burkhalter, 88 Ind. 368 (1882).

[25] *E.g.*, Chambless v. Gentry, 178 Ark. 558, 11 S.W.2d 460 (1928); Wilson v. Fisher, 298 Ky. 790, 184 S.W.2d 104 (1944).

[26] *In re* Hansen's Guardianship, 67 Utah 256, 247 P. 481 (1926); *In re* Kohn's Estate, 56 Utah 17, 189 P. 409 (1920); *In re* Little, 22 Utah 204, 61 P. 899 (1900).

[27] *In re Hansen's Guardianship* was not cited in the briefs.

[28] Likewise, the court's failure to discuss similar cases brought to its attention is bound to effect not only the quality of briefs filed by practicing attorneys but also the quality of law practice in the state. An attorney will not be encouraged to prepare comprehensive and enlightening briefs if it is believed that they will be ignored or lightly considered.

[29] 22 Utah 204, 61 P. 899 (1900).

[30] *See* text accompanying notes 13 & 14 *supra*.

analysis, if a husband, without mentioning his wife's statutory dower interest, transfers to her by will less than such interest, the gift may be treated as being in lieu of her statutory share. The status of *Little* is uncertain, however, since it did not involve a transfer of *all* the husband's property to the wife as did *Paxman*.[31]

The second case, *In re Hansen's Guardianship*,[32] involved a testamentary trust created by the husband under which the wife received a life estate in all of his property. The will did not mention the wife's statutory interest; the Utah Supreme Court held that the wife's life estate in the trust property was in lieu of her statutory share. The fact that a trust was involved indicated that the gift was in lieu of the statutory share, since the trust deprived the widow of the right to use and possess the property to the same extent as if she had received her interest under the dower statute.[33] In effect, part of the widow's share was given to third persons; therefore *Hansen* would appear to be good law under the *Paxman* reasoning. Thus, if a husband devises all his property in trust for the benefit of the wife for her life, under the Utah widow's election statute, it "appears from the will" that her gift is in lieu of her statutory share.

The third case, *In re Kohn's Estate*,[34] appears to be indistinguishable from *Paxman*. *Kohn* involved a testamentary gift by the husband to his wife of all his property in fee using language very similar to that in *Paxman*.[35] The Utah Supreme Court held that because the will failed to indicate clearly that the testamentary provision was in addition to the statutory share, the disposition was in lieu of such share. The court reasoned that since the husband gave everything to his wife, there was nothing left in which she could claim a statutory interest.[36] The *Paxman* case clearly overruled *Kohn*.

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[31] The Tax Commission has interpreted *Paxman* as being limited to a case in which the husband gives *all* his property in fee to his wife. Interview with Reed Hunter, Assistant Attorney General for the State of Utah, May 6, 1968.

[32] 67 Utah 256, 247 P. 481 (1926).

[33] *See* United States Nat'l Bank v. Daniels, 180 Ore. 356, 177 P.2d 246, 249 (1947).

[34] 56 Utah 17, 189 P. 409 (1920).

[35] The court found that the husband's nominal gifts of five dollars to each of his five children were "notice to all that he had not intentionally omitted any of them, and had therefore complied with our statute in that regard." 56 Utah at 22, 189 P. at 411. The will then provided: "I give, bequeath and devise to my wife Rose Kohn, all the rest, residue and remainder of my personal estate, goods and chattels; and all the rest, residue and remainder of any and all real estate, of every name and nature whatsoever, owned by me at the time of my death." *Id.* at 21, 189 P. at 410. *Compare* the foregoing language *with* that found in *Paxman*, note 2 *supra*.

[36] The court stated:

> It no doubt was the intention of the testator to devise and bequeath his entire estate to his wife, which, to all intents and purposes, he did. He therefore gave her all he had, and hence there was not the slightest necessity for giving her anything in addition to her statutory interest. Indeed, *after giving her all of his property, no necessity existed for referring to her statutory interest, since all of that was necessarily included in the whole estate.* It is needless, therefore, to contend that in making the bequest to his wife the testator intended it as an addition to her statutory share. By giving her all he had there was nothing to add to the bequest. The intention of the testator is expressed in clear and unmistakable language, and hence the presumption referred to in section 6407, supra, that the bequest was intended in lieu of, and not in addition to, her statutory interest, must prevail.

56 Utah at 22–23, 189 P. at 411 (emphasis added).

The court's opinion in *Paxman* may well have been influenced by the dissenting opinion in the *Kohn* case. In that opinion, Justice Gideon indicated that the wife will receive all of her deceased husband's property whether the will states "all my property to my wife" or "all my property to my wife in addition to her statutory share."[37] He concluded that since the testator's intent is the same in both instances — that the wife receive all his property — the will should be interpreted to reach the same result under either provision.

This position is difficult to justify in the case of language stating "all my property to my wife," since the intent to dispose of property in addition to the statutory share does not "appear from the will" as required by the widow's election statute. Although the same result is reached under either provision, reliance on a presumption is necessary absent mention of the statutory share. The reasoning of Justice Gideon does make practical sense, however, since a husband who gives all his property to his wife by will is probably unaware of the different tax consequences that result from slight differences in phraseology. He only intends that his wife have all his property. This fact alone is sufficient justification for the decision in *Paxman*.

The language of the *Kohn* dissent and the *Paxman* court suggests that both opinions were influenced by the tax inequity created when a will fails to state that its provisions are in addition to the statutory share.[38] Since the *Bullen* case, which was decided after enactment of the election statute,[39] made possible the inequity, the correctness of that decision is subject to inquiry. In *Bullen* the question was whether property taken as statutory dower passed by the "statute of inheritance" (intestate succession law) as required by the inheritance tax statute in order to be taxed.[40] The supreme court held that the one-third interest passed to the wife, not as an heir, but in her own right;[41] consequently, the interest was not to be included in her husband's estate for inheritance tax purposes.[42]

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[37] Justice Gideon's statement was:

> Where a certain result is obtained from the language used, and a like result would follow from different language, is it not a reasonable and logical deduction that the intent of the testator was the same in both instances, and that such intent appears from the language used? To conclude otherwise in this case is to give effect to the evident intent of the testator by giving the entire estate to the widow, but at the same time denying the effect of the intent by contending that it does not so appear from the language of the will.

56 Utah at 27–28, 189 P. at 413 (Gideon, J., dissenting).

[38] *In re* Estate of Paxman, 19 Utah 2d 56, 59, 426 P.2d 6, 7 (1967); *In re* Kohn's Estate, 56 Utah 17, 27, 189 P. 409, 413 (1920) (Gideon, J., dissenting).

[39] The election statute was enacted in 1898. *In re* Reynolds' Estate, 90 Utah 415, 421, 62 P.2d 270, 273 (1936). *Bullen* was decided in 1915. *See* note 9 *supra*.

[40] *See* note 10 *supra*.

[41] *In re* Bullen's Estate, 47 Utah 96, 151 P. 533 (1915).

[42] *Bullen's* determination that the dower interest is not subject to inheritance tax creates a limited marital deduction. The tax benefit accrues, however, only to the estate of the testator who possessed interests in real property during marriage to his surviving spouse. Since there is an alternative that should be considered — a power of appointment in the wife — use of the tax advantage may not be appropriate in all estates.

If the wife survives the husband and if the "limited marital deduction" route is selected, the dower interest passes to the wife free from state inheritance tax. Such interest will be taxed at her death, however, unless she consumes it or gives it away during her lifetime. If on the other hand, a testator by will provides for gifts in lieu

The court in *Bullen* relied heavily upon community property law under which "the surviving spouse takes his or her half of the community property, not by succession, descent or inheritance, but as survivor of the marital community or partnership."[43] This reliance might seem improper, since principles of community property law "are generally inconsistent with dower and its statutory substitutes."[44] The community property interest is created by law as an incident of marriage and vests in the wife during the marriage, whereas common law dower vests only upon survival of the husband. Like the community property interest, however, the wife received her common law dower not as an heir but as a right independent of the rights she acquired by will or intestate succession.[45]

Utah law, though stating that common law dower is abolished,[46] has preserved its essential elements.[47] Consequently, the court's view in *Bullen* that dower was taken in the wife's own right was consistent with other Utah law on the nature of statutory dower. Whether dower is taken in addition to the testamentary provisions should not effect the tax consequences. The interest does not pass from the husband and, therefore, is not a proper subject for inheritance tax imposed upon the transfer of the husband's property. *Bullen* was clearly applicable to the *Paxman* situation.

The tax inequity arising from *Bullen* is the result of applying a tax-oriented decision to an election statute that was drafted without consideration of the differing tax consequences that might occur.[48] The exception to the election

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of dower and creates a power of appointment in the wife, the transfer upon the husband's death of the property subject to the power will be taxed in his estate because the wife takes under the will instead of in her own right. Upon the wife's death, if she has not exercised the power "in favor of [her]self, [her] estate, [her] creditors, or the creditors of [her] estate," the property subject to the power is not included in her taxable estate and thus is not taxed. Inheritance Tax Reg. No. 5 (1966); *In re* Fenner's Estate, 2 Utah 2d 134, 270 P.2d 449 (1954).

Because of the foregoing alternative, the will draftsman and estate planner must consider not only the advantages and disadvantages of powers and gifts in lieu of dower, but also the timing of the transfer of the taxable property — should it be transferred at the husband's or the wife's death.

[43] Kohny v. Dunbar, 21 Idaho 258, 121 P. 544, 547 (1912).

[44] 1 AMERICAN LAW OF PROPERTY § 5.1, at 617 (A.J. Casner ed. 1952).

[45] *See, e.g., In re* Noble's Estate, 194 Iowa 733, 190 N.W. 511 (1922).

[46] UTAH CODE ANN. § 74-4-9 (1953).

[47] *E.g., In re* Bullen's Estate, 47 Utah 96, 151 P. 533 (1915); 1 AMERICAN LAW OF PROPERTY § 5.1 & n.7 (A.J. Casner ed. 1952).

[48] *See* note 38 *supra* and accompanying text. Although the purpose of allowing the husband to give his wife property in addition to the statutory share is not clear, the effect is to assure that part of the husband's estate — the statutory share — will pass without becoming subject to the debts of his estate "except those secured by liens for work or labor done or material furnished exclusively for the improvement of the [real property], and except those created for the purchase thereof, and for taxes levied thereon." UTAH CODE ANN. § 74-4-3 (1953).

It should be noted that such an advantage accrues only to the husband whose debts are large in proportion to his assets and whose assets are mainly real property. *See* 1 AMERICAN LAW OF PROPERTY § 5.42, at 738 (A.J. Casner ed. 1952).

If, for example, a husband dies possessing as his sole asset real estate worth $100,000 and having debts in the amount of $80,000 the wife as sole heir under a will which disallows the statutory share would get $20,000. If the will states that its provisions are in addition to the statutory share, then the wife will receive $33,333 and the creditors will have to split the remaining $66,667, receiving approximately 80 cents on the dollar.

statute created by *Paxman* has been restricted by administrative interpretation to the case in which the husband disposes of all his property by will to his wife in fee.[49] Whether the reasoning of *Paxman* will be extended to include situations in which the wife receives less than all of the property but more than her dower interest is not clear.[50] Until the election statute is amended,[51] a will which provides for the disposition of all the husband's property in fee but does not refer to the wife's statutory interest will qualify for the tax benefits of *Bullen*. If the husband devises real property to his wife, the safest way to obtain the favorable tax treatment is to clearly state in the will that the testamentary provisions are in addition to the statutory share.

D.W.M.

[49] *See* note 31 *supra*.

[50] *See* text accompanying notes 30 & 31 *supra*.

[51] The Tax Commission has prepared a bill and will present it to the 1968 Utah legislature. The bill prohibits the husband from designating that his testamentary provisions are in addition to the statutory share. Interview with Reed Hunter, Assistant Attorney General for the State of Utah, May 6, 1968.

Discovery of Liability Insurance Permitted by Rule 26(b) of the Rules of Civil Procedure

The discoverability of liability insurance in a civil action, an issue not previously considered by the Utah Supreme Court, was firmly established in *Ellis v. Gilbert*.[1] The case involved an automobile collision and, by way of interrogatories pursuant to rule 33 of the Utah Rules of Civil Procedure, the plaintiffs sought to discover whether the defendant was insured and, if so, to what extent and by whom. The court, in interpreting rule 26(b), which defines the scope of discovery, was faced with the question whether the discovery of insurance was "relevant to the subject-matter involved." The court reasoned that the ultimate objective of any lawsuit is to obtain a swift and just determination of the dispute. Discovery of liability insurance would help implement this objective since it aids a plaintiff in realistically evaluating and preparing his suit and promotes the prospects of settlement. Thus, the court concluded, after propounding several other policy reasons for allowing discovery,[2] that liability insurance is "relevant" and within the scope of rule 26(b).

[1] 19 Utah 2d 189, 429 P.2d 39 (1967). The holding in *Ellis* was reaffirmed in another Utah case decided shortly after *Ellis*. *See* Young v. Barney, 20 Utah 2d 108, 433 P.2d 846 (1967).

The Nevada Supreme Court also recently approached the question for the first time. Washoe County Bd. of School Trustees v. Pirhala, 433 P.2d 756 (Nev. 1968). Plaintiff in that case, suing on a school playground injury, propounded interrogatories to the defendants in an attempt to discover whether defendants had liability insurance covering the injury. The court held, after a review of several cases, that the better rule was to deny discovery. To allow discovery, the court felt, would torture the clear meaning of such words as "relevant" and "subject-matter" as those terms are used in NEV. R. CIV. P. 26(b) which governs the scope of discovery.

[2] The reasons given by the court in reaching its decision are more fully explained *infra*. *See* notes 8–37 *infra* and accompanying text.

Whether discovery of liability insurance should be permitted has been one of the most unsettled questions in civil procedure.[3] Many states have, like Utah, adopted the language of rule 26(b) of the Federal Rules of Civil Procedure,[4] which states:

> Unless otherwise ordered by the court . . . the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.[5]

In interpreting this language, it is necessary to determine whether discovery of liability insurance is relevant to the "subject matter" of a lawsuit. Since "subject matter" is not defined in the rules, the term can be interpreted either narrowly or broadly.[6] Courts that do not allow discovery of liability insurance hold that "subject matter" only refers to issues that could or will be presented at trial.[7] Courts that do allow discovery, on the other hand, reason that "subject matter" refers to everything related to the lawsuit and not merely to pleadings and procedure. By this definition, how a case is to be prepared and whether it should be settled is part of an action's subject matter and since discovery of liability insurance plays an important role, it is within the "subject matter" requirement.[8] To support a broad interpretation of the

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[3] Many courts and writers have dealt with the subject. The leading cases and writings are listed in Cook v. Welty, 253 F. Supp. 875, 876 (D.D.C. 1966); 2A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 647.1 nn.45.5–.7 (C. Wright ed. 1961, Supp. 1967) [hereinafter referred to as BARRON & HOLTZOFF]; 4 J. MOORE, FEDERAL PRACTICE ¶ 26.16[3] n.4 (2d ed. 1967, Supp. 1968). According to these sources, the authorities are about evenly split with regard to the question whether liability insurance should be or is discoverable.

[4] *See, e.g.*, ARIZ. R. CIV. P. 26(b); MINN. R. CIV. P. 26.02.

[5] FED. R. CIV. P. 26(b). For the sake of convenience and conciseness, the language embodied in this rule will hereinafter be referred to as rule 26(b), whether or not that is its designation in each jurisdiction adopting this language.

[6] One authority in commenting on the relevancy test of rule 26(b) said:

> The boundaries defining information which is relevant to the subject matter involved in the action are necessarily vague and it is practically impossible to state a general rule by which they can be drawn. Certainly the requirement of relevancy should be construed liberally and with common sense, rather than in terms of narrow legalisms. Indeed it is not too strong to say that discovery should be considered relevant where there is any possibility that the information sought may be relevant to the subject matter of the action. If protection is needed, it can better be provided by the discretionary powers of the court under Rule 30, rather than a constricting concept of relevance.

2A BARRON & HOLTZOFF § 647, at 67 (footnote omitted).

[7] *See, e.g.*, Sanders v. Ayrhart, 89 Idaho 302, 309, 404 P.2d 589, 592 (1965); Jeppesen v. Swanson, 243 Minn. 547, 560, 68 N.W.2d 649, 656–57 (1955); Washoe County Bd. of School Trustees v. Pirhala, 435 P.2d 756 (Nev. 1968).

[8] One authority has said:

> As a practical matter the fact and amount of insurance have the greatest relevance to the subject matter in dispute — as distinguished from the issues framed by the pleadings — and it is this broad test of relevancy that should govern discovery.

F. JAMES, CIVIL PROCEDURE § 6.11, at 214–15 (1965).

rule, these courts point out that had a narrow rule been intended, the framers[9] would have used the term "issue" rather than "subject matter."[10]

The interpretation of rule 26(b) also turns upon a determination of whether the second sentence limits the relevancy test of the first sentence. The second sentence reads: "It is not ground for objection that the testimony will be inadmissible at the trial *if* the testimony sought appears reasonably calculated to *lead to the discovery of admissible evidence.*"[11] If this sentence is read as limiting the first sentence of rule 26(b), liability insurance, even though deemed relevant to the subject matter of the dispute, would not be discoverable. The existence of insurance coverage is inadmissible as evidence[12] and it is difficult to conceive how discovery of insurance could *lead* to admissible evidence. The body that drafted the Federal Rules of Civil Procedure has stated that although the second sentence was added only to "make clear the broad scope of examination[,] . . . matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry . . . ."[13] Despite the holding of the court to the contrary,[14] then, it seems reasonably clear that the second sentence of rule 26(b) limits the rule's first sentence. As a result, if the question were resolved strictly by interpretation of the rule's language, liability insurance would not fall within the scope of discovery.[15]

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[9] Under 28 U.S.C. § 2072 (1964), *as amended* (Supp. II 1966), the United States Supreme Court has been given the power to prescribe the civil rules of practice and procedure for all federal district courts and courts of appeals. The Utah Supreme Court has been given a similar grant of power for the state court system. UTAH CODE ANN. § 78-2-4 (1953). These courts in turn appointed advisory committees to draft the rules. *See* Appointment of Committee, 295 U.S. 774 (1935). The committees analyzed existing practices and made recommended changes which were adopted by the courts. When a court therefore speaks of the intent of the framers, it is in a general sense referring to its own intent. In a more specific sense, however, it is referring to the members of the drafting committee, chosen because of their expertise. In relying on this latter body, it is drawing upon the experience and understanding of those directly responsible for the actual writing of the rules and whose interpretation is beneficial in much the same way that legislative history is beneficial in interpreting legislation.

The Utah Supreme Court, it could be argued, should amend a rule rather than strain at its wording in order to reach a particular result. However, the rules should be of a permanent nature in order to promote uniformity between courts, and every specific problem should not have to be answered by an amendment. Even though the court did not specifically find in the rules that liability insurance could be discovered, there was no need for the court to amend the rules to allow for such discovery as long as the policy of the rules permitted it.

[10] *See, e.g.*, Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 364 P.2d 266, 284, 15 Cal. Rptr. 90, 108 (1961); Pettie v. Superior Court, 178 Cal. App. 2d 680, 3 Cal. Rptr. 267, 271–72 (1960); *cf.* Lucas v. District Court, 140 Colo. 510, 521–22, 345 P.2d 1064, 1070 (1959); Ellis v. Gilbert, 19 Utah 2d 189, 191, 429 P.2d 39, 40 (1967).

[11] *E.g.*, FED. R. CIV. P. 26(b); UTAH R. CIV. P. 26(b) (emphasis added).

[12] *E.g.*, Johanek v. Aberle, 27 F.R.D. 272, 280 (D. Mont. 1961); Young v. Barney, 20 Utah 2d 108, 433 P.2d 846 (1967).

[13] FED. R. CIV. P. 26(b), Notes of Advisory Committee on Amendments to Rules.

[14] Ellis v. Gilbert, 19 Utah 2d 189, 190, 429 P.2d 39, 40 (1967); *accord*, Lucas v. District Court, 140 Colo. 510, 518, 345 P.2d 1064, 1068 (1959).

[15] The discovery rules of some jurisdictions basically following the Federal Rules have been amended to specifically permit discovery of liability insurance. *E.g.*, Myers v. St. Francis Hosp., 91 N.J. Super. 377, 220 A.2d 693, 701–02 (1966) (N.J.R. CIV. P. 4:16–2); 2A BARRON & HOLTZOFF, § 647.1 n.45.5 (Supp. 1967) (R.I.R. CIV. P. 26(b)(2)). The proposed amendments to the Federal Rules would also permit

Regardless of the difficulties presented by the language of rule 26(b), there are strong policy reasons for allowing discovery of insurance.[16] One of the most persuasive reasons is that if the plaintiff knows of the existence and amount of liability insurance possessed by the defendant, he can determine how much expense and preparation should go into his case.[17] If a defendant is impecunious and has no insurance, no action may be taken at all since there is little point in obtaining an unsatisfiable judgment.

Moreover, knowledge by the plaintiff of the extent of the defendant's insurance coverage can easily lead to settlement.[18] A plaintiff is usually willing to settle within a defendant's policy limits if the defendant has no other significant assets.[19] It is true, on the other hand, that settlement is not as likely if the defendant's policy limits are high, since the plaintiff may demand more than the insurance company is willing to pay.[20] Nevertheless, settlement is just as unlikely if the plaintiff knows nothing about the policy limits. The plaintiff would probably just as soon have the case tried to see what he can collect after judgment as to settle blindly not knowing how much coverage defendant has. Discovery of the amount of liability insurance protects against inadequate settlements accepted by a plaintiff who is unaware that the defendant is insured, or who thinks that the coverage is very limited and believes defendant to have only minimal assets.[21] Since the discovery rules are designed to provide a "just, speedy, and inexpensive determination

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discovery of liability insurance. FED. R. CIV. P. 26(b)(2) (Proposed amendment, Nov. 1967). All the above amendments have added language allowing discovery of insurance; the first and second sentences of rule 26(b) have remained virtually unchanged. This may indicate that the second sentence is neither a limitation of the first nor is it incompatible with the discovery of insurance. On the other hand, it could be argued that the additional language was necessary before a court was properly authorized to allow discovery of liability insurance.

[16] All the policy reasons discussed herein were considered by the Utah court in *Ellis v. Gilbert* and helped form the basis for the court's decision.

[17] People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 238, 145 N.E.2d 588, 593 (1957).

[18] One author stated the reasons for discovery rather bluntly:

> All disclosure permits is that the plaintiff place a more realistic evaluation upon his case if coverage is adequate — or become even more realistic and settle within low policy limits if a jury verdict would be worthless above the limits. If a plaintiff is being given an advantage because he is able to decide whether to try his case or settle by reason of being on an even plane with defendant, so be it!

Jenkins, *Discovery of Automobile Liability Insurance Limits: Quillets of the Law*, 14 KAN. L. REV. 59, 79 (1965).

[19] *See* Cook v. Welty, 253 F. Supp. 875, 877 (D.D.C. 1966).

[20] Insurance companies would seem to have some protectable interest in the discoverability of liability insurance. If insurance is discoverable, it is conceivable that a company will be forced to pay more, especially in those cases in which the defendant has extensive coverage. As a consequence, premiums may have to be increased, thereby affecting the public at large. The public interest, however, would seem to be best served by allowing discovery to protect against inadequate settlements.

[21] *See, e.g.*, Pettie v. Superior Court, 178 Cal. App. 2d 680, 3 Cal. Rptr. 267, 273 (1960); People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 238, 145 N.E.2d 588, 593 (1957).

of every action,"[22] discovery of liability insurance should be allowed since it aids in implementing this purpose.[23]

Another argument often posited by the courts as justification for allowing discovery of insurance is based on the existence of a state statute — typically termed a safety responsibility act[24] — which places upon all owners of vehicles the duty to purchase liability insurance for the benefit of third parties injured by the insured. Arguably, this legislation operates to make the injured party a third-party beneficiary to the insurance contract and, as such, entitles him to know the conditions of the contract of which he is a beneficiary.[25] The problem with the argument is that a third-party beneficiary relationship is only established when the insured is proven liable, which may occur only upon trial and judgment.[26] More valid is a related argument, the essence of which is that by enacting a safety responsibility act, the legislature has indicated its belief that liability insurance is relevant to a lawsuit. This manifestation is then employed to find that insurance is part of the "subject matter" of a lawsuit within the meaning of rule 26(b).[27]

The courts also place some weight on the fact that, because most defendants are insured, the real party in interest in the suit is the insurance company.[28] The insurance company often employs defendant's counsel and the company or its counsel investigates the matter, interviews witnesses, and handles any settlement. Because of this, the courts believe fairness demands that the plaintiff know with whom he is actually dealing.[29]

Although most of the courts that do not allow discovery of liability insurance do so on the ground that it is not relevant and will not lead to admissible evidence,[30] an additional argument by some courts has been that the

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[22] This policy, as stated in rule 1, *e.g.*, FED. R. CIV. P. 1(a); UTAH R. CIV. P. 1(a), is implemented when discovery of liability insurance is allowed. Discovery of the amount of insurance may not only encourage settlement, it may facilitate the preparation of plaintiff's case. Note, *Discovery of Liability Insurance: Broadening of the Doctrine in California*, 13 HASTINGS L.J. 273, 281–82 (1961).

[23] The courts also benefit by permitting discovery of liability insurance. The dockets of the courts are reduced by cases being settled. Cook v. Welty, 253 F. Supp. 875, 877 (D.D.C. 1966). *But see* Cooper v. Stender, 30 F.R.D. 389, 393 (E.D. Tenn. 1962) ("Compromise settlement is not the aim of the discovery rules"); Carman v. Fishel, 418 P.2d 963 (Okla. 1966) (a rule should not be adopted simply to clear the court's calendar); Ellis v. Gilbert, 19 Utah 2d 189, 194, 429 P.2d 39, 43 (1967) (dissenting opinion of Henriod, J.).

[24] *See, e.g.*, Safety Responsibility Act, UTAH CODE ANN. §§ 41-12-1 to -41 (Repl. vol. 1960), *as amended* (Supp. 1967).

[25] Ellis v. Gilbert, 19 Utah 2d 189, 192, 429 P.2d 39, 41 (1967); *accord, e.g.*, Ash v. Farwell, 37 F.R.D. 553, 555 (D. Kan. 1965); Superior Ins. Co. v. Superior Court, 37 Cal. 2d 749, 754, 235 P.2d 833, 835–36 (1951). *But see* State *ex rel.* Allen v. Second Judicial Dist. Court, 69 Nev. 196, 245 P.2d 999 (1952) (act only provides security for judgments).

[26] *See* Clauss v. Danker, 264 F. Supp. 246, 248 (S.D.N.Y. 1967).

[27] Lucas v. District Court, 140 Colo. 510, 516–17, 345 P.2d 1064, 1067–68 (1959); People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 237–38, 145 N.E.2d 588, 592–93 (1957).

[28] *See* Ellis v. Gilbert, 19 Utah 2d 189, 193, 429 P.2d 39, 42 (1967); Jenkins, *supra* note 18, at 78–79.

[29] *See* Cook v. Welty, 253 F. Supp. 875, 877 (D.D.C. 1966); Johanek v. Aberle, 27 F.R.D. 272, 278 (D. Mont. 1961).

[30] *See, e.g.*, Berry v. Haynes, 41 F.R.D. 243 (S.D. Fla. 1966); *cf.* Flynn v. Williams, 30 F.R.D. 66 (D. Conn 1958); *see also* cases cited note 7 *supra*.

discoverability of liability insurance would open the door for the discovery of a defendant's other assets. Discovery, they claim, would then become a process for disclosing a person's financial condition to the world, thereby subjecting all defendants to an invasion of privacy.[31] This argument has been answered in several ways. First, it is noted that insurance is purchased to protect one's other assets when the holder of the insurance is subjected to liability; it has no independent value to its possessor.[32] In states having a safety responsibility act, it is also purchased to protect persons wrongfully injured. The same is not true of one's other assets. Second, in assessing his chances of satisfying a judgment against a defendant, a plaintiff can obtain a great deal of information about defendant's other property through private investigation.[33] A defendant's possession of liability insurance, however, is often the determinative factor in a plaintiff being able to collect on his judgment, and the existence of insurance is not usually discoverable through private investigation.[34] On the basis of these two points, it has been argued that a court should have no difficulty restricting discovery of a defendant's assets to insurance.[35]

It has been pointed out that the insured's primary concern is to avoid liability in excess of his insurance coverage; whether this coverage is known to the opposing party is, therefore, usually unimportant to the defendant.[36] When, however, it appears to the court that discovery of insurance might actually result in an invasion of privacy detrimental or embarrassing to the defendant, the court can, on the motion of the defendant, order such protection as is deemed necessary.[37] In doing so, the court should, of course, consider that the discovery rules by their nature inquire into a person's affairs, yet this concern is usually outweighed by the needs of the parties to an action to be apprised of all the relevant facts of a case.

Although the court's construction of the *language* of rule 26(b) was probably not correct,[38] policy reasons militate strongly for the discovery of

[31] *See, e.g.*, Hillman v. Penny, 29 F.R.D. 159, 161 (E.D. Tenn. 1962); Gallimore v. Dye, 21 F.R.D. 283, 285–86 (E.D. Ill. 1958); Washoe County Bd. of School Trustees v. Pirhala, 435 P.2d 756, 759 (Nev. 1968).

[32] People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 238, 145 N.E.2d 588, 593 (1957); Comment, *Pre-Trial Discovery of Liability Insurance in Automobile Negligence Actions*, 7 ARIZ. L. REV. 96, 103 (1965).

[33] *See* Thode, *Some Reflections on the 1957 Amendments to the Texas Rules of Civil Procedure Pertaining to Witnesses at Trial, Depositions, and Discovery*, 37 TEXAS L. REV. 33, 41 (1958).

[34] Johanek v. Aberle, 27 F.R.D. 272, 278–79 (D. Mont. 1961); Comment, *supra* note 32.

[35] In Utah there are now at least two different ways to discover insurance. Under rule 33, employed in Ellis v. Gilbert, 19 Utah 2d 189, 429 P.2d 39 (1967), the plaintiff can obtain pertinent information concerning the defendant's insurance through the use of interrogatories. Under rule 34, which provides for the production of documents, the insurance policy itself can be discovered for inspection and copying. This latter method was employed in Young v. Barney, 20 Utah 2d 108, 433 P.2d 846 (1967).

[36] Jenkins, *supra* note 18, at 78.

[37] Rule 26(b) is subject to the protections afforded by rule 30(b). This rule permits the courts to make any order "which justice requires to protect the party or witness from annoyance, expense, embarrassment, or oppression." *E.g.*, FED. R. CIV. P. 30(b); UTAH R. CIV. P. 30(b).

[38] *See* Cook v. Welty, 253 F. Supp. 875, 876–77 (D.D.C. 1966); *Developments in the Law — Discovery*, 74 HARV. L. REV. 940, 1019–20 (1961).

liability insurance.[39] It is important to the betterment of the judicial system that a lawsuit be less a game of tricks and deception and more a process in which the parties proceed with reasonably full knowledge of all that is relevant to resolving their dispute.[40]

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[39] *E.g.*, F. JAMES, *supra* note 8; 4 J. MOORE, *supra* note 3, at ¶ 26.16[3].
[40] Jenkins, *supra* note 18, at 70.

"Children" Does Not Include Stepchildren Under Utah Inheritance Tax Exemption Statute

In *Walker Bank & Trust Company v. State Tax Commission*,[1] the Utah Supreme Court upheld a decision of the Commission that stepchildren of a deceased person are not "children of the deceased" within the meaning of a Utah tax exemption statute.[2] Thus, gifts made by a deceased to his stepchildren may not be claimed as exempt from state inheritance taxes.[3]

The basis of the court's opinion was that the exemption statute speaks only of "children." Such a reading of the statute seems to utilize the plain-meaning rule of statutory interpretation,[4] although the court was not consistent in its application. Though stating that inclusion of stepchildren would be "twisting" the statute, the court suggested that adopted children would fall within the exemption.[5] This interpretation seems to go beyond the statute's express language and is, therefore, in itself "twisting" the statute.

In reaching its decision, the court found "somewhat significant" an earlier Utah decision, *In re Walton's Estate*,[6] which held under the same statute that "children" does not include grandchildren. Why this case was thought significant was not stated, but the court implied that to include either stepchildren or grandchildren within the meaning of "children" would be to go

[1] 18 Utah 2d 300, 422 P.2d 201 (1967).
[2] UTAH CODE ANN. § 59-12-2 (Repl. vol. 1963) provides an exemption from the state inheritance tax "where property not exceeding in value the sum of $40,000 goes to the husband, wife and/or children of the deceased or any or all of them by descent, devise, bequest or transfer directly or through a trustee . . . ."
[3] The Utah statute provides a $10,000 exemption for all estates, but if gifts are made to the surviving spouse and/or children, the exemption is $40,000. *Id.*
[4] Justice Henriod, who authored the opinion, seems to favor the plain-meaning rule. *See* Hansen v. Legal Serv. Comm., 19 Utah 2d 231, 429 P.2d 979 (1967); Johnson v. State Tax Comm'n, 17 Utah 2d 337, 342, 411 P.2d 831, 834 (1966), *discussed in Survey of Utah Law — 1966*, 1967 UTAH L. REV. 408, 433–36. As the *Survey* points out, the interpretation of statutes involves policy choices, and a court "chooses the policy that appears to be best supported under the legislation before it; its use of maxims of construction is merely verbal support for the policy." *Id.* at 436. The court as a whole does not always adopt the plain-meaning rule of construction, but Justice Henriod has shown a strong proclivity toward its use.
[5] Walker Bank & Trust Co. v. State Tax Comm'n, 18 Utah 2d 300, 422 P.2d 201 (1967).
[6] 115 Utah 160, 162, 203 P.2d 393, 394 (1949).

outside the statutory language.[7] This analogy is not consistent however. The grandchild does not normally occupy the status of a member of his grandparent's immediate family, but instead belongs to and is cared for in another family unit. The stepchild, on the other hand, like the natural or adopted child, is often cared for by his stepparent and is, consequently, a "child" in the general sense. Thus, a stepchild could rationally be included within the definition of "children" without claiming that "children" includes all "issue," as the taxpayer contended in *Walton's Estate*.[8]

Although the court in *Walker Bank* did not elaborate on its dictum that adopted children should be included within the exemption statute, there is authority to support this position. Utah statutory law provides that upon adoption, the parent and the child "shall sustain the legal relation of parent and child, and shall have all the rights and be subject to all the duties of that relation."[9] This provision would seem to compel the courts, when applying the exemption statute, to treat adopted and natural children equally. Otherwise, an adopted child would not have "all the rights" of a natural child.[10]

The same authority does not exist for the contention that the Utah legislature intended the rights of a stepchild and a natural child to be equal. It may be that the legislature never considered who might be termed "children" when it enacted the exemption statute.[11] If it had, it is quite possible that

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[7] The extent of the court's comment was:

> In re Walton's Estate said "grandchildren" were not "children" under such a statute. We think that case is somewhat significant here, and affirm it. The complications of twisting the language to include any one but a natural or legally adopted child seem obvious. Otherwise, the words "cousin" or "mistress" might acquire added significance if either claimed his or her benefactor was a loco "parentis."

18 Utah 2d at 300, 422 P.2d at 201–02 (footnote omitted).

[8] The court found in *Walton's Estate* that the Utah legislature had used the word "children" in all other statutes in its common sense meaning, and not in the sense of "issue." 115 Utah at 162–63, 203 P.2d at 394–95. Interpreting "children" to mean "issue" would not have been helpful in *Walker Bank*, since "issue" connotes blood relationship. *See, e.g.*, Comer v. Comer, 195 Ga. 79, 23 S.E.2d 420 (1942); Oler, *Construction of Private Instruments Where Adopted Children Are Concerned: I*, 43 MICH. L. REV. 705, 727 (1945). Such a relationship does not exist with the stepchild-stepparent.

The word "issue" in a will has been interpreted to include those outside the blood relationship, but only when the circumstances indicate that this was the testator's intent. *E.g.*, Fidelity Union Trust Co. v. Potter, 8 N.J. Super. 533, 73 A.2d 625 (Ch. 1950).

[9] UTAH CODE ANN. § 78-30-10 (1953). The court was aware of Utah law on the status of adopted children, since the Commission's brief discussed it extensively. Brief for Defendant at 16–20.

[10] In the past, the court has not followed the statutory law on adoption to the logical conclusion suggested in the text. *In re* Harrington's Estate, 96 Utah 252, 85 P.2d 630 (1938), held that an adopted child was not "issue" of his adopting father's parents and, thus, could not be an heir to the estate of the adoptive father's father. The court has been urged to reverse this decision and accept the attitudes displayed toward an adopted child in modern society, but the *Harrington* case was upheld in *In re* Smith's Estate, 7 Utah 2d 405, 326 P.2d 400 (1958). For an enlightening and vigorous dissent, see Justice Crockett's opinion in the latter case. *Id.* at 406, 326 P.2d at 401.

[11] A check of references to statutes under the topic "children" and related topics in the index to the Utah Code Annotated reveals no statute that deals specifically with stepchildren in any manner. Two opposing inferences can be drawn: (1) that the legislature has considered the stepchild and decided to do nothing about him, or (2) that the legislature has not considered the problems of the stepchild. The latter

the legislature would have adopted a statute similar to those of other states, which distinguish between natural children, adopted children, stepchildren, and children in a "mutually acknowledged" relationship of parent and child.[12] Since the statute itself does not clarify "children," the court may have acted too hastily in summarily dismissing the taxpayer's contention. Instead, it should have examined the policy behind the exemption statute to determine what was intended by the use of the term "children."[13]

The court was obviously influenced by the maxim that tax exemption statutes should be construed strictly against the taxpayer, although there was no reference to it in the opinion.[14] The rationale of the maxim is three-fold: taxation is favored over exemption because revenue is essential to governmental existence;[15] exemptions are a matter of legislative grace and favor;[16] and tax administration is simplified by the strict construction of exemptions.[17] Nevertheless, strictness is not always the rule:

> When public policy dictates a more liberal attitude, as with bequests for public purposes and the performing by private means of what would ultimately entail public expense .... Such an exemption is an act of public policy, not a matter of grace and favor, and the exemption provision is to be liberally applied.[18]

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inference would seem to be the more likely especially in the case of a legislature that generally meets for only sixty days biennially. UTAH CONST. art. VI, §§ 2, 16.

In a society where divorce and family disintegration are continually on the increase, there is bound to be an increase in the number of stepchildren. This factor should cause the Utah legislature to consider the problems of the stepchild and spell out his rights. *See* notes 12, 13, and 25 *infra.*

[12] The Virginia exemption statute, for example, makes reference to "children by blood or by legal adoption, stepchildren ...." VA. CODE ANN. § 58–153 (1959). A variation is the New York law: "lineal ancestor or descendant, adopted child or stepchild ...." N.Y. TAX LAW § 958(b)(2) (McKinney 1966).

Some exemption statutes refer to children in reference to whom the decedent stood in the "mutually acknowledged" relationship of a parent. *E.g.*, WIS. STAT. ANN. § 72.02 (1957). Although acknowledgment has generally referred to the illegitimate child, some courts have placed a broader interpretation on the concept so as to include a child and her aunt in a "mutually acknowledged" parent-child relation. *E.g., In re* Spencer's Estate, 4 N.Y.S. 395 (Sur. Ct. 1889). If the language can be interpreted that broadly, it would follow that stepchildren can be "children" through mutual acknowledgment. *See* Shearer, *The Mutually Acknowledged Relationship of Parent and Child Under Inheritance Tax Statutes*, 39 TAXES 197, 203–04 (1961).

[13] In the *Walker Bank* case, it seems clear that the statute could reasonably have been construed to include stepchildren within the meaning of "children." Although no inheritance tax cases have been found giving such an interpretation, none have been found deciding otherwise. As pointed out in note 12 *supra*, exemption statutes are generally more specific in spelling out the classes of children who are preferred beneficiaries under the tax laws. This, no doubt, is a major factor accounting for the sparsity of decisions.

There are cases in the field of workmen's compensation that interpret the word "children" to include "stepchildren." *E.g.*, Travelers Ins. Co. v. E.I. Du Pont De Nemours & Co., 40 Del. 285, 9 A.2d 88 (1939); Newark Paving Co. v. Klotz, 85 N.J.L. 432, 91 A. 91 (1914). One purpose of these laws is to provide support for those dependent on the workman when he dies, a purpose similar to that of the exemption statute herein. *See* text accompanying notes 19, 22 *infra.*

[14] The Commission relied heavily on this maxim in its brief. Brief for Defendant at 6–8.

[15] 1 J. MERTENS, FEDERAL INCOME TAXATION § 3.07, at n.76 (W. Oliver ed. 1962).

[16] *Id.* at n.77.

[17] Brief for Defendant at 12–16.

[18] 1 J. MERTENS, *supra* note 15, at nn.82–83.1, *see* Neuhoff, *Deductions, Exemptions, and Credits in State Inheritance and Estate Taxation*, 26 IOWA L. REV. 593

There appear to be public policies present in the Utah statute that would justify the interpretation urged by the taxpayer in *Walker Bank*. It is arguably a basic purpose of the exemption statute to assist the family of the deceased to avoid becoming a burden on society.[19] The effectuation of this policy is accomplished by encouraging gifts to the family[20] and by making more funds available through a lighter tax burden.[21] The state has a direct interest in the maintenance of the family; if those who are dependent on the decedent for support are not provided for when he dies, the state may have to assume the burden.[22]

(1941). This same attitude towards statutory interpretation in general is found in the Utah legislation on statutory construction, which provides:

> The statutes [of the state] establish the laws of this state respecting the subjects to which they relate, and *their provisions* and all proceedings under them *are to be liberally construed with a view to effect the objects of the statutes* and to promote justice.

UTAH CODE ANN. § 68-3-2 (Repl. vol. 1961) (emphasis added). The court often ignores the statute. Many other states have a similar statute, and it is not uncommon for the statute to be similarly ignored. 3 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 6205 (2d ed. 1943).

[19] *See* Neuhoff, *supra* note 18, at 613. As Horack points out, only Congress and a few state legislatures (not including Utah) have provided the courts and administrative bodies with materials beyond the statutes themselves. Horack, *Cooperative Action for Improved Statutory Interpretation*, 3 VAND. L. REV. 382, 387 (1950). A court must still look for legislative intent since legal language generally does not fix, but merely circumscribes meaning. Thus, as one author states: "Legal interpretation is concerned, not with the meaning of words, but only with their boundaries." Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407, 426 (1950). And, as Karl Llewellyn has stated: "If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense." Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Art To Be Construed*, 3 VAND. L. REV. 395, 400 (1950).

Though the policies suggested in the text are not spelled out by either the legislature or the court, they are effectuated by the exemption statute's application. Both parties in *Walker Bank* assumed that the legislature had such policies in mind. *See* Brief for Plaintiff 15–17; Brief for Defendant 16–20.

[20] Some states do not entirely exempt from taxation gifts to the immediate family, but merely tax all such gifts at lower rates than other gifts. *E.g.*, VA. CODE ANN. § 58–153, *as amended*, (Cumulative Supp. 1966).

[21] The Commission argued in its brief that restricting the definition of "children" in the statute to natural and adopted children would further these policies because the testator would be encouraged thereby to adopt his stepchildren, and thus gain the benefit of the exemption. Although many people do unusual things to obtain tax advantages, it seems unlikely that a parent would adopt a stepchild merely to obtain the advantage of an inheritance tax exemption, especially when it does not benefit the testator but only the stepchild. On the other hand, if the stepfather desires his stepchild in an *in loco parentis* relationship to receive all of the legal benefits of a natural child, he will adopt him to assure that result.

[22] Utah statutes protect the wife from complete disinheritance by extending to her a one-third interest in real property possessed by the husband during the marriage. UTAH CODE ANN. § 74-4-3 (1953). Today, when real property is generally an insignificant part of a man's assets, this protection may be inadequate, especially if the only real estate is the family home or if the family lives in rental property. Also, the Utah statute permits a man to disinherit his children completely. *Id.* at § 74-1-32. Therefore, if a husband whose only real property was the family home chose to disinherit both his wife and his children, the only asset that the wife could claim would be the equivalent of a one-third interest in the family home. She may then have to turn to the state for support of herself and their children.

Although the above factors indicate that the wife needs greater statutory rights in her husband's estate, they also indicate that gifts to the wife and children should be encouraged whenever possible. A broad interpretation of "children" in the Utah tax exemption statute would be one way of encouraging such gifts.

In accordance with the above policy, the taxpayer argued that the word "children" should be interpreted to include only stepchildren to whom the decedent was *in loco parentis*.[23] Generally speaking, the *in loco parentis* relationship exists when a person, without going through adoption formalities, assumes the responsibility of providing for a child's care, support, health, and education.[24] The reasoning in support of a tax exemption is that since the stepchild has been treated as a natural child by the decendent, the law should accord him the same treatment. The court made no reference to this argument, despite the taxpayer's review of numerous decisions in which a stepchild in an *in loco parentis* relationship had been accorded the same rights as a natural or adopted child.[25] Since a stepchild in an *in loco parentis* relationship needs continued support after his stepfather dies just the same as a natural or adopted child, such support should be encouraged and aided by allowing the preferred tax treatment.

It was urged by the Commission that allowing the exemption to stepchildren in an *in loco parentis* relationship would create tax administration problems because of difficulties in determining to which stepchildren the deceased was *in loco parentis*. Numerous examples were set forth to illustrate the administrative difficulties encountered when a child has lived in numerous foster homes, when a child has lived in one home but has been supported by another adult, or when a child has lived in a temporary *in loco parentis* situation.[26] Such examples would no doubt cause administrative problems, but the difficulty is not merely administrative. The court would have to establish specific guidelines to determine eligibility for the exemption.[27] It is difficult

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[23] Brief for Plaintiff at 4–5.

[24] *See, e.g.*, Bourbeau v. United States, 76 F. Supp. 778 (D. Me. 1948); Baldwin v. United States, 68 F. Supp. 657 (W.D. Mo. 1946).

[25] Brief for Plaintiff at 7–15. In Utah, a father or mother has the statutory duty to support "his or her minor child or children." UTAH CODE ANN. § 76-15-1 (Supp. 1967). The words "child or children" have received no interpretation by the court to date. Since they are contained in a penal statute, however, they would probably be narrowly interpreted.

The practices of the Utah State Welfare Department are interesting in this regard. Although the department's regulations state that the natural father is not relieved of his duty of child support, stepchildren in a stepparent's home are not entitled to state welfare aid unless normal conditions of need exist. Thus, if the natural father refused or failed to meet his support payments, the stepfather is effectively required to support the stepchild unless his income falls below normal minimum requirements for receiving state welfare aid. *See* 4 UTAH STATE DEPARTMENT OF PUBLIC WELFARE, MANUAL OF PUBLIC ASSISTANCE POLICIES §§ 4431.61, –.65 (1968).

Other states generally have more explicit statutory provisions as to legal duty of support. For example, California requires a father to support "his legitimate or illegitimate minor child." CAL. PEN. CODE § 270 (West 1956). However, another statute provides for stepchildren:

> A husband is not bound to maintain his wife's children by a former husband; but if he receives them into his family and supports them, it is presumed that he does so as a parent, and, where such is the case, they are not liable to him for their support, nor he to them for their services.

CAL. CIV. CODE § 209 (West 1954). The Utah Legislature should give greater consideration to enacting more explicit family relations laws — especially in the case of the stepchild. See note 11 *supra*.

[26] Brief for Defendant at 12–16.

[27] Thus, the court would have to decide whether to follow common law requirements for *in loco parentis* or develop some other standard. As taxpayer's brief pointed out, the common law requirements of the *in loco parentis* relationship were

to conceive that the legislature, without more explicit guidelines than those provided in the statute, intended that the court lay down detailed criteria. Likewise, it is difficult to find a legislative intent that tax authorities should have to make the case-by-case determinations necessitated by the adoption of the *in loco parentis* concept.

Justice Henriod concluded the opinion by stating that whether a stepchild is deemed a child for purposes of the exemption statute is a question for the legislature to decide.[28] While the scope of the exemption statute may be a matter that the legislature will want to examine in light of the court's decision,[29] the policies discussed above illustrate the desirability of a more thorough treatment of the issue involved than that accorded by the court.

If the legislature does respond to the decision, a careful delineation of those entitled to the exemption should be made. Although the exemption is now limited to the surviving spouse and children, specific reference should be made to natural children, adopted children, stepchildren, and "mutually acknowledged" children. If it is deemed desirable to extend the policy of the exemption to those who may be dependent on the decedent at the time of his death, the distinctions drawn by the 1967 Illinois statute should be considered.[30] Under that law the surviving wife is given a greater exemption than a surviving husband, obviously because the husband is generally in less need of assistance than the wife. Adult children receive smaller exemptions than minor children. Gifts to grandchildren, grandparents, sons- and daughters-in-law, and brothers and sisters also receive preferential tax treatment, but in a lesser amount than closer relatives.[31] Such distinctions recognize that the public policies discussed above are generally more applicable to the immediate family, although they may still apply to other relatives. Utah legislators would do well to consider more comprehensive assistance to beneficiaries in this regard.

D.W.M.

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(1) The person in the role of parent must consciously intend to assume the relationship; (2) He must actually fulfill the obligations of a parent by supporting and otherwise providing for the child; (3) The person with whom the relationship is sought to be established must be a minor or a person in need of parental support because of physical handicaps.

Brief for Plaintiff at 17–18. Taxpayer argued that the Tax Commission could identify a stepchild in an *in loco parentis* relationship as readily as a natural child, but the above tests suggest that more would be involved. Thus a birth certificate or adoption papers would probably suffice for determining whether the child was natural born or adopted. As to the stepchild in an *in loco parentis* relationship, however, there is an objective requirement of actual support which would have to be documented. In addition, it would be necessary to prove a subjective intent to assume the relationship of parent and child on the part of the parent. Establishing the child's minority or handicap would be the easiest part of meeting the common law requirements.

[28] *Compare Walker Bank with* Johnson v. State Tax Comm'n, 17 Utah 2d 337, 342, 411 P.2d 831, 834 (1966).

[29] The Utah statute is one of the few using the word "children" to refer only to members of a decedent's immediate family. The word "children" in exemption statutes has been a continuous source of litigation, J. HELLERSTEIN, STATE AND LOCAL TAXATION 502 (2d ed. 1961), and has probably encouraged other state legislatures to draft more explicit legislation.

[30] ILL. REV. STAT. ch. 120, § 375 (Smith-Hurd 1968).

[31] For a cogent discussion of the bill which brought about the changes in the Illinois law, see Barnard, *Inheritance Tax Amendments of 1967*, 56 ILL. B.J. 26 (1967).

Life Insurance Policies and "Binding" Receipts: Is the Insurer Bound?

In *Prince v. Western Empire Life Insurance Company*,[1] the Supreme Court of Utah considered the effect to be given a "binding receipt" issued by an insurance company to a prospective policyholder.[2] Plaintiff's husband had applied for a $100,000 life insurance policy to replace other policies he held which furnished coverage totaling $80,000. At the time of application, he paid a year's premium in advance and was given a binding receipt. A statement printed on the receipt provided that the applicant's insurance would become effective, for an amount not exceeding $50,000, either on the date of application or on the day of any required medical examination — whichever was later — if the insurer determined that the applicant was insurable at the critical date. Though the applicant's insurability was approved by two medical examiners, the company requested additional medical information ostensibly because the results of the examinations did not coincide. Before the company could obtain that information, the applicant was accidentally killed, whereupon the company returned the applicant's premium to his widow. In a suit brought by the widow as beneficiary, the trial court found for the company. The supreme court, basing its decision on a factual analysis, reversed stating that the receipt was binding on the company and remanded with instructions to enter a $50,000 judgment for the plaintiff.

Most insurers state in their application forms that a life insurance policy will not take effect until the application has been approved by the company's home office.[3] The applicant is not covered by insurance during the interim and may renege and demand return of the premium at any time before final approval. Withdrawal by the applicant causes the insurer loss of money expended in processing the application and in having the applicant medically examined. To protect themselves from the applicant's arbitrary cancellation, companies commonly issue receipts, which are interrelated with the application, purportedly furnishing the applicant with insurance during the interim

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[1] 19 Utah 2d 174, 428 P.2d 163 (1967).

[2] A binding receipt, which is also called a conditional receipt or a "binder," has been defined as

> a limited acceptance of an application for insurance given by an authorized agent pending the ascertainment of the company's willingness to assume the burden of the proposed risk, the effect of which is to protect the applicant until the company acts upon the application . . . .

BLACK'S LAW DICTIONARY 213 (4th ed. 1951). *See also* Harris v. Sachse, 160 Pa. Super. 607, 52 A.2d 375 (1947), in which the court, quoting from Webster's International Dictionary, described such a receipt as a " 'written instrument, used when [an insurance] policy cannot be immediately issued, to evidence that the insurance coverage attaches at a specified time, and continues, . . . until the policy is issued . . . .' " *Id.* at 612, 52A.2d at 378. Depending on the terms of the contract the applicant has signed, the coverage under the binder may be for the full amount of the insurance policy or, as in *Prince*, for a lesser amount.

[3] *See* W. VANCE, HANDBOOK ON THE LAW OF INSURANCE § 40, at 239 (3d ed. B. Anderson 1951); Comment, *Life Insurance Receipts: The Mystery of the Non-binding Binder*, 63 YALE L.J. 523 (1954); Comment, *Operation of Binding Receipts in Life Insurance*, 44 YALE L.J. 1223 (1935).

between the application and the issuance of the policy.[4] These "binders" are, generally, of two types: the "approval" type, which states that no coverage of any kind will be given until final approval of insurability by the company's home office, and the "insurability" type, which conditions coverage on a physical examination indicating that the applicant is an insurable risk.[5]

A problem traditionally encountered by the courts is the effect to be given a binding receipt when the applicant dies, as in *Prince*, or his physical condition changes for the worse prior to delivery of the policy.[6] In such situations, approval binders have generally been held to afford the applicant no protection until the insurer has given final approval.[7] Under the insurability binder, however, courts have ruled that the interim insurance is in effect upon a medical finding of insurability and before final acceptance by the company.[8]

In *Prince*, the court set out to determine the effectiveness of a binding receipt in Utah[9] by examining the nature of the particular binder and its relationship to the factual record. Since the receipt stated that both a medical examination and determination of insurability by the company were requisites to insurability, it might be considered to involve elements of both insurability and approval types. Nonetheless, the court treated it as an insurability receipt, thereby granting plaintiff recovery on a showing that her husband had satisfactorily completed the required physical examinations. In finding that the plaintiff's husband was covered by the binder, the court discussed some elements of the theories of "constructive ambiguity," unconscionability, and detrimental reliance. Rather than settling the status of binding receipts in Utah, the court rendered a decision on the equitable considerations presented by the fact situation in *Prince* and evidently based its conclusion on the total impact of these theories.

The court approved a California case, *Ransom v. Penn Mutual Life Insurance Company*,[10] which arose under facts essentially identical to those

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[4] Comment, 44 YALE L.J., *supra* note 3, at 1224. *See also* G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 91 (1929, Supp. 1956). The binding receipt protects the insurance company principally in the following manner:

> The issuance of . . . binding receipts effectively does away with the disadvantage threatening the insurer . . . . The applicant to whom a binding receipt is issued feels, as a rule, contractually obliged to perform and, should he withdraw his application, he is unlikely to resort to a lawsuit to recover the relatively small sum paid.

Annot., 2 A.L.R.2d 943, 946 (1948).

One writer argues that "binding receipts" is a misnomer, since insurance companies do not intend to be bound by them. He suggests using the term "conditional receipts." Fortunato, *Conditional Receipts: Should the Uninsurable Have Insurance?*, THE FORUM, April 1966, at 6–7.

[5] *See* Fortunato, *supra* note 4, at 12–15.

[6] *See id.*; Comment, 44 YALE L.J., *supra* note 3, at 1225.

[7] Fortunato, *supra* note 4, at 12. *See also* Comment, 44 YALE L.J., *supra* note 3, at 1225–26. *But see* De Cesare v. Metropolitan Life Ins. Co., 278 Mass. 401, 180 N.E. 154 (1932); Starr v. Mutual Life Ins. Co., 41 Wash. 228, 83 P. 116 (1905).

[8] *See* Johnson v. Equitable Life Assurance Soc'y of the United States, 275 F.2d 315 (7th Cir. 1960) (dictum); Union Life Ins. Co. v. Rhinehart, 229 Ark. 388, 315 S.W.2d 920 (1958) (dictum); Annot., *supra* note 4, at 988–91.

[9] 19 Utah 2d at 175, 428 P.2d at 164.

[10] 43 Cal. 2d 420, 274 P.2d 633 (1954).

in *Prince*. The receipt in *Ransom* stated that the insurance would be in effect on the date of the application provided that the company find the applicant "acceptable." The California court held that there was an ambiguity in the contractual terms of the receipt signed by the applicant which had induced his belief that he was covered by the binder.[11] The court held that the applicant had been effectively insured under the receipt when the company had received the application and premium payment and the applicant's physical examination been completed.[12] The court refused to consider the insurer's contention that the applicant ultimately might have been physically ineligible for the policy coverage he sought. Thus, according to the California court, approval by the company's home office was merely a condition subsequent to applicant's being covered by the binder.

Other courts have also held that where binders are "constructively ambiguous," as in *Ransom*, the ambiguity should be construed against the insurer. Reviewing facts again similar to those in *Prince*, Judge Learned Hand, in *Gaunt v. John Hancock Mutual Life Insurance Company*,[13] stated that the court should construe the binder as it would be understood by the ordinary

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[11] *Id.* at 425, 274 P.2d at 635–36.

[12] *Id.* at 425, 274 P.2d at 636.

The application provided:

> If the first premium is paid in full in exchange for the attached receipt . . . *the insurance shall be in force . . . from the date . . . of this application*, . . . provided the Company shall be satisfied that the Proposed Insured was at that date acceptable under the Company's rules for insurance upon the plan at the rate of premium . . . but that if . . . the Company is not satisfied as to such acceptability, no insurance shall be in force until . . . the policy is delivered . . . .

Id. at 423, 274 P.2d at 634 (emphasis added).

The California court stated that the applicant could reasonably have believed from the language of the first clause that the insurance was effective from the date of application and his payment of the first premium. *Id.* at 425, 274 P.2d at 636. It has also been contended that such an application is susceptible to the reading that the applicant would be covered under the application only if it had been solicited by a high official in the company's home office. *See* Comment, *"Binding Receipts" in California*, 7 STAN. L. REV. 292, 296 (1955). The author of this comment, however, failed to note the application by the California court of the *Gaunt* doctrine: the application should be construed as it would be understood by an ordinary applicant who would have no reason to believe he was not insured by the binder. *See* Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, *cert. denied*, 331 U.S. 849 (2d Cir. 1947). *See also* text accompanying notes 13 & 14 *infra*.

Compare the wording of the application in *Ransom* with that printed on the back of the contract in *Prince*:

> [Insurance applied for in this application] *shall take effect on the date of the application or date of medical examination, if required* . . . provided that . . . [applicant is determined insurable by the Company's home office and the] first premium is paid in cash on date of application . . . .

19 Utah 2d at 175, 428 P.2d at 164 (emphasis added). One can easily see how plaintiff's husband could have relied on obtaining interim coverage under the language of the *Prince* application.

[13] 160 F.2d 599, *cert. denied*, 331 U.S. 849 (2d Cir. 1947).

The application in *Gaunt* stated that if the company was satisfied as to the insurability of the applicant and if the application was approved prior to the death of the applicant the insurance would be in effect as of the date of the completion of Part B (ostensibly the medical examination certificate) of the application. 160 F.2d at 599–600.

The lower court found that applicant was in fact insurable "in accordance with the rules of the defendant company for the plan and the amount applied for" at the time of the completion of Part B. 160 F.2d at 601.

applicant for insurance, who "would not by the remotest chance understand the clause as leaving him uncovered until the insurer at its leisure approved the risk," and who "would assume that he was getting immediate coverage for his money."[14] In *Prince*, concededly, plaintiff's husband had not provided the insurer with all medical data requested. Nonetheless, the applicant had been examined by two doctors selected by the insurer; and, though there was some question concerning the applicant's health, both doctors had approved the applicant's insurability.[15] Thus, even if the applicant had not believed he was covered upon execution of the application, he certainly must have considered himself insured upon completion of the examinations.

Moreover, plaintiff in *Prince* had a much stronger case of detrimental reliance on an "ambiguous" binder than the plaintiffs in either *Gaunt* or *Ransom*. Using an interplay of the theories of estoppel and unconscionability, along with "ambiguity," in reaching its determination, the court noted that the conditions of acceptance on a *contrat d'adhesion*, such as those printed on the binder in *Prince*, have traditionally been elements of unconscionability where an individual is dealing with a large corporation on a "sign this or get nothing" basis.[16] The court further acknowledged that the applicant's reliance on his being covered by the receipt was strongly evidenced when he let his current insurance coverage lapse.[17] Thus, on the basis of modern decisional law and *Prince's* special facts, the *result* reached by the court is fully supportable.

Although the court laid a broad theoretical basis for its decision, it nonetheless failed to resolve the question it purported to answer: the effect to be given binding receipts in Utah. Instead of formulating a general standard to govern binding receipts, the court limited its decision to a factual analysis of the case, and *Prince* itself concerns only the insurability type — or, at best, a combination approval-insurability type — binding receipt. The court apparently did not want to commit itself to the degree that the California court seems to have done in *Ransom* through an unequivocal ruling that the

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[14] *Id.* at 601–02. Other cases following the rationale outlined in *Gaunt* and *Ransom* are: Metropolitan Life Ins. Co. v. Wood, 302 F.2d 802 (9th Cir. 1962); Metropolitan Life Ins. Co. v. Grant, 268 F.2d 307 (9th Cir. 1959); Allen v. Metropolitan Life Ins. Co., 44 N.J. 294, 208 A.2d 638 (1965). *See also* Service v. Pyramid Life Ins. Co., 440 P.2d 944 (Kan. 1968).

[15] 19 Utah 2d at 175–76, 428 P.2d at 164–65.

Where the "binder" requires that the applicant pass a medical examination, often, as in *Prince*, the applicant is also required to be physically fit for the specific policy — with its concomitant premiums — for which he applied. The effect of an applicant's passing an examination, being recommended for insurance, though at a higher premium rate than that applied for, and undergoing adverse physical change in the interim between the examination and negotiation of the new policy has undergone significant change in recent years. *Compare* Gonsoulin v. Equitable Life Assurance Soc'y of the United States, 152 La. 865, 94 So. 424 (1922) (beneficiary of applicant who was not insurable under the policy applied for and who died before acceptance could not collect) *with* Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, *cert. denied*, 331 U.S. 849 (2d Cir. 1947), and Ransom v. Penn. Mut. Life Ins. Co., 43 Cal. 2d 420, 274 P.2d 633 (1954).

[16] 19 Utah 2d at 177–78, 428 P.2d 165–66. *See* 1 A. CORBIN, CONTRACTS § 107, at 479 (1963).

[17] *See* 19 Utah 2d at 179, 428 P.2d at 167. The court noted as significant applicant's advance payment of a premium totaling over $2400, more than $400 of which had been "eaten up by expiration of time before his death occurred." *Id.* at 182, 428

applicant is covered by a binder as of the date of the application and payment of premium as soon as he has completed his medical examination, and regardless of his physical fitness for the particular policy. Since the court relied in essence on three theories, the decision leaves to conjecture whether a plaintiff pleading only one of these, without more, could succeed in effecting coverage in a similar situation.[18] Moreover, it is uncertain to what extent the inequities evidenced in *Prince* influenced the court's decision.

The broad operative guidelines to insurance companies and attorneys in Utah are nevertheless workable since, hopefully, the court in future rulings will find against insurers which have revoked applications for interim coverage upon noting an adverse change in the applicant's health after "acceptance" of such applications. Further, it is possible that the doctrine of "constructive ambiguity" could be applied to situations involving an approval type binder wherein the facts demand an equitable treatment of the applicant. This entire approach is compelled by the overall unconscionability apparent when an individual relies to his detriment on a receipt by which a large corporation never intended to bind itself.

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P.2d at 169. While payment of some consideration is a necessary element of detrimental relience, in future cases reliance on an "ambiguous" contract will likely control, diminishing the materiality of the *amount* of the premium paid.

[18] For example, the concept of "constructive ambiguity," as used in *Gaunt* and *Ransom*, includes some element of detrimental reliance which necessarily makes estoppel an adjunct of that theory. Under the decision in *Prince*, then, the beneficiary of one who signed an "ambiguous" receipt, but who did not manifestly rely on being covered, arguably could not be heard to complain.

Landscaping and the Mechanics' Lien Law

In *Frehner v. Morton*,[1] plaintiffs landscaped defendants' property while a home was being constructed. When defendants refused to pay for the services,[2] plaintiffs brought an action seeking recovery of the amount due through attachment of a mechanics' lien.[3] The Utah Supreme Court, in upholding the judgment of the trial court, held that landscaping comes within the mechanics' lien statute when it is done as an integral part of the

[1] 18 Utah 2d 422, 424 P.2d 446 (1967).

[2] The defendants claimed that they had not authorized the performance of the work in question. The court held that since defendants had full knowledge of the work at the time it was being performed, and that since the defendant parents had authorized the defendant daughter to contract out the work, there were sufficient grounds to believe that they all had authorized the work although the contract was only with the defendant daughter.

[3] The Utah mechanics' lien statute states:

> [A]ll persons performing labor upon, or furnishing materials to be used in, the construction or alteration of, or addition to, or repair of, any building, structure or improvement upon land . . . shall have a lien upon the property upon or concerning which they have rendered service, performed labor or furnished materials . . . .

UTAH CODE ANN. § 38-1-3 (Repl. vol. 1966).

construction of a home for the purpose of contributing toward its enjoyment.

The court is construing the mechanics' lien statute followed the construction given a similar statute in *Backus v. Hooten*.[4] Since that case involved a bond statute,[5] the court in *Frehner* was not compelled to follow it. It chose to do so, however, because both the wording and purpose of the two statutes are similar.[6] In *Backus* the question was whether leveling of land for irrigation and cultivation constituted "construction, addition to, or alteration or repair of, any building, structure or improvement upon land...."[7] The court in *Backus* applied the *ejusdem generis* rule to the statute, holding that the general term "improvement" is limited by the preceeding specific terms and therefore must refer to a building or some kind of structure.[8]

Although the court in *Frehner* adopted the *Backus* definition of "improvement upon land" as meaning some kind of structure, it distinguished *Backus* on its facts. In *Backus* the court had stated that the work accomplished did not involve any building or structure, whereas the landscaping in the instant case was "an integral part of the building of a home."[9] Landscaping qualifies for a lien, therefore, since it is an important part of the construction of the home, making it more complete, beautiful, and enjoyable.[10]

The court set up three tests to bring landscaping within the mechanics' lien statute. It must be 1) done during the construction process, 2) as an integral part of construction, 3) for the purpose of contributing toward the enjoyment of the building or structure.[11] It is not clear whether these tests were meant to be absolute or whether they were formulated only with the specific facts of *Frehner* in mind. In light of the statutory language that a lien may be given for "alteration of, or addition to... any building," it is doubtful that the landscaping must necessarily be done *during* construction

[4] 4 Utah 2d 364, 294 P.2d 703 (1956).

[5] The bond statute requires that any owner of land obtain a bond from a contractor about to construct, add to, alter or repair any building or structure on the landowner's property. The benefits of the bond run to materialmen and laborers protecting them from default by the contractor.

[6] *See* King Bros., Inc. v. Utah Dry Kiln Co., 13 Utah 2d 339, 374 P.2d 254 (1962). The benefits of the bond run to those who furnished materials or performed labor on the building, structure, or improvement which requires bonding. Likewise, the mechanics' lien is available to all those who labor upon or furnish materials for the construction of the improvement in question.

[7] UTAH CODE ANN. § 14-2-1 (Repl. vol. 1962). This provision was cited by the court in Backus v. Hooten, 4 Utah 2d 364, 294 P.2d 703 (1956).

[8] 4 Utah 2d at 366, 294 P.2d at 705.

[9] Frehner v. Morton, 18 Utah 2d 422, 427, 424 P.2d 446, 449 (1967).

[10] Justice Henriod, in a concurring opinion, approached the problem in a novel way. He would apply an affixation theory and say that landscaping creates improvements upon land. He would disregard the question whether the landscaping had any connection to a building as long as the landscaping could be said to have affixed something of a beneficial nature to the property. *Id.*

[11] The court stated its tests as follows:

> We, therefore, hold that where landscaping is done during the construction of a home and as an integral part of the construction for the purpose of contributing toward the enjoyment to be had from living in that home, the work done and material furnished would be subject to a mechanic's [*sic*] lien.

Id. It should be noted that the test is formulated in terms of "home," but it is doubtful that the building in question would have to be a home in order to subject the landscaping to a mechanics' lien. Rather it appears that the court was merely applying its holding to the facts of the case before it.

of the building in question, as the first test requires; landscaping done even months afterward would appear to be at least an "addition to" the structure. The third test — that that which is done must contribute to the enjoyment of the building — is probably gratuitious language and is just another way of stating the "integral" requirement of test two.

If the court's tests are applied as they are stated in *Frehner*, a number of problems may be produced. For example, the requirement that landscaping be done *during* construction is artificial and does not comport with the general practice of landscaping after a building is completed. There is no apparent justification for favoring one landscaper over another simply because the one had started work before the building in question was completed while the other had started after completion. The second test raises a problem with the word "integral." The test would seem to depend on an individual judge's notion of what should be considered part of the construction of a building. Under this test a court could deny a lien if it believed that a particular type of building or structure did not need landscaping to be considered fully completed. Finally, the court failed to indicate what it meant by "contributing to the enjoyment" of a building. It may have meant "enjoyment" in an esthetic sense, or it may have meant it in a broader sense covering utilitarian as well as esthetic landscaping.[12] Because of the ambiguity of the three tests, the court would do well to clarify them in a future case.

The allowance of a lien for landscaping under the language of the Utah mechanics' lien law, although unique among states having similar language, is not entirely without precedent. As mechanics' lien laws were enacted, courts were very careful to limit protection to the explicit statutory language.[13] In states having language similar to the Utah law, the lien was limited to work done directly on some type of structure; any work done solely to the property was not subject to a lien.[14] Later the protection was extended to allow a lien for grading in preparation for the construction of a building.[15]

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[12] It is very possible, for example, that the land around a home may be terraced and planted with lawn purely to prevent erosion. Yet it would seem that such utilitarian landscaping ought to qualify the same as landscaping intended to beautify.

[13] *See* 61 MICH. L. REV. 196, 198–99 (1962).

[14] In Brown v. Wyman, 56 Iowa 452, 9 N.W. 344 (1881), the court was faced with the question whether breaking prairie land for the first time was an "improvement" within a statute giving a lien to those "who shall do any labor upon . . . any building, erection, or other improvement upon land." Ch. 100, § 3, [1876] Iowa Laws 85. The court held that while plowing was an improvement *of* land, it was not an improvement *upon* the land in the sense of being a structure or erection. Therefore, no lien was to be given.

In Nanz v. Cumberland Gap Park Co., 103 Tenn. 299, 52 S.W. 999 (1899), the question was whether landscaping property gave rise to a lien under a statute which provided for a lien on property "upon which a house has been constructed, built or repaired, or fixtures or machinery furnished or erected, or improvements made . . . ." The court held that "improvements" referred to erections or structures and not to landscaping.

Other cases have made similar interpretations. *E.g.*, Goldsmith v. Orange Belt Securities Co., 115 Fla. 683, 156 So. 3 (1934); Pillow v. Kelly, 155 Tenn. 597, 296 S.W. 11 (1927).

[15] In Southwestern Elec. Co. v. Hughes, 139 Kan. 89, 30 P.2d 114 (1934), the question was whether grading in preparation for the construction of an apartment building gave rise to a lien under the Kansas statute. That statute gave a lien for work or materials going into "the erection, alteration or repair of any building, improve-

This was justified by some courts as being "an essential and integral part" of construction.[16] However, no court previous to the *Frehner* decision had gone as far as to hold that landscaping is *part of the construction* of a building. It is true that many people today do not consider a home completed until there has been at least partial landscaping. Nevertheless, the court in *Frehner* did not discuss any modern construction trends or take judicial notice of any facts which would support its conclusion that landscaping is part of the construction process. In light of the fact that the court extended the notion of "construction" as used in the mechanic's lien laws, it would have been wiser had the court given stronger justification for its position.[17]

Among state legislatures as well, there seems to be a definite trend towards broadening the scope of coverage and protection afforded by mechanics' lien laws. Early mechanics' lien statutes, designed to promote construction of buildings, often gave a lien only to builders.[18] However, the scope of protection was expanded as construction grew more complex. State legislatures soon provided liens for subcontractors and materialmen.[19] It gradually became apparent to many legislatures that the terms "building or structure" were inadequate to describe all the changes that might be made on property and which should be subject to lien; therefore, broader terms were substituted. Some statutes gave *express* protection for landscaping and other types of work done directly on property.[20] The broadest language now provides a lien for "the improvement of real property."[21] This would seem to

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ment or structure...." Ch. 235, § 1, [1919] Kan. Laws 311. The court held the grading subject to a lien since it was part of the construction of the building.

In Vasquez v. Village Center, Inc., 362 S.W.2d 588 (Mo. 1962), the grading was in preparation for a shopping center. The court in construing the lien statute which gave a lien for work or labor upon "any building, erection or improvements upon land" held that the grading was "an integral part of a total plan to proceed without delay to erect a group of buildings as a shopping center on the land in question." *Id.* at 593–94.

Under similar language other courts have also given a lien for grading. *E.g.*, Reid v. Berry, 178 Mass. 260, 59 N.E. 760 (1901); H.B. Deal Const. Co. v. Labor Discount Center, Inc., 418 S.W.2d 940, 956–57 (Mo. 1967).

[16] H.B. Deal Const. Co. v. Labor Discount Center, Inc., 418 S.W.2d 940, 956–57 (Mo. 1957). *See also* Reid v. Berry, 178 Mass. 260, 59 N.E. 760 (1901) (grading was "reasonably necessary" to construction); Vasquez v. Village Center, Inc., 362 S.W.2d 588 (Mo. 1962).

[17] The court, in an attempt to justify its decision, drew an analogy to paint applied to a house for the purpose of beautification after it is completed. 18 Utah 2d at 427, 424 P.2d at 449. The problem with this analogy is that paint is considered material which is added to the structure and is a more necessary part of the construction process than landscaping. Moreover, paint is added not only for its esthetic but also for its utilitarian value, *i.e.*, as a preservative, and is not usually considered optional depending upon the owner's tastes.

[18] The Code Napoleon provided a lien for those employed in building houses, and the first mechanics' lien prototype in America, enacted to "facilitate the construction of buildings in the proposed capitol City of Washington," gave a lien to master builders. Cushman, *The Proposed Uniform Mechanics' Lien Law*, 80 U. PA. L. REV. 1083 (1932).

[19] Note, *Mechanics' Liens and Surety Bonds in the Building Trades*, 68 YALE L.J. 138, 147–51 (1958); *cf.* Rio Grande Lumber Co. v. Darke, 50 Utah 114, 122, 167 P. 241, 244–46 (1917).

[20] *See, e.g.*, ILL. ANN. STAT. ch. 82, § 1 (Smith-Hurd 1966); IOWA CODE ANN. § 572.2 (1950).

[21] KAN. GEN. STAT. ANN. § 60–1101 (Supp. 1965).

cover work or materials which benefit the property regardless of whether they are connected in any way to a building or a structure.

The courts have likewise expanded the scope of mechanics' lien coverage and protection. As previously noted, liens have been given for grading preparatory to construction under statutory language similar to Utah's. Two recent cases extended coverage by giving liens for work that benefited real property. In *Green v. Reese*[22] the Supreme Court of Oklahoma relied on the fact that its statute, in addition to giving a lien for "the erection, alteration or repair of any building, improvement or structure thereon," gave a lien for the planting of "any tree, vines, plants or hedge . . . ."[23] The court interpreted the term "improvement" so as to include the grading of vacant lots in preparation for future construction of buildings.[24] The Alabama Supreme Court, in *Mazel v. Bain*,[25] interpreting a statute that gave a lien for work upon "any building or improvement on land,"[26] concluded that "improvement" is to be defined as a permanent benefit to land. That court, therefore, felt justified in giving a lien for the clearing of land entirely unconnected with the construction of any building.[27] The court in *Mazel* has gone further in extending the benefits of the mechanics' lien law than any other court construing language similar to the Utah provision.

Although the Utah court was following this recent trend when it gave a lien for landscaping in connection with the construction of a building, the question remains whether the court will or should go further and give a lien for any work that benefits real property. It may be desirable to give a lien without requiring the work to be in connection with some structure since land is equally benefited whether the labor and materials go directly to the land or to a structure on the land. Nevertheless, to interpret "improvement" as including benefit to land would seriously distort the meaning of "improvement" as used in the Utah statute and would require an overruling of the *Backus v. Hooten* construction that "improvement" refers only to buildings or structures. Moreover, granting any such lien is a serious step since it encumbers real property: the courts should not disregard the right of the

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[22] 261 P.2d 596 (Okla. 1953).

[23] OKLA. STAT. ANN. tit. 42, § 141 (1954).

[24] *Green v. Reese* has since been read very narrowly by a federal circuit court interpreting the Oklahoma statute. Browning v. Allied Helicopter Serv., Inc., 309 F.2d 712, 715 (10th Cir. 1962). In *Browning* the court refused to apply the broad "benefit" notion espoused by the *Green* court and instead denied a lien for the chemical spraying of defendant's land to kill foliage. The spraying was clearly a benefit to the land but was not part of the construction of a building or structure.

[25] 272 Ala. 640, 133 So. 2d 44 (1961), *noted in* 15 ALA. L. REV. 630 (1963) *and* 61 MICH. L. REV. 196 (1962).

[26] ALA. CODE tit. 33, § 37 (1959). The court restricted itself to defining "improvement" and did not attempt to employ other language of the statute giving a lien for "repairing, altering, or beautifying [any building or improvement]."

[27] The dissent in *Mazel v. Bain* argued that the majority had twisted the meaning of "improvement" as used in the statute. The Alabama statute provides that the lien given will be "on such building or improvements *and* on the land on which the same is situated . . . ." ALA. CODE tit. 33, § 37 (1959) (emphasis added). To read "improvement" to include grading, the dissent pointed out, would give a lien on the graded land on the land, or in other words, a lien on land on land. This result, the dissent felt, could hardly have been intended by the legislature. Mazel v. Bain, 272 Ala. 640, 133 So. 2d 44, 48 (1961) (dissenting opinion).

property owner to keep his land unemcumbered except upon legislative mandate. It is important for a property owner to be aware of the possible risk to property incurred by contracting for work thereon. Since the present language of the statute suggests that a lien is only given when a building is involved, an owner would not be prepared for an interpretation applying a broad "benefit" concept should the court decide to expand coverage.

Further extension of the meaning of the mechanics' lien statute should be made by the legislature rather than by the courts. There is no apparent reason why a person working directly on real property should not have as great a right to a lien as a person building a structure. Both have benefited the real property by adding labor and materials. In light of the various ways real property can be improved today, the fact that the lien was initially designed to protect construction should not prevent an amendment of the statute to provide a lien for other types of work. The language of other states' statutes[28] as well as that of the Uniform Mechanics' Lien Act[29] explicitly granting a lien for landscaping, grading, clearing, and other such work would serve as a good example for the legislature to follow. In any event, the legislature would do well to set up more explicit standards of coverage in order to avoid guesswork and speculation on the part of property owners about to contract out work to be done on their real property.

J.C.R.

[28] Some statutes allow a lien for grading and landscaping by including such work within the definition of "improvement." *E.g.*, TENN. CODE ANN. § 64–1101 (Supp. 1967); WIS. STAT. ANN. § 289.01(1)(b) (1958). Other statutes deal directly with grading and landscaping by expressly stating the limits of the lien. *E.g.*, ILL. ANN. STAT. ch. 82, § 1 (Smith-Hurd 1966); OKLA. STAT. ANN. tit. 42, § 141 (1954).

[29] UNIFORM MECHANICS' LIEN ACT § 1 (act withdrawn 1943). The Act covered landscaping by including it within the definition of "improvement."

The Commissioners on Uniform State Laws withdrew the Act in 1943 largely because building conditions are so different from state to state that no one mechanics' lien law can fit the varying conditions. 4 AMERICAN LAW OF PROPERTY § 16.106F n.11 (A.J. Casner ed. 1952); HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 150 (1943).

The Willful Misconduct Exception to the Utah Guest Statute — Suggested: An Objective Standard

In *Roylance v. Davies*,[1] the plaintiff was riding in defendant's car; it was dark and a light snow was falling.[2] Upon reaching a point at which the road they were traveling intersected with a divided highway, the defendant planned to make a left turn onto the highway. He became impatient waiting for a break in heavy traffic on the far side of the highway,[3] "spun gravel,"

[1] 18 Utah 2d 395, 424 P.2d 142 (1967).

[2] *Id.* at 397, 424 P.2d at 143.

[3] The defendant planned to make a left turn onto the highway and to proceed for some distance until there was a break in the dividing barricade, there to make a U-turn and return to the lounge where plaintiff worked. *Id.*

and started along the left-hand shoulder of the road — against traffic — toward their goal, a tavern which was about 300 yards away. Almost immediately the car hit a pole, which resulted in plaintiff's injuries. The plaintiff brought suit under the Utah guest statute which provides that a "guest" riding in another's automobile cannot sue the driver for injuries resulting from an accident unless he can show that the driver's intoxication or willful misconduct proximately caused the injuries.[4] He obtained a jury verdict in the trial court, but the supreme court reversed, holding that the facts clearly did not create a jury question on the issue of willful misconduct and that the plaintiff had no cause of action.[5]

Standards imposing liability on a "host" under a guest statute vary according to the jurisdiction in which the case arises. One group of states contemplates a showing of "gross negligence" for a guest to recover.[6] Another requires intentional misconduct or reckless disregard of others' rights.[7] A third group, of which California and Utah are representative, demands evidence of willful misconduct.[8] Those states applying the standard of willful misconduct show confusion as to exactly what conduct must be proved to impose liability on the "host." [9] There seems to be agreement, however, that the conduct must constitute, qualitatively, something more than mere negligence.[10] Consequently, the usual construction applied by the courts today is that willful misconduct is an intentional act of an unreasonable character perpetrated in disregard of a risk known to the actor or so obvious that he

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[4] UTAH CODE ANN. § 41-9-1 (Repl. vol. 1960). The statute states:

> Any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways in the state of Utah, and while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle. . . . Nothing in this section shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to . . . such guest proximately resulting from the intoxication or willful misconduct of such owner, driver or person responsible for the operation of such vehicle; . . . the burden shall be upon plaintiff to establish that such intoxication or willful misconduct was the proximate cause of such . . . injury or damage.

The California guest statute is substantially similar to the Utah provision. *See* CAL. VEHICLE CODE § 17158 (West Supp. 1966). The Nevada provision requires proof of intoxication, gross negligence, or willful misconduct proximately causing the injury in order for a guest to recover. NEV. REV. STAT. § 41.180 (1967).

More than half of the states now have guest statutes. Enactment of these statutes has resulted from the work of effective insurance lobbies, which claim that insurers are "particularly exposed to collusion between the injured guest and a host anxious to see compensation paid." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 34, at 190–91 (3d ed. 1964). *See also* text accompanying note 21 *infra*.

[5] 18 Utah 2d at 402, 424 P.2d at 147.

[6] *See, e.g.*, KAN. GEN. STAT. ANN. § 8–122b (1964); MONT. REV. CODES ANN. § 32–1113 (1961).

[7] *See e.g.*, TEX. REV. CIV. STAT. art. 6701b (1960); N.M. STAT. ANN. § 64-24-1 (1960).

[8] *See* note 4 *supra*.

[9] *See* Note, *Treadmill to Confusion — Ohio's Guest Statute*, 8 W. RES. L. REV. 170, 173–74 (1957).

[10] 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 16.15 at 953 (1956). The Utah court stated a similar rule in Stack v. Kearnes, 118 Utah 237, 243, 221 P.2d 594, 597 (1950).

must have been aware that it would cause probable harm,[11] or "an intentional doing of an act with wanton and reckless disregard of its probable results." [12] Such standards could be termed a "state of mind" test since they are based on the host's subjective intent in the face of a "known" danger.

In *Roylance*, the court looked at the factual elements of the case separately. In applying the "state of mind" test, it noted that the evidence indicated no traffic on the shoulder where the parties were traveling and no showing that the vehicle was traveling at an excessive speed.[13] Citing an earlier Utah case,[14] the court determined that speed alone, especially when there was no traffic in the vicinity, was not sufficient to constitute willful misconduct. The court further noted that, since the headlights on defendant's car were in working order, that it was dark when the accident occurred was not material.[15] It concluded that the "law of self-preservation" gave reason for doubt that the defendant foresaw the accident, since if he had, he would have avoided it.[16] Thus, the court determined as a matter of law that the jury could not have found that defendant's acts constituted willful misconduct under the Utah standard.[17]

The Utah standard has been formulated as, "the intentional doing of an act or intentionally omitting . . . to do an act, with knowledge that serious injury is a probable and not merely a possible result, or the intentional doing of an act with wanton and reckless disregard of the possible consequences." [18] This standard is a manifestation of the "state of mind" test since the individual's intent and knowledge must be determined from his overt acts. The attempt to impute intent and knowledge inherently augments the confusion resultant from applying any subjective test. Additional confusion may be attributed to the Utah court's apparent efforts to further the legislative purpose of avoiding collusion between the parties to defraud insurance companies,[19] rather than merely to analyze the operative facts.[20] For example, in

[11] W. PROSSER, *supra* note 4, at 188–89. *See also* Comment, *The Ohio Guest Statute*, 22 OHIO ST. L.J. 629, 637 (1961).

[12] Cope v. Davison, 30 Cal. 2d 193, 202, 180 P.2d 873, 875 (1947). For an analysis distinguishing willful misconduct from other forms of aggravated negligence see Quint, *'Wilful Misconduct,' 'Wanton and Reckless Misconduct,' 'Gross Negligence,'* J. ST. B. CAL. 481 (1965).

[13] 18 Utah 2d at 399, 424 P.2d at 145.

[14] Ricciuti v. Robinson, 2 Utah 2d 45, 269 P.2d 282 (1954).

[15] 18 Utah 2d at 400, 424 P.2d at 145.

[16] *Id.* at 401, 424 P.2d at 146. If this "law of self-preservation" reasoning is considered as the supreme court's interpretation of the "intent" necessary to make up willful misconduct, future "guests" need not bother to file suit against drivers of automobiles in which they were injured. The court's statement proclaims the obvious: few, if any, drivers will intentionally operate their vehicles in a manner that will cause *certain* harm to themselves and their passengers. If an injured guest must show that a manifest intent to do harm caused his injury, the meaning of the statutory standard will be nugatory, since the court seems to be asking for a showing of *intentional* misconduct (implying certitude in the result) rather than willful misconduct (requiring only probability of the result).

[17] *Id.* at 402, 424 P.2d at 146–47.

[18] Stack v. Kearnes, 118 Utah 237, 243, 221 P.2d 594, 597, (1950); *accord* Ricciuti v. Robinson, 2 Utah 2d 45, 47, 269 P.2d 282, 283 (1954).

[19] *See* note 4 *supra*; Weinstein, *Should We Kill the Guest Passenger Act?*, 33 DETROIT LAW. 185, 189 (1965); Comment, *supra* note 11, at 643.

[20] *Compare* Stack v. Kearnes, 118 Utah 237, 221 P.2d 594 (1950) (defendant met plaintiff at a party and drove him home; facts constituted willful misconduct) *with* Roylance v. Davies, 18 Utah 2d 395, 424 P.2d 142 (1967) (parties were "buddies").

Roylance, the court observed that the parties were good friends prior to the accident and that the two friends were now engaged in a lawsuit.[21] Although the decision was in no way overtly based on this observation, the obvious inference is that the court feared the parties were working together to see that defendant's insurer compensated plaintiff. Moreover, the concurring opinion based its argument entirely on that relationship and the jury's evident knowledge of the insurer's ultimate liability to plaintiff.[22]

Until *Roylance*, the Utah standard has not necessarily sparked confusion because of the paucity of Utah decisions involving willful misconduct under the guest statute. Moreover, those reported decisions include fact situations which either "clearly" constitute willful misconduct or "clearly" constitute mere negligence. In *Stack v. Kearnes*,[23] defendant was driving too fast around familiar curves. His passenger repeatedly told him to slow down, but he disregarded the warnings. In the passenger's suit for injuries consequent to an accident, the court held that plaintiff had offered sufficient evidence upon which a jury could have found that state of mind necessary to constitute willful misconduct. The court in *Stack* specifically noted the frequent warnings given by plaintiff and imputed knowledge to defendant of dangers on the road which he traveled frequently. The court also observed that the parties were not good friends, but that plaintiff had met defendant at a party and accepted a ride home. The nature of their relationship would tend to negate any strong inference of collusion between the parties in the court's mind.

On the other hand, the court has held that the host's reaching for a lighted cigarette while driving in an allegedly intoxicated condition[24] or falling asleep at the wheel[25] do not constitute willful misconduct. Thus, the reported cases fit neatly into the Utah standard for willful misconduct: in *Stack* there was imputable knowledge and intent (and the absence of a special "collusive" relationship); in the other cases mere inadvertence caused the accident and resulting injuries.

Another facet of the Utah standard is the jury's role in assessing willfulness. Although the court in *Roylance* disregarded the jury verdict, it has previously stated a strong bias for a jury determination of the facts in willful misconduct cases. In *Ricciuti v. Robinson*,[26] defendant, while speeding, dropped a lighted cigarette on his clothing, thereby causing an accident resulting in injury to his "guest." The court, holding that there was no question of willful misconduct, stated that *the matter of willful misconduct is ordinarily a jury question*, and only where reasonable minds could not conclude that there was that degree of intent, knowledge, or aggravated negli-

[21] 18 Utah 2d at 396, 424 P.2d at 142–43.
[22] *Id.* at 402–03, 424 P.2d a t147 (Henriod, J., concurring).
[23] 118 Utah 237, 221 P.2d 594 (1950).
[24] Milligan v. Harward, 11 Utah 2d 74, 355 P.2d 62 (1960).
[25] Brown v. Frandsen, 19 Utah 2d 116, 426 P.2d 1021 (1967).
[26] 2 Utah 2d 45, 269 P.2d 282 (1954).

gence necessary to constitute willful misconduct would the courts be justified in taking the case from the jury.[27]

The interpretation of precedent underlying the Utah standard suggests that *Roylance's* facts approach a showing of willful misconduct under the "state of mind" test in terms of knowledge of harm and reckless disregard of the possible consequence of the act. The court concluded that a jury could not reasonably find that the accident was the result of plaintiff's knowledge of probable harm or intent, since there was no traffic on the shoulder on which the parties were traveling, plaintiff's speed was not excessive, and "the law of self-preservation" militated against his intentionally doing an act which would injure himself and his guest. The jury might well have considered *other* factors: the facts in *Roylance* are such that reasonable men might differ as to their legal significance. Thus, plaintiff was entitled to have the jury review such evidence as the defendant's spinning gravel as it affected his control over the automobile, his knowledge of the terrain and its dangers, and his intentionally proceeding on the shoulder to the left of the road after dark and in a snowstorm. A jury could have — as it did — decided that such evidence indicated defendant's knowledge of probable harm or his reckless disregard for plaintiff's safety.

The primary implication of *Roylance*, however, is that plaintiffs in future willful misconduct litigation will have difficulty in showing the defendant had the requisite mental attitude, no matter how blameworthy his *conduct* may have been. For example, the court in *Roylance* disregarded conduct which a jury felt indicated the mental attitude substantiating a finding of wilful misconduct. Since the terms "knowledge," "mental attitude," and "willfullness," are mere verbiage, the courts can, without more, subject fact situations to arbitrary categorization based, not on fault or "willfulness," but on the relationship of the parties. Thus, this relationship without more could be fatal to a guest's case because of the court's apparent fear that parties may have colluded to defraud insurers. Such a fear, while not groundless, may be without practical support. Modern sophisticated juries arguably can distinguish colluded cases from bona fide suits, thereby making the danger of fraud or collusion in this area of the law anachronistic.[28]

The supreme court could mitigate the confusion which may follow the *Roylance* decision under the Utah standard — based on a subjective "willfulness" and attenuated by the court's suspicion of collusion — by adopting an objective standard. An objective evaluation should be based on the defendant's acts or omissions rather than his "state of mind,"[29] although "state of

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[27] *Id.* at 48, 269 P.2d at 283–84. *See also* 1 BLASHFIELD AUTOMOBILE LAW AND PRACTICE § 67.5 (3d ed. 1965).

[28] Weinstein, *supra* note 19, at 189; *cf.* Comment, *supra* note 11, at 643; Note, *supra* note 9, at 182.

[29] Such a basis for imposing liability is suggested in 2 F. HARPER & F. JAMES, *supra* note 10, at 954–55. The *Restatement of Torts* defines "willful misconduct" as synonymous with "recklessness." RESTATEMENT (SECOND) OF TORTS, Special Note § 500 at 587 (1965). That definition emphasizes conduct rather than "state of mind":

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable

mind" (knowledge and intent) may be a relevant factor and may by itself turn mere negligence into willfulness.[30] Thus, keeping in mind the definition of willful misconduct as conduct qualitatively worse than mere negligence, the emphasis would be on a case-by-case analysis of the parties' *conduct* rather than the question whether the defendant's "mental attitude" precipitated the injury. The jury might be instructed that if "defendant's conduct, in the light of circumstances which he knew or should have known, involved a high degree of manifest danger,"[31] a sufficient basis would be present for finding willful misconduct without regard to "state of mind." The objective test should involve the jury's making a factual analysis in each case based on all the relevant factors taken as a whole, including the driver's physical condition; his knowledge of any operative defects in his automobile and his concomitant misuse of the vehicle; weather, highway and traffic conditions; the speed of his vehicle, along with the control he had over it; and his obedience to those statutes enacted to prevent traffic accidents.[32] An *extreme* manifestation of collusion may be considered by the court, but the driver's intent should be only an ancillary consideration to be used when the "host's" overt acts do not constitute willfulness, but when coupled with the actor's disregard of the consequences show willfulness or recklessness.

Such an objective standard applied to facts similar to those in *Roylance* would lead to a showing of willful misconduct. The defendant's spinning gravel and starting out on the wrong side of the road, in addition to the darkness and snow — which he must have known would impair his vision and control over the vehicle — would certainly substantiate dissenting Chief Justice Crockett's opinion that the jury could reasonably believe defendant's conduct was highly irrational.[33] The defendant's conduct, taken as a whole, could accordingly be classified as "willful" or "reckless" without regard to his actual mental attitude.

The main thrust of the recommended objective standard would be to minimize the courts' ability to mold facts to fit within or without the scope of "willfulness" as their sense of justice dictates. Both practitioners and courts could thus work with a clarified standard of what conduct will be termed willful or reckless. Since the scope of willfulness is far from distinct,[34] however, under either standard a jury is far better able to weigh the facts of

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> man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

RESTATEMENT (SECOND) OF TORTS § 500 (1965).

[30] 2 F. HARPER § F. JAMES *supra* note 10, at 956–57.

[31] *Id.* at 954.

[32] At least two other student writers have proposed a similar standard. *See* Comment, *supra* note 11, at 641; Note, *supra* note 9, at 182. Moreover, some jurisdictions have implicitly adopted such a standard. *See* Dexter v. Green, 55 So. 2d 548 (Fla. 1951) (all circumstances — every act or omission — must be considered); Martin v. Clum, 142 So. 2d 149 (Fla. Ct. App. 1962); Kamholtz v. Stepp, 31 Ill. App. 2d 357, 176 N.E.2d 388 (1961) (normally, willfulness is a question of fact for a jury and depends on the particular circumstances of each case).

[33] 18 Utah 2d at 405, 424 P.2d at 148.

[34] *See* 4 BLASHFIELD'S CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 2322 at 383 (perm. ed. 1946); Weinstein, *supra* note 19 at 186–87.

close cases — including evidence of collusion — than is an appellate court. Whether the "state of mind" or recommended objective test is used, Utah courts should more closely follow the *Ricciuti* dictum stating the policy for a jury determination of willful misconduct under the guest statute.

R.B.B.