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Introduction

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INTRODUCTION

America is a nation on wheels. Just as the automotive manufacturing industry has become a primary factor in our national economy, so the use of the automobile has become one of the most prolific sources of litigation. A major portion of the work load of the lawyer in general practice is in some way connected with the ownership and use of the automobile.

In view of the complexities of the many facets of litigation involving automobile use and ownership, the editors of the Wyoming Law Journal felt it might be helpful to collect in a single volume much of the statutory and case law governing the ownership and use of the automobile in Wyoming. With this thought in mind, the following symposium is offered for your approval.

WYOMING LAW JOURNAL EDITORS

THE AUTOMOBILE, NEGLIGENCE, AND WYOMING LAW

"We have grown up with the motor vehicle. We are the products of its revolutionary effects, dependent upon it for everything we do. It is so much a part of our lives that we are unable to assess its influence upon our thought, our activities, our livelihoods, our culture, our law. We know its dangers — the great toll of lives it takes and the great toll in suffering, loss of services of those who are injured, and services of those who must care for them, losses in happiness, productive energies, property and money, wholly incalculable."¹

When the automobile burst upon this nation, the traditional legal concepts of negligence were applied. By court decision and legislative action the slow process of developing doctrinal refinements and limitations for softening the immunities of the early law of negligence was begun.

This note is limited to how Wyoming law and courts have handled the problem of the automobile. No attempt is here made to suggest what the law should be in Wyoming. The cases and authorities cited do not presume to encompass all the cases or authorities in Wyoming on the particular point discussed. However, the cases and authorities cited, it is hoped, do reflect the present law on the particular point or doctrine.

Negligence has been defined in Wyoming as "the failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby

1. Green, Leon, *Traffic Victims: Tort Law and Insurance*, Northwestern University Press (1958), p. 65.

such other person suffers injury."² This definition imposes a standard of care best described in *Ries v. Cheyenne Cab and Transfer Co.*

Care and vigilance on the part of vehicular travelers should always vary, according to the exigencies which require vigilance and attention. An automobile driver is bound to use his eyes, bound to see seasonably that which is open and apparent, and take knowledge of obvious dangers. When he knows, or reasonably ought to know, the dangers, it is for him to govern himself suitably. Thoughtless inattention on the highway, as elsewhere in life, spells negligence.³

Both the above definition and standard apply the reasonable prudent person test to the Wyoming roads and highways. Thus, if in the existing circumstances one does not exercise that degree of care which the reasonable prudent person would exercise in the same or similar circumstances, and another is injured as a proximate result thereof, one is liable for such injury. "The words 'reasonable man' denote a person exercising those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and interests of others."⁴

Once the defendant's negligence is alleged, the defendant may admit such in his answer or deny it and in the alternative plead that even if he be found negligent the plaintiff's conduct bars any recovery by the plaintiff. Herein lies the doctrine of contributory negligence, which in most jurisdictions imposes upon the plaintiff an all or nothing proposition in that should the plaintiff negligently contribute to his own injury, he can not recover from the defendant.

Several jurisdictions apply the doctrine of comparative negligence, which takes into consideration the negligence of each party and proportionately limits recovery by the plaintiff.⁵ Wyoming does not adhere to this doctrine⁶ except in cases arising under the Federal Employer's Liability Act.⁷

The defense that the plaintiff has negligently contributed to his injury arises in nearly every automobile negligence suit, and imposes upon

2. *Cimoli v. Greyhound Corp.* 372 P.2d 170, 171; (Wyo. 1962), citing with approval *Hildebrand v. Chicago, B.&Q. R.R.*, 45 Wyo. 175, 17 P.2d 651, 658 (1933).

3. *Ries v. Cheyenne Cab and Transfer Co.*, 53 Wyo. 104, 79 P.2d 468, 472 (1938); quoting *Callahan v. Amos D. Bridges Sons*, 128 Me. 346, 147 A. 423, 424. (1929)

4. *Johnston v. Vukelic*, 67 Wyo. 1, 213 P.2d 925, 930 (1950); approving Restatement, Torts, §§ 463 and 464 and approved in *Cimoli v. Greyhound Corp.*, supra note 2, at p. 174.

5. Prosser, Torts, 2d ed., 1955, ch. 10, § 53, pp. 296 to 299, briefly and adequately discusses the development and extent comparative negligence is used by courts today. This section lists the jurisdictions that apply the doctrine and the situations to which they apply it.

6. *Borzea v. Anselmi*, 71 Wyo. 348, 258 P.2d 796, 800 (1952) and *Hill v. Walters*, 55 Wyo. 334, 100 P.2d 98, 102 (1940).

7. 45 U.S.C.A. § 51 (1910).

8. Wyo. Rules of Civil Procedure No. 8.

the defendant the burden of alleging and proving the affirmative defense of contributory negligence,⁸ which is defined as:

. . . conduct on the part of a plaintiff which falls below the standard to which he should conform for his own protection and which is a legally contributing cause, co-operating with the negligence of the defendant in bringing about plaintiff's harm. The standard of conduct to which he should conform is the standard to which a reasonable man would conform under like circumstances.⁹

Thus in Wyoming, the reasonable prudent person test is used in determining whether or not the plaintiff is contributorily negligent. The duty of care or standard mentioned above is just as applicable to the doctrine of contributory negligence as to that of negligence. In addition, the Wyoming Supreme Court has held that assumption of risk is not to be distinguished from contributory negligence.¹⁰ However, this may be questioned because of the recent guest case in which the Court stated that any distinction between contributory negligence and assumption of risk is to be determined upon the facts and circumstances of each case.¹¹ Further, Wyoming does not adhere, as do several sister states, to the doctrine of degrees of negligence except where the guest statute is involved and the language of the statute requires that the doctrine be applied.¹²

Standing alone, the foregoing definitions of negligence, care, and contributory negligence (which lead to the reasonable prudent person test) impart to some degree a moral quality, and perhaps even introduce an element involving the state of mind of the parties. This, of course, is not the purpose of such definitions, and, therefore, when standing alone, the reasonable prudent person test is of little or no actual value. It is when the definition that is employed is applied to the facts of a particular case and to the conduct of the particular party that any value is derived.

In a particular case or controversy each party must satisfy the burden of proof placed upon him. (Burden of proof is used here to mean the burden of persuasion, or risk of non-persuasion, and not the shifting duty of going forward with the evidence.) Thus the plaintiff must prove the defendant's negligent conduct and that such was the proximate cause of the plaintiff's injury. The defendant in turn must explain his conduct and, of course, bears the burden of proving the plaintiff's contributory negligence if the defendant alleges such. So far as contributory negligence and proximate cause are concerned, the party with the burden need not produce

9. Johnston v. Vukelic, *supra* note 4, at p. 930; approving Restatement Torts §§ 463 and 464 and approved in Cimoli v. Greyhound Corp., *supra* note 2, at p. 174.
 10. Ford Motor Co. v. Arguello, 382 P.2d 886, 891 (Wyo. 1963) and Rocky Mountain Trucking Co. v. Taylor, 79 Wyo. 461, 335 P.2d 448 (1959).
 11. Cross v. Foster, 378 P.2d 903, (Wyo 1963).
 12. The guest statute and its application is discussed in another note in this symposium; however, in Davies v. Dugan, 365 P.2d 198 (Wyo. 1961), use is made of the term gross negligence in a case not involving the guest statute but such use is at most descriptive and dicta.

direct evidence. Contributory negligence and proximate cause may be determined from the opposition's evidence and/or the circumstances of the case. It is sufficient so long as contributory negligence and proximate cause appear from the evidence.¹³

Negligence, contributory negligence, and the various doctrines and theories to be discussed below are to be determined by a jury¹⁴ unless the court determines as a matter of law that reasonable men could draw but one inference from the facts of the particular controversy.¹⁵ However, it is not always necessary that there be conflicting facts to have a question of fact. So long as "different minds may fairly arrive at different conclusions, and where the inferences from the facts are not so certain that all reasonable men, in the exercise of fair and impartial judgment, must agree upon them"¹⁶ there exists a question of fact for a jury.

Once the case is appealed, the "rule of review" is applied in Wyoming. This rule states that the appellate court

must assume that the evidence in favor of the successful party is true, leave out of consideration entirely the evidence of the unsuccessful party in conflict therewith, and give to the evidence of the successful party every favorable inference which may be reasonably and fairly drawn from it.¹⁷

If any benefit is to be forthcoming from the foregoing definitions and rules, it is to be derived by attempting to find a "thread" between such definitions and rules on the one hand, and past decisions in which such definitions and rules have been applied on the other hand. In this fashion, one should be prepared to venture an opinion as to whether a particular fact situation will be determined by a jury or by the court as a matter of law.

It is impossible to list every type of conduct that may or may not constitute a breach of duty, but it is possible to state several of the more common areas of duty and what type of conduct has constituted a breach of duty.

MAINTAINING A LOOKOUT: "A person is presumed to see that which he could see by looking . . . He will not be permitted to say that he

13. As to contributory negligence, *Johnston v. Vukelic*, supra note 4, at p. 930; as to proximate cause, *O'Mally v. Eagan* 43 Wyo. 233, 2 P.2d 1063, 1066 (1931).

14. *Dallason v. Buckmeier*, 74 Wyo. 125, 284 P.2d 386 (1955).

15. As to negligence, *Davis v. Dugan*, 365 P.2d 198, 200, (Wyo. 1961). As to proximate cause, *Ibid.*, at p. 390, and *Ford Motor Co. v. Arguello*, supra note 10, at p. 891 and 892. As to contributory negligence, *Ries v. Cheyenne Cab and Transfer Co.*, supra note 3, at p. 473.

16. *Templar v. Tongate*, 71 Wyo. 148, 255 P.2d 223, 230 (1953); quoting with approval from *Loney v. Laramie Auto Co.*, 36 Wyo. 339, 354, 255 P. 350, 354, 53 A.L.R. 73. ((1927) Similar language is found in *O'Mally v. Eagan*, supra note 13, at p. 1066.

17. *Chandler v. Dugan*, 70 Wyo. 439, 251 P.2d 580, 584 (1952). Also found in the recent cases: *Brasel & Sims Construction Co. v. Neuman Transit Co.*, 378 P.2d 501, 503; (Wyo. 1963), and *Fisher v. Robbins*, 78 Wyo. 50, 319 P.2d 116, 117, 118 (1957).

did not see what he must have seen, had he looked.”¹⁸ The Wyoming Supreme Court has quoted authority stating that, “It has been stated that failure to look at all constitutes negligence as a matter of law while the question as to whether one who looks, sees all that he should see, is one of fact for the jury.”¹⁹ and the Court has held a driver negligent in at least two cases for not looking in the direction the car was travelling.²⁰

VISION: Closely related to the duty to maintain a lookout, is the duty concerning vision.²¹ Wyoming has employed three approaches to automobile negligence cases involving the driver’s vision. First, the “assured clear distance” rule which provides that the driver of an automobile is charged with a duty to so drive his vehicle that he can stop the automobile within the visible distance ahead. Second, the assured clear distance rule with exceptions — “disconcerting circumstances.” Third, the reasonable prudent person test applied to the circumstances of the particular case.

The assured clear distance rule was applied in *Price v. State Highway Commission*²² where the plaintiff collided with a snowplow, which possessed no warning signals, because of blowing snow which obscured the plaintiff’s vision.

The assured clear distance rule with exceptions was formulated in the case of *Merback v. Blanchard*,²³ wherein the defendant stopped his truck upon the highway at night and the decedent drove into the rear of the truck. The Court reasoned that there were “disconcerting circumstances” in that the defendant’s truck was covered with road oil, it was a dark moonless night, the truck’s lights were not operating properly, and another of defendant’s trucks was approaching from the opposite direction. Thus, the Court reversed the directed verdict rendered below in favor of the defendant upon the assured clear distance rule. In *Hawkins v. Loffland Brothers Company*²⁴, where plaintiff’s decedent crashed into the rear of defendant’s truck which was stopped upon the highway without proper lights, the Court reversed the judgment of the lower court and held the decedent guilty of contributory negligence as a matter of law because of the absence of any disconcerting circumstances.

In the case of *Templar v. Tongate*²⁵, the Court stated that it was for the jury to determine whether or not the defendant was negligent in not seeing the decedent. The defendant was blinded by sunlight upon

18. *Chandler v. Dugan*, supra note 17, at p. 587, quoting *Chapman v. Ewing*, 46 Wyo. 180, 186, 24 P.2d 687, 688 (1933).

19. *McDowall v. Walters* 360 P.2d 165, 169, (Wyo. 1961).

20. *Davies v. Dugan* 365 P.2d 197, 200; (Wyo. 1961) and *Johnston v. Vukelic*, supra note 4.

21. Archibald, “The Duty of a Driver Whose Vision is obscured,” 12 Wyo. L.J. 116 (1958).

22. *Price v. State Highway Commission*, 62 Wyo. 385, 167 P.2d 309 (1949).

23. *Merback v. Blanchard*, 56 Wyo. 152, 105 P.2d 272 (1940).

24. *Hawkins v. Loffland Brothers Company*, 70 Wyo. 366, 250 P.2d 498 (1952).

25. *Templar v. Tongate*, 71 Wyo. 148, 255 P.2d 223 (1953).

cresting a small hill just prior to the collision with the decedent who was driving very slowly upon the highway. The Court also recognized that the defendant had "a right to presume and to act upon the presumption, that the way is safe for ordinary travel, . . . and he is not required to be on the lookout for extraordinary dangers or obstructions to which his attention has not been called."²⁶ Because of this last quoted rule, one cannot definitely classify the *Templar* decision as an application of the reasonable prudent person test. However, in *Gamet v. Beasley*²⁷ the Court did apply the reasonable prudent person test where the plaintiff collided with the defendant's parked car during a foggy night.

This writer doubts if the distinction between the rules is that the reasonable prudent person test will be employed where two automobiles are involved, and the assured clear distance rule with or without exception will be employed where one or more trucks are involved. However, one cannot determine with any degree of certainty which rule will be applied in a particular case. This writer believes the better rule considering the present condition of roads and the modern vehicles is to apply the reasonable prudent person test to the facts of each case.

INTERSECTIONS: *Ries v. Cheyenne Cab and Transfer Co.* provides the applicable duty at right-of-way intersections. In this case, the Court qualifies the rule that the driver to the right has the right-of-way by stating that such right may not be "invoked when the car moving from the favored direction is so far from the intersection at the time the car from the left comes into it that, with both proceeding within the lawful limits of speed, the latter will reach the line of crossing before the former will reach the intersection."²⁸

CONTROL: The driver of an automobile must have control of his automobile under the particular circumstances. Where the driver loses control, begins to skid, and injury results, the driver has the burden of showing that such injury and loss of control was not due to his negligence.²⁹ There is also the following inference which he must rebut: ". . . when it is shown that causes calculated to produce a certain result were in operation at a given time, it is a permissible inference that the natural result in fact followed."³⁰ In *Dr. Pepper Co. v. Heiman*, the Court stated in affirming the lower court, which sat without a jury:

It taxes credulity to suggest that a road intermittently covered with snow, slush and ice was not a contributing factor when a vehicle skidded and spun around, or to imply that speed was not

26. *Ibid.*, at p. 232.

27. *Gamet v. Beasley*, 62 Wyo. 1, 159 P.2d 916 (1945).

28. *Ries v. Cheyenne Cab and Transfer Co.*, supra note 3, p. 472.

29. *Dr. Pepper Co. v. Heiman*, 374 P.2d 206, 209 (Wyo. 1962); *Butcher v. McMichael*, 370 P.2d 937, 939 (Wyo. 1962); and *Wallis v. Nauman*, 61 Wyo. 231, 157 P.2d 285, 288 (1945).

30. *Dr. Pepper Co. v. Heiman*, supra note 29, at p. 209.

also a contributing cause when the skidding and spinning actually occurred. This left it reasonable for the trial court to infer that the road's condition and the driving at a speed of as much as 35 miles per hour did induce the skidding and spinning and, hence, such driving was negligent. This is especially true inasmuch as the plaintiff offered no evidence whatever to explain the cause for the car's going into the spin.³¹

Whenever there is an issue of control, there will be concern and inquiry as to the physical and/or mental condition of the driver, the condition of the road, the speed at which the automobile was traveling, and other pertinent factors.

SPEED: One may be well within the authorized speed limit and still be found negligent. (See above quote from *Dr. Pepper Co. v. Heiman*.) Such is based upon a rule of the road that one must travel at a speed which is reasonable under the existing circumstances.³² Further, parties may always act under the assumption that an approaching automobile will proceed at a lawful rate of speed.³³

TRAFFIC LANES: The general rule is that a motor vehicle is to travel in the right hand lane of traffic.³⁴ However, where two motor vehicles are approaching one another and one is in the wrong lane, the Wyoming Supreme Court has stated that "the driver of a motor vehicle who is in his own lane of traffic and sees another vehicle coming toward him in the wrong lane has a duty to use ordinary care to avoid an impending collision and any assumptions which he makes as to the yielding of the right of way or the return of the vehicle to its proper lane must be reasonable in view of the circumstances."³⁵ When a driver is changing his driving lane or turning onto another street or road, he is "to make certain that this might be done with safety."³⁶

STOPPING IN TRAFFIC: A driver has a right to presume that the automobile in front of him will continue to travel instead of stopping in the lane of traffic.³⁷ If one should find it necessary to stop, one should drive off the road or lane of traffic. The Court has held that one is "negligent and, in fact, grossly negligent in stopping right in the lane of travel when he knew that other cars were following him and when he had ample space to stop his car north of the lane of traffic."³⁸

STOPPING ON HIGHWAYS: A driver has the right to presume that any highway is open to public travel and that all other drivers will observe

31. *Ibid.*, at pp. 209 and 210.

32. Wyo. Stat. § 31-130 (1957).

33. *Borzea v. Anselmi*, 71 Wyo. 348, 258 P.2d 796 (1952) and *Ries v. Cheyenne Cab and Transfer Co.*, *supra* note 3.

34. Wyo. Stat. § 31-99 (1957). This section also lists the exceptions to the general rule.

35. *Cimoli v. Greyhound Corp.*, *supra* note 2, at p. 174.

36. *Checker Yellow Cab Co. v. Shiflett* 351 P.2d 660, 664. (Wyo. 1960).

37. *Davies v. Dugan*, *supra* note 20, at p. 200.

38. *Id.*

this presumption and not leave their motor vehicles on the traveled part of the highway.³⁹ An exception is where the vehicle is "disabled." Wyoming has by statute adopted this exception.⁴⁰ States which have a statute similar to that of Wyoming have construed the exception in one of two ways: by holding a vehicle is disabled when it cannot be moved under its own power, or by holding a vehicle disabled when it is impossible to avoid stopping or temporarily leaving them in such position, and that the word "impossible" should not be given a literal construction, but should be construed to mean "not reasonably practical."

In *Merback v. Blanchard*⁴¹ (also discussed supra at page 7.) the Court held that where a vehicle is stopped upon the traveled part of a highway, which has a shoulder two and a half feet wide, because of defective lights of which the driver was aware some time before stopping, it is a jury question as to whether the vehicle is disabled. In view of this decision, it would appear that Wyoming has decided to follow the latter of the two interpretations mentioned above.

PEDESTRIANS: In *Johnston v. Vukelic*⁴² the Court cited with approval Wyo. Stat. § 60-521 (1945), which placed the duty of care on the pedestrian and motor vehicle driver in the following language:

- (a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.
-
- (d) Notwithstanding the provisions of this section every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon any roadway.⁴³

In *Borzea v. Anselmi*, the Court approved the statement that

a pedestrian, who sees an automobile approaching, may calculate upon passing in front of it, upon the assumption that it will approach at a lawful rate of speed, and, if he observes no vehicles on the street within a distance which would be covered by vehicles operating at a lawful speed, he may proceed on the assumption that all vehicles outside of such distance will not run at an unlawful speed."⁴⁴

VIOLATION OF TRAFFIC REGULATIONS: The violation of

39. *Jackson v. W.A. Norris, Inc.*, 54 Wyo. 403, 93 P.2d 498, 502 (1939).

40. Wyo. Stat. § 31-148 (1957).

41. *Merback v. Blanchard*, supra note 23.

42. *Johnston v. Vukelic*, supra note 4, at p. 930.

43. Today the respective statutes are: as to pedestrians the same exact language is quoted in Wyo. Stat. § 31-159 (1957), with two additional subsections; as to the driver's duty, Wyo. Stat. § 31-163 (1957), uses almost the same language with several minor changes.

44. *Borzea v. Anselmi*, supra note 33, at p. 801.

Wyoming traffic regulations, whether state or municipal, is "at least evidence of negligence"⁴⁵ or "prima facie evidence" of negligence.⁴⁶ However, such violation has been viewed as negligence per se.⁴⁷ Regardless of this distinction, the court immediately points out that liability does not follow unless the violation is also the proximate cause.⁴⁸

It is apparent that in all the above areas as in any specific area of duty, whether or not the duty has been breached depends upon the reasonable prudent person test. The doctrine of *res ipsa loquitur* certainly involves due care, but, a specific act of negligence is not directly involved.

The doctrine is applicable,

when a thing that causes injury, without fault of the plaintiff, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from defendant's want of care.⁴⁹

Res ipsa loquitur is seldom used in the vehicle negligence area because "If it may be found from other evidence than the event that due care would have avoided" the act or omission, "then liability follows without resort to the formula or *res ipsa loquitur*."⁵⁰ Thus once the specific act of negligence is ascertainable, which it usually is in automobile accidents, one has no need of this doctrine.

Once a duty of care has been established and that the duty has been breached, the plaintiff has the burden of proving that such breach was also the proximate cause of the injury.⁵¹ Proximate cause has been defined as:

that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. But the proximate cause is not necessarily the nearest in point of time or place to the injury. . . . It is necessary that an injury should be able to be foreseen. . . . That the efficient cause is the cause that necessarily sets the other causes in operation. Proximate cause is the probable cause, and remote cause is improbable cause.⁵²

and;

Proximate cause has been variously defined, but the definition

45. *Hester v. Coliseum Motor Co.*, 41 Wyo. 286, 285 P. 781, 784 (1930).

46. *O'Mally v. Eagan*, 43 Wyo. 233, 2 P.2d 1063, 1066 (1931).

47. *Checker Yellow Cab Co. v. Shiflett*, supra note 26, at p. 666.

48. *Ibid.*, at p. 663; *O'Mally v. Eagan*, supra note 46, at p. 1067; and *Hester v. Coliseum Motor Co.*, supra note 45, at p. 784.

49. *Corson v. Wilson*, 56 Wyo. 218, 108 P.2d 260, 261 (1940); citing *Stanolind Oil and Gas Co. v. Bunce*, 51 Wyo. 1, 62 P.2d 1297 (1936).

50. *Dr. Pepper Co. v. Heiman*, supra note 29, at p. 210.

51. *Checker Yellow Cab Co. v. Shiflett*, supra note 36, at p. 663; and *O'Mally v. Eagan*, supra note 46, at p. 1066.

52. *Lemos v. Madden*, 28 Wyo. 1, 200 P. 791, 793 (1921).

thereof which appears to meet with general approval is that it is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the injury would not have occurred.⁵³

The causal relationship between the defendant's negligence and the plaintiff's injury is usually shown by employing the "but for" or *sine qua non* test, which simply provides that the defendant's negligence is a cause in fact of the injury where the injury would not have occurred but for the defendant's negligent conduct. Although this rule establishes cause in fact, it is of little aid in determining the proximate cause. The distinction between the two is that the proximate cause doctrine draws an imaginary line beyond which the defendant will not be liable even though he was or is responsible for the cause, or one of the causes, in fact. The reason this line must be drawn is simply that a cause in fact can be carried to unreasonable lengths and that the "but for" rule works both ways — had the plaintiff not been there or acted as he did, the defendant would not have injured him.⁵⁴

Naturally, the difficulty one encounters with proximate cause is where to draw the imaginary line in the particular circumstances. Courts have used various theories in drawing this line, including such theories and terms as probability and improbability, foreseeability, remoteness, substantial factor or intervening cause. Wyoming is no exception. The terms most often used are substantial factor, intervening cause, foreseeability, and efficient cause. Regardless of the terms used, the issue is always whether or not the defendant's negligence was the proximate cause of the plaintiff's injury.

Rather than discuss the rationale underlying each of the above theories of proximate cause, I believe it will be far more beneficial to attempt to determine by prior Wyoming decisions whether or not the Wyoming Supreme Court has indicated where the imaginary line separating proximate cause from cause in fact is to be drawn. Many decisions exist wherein the Court has discussed this issue but they are of small value to the practitioner because the discussion has little or no bearing upon the facts of the particular case. Upon examining the decisions, one is aware of the fact that either the Wyoming Supreme Court has yet to encounter a difficult proximate cause problem or that the Court is speaking only in terms of cause in fact. There is a logical reason for this conclusion. In this type of case, the motor vehicles are either involved or not involved in an accident. Therefore, in the usual case, there is not a difficult proximate cause issue.

Exceptions — the unusual cases involving a real proximate cause issue—

53. *Hester v. Coliseum Motor Co.*, supra note 45, at p. 786.

54. *Frazier v. Pokorny* 349 P.2d 324, 329, (Wyo. 1960).

do exist.⁵⁵ Three recent automobile cases involved a substantial issue of proximate cause. First, *Checker Yellow Cab Co. v. Shiflett*⁵⁶, in which the defendant truck traveling on the right side of the right hand lane illegally turned left and struck the defendant cab which was passing the defendant at an illegal rate of speed. Upon the collision, the defendant cab crossed the road and struck the plaintiff's parked automobile. The Wyoming Supreme Court affirmed the lower court's determination that both defendants were liable to the plaintiff and that the defendant truck was liable to the defendant cab. The Court held that the defendant cab's excessive speed was not a proximate cause of the collision with the defendant truck; that the illegal left turn by the defendant truck was the proximate cause of the collision with the defendant cab; and that the illegal speed of the defendant cab and the illegal left turn by the defendant truck were the proximate cause of the injury to the plaintiff's automobile. Second, *Convoy Company v. Dana*⁵⁷, involved a plaintiff who left his truck with defective brakes, including the emergency brake, at the defendant's garage one evening without the defendant, who was not present, knowing of the defects. The next day while moving the plaintiff's truck, the defendant could not stop the truck and injured one Burdick. Burdick sued and recovered from plaintiff, who sought contribution from the defendant. The Supreme Court affirmed the lower court's decision in favor of the defendant. The Court discussed three theories of proximate cause — foreseeability, intervening cause, and substantial factor — and upon the rationale of each, concluded that the plaintiff's conduct was the proximate cause of Burdick's injury. Third, *Ford Motor Co. v. Arguello*⁵⁸, wherein the plaintiff, a guest in defendant Peterson's automobile, alleged and the jury found that the accident in which the plaintiff was injured was caused in part by the defendant Ford Motor Company's negligence. The rivets holding the rim to the spider of the right-front wheel of Peterson's automobile were inferior in quality and one did in fact fall out of its hole thus allowing the tubeless tire to deflate. The Court in affirming the jury's determination held that the evidence (including expert testimony) was sufficient to "indicate poor metallurgical control and a lack of proper inspection for the purpose of keeping the quality of the rivets up to prescribed specifications, during the manufacturing process."⁵⁹

One is immediately aware of the fact that in the foregoing decisions the cause in fact was found to be the proximate cause. Therefore, the practitioner is not provided with any actual criteria upon which to rely when distinguishing a cause in fact from the legal or proximate cause.

55. In *Lemos v. Madden*, supra note 52, the Court was confronted with a difficult proximate cause problem. However, this was not a case involving automobiles. The decision discussed the various theories of proximate cause, and found the cause in fact to be the proximate cause.

56. Supra note 36.

57. 359 P.2d 885 (Wyo. 1961).

58. Supra note 10.

59. *Ibid.*, at p. 889.

Further, the Court seems to rely heavily upon the substantial factor and foreseeability theories of proximate cause.

The substantial factor doctrine serves two purposes, first to establish cause in fact and second if "defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from responsibility merely because other causes have contributed to the result. . . ." ⁶⁰ The test of substantial factor sounds of the "but for" rule— ". . . it will be such a substantial factor if the result would not have occurred without it." ⁶¹ However, the term substantial conveys the meaning of principal or main cause, and the Court has held that whether the cause is the substantial cause is for the jury to determine. ⁶²

The term "anticipated" is often interchanged with that of "foreseeability." The issue here is to what extent is the defendant required to anticipate that his act or omission will or could cause injury and to what extent must he foresee the extent of injury? The Wyoming Supreme Court has held that "the universally accepted doctrine, from which no court has dissented, that it is not necessary that the precise injury, or the particular manner or conditions under which it occurred, should have been anticipated, and all that is necessary is that an injury of some character could have been reasonably anticipated." ⁶³ Also, foreseeability "does not require that the negligent person should . . . anticipate the particular consequences which actually flowed from his act or omission. . . ." ⁶⁴

Considering the above discussion, this writer believes that the Wyoming situation involves the basic concept that the defendant will be liable for any injury sustained by any person within the risk created by the defendant. To summarize, if the defendant's negligent conduct creates a condition in which a reasonable person could foresee the likelihood of injury to a third person, the defendant's conduct will be the producing or proximate cause of such injury.

Of course, there may be more than one proximate cause. If so, the two separate and distinct acts may be simultaneous in point of time ⁶⁵ or one act may be subsequent to the other. ⁶⁶

Proximate cause has been called "the master doctrine of negligence law into which every difficult problem may be resolved." ⁶⁷ By the use of this doctrine, the court may take the case from the jury simply because

60. *Convoy v. Dana*, supra note 57, at p. 889, quoting Prosser, *Torts*, p. 222, (2d ed. 1955).

61. *Ibid.*, at page 889, quoting Prosser, *Torts*, page 218 (2d ed.). Similar words are found in *O'Mally v. Eagan*, supra note 46, at p. 1066.

62. *Frazier v. Pokorny*, supra note 54, at pp. 330 and 331.

63. *Hines v. Sweeney*, 28 Wyo. 57, 201 P. 165, 171 (1921).

64. *Frazier v. Pokorny*, supra note 54, at p. 329.

65. *Checker Yellow Cab Co. v. Shiflett*, supra note 36; and *Hester v. Coliseum Motor Co.*, supra note 45.

66. *Convoy Company v. Dana*, supra note 57; *Hines v. Sweeney*, supra note 63; and very often where plaintiff's contributory negligence is involved.

67. *Green, Leon*, supra note 1, at p. 74.

proximate cause is a mixed question of law and fact.⁶⁸ The court determines this upon whether only one inference or conclusion can be drawn from the evidence. Thus by the proximate cause doctrine, the appellate courts are able to control not only automobile negligence law, but the entire area of torts.

Another doctrine often used by the plaintiff as well as the defendant is the emergency or sudden peril doctrine. This doctrine has been described as:

Where the operator of a motor vehicle is by a sudden emergency not caused in whole or in part by him, placed in a position of imminent peril to himself or to another, without sufficient time in which to determine with certainty the best course to pursue, he is not held to the same coolness, accuracy of judgment, or degree of care as is required of him under ordinary circumstances, or of one having ample opportunity for the full exercise of judgment, and is not liable for injuries caused by his vehicle if an accident occurs, provided he exercises ordinary or reasonable care or prudence, concerning the stress of the circumstances, to avoid an accident, and, according to the decisions on the question, acts in a way not obviously faulty or which cannot reasonably be found improper or imprudent, and even though a course of action other than that which he pursues might have been better, safer, or more judicious.⁶⁹

An emergency or sudden peril has been described as "Anything which operates to deprive a person of the ability to exercise his intellectual powers and guide his acts," and will thereby "relieve him of an imputation of negligence that otherwise might arise from his conduct."⁷⁰ One requirement is stated again and again, the person in peril must not have placed himself in such position by his own negligent conduct.⁷¹

A good example of the emergency doctrine is provided by *Dallason v. Buckmeier*⁷², where the defendant's judgment on his cross-petition was affirmed. The defendant found himself in peril due to the plaintiff's truck driver turning a highway corner in the wrong lane of traffic. To avoid the accident, the defendant turned to his left only to collide with the plaintiff's truck. The Court found that the defendant had acted reasonably under the circumstances.

Assuming that the plaintiff has alleged and proven defendant's negligent conduct, that the defendant has alleged and proven plaintiff's contributory negligence, and that neither party may apply the emergency doctrine, the plaintiff cannot recover unless he is able to invoke the last clear

68. *Dallason v. Buckmeier*, 74 Wyo. 125, 284 P.2d 386 (1955).

69. *Ibid.*, at pages 389 and 390, quoting 60 C.J.S., *Motor Vehicles*, § 257, pp. 624 to 626. The Court said this was the rule applied in *Wells v. McKenzie*, 50 Wyo. 412, 62 P.2d 305 (1936).

70. *Kowlak v. Tensleep Merchantile Co.*, 41 Wyo. 20, 281 P. 1000, 1002 (1929).

71. *Macy v. Bissings*, 74 Wyo. 404, 289 P.2d 422, 423 (1955); *Hill v. Walters*, *supra* note 6, at p. 102; and *Hines v. Sweeney*, *supra* note 63, at p. 172.

72. *Supra* note 68.

chance doctrine. This doctrine and the emergency doctrine reach the same result when applicable, by allowing one to recover even though in a position of danger. However, the last clear chance doctrine is applied where the plaintiff by negligent conduct on his part places himself in a position of danger,⁷³ whereas the emergency doctrine is applied where the plaintiff (or party seeking to apply the doctrine) finds himself in a position of danger *not* due in part or entirely to any negligent conduct on his part.⁷⁴

The last clear chance doctrine has been very simply defined as:

The party who last has a clear opportunity of avoiding an accident, notwithstanding the negligence of his opponent, is considered solely responsible for it.⁷⁵ . . . the doctrine of last clear chance entails a clear and apparent opportunity to avoid the result.⁷⁶

This doctrine is not an exception to the doctrine of contributory negligence nor does it allow one to recover in spite of his contributory negligence. Such result is accomplished by characterizing the defendant's negligence as an intervening cause between the plaintiff's negligence and the accident and in addition finding that the defendant's negligence is the sole proximate cause. Thus the plaintiff's negligence is a remote cause. As a remote cause plaintiff's negligence cannot be contributory negligence, which must be one of the proximate causes.⁷⁷

The Wyoming Supreme Court has adopted both section 480 and section 479 of the Restatement, Law of Torts, which apply to the inattentive and the attentive plaintiff respectively. These sections provide:

§480: A plaintiff who, by the exercise of reasonable vigilance could have observed the danger created by the defendant's negligence in time to have avoided harm therefrom, may recover if, but only if, the defendant

- (a) knew of the plaintiff's situation, and
- (b) realized or had reason to realize that the plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid the harm, and
- (c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff.⁷⁸

§479: A plaintiff who has negligently subjected himself to a risk

73. *Chandler v. Dugan*, supra note 17, at p. 587. The Court cited 61 C.J.S., *Motor Vehicles*, § 493 (2), p. 123.

74. Often it is said that the doctrine of last clear chance is an indirect method of using degrees of negligence.

75. *Borzea v. Anselmi*, supra note 33, at p. 802.

76. *Dr. Pepper Co. v. Heiman*, supra note 29, at p. 212.

77. *Borzea v. Anselmi*, supra note 33, at p. 802.

78. In *Johnston v. Vukelic*, supra note 4, at p. 931, the Court stated of § 480, "We accept this as a correct statement of the rule to be followed in the case of an inattentive plaintiff."

of harm from the defendant's subsequent negligence may recover for harm caused thereby if, immediately preceding the harm.

- (a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care, and
- (b) the defendant
 - (i) knows of the plaintiff's situation and realizes the helpless peril involved therein; or
 - (ii) knows of the plaintiff's situation and has reason to realize the peril involved therein; or
 - (iii) would have discovered the plaintiff's situation and thus had reason to realize the plaintiff's helpless peril had he exercised the vigilance which it was his duty to the plaintiff to exercise, and
- (c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff.⁷⁹

Even though this doctrine is frequently invoked, one often overlooks the limitations and qualifications of the doctrine. Four major "limitations" are: First, as mentioned above, the last clear chance doctrine applies only where the plaintiff has placed himself in a position of danger due to his own negligence. Second, the defendant must be aware or by reasonable care should have been aware of the plaintiff's situation.⁸⁰ Third, the doctrine "can never apply where the party charged is required to act instantaneously, and if the injury cannot be avoided by the application of all means at hand after the discovery of the peril, or as some would hold, after the peril should have been discovered, . . ."⁸¹ Fourth, the doctrine "does not apply where the plaintiff has been negligent, and his negligence continues, and concurrently with the negligence of defendant, directly contributes to produce the injury, it applies only where there is negligence of the defendant subsequent to, and not contemporaneous with, negligence by the plaintiff so that the negligence of defendant is clearly the proximate cause of the injury, and that of the plaintiff the remote cause."⁸²

Upon reading the Wyoming automobile cases in which the last clear chance doctrine has been allowed by the Court, one realizes that such doctrine may be termed in Wyoming a pedestrian's doctrine.

The above are, very briefly, the existing doctrines of automobile negligence law used in Wyoming today. Because of the wide use and

79. The Court in *Borza v. Anselmi*, supra note 33, found for the plaintiff using § 479.

80. *Dr. Pepper Co. v. Heiman*, supra note 29, at p. 212; *Convoy Company v. Dana*, supra note 57, at p. 887; and *Rienecker v. Lampman*, 55 Wyo. 159, 96 P.2d 561, 564 (1939).

81. *O'Mally v. Eagen*, supra note 46, at p. 1071. Also quoted in part in *Johnston v. Vukelic*, supra note 4, at p. 932.

82. *Davies v. Dugan*, supra note 20, at p. 201. Case in which after passing a green traffic signal, plaintiff stopped in the middle of the right lane of a four lane street. Defendant ran into plaintiff. The Court held that the last clear chance doctrine did not apply.

dependency upon the automobile and the impact of automobile insurance, which provides a solvent but undisclosed defendant, it is not surprising that the greater part of the tort litigation today involves the automobile.

The impact of the automobile and insurance upon the law has caused much concern as to the ability of the law to cope with the litigation which results from traffic accidents. Crowded court calendars, astronomical judgments, and other particular problems with each state's negligence law has encouraged scholars and experts in the negligence field to advocate various changes in the administration of traffic accident litigation. Naturally, Wyoming has not felt the impact that New York or California have felt upon their law and procedures. However, now is the time to re-evaluate our law and determine not only if it is sufficient for the present but also for the future.

JOSEPH E. VLASTOS

CRIMINAL LIABILITY FOR DEATH CAUSED BY OPERATION OF MOTOR VEHICLES IN WYOMING

Justice Parker, writing the opinion of the case of *State v. Wilson*,¹ quoted the following words from Moreland's *A Rationale of Criminal Negligence*:

. . . A carelessly drawn statute in Wyoming provides that an unintentional homicide in the commission of an unlawful act or by culpable negligence or criminal carelessness is manslaughter.²

The law in question in *State v. Wilson* was Wyoming's involuntary manslaughter statute.³ The case involved an automobile collision in which a little girl was killed. The Wyoming Supreme Court reversed a conviction of involuntary manslaughter and held that reversible error was committed by the District Court of Goshen County in its denial of the defendant's motion for a bill of particulars. The Supreme Court said that the defendant was misled as to the precise theory upon which the State would prosecute the manslaughter charge because the State had not made it clear whether the claim would be that the homicide resulted from defendant's alleged intoxication, negligence in driving on the wrong side of the road, carelessness in coming on the highway, or some other improper act. Justice Parker went on to say that there had been justifiable criticism of the legislature, both in using alternative, similar terms to define involuntary manslaughter and also in enacting and retaining two other statutes, each referring to deaths caused by unlawful automobile operation,⁴ with no correlation of these statutes and no directions to enforcement officials concerning how and when the statutes are to be applied.

The opinion in *State v. Wilson* was written in 1956 and the statutes then in operation were the Compiled Statutes of 1945. The situation today, however, is much the same as it was then, in that the manslaughter statute is the same;⁵ the negligent homicide statute which was then Sec. 60-413, W.C.S. 1945, is almost identical;⁶ however, what was Sec. 60-138, W.C.S. 1945, respecting the penalty for causing injury or death to a

1. 76 Wyo. 297, 301 P.2d 1056 (1956).

2. *Id.* at 1065.

3. Wyo. C.S. § 9-205 (1945).

4. Wyo. C.S. §§ 60-138 and 60-413 (1945). Section 60-138 reads as follows: The violation of any of the provisions of this article, except where otherwise provided, by any person, shall be deemed a misdemeanor, punishable by a fine not exceeding six (6) months, or by both such fine and imprisonment; and, if any person operating a motor vehicle in violation of the provisions of this article shall, by reason thereof, seriously maim, injure or disfigure or cause the death of any person or persons, such person shall be deemed guilty of a felony, and upon conviction shall be imprisoned in the penitentiary for not less than one year nor more than fourteen (14) years.

5. Wyo. Stat. § 6-58 (1957).

6. Wyo. Stat. § 31-232 (1957). Section 31-232 differs from § 60-413 only in that the legislature has provided in § 31-232 that the director shall revoke the operating privilege of any non-resident convicted of negligent homicide, which provision was not included in § 60-413.

person because of operating a motor vehicle in violation of the provisions of the Motor Vehicle Code, has been changed by dropping therefrom any reference to death or injury caused by motor vehicle operation. The provisions for punishment when death ensues were apparently deleted because they were considered unnecessary in view of the manslaughter and negligent homicide statutes. Injuries from negligent motor vehicle operation, as distinguished from death therefrom, no longer constituted separate crime, and would be covered by battery statutes.

The statutory situation concerning automobile homicide, then, is much the same now as it was when *State v. Wilson* was decided. It will be the purpose of this article to investigate this area of Wyoming law on deaths from motor vehicle operation in an attempt to determine whether the attending confusion is as serious as it seems to be at first blush. The article will deal largely with involuntary manslaughter and negligent homicide; the range of application and extent of overlapping, if any, of the respective statutes; some problems of proof and procedure; and the sanctions and penalties applicable and available under each statute. Because of the paucity of reported Wyoming cases there is a very meager amount of explicit construction and interpretation of the various provisions and words of the statutes. Therefore it will sometimes be necessary to imply these constructions and meanings from various statements made in the cases. For example, to date, no decision has been reported in which a person has been charged with negligent homicide. The decisions that have been reported indicate that Wyoming prosecutors have instead proceeded under the manslaughter statute in automobile death cases. The article will show that where manslaughter is available, so would a charge of negligent homicide be when the death is the result of motor vehicle operation, although the converse is not necessarily true.

The provisions for involuntary manslaughter, within the general manslaughter statute, read as follows:

Whoever unlawfully kills any human being . . . involuntarily, but in the commission of some *unlawful act*, or by any *culpable neglect or criminal carelessness*, is guilty of manslaughter, and shall be imprisoned in the penitentiary not more than twenty years.⁷ (Emphasis supplied)

A Wyoming statute provides that where homicide is charged, it shall be sufficient in the indictment to charge that the defendant did unlawfully kill the deceased, without the necessity of setting forth the manner or means by which the death was caused.⁸ This statute has been held constitutional and not in violation of the provisions guaranteeing due process.⁹ Justice Parker has pointed out, however, that while such word-

7. *Supra* note 4.

8. Wyo. Stat. § 7-134 (1957).

9. *State v. Dobbs*, 70 Wyo. 26, 244 P.2d 280 (1952); *State v. Wilson*, 76 Wyo. 297, 301 P.2d 1056 (1956).

ing is sufficient in the first instance, the statutory provisions should not be considered to be restrictive so as to *preclude* the providing of specific information in the interest of justice after the initial filing and during the trial.¹⁰ And, of course, in order to obtain a conviction it must be shown that the defendant killed the deceased either through the commission of an unlawful act or by culpable neglect or criminal carelessness, within the meaning of the statute.

It is plain that in Wyoming ordinary negligence on the part of the defendant is not sufficient to convict him on a charge of involuntary manslaughter, but the negligence must be culpable.¹¹ Wyoming has also held that the terms "culpable neglect" and "criminal carelessness" are synonymous.¹² The meaning of the words "culpable" and "criminal" is closely akin to that of "willful" or "wanton" and involves circumstances where the offender is aware or should be aware of the probable consequences of his acts.¹³ In *State v. McComb*, Justice Blume made the following statement:

. . . carelessness by reason of driving at a speed that is unreasonable or is such as is *likely* to endanger life or limb is not necessarily criminal carelessness within the meaning of our statute providing for punishment for manslaughter.¹⁴ (Emphasis supplied)

So, it is not enough that life or limb is likely to be endangered, but accompanying this likelihood must be the fact that the actor is aware of such likelihood, or circumstances must be present under which he would be charged with such an awareness.

The majority of Wyoming cases involving manslaughter by automobile are instances in which the prosecution sought to convict the defendant by proceeding under the "unlawful act" portion of the statute.¹⁵ One might wonder whether there is any difference between manslaughter by unlawful act and manslaughter through culpable neglect or criminal carelessness, and if there is, what determines which route the prosecutor will take? The Wyoming Supreme Court has stated that when the unlawful act complained of consists of negligence, it must be more than ordinary negligence and must be culpable or criminal in its nature.¹⁶ But what of the case where negligence is not a factor, or if it is, is not culpable or criminal? Those manslaughter-by-automobile cases in Wyoming which have resulted in convictions all appear to have involved the unlawful act of driving under the influence of intoxicating liquor. Drunken driving has been made a misdemeanor in Wyoming¹⁷ and the commission of such

10. *State v. Wilson*, 76 Wyo. 297, 301 P.2d 1056, 1064 (1956).

11. *State v. McComb*, 33 Wyo. 346, 239 Pac 526 (1925).

12. *State v. Catellier*, 63 Wyo. 123, 179 P.2d 203 (1947).

13. *Supra* note 11.

14. *Id.* at 529.

15. In addition to the cases already cited see *State v. Cantrell*, 64 Wyo. 132, 186 P.2d 539 (1947); *Goich v. State*, 80 Wyo. 179, 339 P.2d 119 (1959).

16. *Supra* note 11.

17. Wyo. Stat. § 31-129 (1957).

an unlawful act is *malum in se*.¹⁸ Misdemeanors *malum in se* have been defined as, "misdemeanors naturally dangerous to life or misdemeanors made such because of a desire of the legislature to avoid the particular kind of death involved in the case under consideration."¹⁹ It has been said that driving while intoxicated is an act of such an unlawful and culpably negligent character that the mere fact of so driving takes the place of a criminal intent, and if death results the driver is guilty of at least manslaughter.²⁰ From the definition of misdemeanors "*malum in se*" given above and those cited in footnote 18, it would appear that not only driving while under the influence of intoxicating liquor, but the commission of all acts *malum in se*, resulting in death, would also constitute at least manslaughter, without proof of negligence. Lending support to the premise that negligence is not an element requiring separate proof when the defendant has been charged with an act *malum in se*, is the fact that in Wyoming automobile manslaughter cases, which as stated before have almost exclusively dealt with drunken driving, negligence has not appeared as a separate issue.²¹

Whether the state proceeds according to manslaughter by unlawful act or by culpable neglect or criminal carelessness, it must prove in any case that the homicide was a proximate result of the violation.²² In *Goich v. State*²³ an instruction was held to be erroneous which led the jury to believe that the defendant was guilty of manslaughter if guilty either of drunkenness or driving on the wrong side of the highway, as both in that case were needed in order to establish the chain of causation. The court said that "the jury in a criminal case must be instructed as to all of the unlawful acts which are requisite to a conviction on any charge, and the failure to so state must be assumed to have been prejudicial to a defendant who is convicted."²⁴

To summarize manslaughter by automobile in Wyoming: it may be accomplished through culpable neglect or criminal carelessness; it may be accomplished by an unlawful act, *malum in se*, not a felony. If the unlawful act is a misdemeanor based on negligence, the negligence must be culpable or criminal.

Further proof that this is what the legislature intended is supplied by a reference to the involuntary manslaughter statute of the State of Indiana, the state of origin of Wyoming's statute.²⁵ The Indiana Statute is identical to that of Wyoming, except that it does not contain provisions involving

18. § Wharton, Criminal Law and Procedure § 974 (1957). See also 44 Iowa L. Rev. 558 (1959).

19. 18 Md. L. Rev. 145, 149 (1958).

20. § Wharton, *op. cit.* supra note 18.

21. See *State v. Cantrell*, supra note 15; *State v. Dobbs*, supra note 9; *Goich v. State*, supra note 15.

22. *Thompson v. State*, 41 Wyo. 72, 283 Pac. 151 (1929).

23. Supra note 15.

24. *Id.* at 122.

25. Ind. Ann. Stat. § 10-3405 (Burns 1956).

than an act prohibited by positive statute is demanded. The Indiana court negligence. Indiana decisions under this statute make it clear that more has held that unlawful acts may include willful, wanton and reckless acts, implying an indifference to consequences equivalent to criminal intent.²⁶

Involuntary manslaughter is of course a felony²⁷ and is punishable by imprisonment in the penitentiary for a period not to exceed twenty years.²⁸

Negligent homicide by motor vehicle, on the other hand, is not a felony, but a misdemeanor.²⁹ Though Wyoming has had a negligent homicide statute since 1939, the reported cases give no evidence of anyone having as yet been convicted of this crime. The statute provides:

When the death of any person ensues within 1 year as a proximate result of injury received by the driving of any vehicle in reckless disregard of the safety of others, the person so operating such vehicle shall be guilty of negligent homicide.³⁰

Any attempt to ascertain the intended scope of this statute and whether and to what extent it has any effect on Wyoming's involuntary manslaughter statute entails a degree of speculation. In *State v. Cantrell* it was contended that the negligent homicide statute impliedly repealed the involuntary manslaughter statute in regard to automobile homicide cases. In rejecting the contention, Chief Justice Riner first mentioned that the negligent homicide statute failed to deal with involuntary manslaughter in the commission of some unlawful act. He continued:

Whether . . . the negligent Homicide Act repeals the provisions of the manslaughter statute immediately following the disjunctive "or" . . . or whether both statutes shall be deemed operative as dealing with separate matters and so both should stand intact we do not find it necessary at this time to decide.³¹

Nor has the Wyoming Supreme Court found it necessary to decide that question since. Chief Justice Riner did state that repeals by implication are not favored.³² Also Sec. 31-232 is almost identical to the provisions of the Uniform Vehicle Code pertaining to negligent homicide³³ and the courts are split on whether the passage of this act effects an implied repeal of manslaughter statutes as they apply to automobile homicide.

What was the intent of the Wyoming legislature when it passed the Negligent Homicide Act? The generally understood purpose for the passage of such acts is that as compared with manslaughter it will tend

26. *Dunville v. State*, 188 Ind. 373, 123 N. E. 689 (1919); *Minardo v. State*, 204 Ind. 422, 183 N.E. 548 (1932).

27. For the statutory provisions regarding penalties for felonies and misdemeanors see Wyo. Stat. §§ 6-6 and 6-7 respectively (1957).

28. *Supra* note 5.

29. Compare Wyo. Stat. § 31-232 and 6-6 (1957), the latter providing that the minimum term of imprisonment in the penitentiary shall be one year.

30. *Supra* note 6.

31. *State v. Cantrell*, *supra* note 15 at 543-544.

32. *Id.* at 542.

33. Uniform Vehicle Code § 11-903 (rev. 1956).

to make juries more receptive to returning convictions in automobile death cases. The feeling has been that juries are reluctant to find offenders guilty of involuntary manslaughter because of the severe punishment meted out.

A number of alternative possibilities present themselves in Wyoming. First, it is possible that the negligent homicide statute was intended to repeal the involuntary manslaughter provisions in automobile cases, except the unlawful act provision. But the cases evince no reason why one part of the manslaughter statute should be repealed and the other left alone. It has never been held that culpable neglect or criminal carelessness partake of a lesser degree of criminal responsibility than that associated with the unlawful act portion of the statute.

A second possibility is that the Wyoming legislature intended that the element of willfulness or wantonness need not be present in order to find someone guilty of a "reckless disregard for the safety of others." If such was the construction intended, the state would be able to get a conviction in an automobile homicide case when the circumstances and evidence might not justify an involuntary manslaughter charge. Thus, where a prosecutor could prove culpable neglect or criminal carelessness, he could also prove reckless disregard, but not vice-versa, if we assume that a reckless disregard is not as severe as culpable neglect or criminal carelessness. This view would account for the reduction in the grade of the crime as compared with involuntary manslaughter.

One substantial obstacle to the theory just mentioned is that "reckless disregard for the safety of others" has often been defined in terms of willfulness or wantonness.³⁴ Too, a Wyoming court, in citing with approval various decisions from other states, appears to equate reckless disregard with wantonness and leaves one with the impression that "reckless disregard" is to mean the same thing as does "culpable neglect or criminal carelessness."³⁵

Assuming that "reckless disregard for the safety of others" does mean the same as "culpable neglect or criminal carelessness" a third possibility is introduced. Perhaps the legislature simply intended that the prosecutor have a choice between negligent homicide and involuntary manslaughter, a choice between equals in all respects except as concerns the punishment inflicted. (This was virtually the effect of *State v. Cantrello*.)³⁶ Such a construction would be in accord with the stated purpose for enacting negligent homicide legislation. If for any reason the state should fear that a manslaughter charge might not stand up, though the evidence seemed sufficient, it could then turn to a charge of negligent homicide, to which the

34. As indicated by the many decisions assembled in "Reckless Disregard of Safety of Others" 36 Words and Phrases 805.

35. *State v. McComb*, supra note 11 at 528-529.

36. *State v. Cantrell*, supra note 15.

jury theoretically should be more receptive. Indeed, it is entirely possible that in particular circumstances negligent homicide could be considered an "included offense" to a charge of involuntary manslaughter.

In conclusion the writer repeats words of Justice Parker, written in 1956 in answer to the argument of unconstitutionality directed against the automobile death statutes of Wyoming:

Neither these criticisms nor the views expressed in defendant's brief convince us of the unconstitutionality of the statutes, but we are of the definite opinion that for the best administration of such negligent homicide law a modernization of the statutes is indicated.³⁷

A proper modernization of the statutes could perhaps be accomplished simply by deleting the "culpable neglect or criminal carelessness" part of the involuntary manslaughter statute and retaining the remainder of that statute and the whole of the negligent homicide statute. With the deletion of that language would go any reason for construing "unlawful act" in terms of negligence, which is, at best, confusing. This does not necessarily mean that the scope of the involuntary manslaughter statute would be reduced since, by following the lead of the Indiana court, the Wyoming court could construe the statute to include any willful, wanton, and reckless acts. Then, depending on his feelings as to the effect of the circumstances of the case upon a jury, and of course on his sense of justice, the prosecutor could then choose whether to proceed under the manslaughter statute or the negligent homicide statute.

KEITH LEWALLEN

37. *State v. Wilson*, *supra* note 10 at 1065.

MUNICIPAL TORT LIABILITY: PURCHASE OF LIABILITY INSURANCE AS A WAIVER OF IMMUNITY

The maxim, "The King can do no wrong," is commonly said to be the foundation upon which the immunity from suit of the state and of the city is based. The law that has resulted from this ancient maxim is presently in a state of chaos and confusion. The instability in this area is not surprising because in dealing with the problem of municipal liability, the courts have been attempting to find a middle ground between two conflicting policy considerations. On the one hand, there is the common law concept of immunity. On the other, there is the belief that the risk of wrongful injury should not be borne by the individual, but by society. By society, it is meant that particular group, whether it be the population of a city, county or state which is represented by a governmental unit, who receives the benefits, services and derives the good out of that unit's activities. The idea that risk of wrongful injury should be borne by that segment of the citizenry which enjoys the services and benefits is a result of the concept that he who enjoys the benefits should bear the cost. This second consideration, based on the unfairness to the innocent victim of a principle of nonliability, and the social desirability of distributing the loss, is merely a manifestation of a trend which is becoming more and more evident in other fields.¹ Some jurisdictions rigidly adhere to the immunity rule while others have made inroads upon it through piecemeal imposition of liability.² Still other courts have found legislatively imposed liability by a liberal construction of statutes empowering municipal corporations to "sue or be sued," abandoning the traditional interpretation of such statutes as waiving only the immunity of the government from suit and not from liability.³

Wyoming courts have strongly adhered to the doctrine of municipal immunity. In the latest reaffirmance of such adherence, *Maffei v. Incorporated Town of Kemmerer* (1959)⁴, the court was asked to renounce this generally recognized doctrine and to judicially declare that which is alleged to be the better rule. This the Wyoming Supreme Court refused to do. To the contrary, it reaffirmed the municipal immunity rule in the performance of governmental functions in Wyoming. The court felt that Wyoming was unquestionably committed to the acceptance of the doctrine of municipal immunity, absent a statutory provision to the contrary. The case precipitated immediate legislation in the 1961 session. By the Laws of 1961, Chapter 81, cities and towns were authorized to carry liability in-

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1. See Fuller and Casner, *Municipal Tort Liability in Operation*, 54 Harv. L. Rev. 437, (1941).
 2. Vacin, *Municipal Corporations—Liability in Tort*, 60 Mich. L. Rev. 379, 380, (1962). Leflar and Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. Rev. 1363, (1945), which briefly summarizes the highlights of each state.
 3. *St. Julian v. State*, _____ La. _____, 82 So. 2d 85 (La. 1955).
 4. *Maffei v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 808, (1959).
 5. Wyo. Stat. §§ 15-20.6 to 20.10 (Supp. 1963).

surance.⁵ The purpose of this article is to investigate how this new statute will effect the present law.

To put the new statute and the old rule into a proper perspective for purposes of analysis and predictability, one must first have a background of the rules and the forces which have acted upon it. Although commonly, the 1788 case of *Russell v. The Men of Devon*⁶ is considered the start of the rule of immunity, several authorities believe that the rule had its genesis much earlier. Nevertheless, with the sovereign concept as a foundation, *Russell v. The Men of Devon* became the principal case establishing municipal non-liability in torts. But many authorities have distinguished this case from the modern problem. "The *Russell* case involved an unincorporated county; the modern problems involve incorporated cities. When the courts of this country were confronted with a problem of similar circumstances but affecting towns which were incorporated and with funds, they applied the doctrine of non-liability to American towns which was applied to the unincorporated county without funds in the *Russell* case. This was clearly mis-application of the precedent established in the *Russell* decision. However, the doctrine with its many variations, inconsistencies, and exceptions in application has been widely accepted and has become the American doctrine of municipal tort immunity."⁷ A fundamental reason for the long continued interest and concern with the doctrine of sovereign immunity is perhaps dissatisfaction with the principle founded and built upon this decision which embodies feudal concepts and political theories of the Middle Ages, that is, non-applicability of the doctrine of *respondeat superior*. It was not until *stare decisis* had done its work and the doctrine had been accepted in this country, that the doctrine of sovereign immunity was introduced as a rationalization of the result. In our early American history, municipal corporations were placed upon the same footing as private corporations in so far as tort liability was concerned, and sovereign immunity was not extended to them.⁸ This was changed in 1842 when the landmark *Bailey* case was decided⁹, and since then the fundamental legal principle underlying municipal tort liability has remained unchanged. Thus was evolved the municipal tort liability doctrine—that a city has both proprietary and governmental functions and that it may be liable for torts arising out of the former but not the latter.

Historically, the proponents of the immunity rule have failed to make a convincing case for its retention. Arguments for the rule must be based on social policy rather than legal maxims. These are, first, that public agencies engage in activities of a scope and variety far beyond that of any private business, which affect a much larger number of the public

6. *Russell v. Men of Devon*, 2 Term. Rep. 667, 100 Eng. Rep. 359 (KB 1788).

7. See Leflar and Kantrowitz, *Tort Liability of the State*, 29 N.Y.U. L. Rev. 1363, (1945); McAndrew v. Mularchuk, 38 N.J. 172, 162 A.2d 820, (1960); Prosser, *Torts* (2d Ed. 1955); See also *Torts—Municipal Corporation*, 27 Mo. L. Rev. 224, (1962).

8. *People v. Albany*, 11 Wend (NY) 539, 27 Am. Dec. 95, (1934); *Martin v. Brooklyn*, 1 Hill (NY) 545 (1841).

9. *Bailey v. New York*, 3 Hill (NY) 531, 38 Am. Dec. 669 (1842).

than do the activities of private enterprise. Many of the activities carried on by government are of a nature so inherently dangerous that no private entity would undertake the risk of performing them. It is argued that government is not free, as would be private industry, to discontinue these functions because of high cost of operation or because liability for continuing them is too great. Police protection, fire protection and health services cannot be cut back. It is said that a rule imposing liability in these areas would result in the curtailment of socially desirable public activities, causing evil effects disproportionate to the benefits which would flow from a doctrine of liability.

As stated above, the development of the law has been in the nature of a series of inroads. An examination of the cases in which these inroads were made reveals a series of distinctions being made which, for historical reasons appear to represent valid differences. It has been clear for some time that there has been no absolute municipal immunity from liability. The problem has been in determining what are the requisities for liability. The first inroad or limitation to be made on the immunity doctrine was the governmental-proprietary dichotomy.¹⁰ Under this, the first relevant determination in the case of negligence by a municipal corporation was a characterization as to the nature of the functional exercise which gave rise to the tort. In effect, this determination resolved the question of whether immunity existed, or conversely, whether liability was possible. Under this basic test, immunity was accorded where the function was governmental and liability was imposed where it was proprietary. No tort liability attaches with respect to the exercise of governmental functions because the city performs such functions under powers delegated by the state and under the same immunity enjoyed by the state.¹¹ On the other hand, in the exercise of proprietary functions or the performance of acts for the benefit of the corporation, a city stands on the same footing as any private corporation as to its liability for torts.¹²

10. See, generally, Antieau, *The Tort Liability of American Municipalities*, 40 Ky. L.J. 131 (1952); aBrnett, *The Foundation of the Distinction Between Public and Private Functions*, 16 Ore. L. Rev. 250 (1937); Fuller and Casner, *Municipal Tort Liability in Operation*, 54 Harv. L. Rev. 437, (1941); Smith, *Municipal Tort Liability*, 48 Mich. L. Rev. 41, (1949). "Apparently the purpose has been to confine the protection afforded to only those activities which have traditionally been considered 'necessary' to government, and to exclude from coverage those activities which are merely conveniently carried on by government instead of by private enterprise. This nineteenth century dichotomy was the judicial compromise struck between complete protection of public funds and complete protection of individuals tortiously injured by government agents. Both the basis of the distinction and its application, which has been difficult and artificial, have widely been regraded as less than satisfactory." Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 Law and Contemp. Prob. 214 (1942).
11. *Seaman v. Big Horn Canal Ass'n.*, 29 Wyo. 391, 213 Pac 938 (1923); *Ramirez v. City of Cheyenne*, 34 Wyo. 67, 241 Pac. 710, 42 A.L.R. 245 (1925); *Villalpando v. City of Cheyenne*, 51 Wyo. 300, 65 P.2d 1109 (1937); *Densmore v. Birmingham*, 223 Ala. 210, 135 So. 320 (1931); *Lambert v. New Haven*, 129 Conn. 647, 30 A.2d 923, (1943); *Baltimore v. State*, 173 Md. 267, 195 Atl. 571 (1937).
12. *Ramirez v. City of Cheyenne*, 34 Wyo. 67, 241 Pac 710, 42 A.L.R. 245, (1925); *Maffei v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 808, (1959); *Hooton v. Burley*, 70 Idaho 369, 219 P.2d 651, (1951); *Perry v. Wichita*, 174 Kan. 264, 255 P.2d 667, (1953); *Bishop v. Meridan*, 223 Miss. 703, 79 So. 2d 221, (1955); *Grimesland v. Washington*, 234 N.C. 117, 66 S.E. 2d 794, (1951).

The determination of the governmental-proprietary issue in any given case is a question of law for the court, not the jury,¹³ and doubt is to be resolved, in a few jurisdictions, in favor of holding the activity in question governmental in nature.¹⁴ Various tests were evolved for the purpose of determining into which category a particular tort fell. The "profit" test looked primarily at the nature of the function involved to determine whether or not the municipality engaged in the activity for profit thus making it a proprietary function. Under the "agent" test, an inquiry is made to determine whether the municipality was acting as the agent of the state in furthering the state policy, or whether it was acting primarily on behalf of the citizens of the community. In this attempt at distinguishing the functions, no satisfactory criteria could be devised. Most jurisdictions have set up some rather vague general guidelines. Usually, activities in the area of fire prevention, law enforcement, education, health, and general government, are governmental. But municipal railways, gas, streets, sidewalks, bridges and sewers are governmental in some jurisdictions and proprietary in others.¹⁵

The almost universal dissatisfaction with the rule of municipal immunity from tort liability has led to its being subjected to a number of other restrictions and qualifications designed to hold the municipality liable under some circumstances. A distinction has been made between contract and tort actions, on the theory that an award of contract damages indirectly benefits the government body by encouraging persons to contract with it, while a tort recovery yields no such advantage.¹⁶ The "nuisance theory" has generally held a municipality liable for injuries resulting from the creation or maintenance of a nuisance.¹⁷ The so-called "active wrongdoing" test, that is, drawing a distinction between municipal misfeasance and nonfeasance, is sometimes used to determine tort liability. Thus, it has been held that a city is liable for positive misfeasance or active wrongdoing but is immune for nonfeasance.¹⁸

13. *Hanson v. Los Angeles*, 63 Cal. App. 2d 426, 147 P.2d 109, 110, (1944).

14. "Activity of a municipality is presumed to be governmental rather than proprietary." *Savage v. Town of Lander*, 77 Wyo. 157, 309 P.2d 152, (1957); *Hayes v. Cedar Grove*, 126 W. Va. 828, 30 S.E. 2d 726, (1944).

15. 63 C.J.S., *Mun. Corp.* §§ 873 to 877. 28 *Am. Jur.*, *Mun. Corp.*, §§ 571 to 667. "A municipality is liable for damages arising out of its negligence in the maintenance of a sewer system; sewer maintenance is a proprietary function for which there is liability." *Lore v. Town of Douglas*, 355 P.2d 367 (1960).

16. See *Florey v. Burlington*, 247 Iowa 316, 73 N.W. 2d 770, (1955).

17. "A municipal corporation is not liable for injuries to children on theory of attractive nuisance, where its servants' negligence occurred or attractive condition was created in exercise of governmental function." *Wilson v. City of Laramie*, 65 Wyo. 234, 199 P.2d 119, (1948); See also, *Annotation*, "Role of municipal immunity from liability for acts in performance of governmental functions as applicable in case of personal injury or death as a result of nuisance," 75 *A.L.R.* 1196.

18. *Van Zandt v. Bergen County*, 79 F.2d 506 (3rd Cir. 1935); *Pennsylvania R. R. v. United States*, 124 F. Supp. 52 (N.J. 1954); *Milstrey v. Hackensack*, 6 N.J. 400, 79 A.2d 37, (1951); *Casey v. Bridgewater Tp.*, 107 N.J. L. 163, 151 *Atl.* 603, (1930); *McKeown v. Chicago*, 319 Ill. App. 563, 49 N.E. 2d 729, (1943); *Hartman v. Brigantine*, 23 N.J. 530, 129 A.2d 876, (1957); See also, *Repka, American Legal Commentary on the Doctrine of Municipal Tort Liability*, 9 *Law and Contemp. Prob.* 214, (1942).

These illustrations should demonstrate that many courts do not like the doctrine of governmental immunity and will go to great lengths to get around it any time it is squarely put to them. In the past three or four years, the high courts of eight states have laid aside these multifarious distinctions in favor of a judicial abrogation of the ancient common law immunity rule in spite of the fact that these same courts had prior thereto said that this matter should be left up to the state legislature.¹⁹ A court which is ready to abandon the doctrine of governmental immunity has an almost inexhaustible source from which it may draw as the basis for a denunciation of the theory of immunity.²⁰

The whole doctrine of governmental immunity from liability for torts rests on a rotten foundation. It is almost incredible that in this modern age of comparative sociological enlightenment, the medieval absolutism supposed to be implicit in the maxim, "The King can do no wrong," should exempt the various branches of government from their wrongful acts and should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual and where it justly belongs.²¹

. . . If the doctrine of state immunity in tort survives by virtue of antiquity alone, this is an historical anachronism, which manifests an inefficient public policy and works injustice to everyone concerned.²²

Probably the most forceful rationale against the doctrine comes from the Michigan decision which abrogates the doctrine, *William v. City of Detroit*.

Little time need be spent in determining whether the strict doctrine of municipal immunity from tort liability should be repudiated. All this is old straw. The question is not "should we"—it is "how may the body be interred judicially with non-discriminatory last rites?" No longer does any eminent scholar or jurist attempt justification thereof . . . from this date forward, the judicial doctrine of government immunity from ordinary torts no longer exists in Michigan. In this case, we overrule preceding court made law to the contrary. We eliminate from the case law of Michigan an ancient rule inherited from the days of absolute

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19. Florida in *Hardgrove v. Town of Cocoa Beach*, 90 So. 2d 130 (Fla. 1957); Arizona in *Stone v. State Highway Commission*, 93 Ariz. 384, 381 P.2d 107 (1963); California in *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211, 11 Cal. Rep. 89, 359 P.2d 457, (1961); Hawaii in *Kamar and Cushnie v. Hawaii County*, 41 Hawaii 527, (1957); Illinois, *Moletor v. Kaneland Community Unit District*, 18 Ill. 2d 18, 163 N.E. 2d 89, (1959); Michigan in *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W. 2d 1, (1961); Minnesota in *Spanel v. Moundsview School District*, 118 N.W. 2d 795 (Minn. 1962); Wisconsin in *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W. 2d 618, (1962).
 20. The classic reference is Professor Borchard. *Governmental Liability in Tort*, an eight part article, 34 Yale L.J. 1, 129, 229; 36 Yale L.J. 759, 1039; 28 Col. L. Rev. 577, 594, 734.
 21. *Thomas v. Broadlands Community Consolidated School District*, 348 Ill. App. 567, 109 N.E. 2d 636, 640. *Annotation*, 75 A.L.R. 1196.
 22. *Tooke, The Extension of Municipal Liability in Tort*, 19 Va. L. Rev. 97, 108.

monarchy which has been productive of great injustice to our courts. By so doing, we join a major trend in this country toward the righting of an age-old wrong.²³

The *Williams* case and like decisions in the seven other states show one side of a historic tug of war. This tug of war is represented by the pulling for the legislative prerogative of abrogation of public policy on one hand and the urging for the judicial prerogative on the other. Other cases indicative of the disdainful attitude adopted by the judiciary at the inactivity of the legislature are *Purce v. Yakima* and *Muskoff v. Corning Hospital District*²⁴ which agreed that the doctrine was judicially created and that its rejection was not the exclusive province of the legislature. *Holytz v. City of Milwaukee*²⁵, the case which abrogated the doctrine for the State of Wisconsin, states, "so far as governmental responsibility for torts is concerned, the rule is liability—the exception is immunity." *McAndrew v. Mularchuk*²⁶ held that there was no municipal immunity in case of negligent acts committed by a municipal corporation saying, "surely it cannot be successfully argued that an outmoded, inequitable and artificial curtailment of a general rule of action created by the judicial branch of the government cannot or should not be removed by its creator."

Perhaps the strongest argument for the abandonment of the sovereign immunity doctrine is its inconsistency with the modern socio-ethical notion that the risk of wrongful injury should not be borne by the individual upon whom the misadventure fortuitously falls, but by the segment of society that benefits from the activity that produces the injury. Another argument is the more extensive activity of government which results in a greater likelihood of injuries to individuals. Thus, it has been urged that compensation of government tort victims should be viewed as a justifiable and expected cost of modern government.²⁷

When there is an abrogation of the doctrine, even its worst enemies conclude that experience indicates that some restraint is necessary for the protection of public funds. In almost every case, there has been a reaction from the legislature or the judiciary itself, which either implements the rule and supplies the necessary safeguards or restores the rule of immunity.²⁸

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23. *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W. 2d 1, (1961). The *Williams*' case explained itself by saying, "it is only as to those harms which are torts that governmental bodies are to be liable by reason of this decision."
24. *Purce v. Yakima*, 43 Wash. 2d 162, 260 P.2d 765, 774 (1953); *Muskoff v. Corning Hospital District*, 55 Cal. 2d 211, 11 Cal. Rep. 89, 359 P.2d 457 (1961).
25. *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W. 2d 618, (1962).
26. *McAndrew v. Mularchuk*, 33 N.J. 172, 162 A.2d 820, 832, (1960).
27. See Douglas, *Vicarious Liability and Administration of Risk*, 38 Yale L.J. 583, 720, (1929); Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. PA. L. Rev. 805, (1930).
28. *Moreno v. Aldrick*, 113 So. 2d 406 (Fla. 1959); *Williams v. City of Detroit*, 369 Mich. 231, 111 N.W. 2d 1; *McDowell v. Markie*, 265 Mich. 268, 112 N.W. 2d 491 (1961).

By contrast, the Supreme Court of Wyoming in the *Maffei* case²⁹ disagreed that the basis of immunity was judicial. The court felt that the doctrine of municipal immunity became the rule in our state by statute and it is only by statute that the doctrine can be abrogated. The statute is Wyo. Stat. § 8-17 (1957) which provides that the common law of England (as of 1607) shall be the rule of decision in Wyoming. The Wyoming court understood that the *Devon* case clearly indicates that antecedent to *Russell v. The Men of Devon*, a judicial pronouncement had recognized the doctrine of municipal immunity. This antecedent pronouncement was found in a 1586 edition of *Brook's, La Graunde Abridgement*, therefore the doctrine of municipal immunity was part of the English common law as of 1607. Thus, by statute, the doctrine of municipal immunity became the rule of decision in our state, and it is only by statute that the doctrine can be abrogated. Our Supreme Court feels it cannot abolish the doctrine by judicial decree. Neither would our court adopt the idea that the 1788 judicial recognition of the common law of English amounted to a court originated doctrine. Rather they believed that the doctrine was already a part of the common law, through long use and custom. In commenting on the harsh language hurled at the doctrine by various indignant courts, Justice Harnsberger adds:

The harsh language thus used adds nothing to persuasiveness. It rather serves to emphasize the impropriety of courts of law assuming to base their decision on their own concept of sociological enlightenment rather than avail legislative reaction to such claimed modern advancements.

More support for the hypothesis that the abrogation of the doctrine is properly legislative can be found in *Ramirez v. Cheyenne*.³⁰ Missouri courts have also indicated that government immunity is to be retained until the legislature decides otherwise.³¹ "While most courts may admit the glaring defects in the present law, they feel that any changes that should be made must be left to the wisdom of the legislature."³² In many jurisdictions of secure consistency, the rule of thumb formula, government function—no liability, proprietary function—liability, is still producing rather normal legal results.³³

29. *Supra*, Footnote 4.

30. *Ramirez v. Cheyenne*, 34 Wyo. 67, 241 Pac. 710, 42 A.L.R. 245 (1925). See also, 38 Am. Jur. sec. 573. Recent Texas' cases have recognized the restriction on the power of the courts to legislate. *Hill v. Palms*, 237 S.W. 2d 455 (Tex. Civ. App. 1951); *Milner v. Red River Valley Publishing Company*, 249 S.W. 2d 227 (Tex. Civ. App. 1952); *Harned v. E-Z Finance Company*, 151 641, 254 S.W. 2d 81, (1953).

31. *Schweskert v. Kansas City*, decided by Kansas City Court of Appeals on June 4, 1962, (unreported), 26 MINLO Municipal Law Rev. 454, 455; *Fette v. St. Louis (Mo.)*, 366 S.W. 2d 446, (1964) (Missouri Supreme Court).

32. *McGraw v. Rural High School District No. 1, Linn County*, 120 Kan. 413, 414; 243 Pac. 1038, 1039.

33. See *Burke v. City of St. Louis*, 349 S.W. 2d 930 (Mo. 1961); *Taylor v. Kansas City*, 353 S.W. 2d 814 (Mo. 1961); *Myers v. Palmyra*, 355 S.W. 2d 17 (Mo. 1962); *Dugan v. City of Portland*, 157 Me. 521, 174 A.2d 660 (1961); *Cook v. City of Shreveport*, 134 So. 2d 582 (La. 1962); *Locigno v. City of Chicago*, 32 Ill. App. 2d 412, 178 N.E. 2d 124 (1961); *Cobin v. Roy City*, 12 Utah 2d 375, 366 P.2d 986 (1961).

Whatever side of the tug of war wins, there is clearly a present tendency against the doctrine of governmental immunity. However, the doctrine is still a well-settled rule in this country. The doctrine is generally considered to rest upon, or to have its source in three grounds: (A) the supposed immunity of the sovereign from suit, which is extended to the municipality as a representative or agency of the sovereign, (B) the idea that it is more expedient that scattered individuals suffer than that the public in general be inconvenienced and (C) the considerations of public policy involved in the theory that government agents will perform their duties more effectively if not hampered by fear of tort liability.³⁴ The rule continues to be applied by the overwhelming majority of courts in this country, and although judicial criticism of the rule is not infrequent,³⁵ it has been said that the tendency is to restrict rather than to extend the principle of immunity.³⁶ The courts have usually concluded that the doctrine is so well entrenched that relief against it must come, if at all, from the legislature.³⁷

Even while Professor Borchard's writing dwells at length upon the desirability of abrogating the doctrine of municipal immunity, he feels that in the United States only statutes can abolish the outmoded, unjust maxims that "The King can do no wrong" and "states are above the law and cannot even be sued." But nowhere does Professor Borchard claim that it is the modern tendency of courts to abolish the rule of nonliability of municipal corporations.

It is obvious that a comprehensive solution cannot be worked out by the judiciary. The court lacks the facilities for an examination of the social, economic and political considerations which must delineate the limits of liability. This problem can only be worked out by the legislature, where all public agencies and other in-

34. See *An Inquiry into the Principles of Municipal Responsibility in General Assumpsit and Tort*, 8 Vanderbilt L. Rev. 753, 765.

35. *Arkansas, Kirksey v. Ft. Smith*, S.W. 2d 257 (Ark. 1957); *Kansas, Wendler v. Great Bend* 181 Kan. 753, 316 P.2d 265 (1957); *Utah, Niblock v. Salt Lake City* 100 Utah 573, 111 P.2d 800 (1941), *Bingham v. Board of Education* 118 Utah 582, 223 P.2d 423 (1950); *Wisconsin, Britten v. Eau Claire* 260 Wis. 382, 51 N.W. 2d 30 (1952). Also, *Supra* footnote 19.

36. *California, Madison v. San Francisco* 106 Cal. App. 2d 232, 234 P.2d 995, 236 P.2d 141 (1951); *Illinois, Both v. Collins* 339 Ill. App. 437, 90 N.E. 2d 285 (1950); *Iowa, Brown v. Sioux City* 242 Iowa 1196, 49 N.W. 2d 853 (1951); *Kansas, Krantz v. Hutchinson*, 165 Kan. 449, 196 P.2d 227, 5 A.L.R. 2d 47 (1948); *Wendler v. Great Bend* 181 Kan. 753, 316 P.2d 265 (1957); *Minnesota, Hahn v. Ortonville*, 238 Minn. 428, 57 N.W. 2d 254 (1953); *New Jersey, Housing Authority v. Trust Company of New Jersey*, 136 A.2d 401 (1957); *Oklahoma, Tulsa v. Washington* 206 Okla. 61, 241 P.2d 194 (1952); *Texas, Parson v. Texas City* 259 S.W. 2d 333 (1953); *Wisconsin, Britten v. Eau Claire* 260 Wis. 382, 51 N.W. 2d 30 (1953). Also see, 38 *Am. Jur. sec. 573*, p. 266.

37. *Maffie v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 808 (1959); *Kirksey v. Ft. Smith*, 300 S.W. 2d 257 (Ark. 1957); *Flory v. Burlington*, 247 Iowa 316, 73 N.W. 2d 770 (1955); *Nissen v. Redelack*, 246 Minn. 83, 74 N.W. 2d 300, 55 A.L.R. 2d 1428 (1955); *Wickmen v. Housing Authority*, 196 Or. 100, 247 P.2d 630 (1953); *Parson v. Texas City* 259 S.W. 2d 333 (Tex. 1953); *Scates v. Board of Comrs.*, 196 Tenn. 274, 265 S.W. 2d 563 (1954); *Kilbourn v. Seattle*, 43 Wash. 2d 373, 261 P.2d 407 (1953); *Hayes v. Cedar Grove*, 126 W. Va. 828, 30 S.E. 2d 726, 156 A.L.R. 602 (1944); *Britten v. Eau Claire*, 260 Wis. 51 N.W. 2d 30 (1952).

terested parties will have opportunity to appear before the appropriate committee to explain their problems and proposed solutions. The special capacity to define and condition the terms of liability is to be found in the legislature and not in the judiciary.³⁸

As stated above, immediately after the *Maffei* case, the legislature of Wyoming enacted a statute allowing cities and towns to carry liability insurance.³⁹ This appears to be a step in the right direction and one which was needed to off-set the harsh results of the common law doctrine. The statute provides that cities and towns are authorized to carry liability insurance in any amount deemed necessary by such town or city, and that any person suffering damages from negligent acts of such cities or towns so insured may maintain action for damages against the city or town in an amount not exceeding the limits of the policy. An insured city or town may not plead governmental immunity as a defense in any action for the negligent acts of cities and towns, their officers, or employees in the performance of governmental functions.

Many problems can be visualized which makes one wonder whether the act is sufficient. First of all, the act is clearly permissive and the cities and towns are free to decide for themselves whether or not they want to spend city funds on insurance. Hence, if a city does not carry such insurance, the innocent victim is still in the same position of not being compensated for his losses suffered as a result of some city's wrongful acts. Next, the act applies only to cities and towns of Wyoming. It does not apply to the State, the counties, the many State agencies, irrigation districts, school districts, or any one of the many other political subdivisions exercising duties for the public good or benefit. As a result, if one happens to be the victim of a misadventure caused by one of these entities, the doctrine of sovereign immunity would be a bar to any type of just compensation. Another obvious inadequacy of the act is that it allows recovery in damages in an amount not to exceed the limit or limits of the insurance policy or policies carried by the municipality. All an innocent victim can do is hope that the policy limit adequate. As of this date, no litigation involving this municipal liability insurance has occurred in Wyoming, but upon its instigation, many other defects and inadequacies will undoubtedly arise.

This Wyoming act exemplifies a recent trend on the part of state and local government to purchase insurance to cover activities in which they engage, and in which they enjoy a sovereign immunity from tort liability. This trend is probably prompted either by a public awareness of the situation caused by a "Maffei" case or a benevolent legislature which feels that some sort of risk-distribution plan is needed. The existence of insurance as a feasible risk-distribution device is the most persuasive reason for modifying the sovereign immunity doctrine, and the insurance in-

38. *Annotation*, 68 A.L.R. 2d 1437, quoting Professor Borchard.

39. *Supra*, Footnote 5.

dustry is the most likely spur to future legislation. There appear to be four reasons why municipalities have procured insurance to cover immune activities: (A) the purpose may be to obtain the insurer's services in defending suits against it; (B) where the law relating to a particular activity is unclear, the purpose may be to place the risk of an adverse judicial determination on the insurer, and even where immunity at the present time clearly attaches, the insurer would bear the risk that the law might be modified during the term of the contract; (C) the purpose may be to protect members of the public injured by government employees; (D) finally, the purpose may be to protect government agents who remain personally liable for their torts. Most states now authorize the purchase of liability insurance covering immune governmental activities.⁴⁰ The statutes authorizing the purchase of liability insurance for immune governmental functions⁴¹ have generally been directed at specific problem areas, *i.e.* the much litigated school bus accident situation,⁴² or municipal vehicles involved in fire or police protection. Several states have gone further and authorized the insurance of all state-owned motor vehicles.⁴³ Although most of these statutes are permissive only, like Wyoming's, a growing number of states have enacted mandatory liability insurance for their municipalities.⁴⁴

This statute authorizing the purchase of liability insurance by cities and towns in Wyoming, as mentioned before, is certainly a step in the right direction. The only criticism is that the statute failed to go far enough. In Wyoming a governmental unit lacks the power to waive immunity and

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40. There appears to be no question that a municipal government entity can insure against liability for "proprietary" functions. The leading case is *Travelers Ins. Co. v. Village of Wadsworth*, 109 Ohio St. 440, 142 N.E. 900 (1924). The reason upholding such a purchase is that the functions might be endangered by tort suits without the insurance.
41. The following is a listing of the statutes enacted: Ark. Stats., § 66-517 (1947); Cal. Vehicle Code Ann., § 400 (1956); Gen. Stat. Conn. Rev., § 52-536 (1958); Del. Code Ann. title 14, § 2904 (1953); Idaho Code Ann. § 41-3304-06 (Supp. 1957); Fla. Stat. Ann., § 240.28 (1957); Ga. Code Ann., §§ 32-429, 32-431 (1952); Ind. Stat. Ann. § 38-1819 (1952); Iowa Code § 368A (12, 517A (1) (1958); Kan. Ben. Stat. Ann. § 72-615 (Supp. 1957); Minn. Stat. Ann., § 471-42-43 (Supp. 1958); Mont. Rev. Codes Ann., § 40-1204 (Supp. 1959); N.J. Stat. Ann., § 18:5-50.4 (Supp. 1959); N.M. Rev. Code, § 64-23-8.9 (1953); N.C. Gen. Stat., § 160-191.1 (1952); N.D. Rev. Code, §§ 15-4731, 39-0108 (Supp. 1953); Ohio Rev. Code Ann., §§ 307.44; 3327.09 (Baldwin 1953); Okla. Stat. title 69, § 30.16-18, title 70, § 9.7 (Supp. 1957); Ore. Rev. Stat., §§ 278.090, 332.180 (1953); Pa. Stat. Ann. title 24, § 7-774 (1950), title 71, § 634 (b) (Supp. 1958); S.D. Laws, C. 199 (1955); Vt. Laws No. 243, § 5 (1949); Va. Code Ann., § 22.284-294 (1950); Wash. Rev. Code, § 28.58.100(11) (1950); W. Va. Code Ann., § 1774 (7) (Michie 1949); Wis. Stat., § 40.57 (1957); Wyo. Stat., § 15-20.6 (Supp. 1963).
42. Every statute listed in note 41 *supra*, covers the school bus problem with the exception of that of South Dakota and Wyoming. The following are states whose statutes authorize only school bus insurance: Delaware, Florida, Georgia, Idaho, Kansas, Minnesota, New Jersey, Pennsylvania, Vermont, Virginia, Washington and Wisconsin. See Wyo. Stat. § 21-154 (1957) which covers the school but problem separately.
43. The following states authorize insurance for all state-owned motor vehicles: California, Connecticut, Indiana, Iowa, Montana, New Mexico, North Dakota, Oregon, Pennsylvania, Washington, and West Virginia.
44. Statutes in the following states require that insurance be purchased: Delaware, Florida, Idaho, Oregon, Pennsylvania, Vermont, Virginia and Wisconsin.

therefore, procurement of liability insurance, notwithstanding its statutory authorization, cannot be such a waiver. In essence the statute only authorizes persons who are suffering damages from the claimed negligent acts of said cities and towns so insured, to maintain an action in the amount of the insurance policy's coverage. Fortunately, a trend toward increasing municipal liability is discernible. But what effect the sanctioning of liability insurance covering immune governmental activities will have in retarding or accelerating the progress of governmental liability in Wyoming is yet unanswered.

W. PERRY DRAY

WYOMING NONRESIDENT MOTORIST STATUTE

The Wyoming Nonresident Motorist Statute, as laid out in section 1-52 of the Wyoming Compiled Statutes (1957) and as amended in 1963, basically provides for a method of service of process upon a nonresident or a resident upon whom service cannot be made within the state. Also coming within the scope of the Wyoming Nonresident Motorist Statute is the agent of such nonresident or resident, personal representative, executor or administrator.

The use and operation of a motor vehicle over or upon any street or highway within the state is deemed an appointment of the Secretary of State as attorney upon whom service of process may be had in any action growing out of such use and operation. Service of process is made by serving a copy upon the Secretary of State. Within ten days thereafter the plaintiff must also send a copy of the process, by certified mail, to the defendant's last known address. The plaintiff must then file an affidavit that he has complied with such requirements; or in the alternative personal service outside the state may be used.

The district court of the county in which the cause of action arose or the district court of the county where the plaintiff resides shall have jurisdiction over such actions.

All fifty states have adopted similar statutes.¹ Nonresident motorist statutes have been upheld as not violating "Due Process,"² "Privilege and Immunities,"³ and the "Equal Protection"⁴ clauses of the Constitution and therefore as constitutional, thus greatly expanding the concept of jurisdiction as laid out in *Pennoyer v. Neff*.⁵

The courts began by saying that whenever a nonresident uses the highway of another state he is consenting to be sued there.⁶ The fiction of consent eventually gave way to the realization that activities within the state are the basis of jurisdiction.⁷ The Supreme Court in *International Shoe v. State of Washington* held that due process requires only that in order to subject a defendant who is not present within the forum to a judgment in personam, there must be certain minimum contacts with the forum so that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.⁸ It is felt that driving an

1. Note 1, 44 Iowa L. Rev. 384; Wyo. Comp. Stat. 1-52 (1957); Alaska Session Laws Chap. 174 § 3 (1959); Hawaii Rev. Statutes § 230-33 (1957).

2. *Hess v. Pawloski*, 274 U.S. 352. (1927).

3. *State v. Lewis*, 118 Fla. 536, 159 So. 792, 99 A.L.R. 123 (1935).

4. *Kane v. State of New Jersey*, 242 U.W. 160, 37 S.Ct. 30, 61 L.Ed. 222 (1916).

5. 95 U.S. 714, 24 L.Ed. 565 (1877). Jurisdiction is based upon presence within the state and service while there.

6. *Supra* note 2.

7. The language of the nonresident motorist statutes is, however, still coined in the terms of consent.

8. 326 U.S. 310, (1945); *Hansen v. Denckla*, 355 U.S. 22, (1957), established the jurisdictional limits of minimal contacts.

automobile in a state is such sufficient minimum contact that maintenance of a suit does not offend traditional notions of fair play and substantial justice.⁹

The constitutionality of a nonresident motorist statute phrased within the limits imposed by the due process clause, which is the only serious constitutional limitation, is no longer questioned.¹⁰ Litigation has shifted from an attack on the jurisdictional basis of the statutes to questions concerning the proper construction of their terms. Basically there is very little variation in the different state nonresident motorist statutes. However, diverse terminology has led to a variety of results in similar cases.¹¹

Generally, the courts strictly construe the nonresident motorist statutes as being in derogation of the common law.¹² However, the courts are not justified in using strict construction to defeat the intention of the legislature¹³ and to restrict the remedy provided.¹⁴ One court considered the nonresident motorist statute as remedial in nature, procedural, and therefore to be liberally construed.¹⁵ Section 1-2 of the Wyoming Compiled Statutes (1957) provides:

The provisions of this act and all proceedings under it shall be liberally construed in order to promote its object and assist the parties in obtaining justice; and the rule of the common law that statutes in derogation thereof must be strictly construed, has no application to this act; but this section shall not be so construed as to require a liberal construction of provisions affecting personal liberty, relating to amercement, or of a penal nature.

The Wyoming Nonresident Motorist Statute will be examined to determine if it is in harmony with the constitutional requirements and the extent of its coverage.

Under the Wyoming Nonresident Motorist Statute, service of process is made by serving a copy upon the Secretary of State and within ten days after such service the plaintiff must send, by certified mail, to the defendant's last known address, a copy of the process.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reason-

9. The idea of minimal contacts has been adopted in Wyoming and is laid out in *Ford Motor Co. v. Arguello*, 382 P.2d 886 (Wyo. 1963).

10. *Supra* note 2.

11. *Parr v. Gregg*, 70 O.A. 235, 42 N.E.2d 922 (1942); *Cody v. Francil Schwarz*, 152 F.Supp. 379 (S.D. Ohio W.D. 1957); *Johnson v. Ciegel*, 110 N.J.L. 374, 165 Atl. 869 (1933); *Eckman v. Baker*, 224 F.2d 954 (3rd Cir. 1955); *Weaver v. Winn Dixie Stores*, 160 F.Supp. 621, (N.D. Ohio E.D. 1958); *Tipton v. Fleet Maintenance*, 75 Abs. 516, 152 N.E.2d 882 (1957); *Pray v. Maier*, 69 O.A. 141, 40 N.E.2d 850 (1942); *McLeod v. Birnbaum*, 14 N.J.M. 485, 185 Atl. 667 (1936).

12. *Jeramaine v. Graf*, 225 Iowa 1063, 283 N.W. 428 (1939); *Harris v. Owens*, 142 Ohio 379, 52 N.E.2d 522 (1943); *Bond v. Golden*, 273 F.2d 265 (10th Cir. 1959); *Carlson v. Dist. Ct. of City and County of Denver*, 116 Colo. 330, 180 P.2d 525 (1947).

13. *Jones v. Pebler*, 371 Ill. 309, 20 N.E.2d 592 (1939).

14. *Kohanovick v. Youree*, 51 Del. 440, 147 Atl.2d 655 (1959).

15. *State v. Dist. Ct. of 6th Jud. Dist.*, 112 Mont. 253, 114 P.2d 1047 (1941).

ably calculated under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections.¹⁶

The question is, does the Wyoming Nonresident Motorist Statute comply with the requisites of due process? In *Schilling v. Odelbak* a non-resident motorist statute similar to Wyoming's was upheld as constitutional¹⁷ The court stated, "the statute provides such prerequisites that it is safe to conclude that it was reasonably certain that the defendant would receive actual notice and that adequate opportunity was afforded him to defend."¹⁸

The term "last known address" has led to some confusion. It does not mean the last address known to the plaintiff.¹⁹ "Last known address" is the one that is most likely to give the party to be served notice, although actual notice is not essential, and such address may be a non-resident's place of business or his residence.²⁰ Some courts have held that the phrase "last known address," means his last address so far as it is reasonably possible to ascertain, and this the plaintiff must learn at his peril.²¹ The trend is to sustain the validity of the process if there is a probability that if the statute is complied with the defendant will receive actual notice.²²

It was held in *Freedman v. Poirier* that a statute providing for mailing notice of service to the nonresident's "last known address" was unconstitutional for failure to make it reasonably probable that notice of service on the Secretary of State would be communicated to the defendant.²³ The nonresident motorist statute relied on failure to provide a specific time limit in which a copy of the process was to be mailed to the defendant. This prompted the court to say that in absence of a provision to the contrary, a copy of the process might be delivered to the defendant at any time before or even after the return day. Some states that do not provide a specified time limit say that notice of service should be given with all reasonable dispatch and do not seem to worry about the time limit.²⁴ Wyoming puts a time limit of ten days after service and thus avoids this problem.

Is the defendant deprived of his rights without due process when he

16. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

17. 177 Minn. 90, 224 N.W. 694 (1929).

18. *Id.* at 696.

19. *Glen v. Holub*, 36 F. Supp. 941, 942, (S.D. Iowa 1941).

20. *Conner v. Miller*, 154 Ohio 313, 96 N.E.2d 13, 17 (1950). Defendant had a known business address at a time subsequent to his leaving the last known residential address. The court held that a copy of the process sent to that residence and not received by such defendant was not sent to "last known address" of such defendant within the meaning of the statute.

21. *Hartley v. Vitiello*, 113 Conn. 74, 154 Atl. 255, 259 (1931); *Drinkard v. Eastern Airlines*, 290 S.W.2d 175 (1956).

22. *Sorenson v. Stowers*, 251 Wisc. 398, 29 N.W.2d 512 (1957). The court held that the plaintiff was entitled to rely on the address stated in the police report and was not obliged at his peril to ascertain the last absolute or true address of the defendant.

23. 134 Misc. 253, 236 N.Y.S. 96 (1929).

24. *Supra* note 21.

has not received actual notice of the action? The Wyoming Nonresident Motorist Statute does not contain a provision requiring a return receipt from the defendant. Without a return receipt the defendant could argue that he did not have notice. Any action commenced against a defendant would not be a complete surprise since everyone is usually aware of the fact that they have been involved in an accident. But knowing of an accident isn't knowledge as to the particular time the suit is to be commenced so as to permit a defendant an opportunity to appear and defend. Many nonresident motorist statutes require the filing of a return receipt.²⁵ Such provisions have been construed to mean that the defendant must have actual notice of the action before jurisdiction over him is acquired.²⁶ Even in those jurisdictions where a return receipt is required this does not mean that the defendant may refuse to receive the notice and sign a receipt and thus invalidate the service.²⁷ Other jurisdictions with nonresident motorist statutes requiring a return receipt have held that it is not an absolute requirement that the defendant actually receive the notice, provided the plaintiff has acted in good faith.²⁸ In view of these decisions it may be inferred that it is not an absolute requirement that a provision for a return receipt be embodied in the nonresident motorist statute. In *Milliken v. Meyer* the court stated that whether or not due process is satisfied does not depend upon actual notice but open whether or not it is reasonably calculated to give him actual notice.²⁹ Where a return receipt is not required, jurisdiction is acquired by service upon the secretary of State and not upon the defendant. It is therefore not considered fatal if the defendant does not actually receive notice. Throughout this discussion the fundamental requisite of due process must be kept in mind, viz., the opportunity to be heard. Even if the service is reasonably calculated to give notice, what good is the service if you are not actually informed?

Another area that has been attacked on constitutional grounds is the venue provision of the nonresident motorist statutes. The venue provision in the Wyoming Nonresident Motorist Statute provides that the district court of the county in which the cause of action arose or where the plaintiff resides may hear the action. On the other hand, if the action is against a resident, section 1-37 of the Wyoming Compiled Statutes (1957) provides that the action must be brought where the defendant resides or where he may be summoned. It might be said that discrimination results by reason of these two statutes. When the action is against a resident defendant,

25. *Hart v. Wiener*, 258 App. Div. 371, 17 N.Y.S.2d 87, (1940); *Weiss v. Magnussen*, 13 F. Supp. 948, (D.C. Va. 1936).

26. *Bucholz v. Hulton*, 153 F. Supp. 62 (D.C. Mont. 1958); *Alexander v. Bush*, 199 Ark. 562, 134 S.W.2d 519 (1939); *Muncie v. Westcraft Corp.*, 58 Wash.2d 36, 360 P.2d 744 (1961).

27. *State ex rel. Charette v. Dist. Ct. of Silver Bow County*, 107 Mont. 489, 86 P.2d 750 (1939); *Creadivk v. Keller*, 160 Atl. 909 (Del. 1932).

28. *William v. Egan*, 308 P.2d 273, (Okla. 1957); *Volmer v. Hoel*, 87 Ohio App., 93 N.E.2d 416, (1950).

29. 311 U.S. 457, 132 A.L.R. 1357, (1940).

the plaintiff has to go after him and the defendant cannot be subjected to suit at plaintiff's residence, unless it happens that he is found and served while there. When the action is against a nonresident defendant, the nonresident can be forced to defend where plaintiff resides even if the action arises in another county and even though the defendant is not found within the county of the plaintiff's residence.

In *Henry Fisher Packing Co. v. Mattox*³⁰ a nonresident motorist statute similar to Wyoming's was held unconstitutional for the reason that the venue provision was discriminatory and violated the "Equal Protection Clause" of the Constitution.

If the law with relation to the use of highways should be uniform when dealing with residents and nonresidents it should be uniform when redress is sought for injury occurring on the roads. The procedure provided should not result in a disadvantage or advantage against or in favor of either one or the other; if it does so the law is discriminatory and constitutes a lack of equal protection.³¹

In reaching this conclusion the court relied on the *Power Mfg. Co. v. Saunders* case.³² Here the venue provision permitted a foreign corporation to be sued in any county of the state; whereas if the suit was against a resident the suit was required to be brought in the county where the corporation had its place of business or where an agent resided. The United States Supreme Court held that the statute discriminated against foreign corporations and was in violation of the "Equal Protection Clause" of the Constitution. The court went on to say,

The clause in the fourteenth amendment forbidding a state to deny any person within its jurisdiction the equal protection of equal laws does not prevent a state from adjusting its legislation to differences in situations or forbid classification in that connection, but it does require that the classification be not arbitrary, but based on real and substantial difference having a reasonable relation to the subject of the legislation.³³

The statute in the *Power* case permitted nonresidents to be sued in any county of the state; whereas in the *Fisher* case the nonresident could only be sued in the county where the injury occurred or where the plaintiff resided. It seems that the court in the *Fisher* case broadened the doctrine as set forth in the *Power* case, overlooked the fact that a state can under its police powers make such regulations as long as they do not arbitrarily discriminate, and failed to discuss to any extent the meaning of the word arbitrary.

A defendant in Wyoming, whether a resident or a nonresident, may be forced to defend where the plaintiff resides. A nonresident may be

30. 262 Ky. 318, 90 S.W.2d 70 (1936).

31. Id. at 71.

32. 274 U.S. 490, (1927).

33. Id. at 498.

forced to defend at plaintiff's residence a greater number of times than the resident, but this alone is not discrimination. If the nonresident feels that it will be hardship he can move for a change of venue or remove the action to a Federal court on the ground of diversity of citizenship.³⁴

It has also been determined that a nonresident motorist statute does not deprive a person of the equal protection of the laws for the reasons that it accords a fair trial in a court of competent jurisdiction to all who are in the same category and that the legislature is not without power to make exceptions to the general rule.³⁵

The Wyoming Nonresident Motorist Statute is broad enough to include constructive service upon the personal representative of a deceased nonresident motorist. One court has said that a statute which provides for service upon the personal representative is unconstitutional.³⁶ One of the arguments used to attack such a provision is that since the statute rests upon the implied consent of the nonresident for the appointment of the Secretary of State as his agent, the agency is revoked by death. The court in *Brook v. National Bank of Topeka* said, "the state police power is not limited by the ordinary rules of agency."³⁷ A second argument as laid out in *Knopp v. Anderson*, which is the only case so holding, is that an action against the estate is in rem and the state where the accident occurred cannot create a right against property wholly within another jurisdiction.³⁸ In spite of these analyses the validity of such provisions has been upheld.³⁹

Setting the constitutional issues aside, the nonresident motorist statute will be probed to determine the scope of its coverage. Uncertainty arises as to what specific acts are included within the meaning of the words "use and operation." It is felt that the operation of a motor vehicle includes more than its movements over the highways.⁴⁰ Some courts feel that a motor vehicle can be operated even when it is standing or parked at the time of the accident.⁴¹ Another jurisdiction holds that such actions as

34. In the ordinary case, extreme hardship to a defendant can be mitigated if the defendant moves to a federal court on the ground of diversity of citizenship under 28 U.S.C. § 1441, and then moves for a change of venue pursuant to 28 U.S.C. § 1404 (a). The principle of *forum non conveniens* may also be available. *Gilbert v. Gulf Oil Corp.*, 153 F.2d 883, (C.C.A. N.Y. 1946); *Price v. Atchinson T&S.F. Ry. Co.*, 42 C.2d 577, 43 A.L.R.2d 756, 268 P.2d 457, 458 (1954). A defendant may also ask for change of venue pursuant to section 1-53 of the Wyoming Compiled Statutes 1957.

35. *Panzram v. O'Donnell*, 48 F. Supp. 74, (S.D. Minn. 1942).

36. *Knopp v. Anderson*, 71 F. Supp. 832 (N.D. Iowa 1947).

37. 251 F.2d 37 (8th Cir. 1958).

38. *Supra* note 36.

39. *Oviatt v. Garretson*, 205 Ark. 792, 171 S.W.2d 287 (1943); *Leighton v. Roper*, 300 N.Y. 434, 91 N.E.2d 876, 18 A.L.R.2d 537 (1950). Certain rules of jurisdiction must yield to the reasonable use of police power. *Plopa v. DuPre*, 327 Mich. 660, 42 N.W.2d 777 (1950).

40. *McDonald v. Superior Ct.*, 43 Calif. Rep.2d 621, 275 P.2d 464 (1954).

41. *Hand & Frazer*, 248 N.Y.S. 557 (1931); *Chiarello v. Guerin Special Motor Freight*, 92 A.2d 136 (N.J. 1952).

loading or unloading or injury occurring while parked have no relation to the use of the highway and therefore do not come within the scope of the statute.⁴²

In *Brauer v. Parkhill*⁴³ a statute similar to Wyoming's was brought into operation. An injury occurred when a truck, which was parked off the highway, was being unloaded. The court said, "It make no difference where the injury actually occurs if it may be attributed to the use of the highway and naturally flows therefrom." It was felt that this injury did not result from the use and operation of a motor vehicle on the highway. More emphasis was placed on the fact that the truck was not on the highway at the time of the accident than on the terms "use and operation." The decision might have been different if the truck had been parked on the highway at the time it was being unloaded.

The question arises as to just who is a nonresident within the meaning of a nonresident motorist statute. Generally, the statutes have been construed to apply to the designated class of nonresident defendants in strict accord with the purpose intended to be accomplished.⁴⁴ Residence has three possible meanings: legal domicile, temporary abode, and actual residence.⁴⁵ "The courts are inclined to adopt the concept of actual residence as distinguished from domicile as governing the applicability of the nonresident motorist statutes."⁴⁶ In *Chapman v. Davis*⁴⁷ the court said:

Applying this concept of actual residence, if a person legally domiciled in one state has an actual residence in another state, he may be served as a nonresident in a suit arising out of the operation of his car in the state of his domicile. On the other hand, if the person actually resides within the state when and where the accident occurs, he is not subject to constructive service of process even though his domicile is elsewhere. While actual residence has a less permanent connotation than domicile, it is not mere temporary abode. A temporary absence from the usual place of abode does not terminate an actual residence. Thus if a person who is living in a state for a limited time without any intention of making it his home and while there, injures a person through the operation or use of an automobile he could be served under the statute as a nonresident.⁴⁸

A nonresident motorist statute does not apply to a person who is employed within the state, who makes a home for himself and his family within the state and who during a reasonable period of time is available

42. *Brown v. Hertz*, 203 Misc. 728, 116 N.Y.S.2d 412 (1952).

43. 383 Ill. 569, 50 N.E.2d 836 (1943).

44. *Clark v. Reichman*, 130 Colo. 329, 275 P.2d 952 (1954).

45. *Chapman v. Davis*, 233 Minn. 62, 45 N.W.2d 822 (1951).

46. 53 A.L.R.2d 1192.

47. *Supra* note 45.

48. *Supra* note 45 at p. 826.

for personal service of process, but applies only to a transient motorist who is here today and gone tomorrow.⁴⁹

It has been established that a corporation,⁵⁰ partnership,⁵¹ minor,⁵² resident of a foreign country,⁵³ and one physically present in a foreign country,⁵⁴ are nonresidents within the meaning of a nonresident motorist statute.

In the absence of a statute providing otherwise, it is generally held that one who is resident at the time of the accident, but subsequently becomes a nonresident, is not subject to constructive service under the act.⁵⁵ Some states, including Wyoming, have overcome this problem by specifically including within the scope of their nonresident motorist statute a resident who becomes a nonresident prior to service within the state.

The Wyoming Nonresident Motorist Statute also expressly covers agents. According to *Austinson v. Kilpatrick* "if an agent was not acting within the scope of his employment this would not permit the defendant to challenge the substituted service, but would be a defense to be brought up at the trial of the action."⁵⁶ When a member of the family is driving the automobile at the time it is involved in an accident, the family purpose doctrine has been used to bring them within the scope of the nonresident motorist statute.⁵⁷

The term "motor vehicle" has created a dilemma in some states because it is not clear as to what type of vehicles are included within the term. Some states have supplied a definition that is applicable to the nonresident motorist statute. Section 31-12 of the Wyoming Compiled Statutes (1957) provides the following definition of a motor vehicle:

"Motor vehicle" shall include all vehicles propelled or drawn other than by muscular power, operated upon public highways, except trailers, machinery used in construction work, not designed as a motor truck and not used for transportation of property over the highways, and implements used exclusively for farm husbandry.

49. *Honeycutt v. Nyquist, Peterson & Co.*, 12 Wyo. 183, 74 P. 90 (1903).

50. *Dealers Transport Co. v. Reese*, 138 F.2d 638 (5th Cir. 1943). A domestic corporation is not a nonresident within the meaning of the statute. *Sease v. Central greyhound Lines*, 306 N.Y. 284, 117 N.E.2d 899 (1954). Nor is a foreign corporation which has a place of business in the forum state in the charge of an agent upon whom service can be made. *194 Ga. 113, 20 S.E.2d 575 (1942)*.

51. *Rigutto v. Italian Terrozza Mosaic Co.*, 93 F. Supp. 124 (W.D. Pa. 1950).

52. *Silver Swan Liquor Corp. v. Adams*, 43 Cal. App.2d 851, 110 P.2d 1097 (1941).

53. *Lulevitch v. Hill*, 82 F. Supp. 612 (E.D. Penn. 1949); *Ewing v. Thompson*, 233 N.C. 564, 65 S.E.2d 17 (1951).

54. *Supra* note 52.

55. *Warwick v. Dist. Ct. of City and County of Denver*, 269 P.2d 704 (Colo. 1954); *Clendening v. Fitterer*, 261 P.2d 896 (Okla. 1953); *Teague v. Dist. Ct.*, 289 P.2d 331 (Utah 1955).

56. 82 N.W.2d 388 (N.D. 1957).

57. *Ewing v. Thompson*, 233 N.C. 564, 65 S.E.2d 17 (1951).

A somewhat similar definition is found in section 31-78 of the Wyoming Compiled Statutes (1957). The problem then arises as to whether or not these definitions of motor vehicle can be used in the context of the nonresident motorist statute. In *Hayes Freight Lines v. Clealton*⁵⁸ the court refused to apply a definition of motor vehicle appearing in the statute on motor carriers, which included a trailer, and held that a trailer was not a motor vehicle within the scope of the nonresident motorist statute.

The place where the accident occurred must be considered, since the Wyoming Nonresident Motorist Statute limits it to "street or highway within the State." Such statutes are usually construed not to include accidents occurring on private property.⁵⁹ However, accidents occurring on undedicated public roads,⁶⁰ sidewalks,⁶¹ or public driveways,⁶² have been included within the scope of "street or highway."

The availability of the nonresident motorist statute in actions commenced by a nonresident plaintiff against a nonresident defendant is well settled in state courts.⁶³ In federal courts a nonresident plaintiff may not sue a nonresident defendant in view of the Supreme Court decision in *Olberding v. Ill. Cent. RR.*⁶⁴ because there is no federal venue. The court said,

A civil action wherein jurisdiction is founded only on diversity of citizenship, may, except as otherwise provided by law be brought only in the judicial district where all the plaintiffs or all defendants reside.⁶⁵

The effect of this decision is to deprive a nonresident plaintiff of a federal forum at the locus of the accident.⁶⁶

There has been some discussion in the federal courts as to the availability of a state's nonresident motorist statute in a suit originating in the federal courts. The general consensus seems to permit such use.⁶⁷ The rule is that any form of service which would be good in the state where the district court is sitting shall also be good in the federal court. Any doubt that may have existed on this point has been removed by the 1963 amendment to the Federal Rules of Civil Procedure 4 (d) (7), (e), and (f).

Since the nonresident motorist statutes have generally been upheld

58. 277 P.2d 622 (Okla. 1954).

59. *Brauer Machine & Supply Co. v. Parkhill Truck Co.*, 383 Ill. 569, 50 N.E.2d 836 (1943); *Kelley v. Koetting*, 164 Kan. 542, 190 P.2d 361 (1948); *Rilling v. Jones*, 130 F.Supp. 834 (D. Md. 1955).

60. *Galloway v. Wyatt Metal and Boiler Works*, 189 La. 837, 181 So. 187 (1938).

61. *Morrissey v. Crabtree*, 143 F. Supp. 105, (M.D. N.C. 1956).

62. *Bertrand v. Wilds*, 198 Tenn. 543, 281 S.W.2d 390 (1955).

63. *Peeples v. Ramspacker*, 29 F.Supp. 632 (E.D. S.C. 1939); *Fine v. Wencke*, 117 Conn. 683, 169 Atl. 58 (1933); *Welsh v. Ruop*, 228 Iowa 70, 289 N.W. 760 (1940).

64. 346 U.S. 338 (1953).

65. *Id.* at 341.

66. *Weber v. Threlkel*, 126 F. Supp. 98 (D. Wyo. 1954).

67. 27 U. Chi. L. Rev. 751.

as constitutional, the only condition that will prevent a plaintiff from using the statute to procure the desired relief is if the particular accident or defendant does not fall within the scope of the terminology of the statute.

—KIM McDONALD

THE AUTOMOBILE AND THE OMNIBUS CLAUSE

Automobile liability policies commonly insure a named person and a specified automobile that he drives. The comprehensive policy also contains a clause which extends coverage to "any person or persons while riding in or legally operating any automobile insured hereunder, and any person, firm or corporation legally responsible for the operation thereof, with the permission of the named assured."¹ This clause is known as the "omnibus" clause,² and its purpose is to permit the named insured to extend his insurance coverage to anyone whom he allows to drive the vehicle specified in his policy.³

More specifically stated, the omnibus clause accomplishes three things. A. It gives an injured party the ability to recover from the insurer even though the named insured, or a person for whom he was legally responsible, was not operating the car. B. It provides the omnibus insured with insurance coverage without his having procured a policy. C. The clause may free the named insured from the threat of suit.⁴

Litigation concerning the application and construction of the omnibus clause has been voluminous, thus making it impossible to cover fully in this article even this small area of automobile liability insurance. Therefore, the discussion is limited to a survey of the cases as they construe the scope of permission granted and the application of such permission by the courts.

To establish liability under an omnibus clause it must first be established that the use is with the permission, either express or implied, of the named insured.⁵ Once this has been established, the courts must determine what they consider to be the scope of the permission given. It is at this point the authorities divide. The theories which seem to reflect the actual holdings of the courts most accurately divide the cases into three basic approaches.

The first approach involves what is called the "strict" or "conversion" rule, and restricts the omnibus application to only the specific use granted by the permission given. That is, the consent given must have included specifically the use being made of the automobile at the time to which the coverage is to be applied. At the other extreme is the so-called "initial permission" or "hell-or-high-water" approach⁶ where the courts determine that when the initial permission is given, the coverage applies regardless of the use to which the car is being put at the time of the accident. Falling

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1. *Odden v. Union Indemnity Co.*, 156 Wash. 10, 286 Pac. 59, 72 A.L.R. 1363 (1930).
 2. As to the validity, construction and effect of the omnibus clause in general, see annotation in 72 A.L.R. 1375, supplemented in 106 A.L.R. 1251 and 126 A.L.R. 544.
 3. See *Dickinson v. Maryland Casualty Co.*, 101 Conn. 369, 125 Atl. 866, 41 A.L.R. 500 (1924) for a discussion of the purpose of the omnibus clause.
 4. See *Couch on Insurance* 2d, § 45:293.
 5. *State Farm Mutual Auto Insurance Co. v. Cook*, 186 Va. 658, 43 S.E.2d 863, 5 A.L.R.2d 594, (1947).
 6. *United States Fidelity and Guaranty Co. v. Smith*, 279 F.2d 678 (C.A. 9 Ariz. 1960).

between these two extremes is what seems to be the more common approach today, the "minor-deviation" rule, which holds that a slight or immaterial deviation does not preclude coverage under the omnibus clause.

In considering the application of the omnibus clause to a particular set of facts, a minority of the courts apply the "strict," "conversion" or "specific purpose" rule. This rule has received additional support from the courts which feel the "actual use" utilization is intended to make this rule applicable to a given situation (as discussed *infra*). Under this view it is not sufficient that permission was gained to make some use of the car. It must be shown that the use being made of the automobile at the time of the accident was within the contemplation of the original permission given. This includes the showing that the time of the permissive bailment has not expired, the particular place where the automobile is being used is within the contemplation of the parties, and the specific use at the time must be within that same contemplation.⁷

The majority of cases which are said to apply the "strict" approach involve instances where the car has been given for a particular use and the granted the use of an automobile for furthering the purpose of his employer granted the use of an automobile for furthering the purpos of his employer is not an additional insured under this view when he uses the car for his own purposes.⁸

In a recent South Carolina case, *Eagle Fire Company of New York v. Mullins*,⁹ the court accepted the "conversion" rule, although recognizing the liberal view, and they said the better reasoned cases hold, "consent should be considered as limited to the purpose for which it was given."¹⁰

More and more, courts have taken an intermediate view of the "minor deviation" rule. In applying this rule the courts adopt the same basic permission test as the strict rule, but modify it in allowing the application of "additional insured" status to the permittee if there is not a gross violation of the terms of permission given. Under this rule the courts must determine in each instance, by looking at the deviation as to time, distance, and use, whether such deviation is material or immaterial. If immaterial, then the coverage is allowed.¹¹ In the case of *Collins v. New York Gas Co.*,¹² the court felt that omnibus coverage is designed not only to protect those given the use of the automobile, but the public in general, and should therefore be applied liberally. However, the court says of the

7. 7 Am. Jur. 2d Automobile Insurance, § 120.

8. *Johnson v. American Automobile Insurance Co.*, 131 Mo. 288, 161 Atl. 496 (1932); *Williams v. Travelers Insurance Co.* (Ca. 4 N.C. 1959) 265 F.2d 531.

9. 238 S.C. 272, 120 S.E.2d 1 (1961).

10. *Id.* at 5.

11. *Lloyds of America v. Tinkelpaugh*, 184 Okla. 413, 88 P.2d 356, (1939); *Collins v. New York Casualty Co.*, 140 W.Va. 1, 82 S.E.2d 288 (1954); *Dickman v. Maryland Casualty Co.*, 101 Conn. 369, 125 A. 866, 41 A.L.R. 500 (1924); *Rickowski v. Fidelity and Casualty Co.*, 116 N.J.L. 503, 185 A. 473 (1936); *Speidel v. Kellum*, 340 S.W.2d 200 (Mo. 1960).

12. 140 W.Va. 1, 82 S.E.2d 288, 295 (1954).

“liberal” rule, “such a rule, if applied within its full scope, would have in numerous cases in the future baneful results not contemplated by either the insurer or the insured.”¹³ Therefore, says the court, the slight deviation rule most nearly effectuates the intent of the parties. The court then went on to find the deviation material.

The minor deviation rule has been criticized for its built-in uncertainty of application. In *Stovall v. New York Indemnity Co.*,¹⁴ the leading case advocating the “initial permission” rule, it was said:

If the application of the contract to a particular injury is made to depend upon the extent to which the driver of an automobile deviated from the permissive use authorized by the owner, the test of liability will be necessarily variable and uncertain. There is surely room for difference of opinion as to whether the deviation shown in *Dickinson v. Maryland Casualty Co.*, supra, was “slight” and unimportant, or substantial and material, when it included visits to two saloons in each of which the driver of the automobile has “some drinks.”

The purpose for which the permission is granted is often the most significant factor in determining the extent of a particular deviation. Where the original permission granted is for social purposes, the borrower being a relative or acquaintance of the named insured, a much greater scope is assumed than in cases where the permission was given to a person occupying the position of an employee or agent.¹⁵

Another basis for determining the extent of a particular deviation is the belief that the omnibus clause should not be effective where the deviation is one which was not contemplated by the named insured in the beginning, and one to which, in the first instance, the insured would be presumed not to have assented.¹⁶ Thus, the courts adopting this rationale feel they are effectuating the intention of all parties concerned. The named insured did not anticipate such a use and presumably would not have allowed such a use, the insurer contemplated coverage only within the intended permission of the named insured, and finally, the borrower or prospective insured who is no longer covered should have known the extent of his permission. This leaves only one person to suffer, the victim who was injured and who had the right to assume the person driving had the permission to do so.¹⁷

This leaves but one rule to discuss, and the “liberal” view is certainly the most controversial and most worthy of discussion. Under the liberal rule, the bailee need only receive permission to use the car in the first instance, and any use following the initial consent is considered to be

13. *Id.* at 299.

14. 157 Tenn. 301, 8 S.W.2d 473 (1928).

15. *Jordan v. Shelley Mutual Plate Glass and Casualty Co.*, 142 F.2d 52, (C.A.4th 1944).

16. *Collins v. New York Casualty Co.*, supra note 8 at 299.

17. For a discussion of the risks insured, etc., see Morris, *Enterprise Liability and the Actuarial Process—the Insignificance of Foresight*, 70 Yale L.J. 554 (1961).

within the coverage of the omnibus clause, even though such use may not have been contemplated when the car was loaned. Therefore, the only qualification is that permission be given in the first instance.¹⁸ Following this line of authority, there can be no such thing as an unauthorized use, and some say once the permission has been given it requires the equivalent of "theft or the like" to remove the driver from coverage within the clause.¹⁹

There are many policy considerations behind the adoption of the "liberal" rule and it is upon these various considerations that most courts base their decisions. The first rationale is that the language should be given a broad construction and interpreted liberally, and further, if there is any ambiguity in the policy provision it should be construed against the insurance company.²⁰

A second rationale is that the liability policies themselves are as much for the benefit of the public as for the "insureds" under the policy. This view was illustrated in the dissenting opinion of *Konrad v. Hartford Accident and Indemnity Co.*²¹ where the judge said: ". . . the rule is based on the theory that the insurance contract is as much for the benefit of the public as for the insured, and that it is undesirable to permit litigation as to the details of the permission and use; . . ."

The final justification upon which the "liberal" rule has been based is illustrative of the great changes which have been evident in the field of automobile insurance in recent years. State legislatures in many instances have drafted exhaustive legislation to assure that persons causing automobile accidents are financially responsible and capable of responding monetarily to innocent victims. Many of the cases adopting the "liberal" rule feel such construction most nearly effectuates the intention of the legislature as evidenced by the financial responsibility legislation. One court, although refusing to adopt the "liberal" rule because of lack of a financial responsibility act, stated the reasoning of the rule in this way:²²

This construction of the policy is in accord with the purpose of the various statutes adopted by several states requiring owners of automobiles to carry indemnity or liability insurance. These

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18. *Stovall v. New York Indemnity Co.*, 157 Tenn. 301, 8 S.W.2d 473 (1928); *Carter v. Southern Farm Bureau Casualty Insurance Co.* (La. App.) 135 So. 2d 316; *Farmer v. Fidelity and Casualty Co. of New York*, 249 F.2d 185 (C.A. 4th 1957); *Foley v. Tennessee Odin Insurance Co.*, 245 S.W.2d 202 (Tenn. 1951); *Hanover Insurance Co. v. Fanke*, 75 N.Y. Super, 68, 182 A.2d 164 (1962); *Parks v. Hall*, 189 La. 849, 181 So. 191 (1938).
19. *Hanover supra* at 167.
20. *Chatfield v. Farm Bureau Mutual Automobile Insurance Co.*, 208 F.2d 250 (C.A. 4th 1953); *Stovall v. New York Indemnity Co.*, *supra* note 20.
21. 11 Ill. App.2d 503, 137 N.E.2d 855 (1956).
22. *Hodges v. Ocean Accident and Guarantee Corporation*, 66 Ga. App. 431, 18 S.E.2d 28, 31 (1941) citing the following cases: *Guzenfield v. Liberty Mutual Insurance Co.*, 286 Mass. 133, 190 N.E.2d 3 (1934); *Dickinson v. Maryland Casualty Co.*, 101 Conn. 369, 125 A. 866, 41 A.L.R. 500 (1924); *Stovall v. New York Indemnity Co.*, note 18 *supra*; *Brower v. Employer's L.A. Co.*, 318 Pa. 440, 177 Atl. 826 (1935).

statutes are enacted to protect the public using the streets and highways as a matter of public policy. The intent of the legislature is to protect those injured by automobiles, no matter who may be driving the car or where it is driven, provided the owner has voluntarily entrusted possession of the car to the driver for some purpose, and regardless of whether the person in possession of the car observes or breaks the contract of bailment.

Courts in other states where the statute specifically requires the inclusion of an omnibus clause in a liability policy say the legislation, being remedial in nature, should be interpreted to subserve the clear public policy, reflected in the statute, to broaden coverage.²³

In their quest to standardize automobile insurance policies, insurance companies have made a subtle though only moderately successful attempt to restrict their liability under the omnibus clause. The omnibus clause as it appears in many of the modern policies, extends coverage to "any person using the automobile with the permission of the named insured, provided his *actual* operation or (if he is not operating) this other *actual* use thereof is within the scope of such permission." [emphasis supplied]²⁴ The insertion of the word "actual" in the policies would appear to be an attempt by the companies to force upon the courts the "strict" or at the most the "minor deviation" rules. As illustrated by the cases, this attempt has met with mixed success. Some hold the insertion of "actual use" is intended to refer to the use at the time of the accident and that particular use must be with the permission of the named insured, thus adopting the "strict" conversion rule.²⁵ It appears that just as many courts have determined that the insertion "does not add or detract from the insurer's liability."²⁶ Cases following the latter view were cited with approval in a recent Wyoming case.²⁷ It would seem that the wording of the Wyoming statute covering the requirements of an insurance policy for purposes of financial responsibility, W.S. § 31-306 (b) 2 (1957), resembles the old type omnibus clauses omitting the reference to actual use. It is doubtful that a policy could deviate from, or restrict, the construction of the statute. Therefore it would seem that in Wyoming the words "actual use" would not add or detract from the liability imposed on the insurer.

This leads us to investigate the position which the Wyoming courts might take if confronted with a difficult and border-line scope of permission question. The Supreme Court did consider an omnibus question in

23. *Jordan v. Shelby Mutual Plate Glass and Casualty Co.*, 142 F.2d 52, (C.C.A. 4th Va., 1944).

24. 1963 Revision of the Standard Family Automobile Liability Policy.

25. *Johnson v. Maryland Casualty Co.* (D.C. Wisc., 1940) 34 F. Supp. 870; *Gulla v. Reynolds*, 82 Ohio App. 243, 81 N.E.2d 406 (1948); *Hartford Accident and Indemnity Co. v. Peach*, 193 Va. 260, 68 S.E.2d 520 (1952); *Folden v. Wolf* (Ohio App.) 67 Ohio 85, 119 N.E.2d 90 (1951).

26. *Waits v. Indemnity Insurance Co. of N.A.*, 215 La. 349, 40 So. 2d 746 (1949); *Sun Underwriters Insurance Co. v. Standard Accident Insurance Co.* (La. App.) 47 So. 2d 133 (1950); *Collins v. New York Casualty Co.*, 82 S.E.2d 288 (W.Va. 1954); *Hauser v. Aetna Casualty and Surety Co.* (La. App.) 185 So. 493 (1939).

27. *Phoenix Assurance Company of New York v. Latta*, 373 P.2d 146 (Wyo. 1962).

Phoenix Assurance Co. of New York v. Latta,²⁸ but the nature of the case permitted the court to put aside determination of the rule to be applied. In that case a drilling superintendent had sole use of a company car, supposedly to be used only for purposes of the business. At the time of the accident the employee was traveling with a female passenger to have dinner. The court found him to be within the coverage of the omnibus clause at the time, holding the determination to be for the trial judge and giving much weight to the fact that the employee had continuous permission to use the automobile with no other contemplated means of transportation. In so finding, the court may have created some precedent for assertion of the "initial permission" rule, in saying:²⁹

Some of the authorities hold that initial permission of an owner for the use of an automobile by another is all that is required to bring use of the vehicle within an omnibus clause of a policy. (citing cases) We do not consider it necessary for us to adopt this liberal view, and we do not pretend to say that initial permission in all cases will be sufficient to bring the use of an automobile within an omnibus clause of a liability policy.

The facts and the result of this case would seem to support the liberal rule were it not for the lack of any other transportation for the employee and the language of the court.

It should be noted for purposes of prophecying a potential decision, that Wyoming has enacted a Safety Responsibility Act.³⁰ In order to show proof of financial responsibility under the act, if circumstances require a driver to do so, an automobile liability policy must include an omnibus clause.³¹ Therefore, it would seem that the Wyoming legislature has expressed an intent to protect innocent traffic victims. Since an omnibus clause is part of this scheme, it may follow that a court would construe such a clause liberally to effectuate the intention of the legislature and might very well adopt the "liberal" or "initial permission" view in application of the omnibus clause.

—MICHAEL SULLIVAN

28. *Ibid.*

29. *Id.* at 150.

30. Wyo. Stat. §§ 31-277 to—315 (1957).

31. Wyo. Stat. § 31-306 (1957).

AUTHORITY OF THE STATE AND LOCAL GOVERNMENTS TO LEGISLATE IN REGARD TO MOTOR VEHICLES

With the enactment of the Uniform Act Regulating Traffic in 1955¹ the Legislature of the State of Wyoming once again asserted its authority over public highways and streets in the state and the operation of motor vehicles upon them.

As a general proposition, the power to regulate the use of public roads and highways is primarily the exclusive prerogative of the individual states.² The determination of what constitutes a public highway is exclusively within the province of the legislature.³ The procedure for creating a public highway is controlled by statutory and constitutional limitations.⁴ There cannot be a road denoted as being public unless there is recognition of it as such by the proper public authorities.⁵

Case law has attributed the power of individual states over public roads and highways within their boundaries to three basic concepts. First, the state derives its authority from a proprietary interest acquired by state expenditures on the construction and maintenance by it of public highways.⁶ This view has been rejected in Wyoming.⁷ The State of Wyoming does not own its highways in a proprietary capacity because they are constructed and maintained with funds derived from taxes and contributions from the general public.⁸ It would be more proper to state that one of the prime requisites of a public highway is that it is maintained by public authorities.⁹ Second, because the streets and highways are built and maintained at public expense for the use of the general public in the ordinary manner, the state, and the city as an arm of the state, have absolute control over them in the interest of the people of Wyoming.¹⁰ Third, the source most frequently used to sustain a state's authority to regulate motor vehicles is the police power vested in the individual states.¹¹ This power extends to control and regulation of residents and nonresidents on

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1. Wyo. Stat. §§ 31-77 to 247.
 2. 7 Am. Jur. 2d, *Automobiles and Highway Traffic* § 12; *Smith v. State Highway Commission*, 185 Kan. 445, 346 P.2d 259 (1959).
 3. *Nixon v. Edwards*, 72 Wyo. 274, 264 P.2d 287 (1953).
 4. *Ibid.* Wyo. Stat. § 24-1 (1957). This statute defines the establishment of public roads on maps and plats of the Federal government, the state, and boards of county commissioners and the recording thereof.
 5. *Nixon v. Edwards*, *supra* note 3, at 291. For prescriptive use making a road public there must be; 1) a public use for the prescriptive period and 2) a recognition of the road as a public road by the proper public authorities.
 6. *Collins-Dietz Morris Co. v. State Corporation Commission*, 134 Okla. 121, 7 P.2d 123, 130, 80 A.L.R. 572 (1931).
 7. *Weaver v. Public Service Commission of Wyoming*, 40 Wyo. 462, 278 Pac. 542 (1929).
 8. *Ibid.* *State v. Luttrell*, 159 Neb. 641, 68 N.W.2d 332 (1955).
 9. *Nixon v. Edwards*, *supra* note 3, at 293. Also consonant with the theory of public maintenance is the Uniform Act Regulating Traffic. Wyo. Stat., § 31-78 (h) (1) (1957), defines street or highway as "The entire width between the boundary lines of every way publically maintained when any part thereof is open to the use of the public for purposes of vehicular travel."
 10. *Public Service Commission of Wyoming v. Grimshaw*, 49 Wyo. 158, 53 P.2d 532 (1936). *Weaver v. Public Service Commission*, *supra* note 7.
 11. *Weaver v. Public Service Commission*, *supra* note 7.

the public highways.¹² The police power of a state is not referable to any particular source of the Federal Constitution, but is commonly delineated as being a power not expressly delegated to the states, but one which is reserved.¹³ In order for there to be a valid exercise of the police power, the regulations under it must tend to prevent offenses, or preserve the public health, morals, safety, or welfare.¹⁴ The validity of legislative enactments rests on several criteria. In general, the legislation must not be contrary to the Constitution and must meet the standard of reasonableness.¹⁵ Similar restrictions are placed upon municipal legislation.¹⁶

Wyoming has not decided the status conferred upon one holding a driver's license. Generally, the question revolves around the concept of a natural, unqualified right to use the highways versus the concept that use of the public highways is a qualified privilege.¹⁷ The controls and limitations exerted by the authorities in specific instances frequently receive their basis from the particular use made of the highway by the individual.¹⁸ As would be expected, commercial usage would require greater control than ordinary uses.

The enactment of the Uniform Act for Regulating Traffic¹⁹ clarified the status of legislation enacted by cities and towns to regulate traffic within their jurisdictional and geographical limits.²⁰ This act of the legislature was designed to provide uniform traffic laws "throughout the state and in all political subdivisions and municipalities."²¹ Because state jurisdiction over the streets and highways has extended this far, it has been held that a municipality may not prohibit use of the streets within its precincts.²² The

12. *Hess v. Pawlowski*, 274 U.S. 352, 356 (1927).

13. 11 Am. Jur. Constitutional Law § 245.

14. *State ex rel Sampson v. City of Sheridan et al.*, 25 Wyo. 347, 170 Pac. 1 (1918). "Thus, the state legislative bodies, as the chosen representatives of the people of the state, may lawfully enact all manner of wholesome and reasonable laws which it may deem proper for the welfare of the people, provided such enactments are not repugnant to the Constitution." *Fisher, Vehicle Traffic Law* 66 (1961).

15. *State ex rel Sampson v. City of Sheridan et al.*, supra note 14, at p. 3. "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. . . . There must be some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof."

16. *Western Auto Transports v. City of Cheyenne*, 57 Wyo. 351, 120 P.2d 590 (1942).

17. *Eastwood v. Wyoming Highway Department*, 301 P.2d 818, 821 (1956). "It may be said that those courts who have disapproved statutes which provided for summary revocation of a drivers license have tended to hold that fundamentally the license to drive is a right, denial of which without due process is a violation of both federal and state constitutions . . ." Courts which view the license to drive as a privilege take a contrary view. *Public Service Commission of Wyoming v. Grimshaw*, 49 Wyo. 158, 53 P.2d 1 (1936), suggests that the ordinary citizen, who uses Wyoming highways, does so as a matter of common right; but that those who use the highways as a means for private gain, such as common carriers, are subject to broader controls due to special or exceptional uses of the public highways.

18. *Public Service Commission v. Grimshaw*, 49 Wyo. 158, 53 P.2d (1936).

19. Wyo. Stat. §§ 31-77 to 247 (1957).

20. 147 A.L.R. 522.

21. Wyo. Stat., § 31-85 (1957).

22. *Western Auto Transports v. City of Cheyenne*, supra note 16.

grant of a right to use highways of the state deprives "local authorities" of the power to prohibit the use of the streets and highways within the local area.²³ The power of the state acting through its legislature to delegate authority to regulate motor vehicles to administrative bodies and municipal corporations was well settled before the enactment of the uniform laws in 1955.²⁴

Two basic theories have been evolved to explain the source of municipal powers. First, the older theory, developed when the population was quite sparse, is that municipalities have "inherent power" to govern local affairs.²⁵ Second, because municipalities are only "creatures" of the state they have only powers given to them by their creator.²⁶ One writer suggests that the "creature concept" represents more of a "limitation" on the "inherent rights concept" rather than the two concepts being diametrically opposed.²⁷ Thus, while the state is the source of the police powers exercised by municipalities,²⁸ the municipalities may reasonably exercise jurisdiction over affairs which the legislature has expressly or impliedly delegated to the municipal concern.²⁹

The legislature is specifically charged with the duty to provide by general laws for the organization of municipal corporations in Wyoming.³⁰ Three cities in Wyoming derive their existence and powers from special charters enacted in the latter part of the last century.³¹ In addition Wyo. Stat. § 31-85 (1957), provides;

Local authorities may, however, adopt by ordinance, traffic regulations either similar to the regulations contained herein, or additional regulations so long as they are not in conflict with provisions

23. *Ibid.*

24. *Public Service Commission of Wyoming v. Grimshaw*, 49 Wyo. 158, 53 P.2d 1 (1936). *Blumenthal v. City of Cheyenne*, 64 Wyo. 75, 186 P.2d 556 (1947). *Western Auto Transports v. City of Cheyenne*, 57 Wyo. 351, 120 P.2d 590, 593 (1942). "But merely because the state has such power, it by no means follows that the City of Cheyenne has it also. Municipalities are the creatures of the legislature. They have only such powers as have been granted by the state. Streets in municipalities are part of the highways of the state, and the legislature has primary power to control and regulate them . . ."

25. *Buchholz, Home Rule: A Solution for Municipal Problems?* 16 Wyo. L.J. 47, 49 (1961).

26. *Ibid.*

27. *Ibid.*

28. 37 *Am. Jur.*, *Municipal Corporations* § 279.

29. *Blumenthal v. City of Cheyenne*, 64 Wyo. 75, 186 P.2d 556 (1947). *Clayton v. State*, 38 *Ariz.* 135, 297 *Pac.* 1037 (1931). *Stewart v. City of Cheyenne*, 60 Wyo. 497, 154 P.2d 355, 360 (1944). The case above involved a challenge of the legislature's authority to provide by statute for a municipal board of utilities. ". . . it has been recognized from the very beginning of Wyoming that the legislature has the right to prescribe the powers and the duties of municipalities and these include not only governmental affairs but strictly local affairs as well." But, in *Town of Green River v. Fuller Brush Co.*, 65 *F.2d* 112, 115 (1933), where the constitutionality of the *Green River Ordinance* was in issue it was stated, ". . . local authorities intrusted with regulation of such matters . . . are primarily the judges of the necessities of local situations calling for such legislation. . . ."

30. *Wyo. Const.*, Art. 13, § 1.

31. See *Wyo. Stat.* §§ 15-636 to 739 (1957). Charter cities are *Cheyenne* (1877), *Laramie* (1884), and *Rawlins* (1886).

of this act, and the said authorities shall have the express authority to enforce said traffic regulations so adopted, by action in their respective local municipal courts.

Other statutes both limit and specify the extent of the police power which may be exercised to regular motor vehicles in Wyoming municipalities.³² The statutes specify certain areas which are of peculiar local concern.³³ There are also established criteria for the exercise of local authority. For example, a condition precedent to alteration of the prima facie speed limits established by Wyo. Stat. § 31-130 (1957), by "local authorities" is that there must be conditions extant based upon "engineering and traffic investigations" which warrant change in speed limits.³⁴ Again, the speed limits established by local authorities must be reasonable and safe.³⁵ The fact that the authority to regulate motor vehicles comes from several sources does not hinder enforcement of municipal regulation of motor vehicles. The authority to adopt ordinances may be derived from a single grant or from a combination of enumerated powers.³⁶

Because Wyoming has no general form of home rule legislation,³⁷ ordinances conflicting with or repugnant to legislative enactments governing the use of motor vehicles will be invalid even if the ordinance might regulate a local matter.³⁸ Municipal legislation must not conflict with either the general policy or the express enactments of the state.³⁹ In *Blumenthal v. City of Cheyenne*⁴⁰ the authority of the city to exclude certain large, commercial vehicles from all city streets except the established truck route was upheld. The court found that neither the Constitution nor the laws had been transcended, that the enactment was necessary in the public interest, and that the enactment was "reasonably" calculated to prevent possible harm caused by heavy trucks passing through the "business" area of the city.⁴¹ Even when municipalities do act, they must not act arbitrarily in local regulation, for there must be a clear and substantial connection between the purpose of the enactment and the provisions contained in it.⁴²

The Uniform Act Regulating Traffic of 1955 served the purpose of making clearer the relative responsibilities towards regulating highway traffic between the state and individual municipalities. The state dele-

32. Wyo. Stat. §§ 31-86, 87, 133, 137, 156 (1957).

33. *Ibid.*

34. *Ibid.*

35. *Ibid.*

36. 37 Am. Jur., Municipal Corporations § 279.

37. 16 Wyo. L.J. 47., *supra* note 26.

38. 147 A.L.R. 522.

39. *Western Auto Transports v. City of Cheyenne*, 57 Wyo. 351, 120 P.2d 590 (1942). This case ruled invalid a prohibitory license tax imposed on certain commercial vehicles hauling automobiles. The local enactment was held to be repugnant to the state's grant to use the highways under license.

40. 64 Wyo. 75, 186 P.2d 556 (1947).

41. *Ibid.*

42. *State ex rel. Sampson v. City of Sheridan et. al.*, 25 Wyo. 347, 170 Pac. (1918).

gates its authority to regulate under its police power to the municipalities in matters of local concern. Both state and municipality are limited by case law standards as to the validity of their regulations. The body of law developed in this area in Wyoming is still sparse because Wyoming and its residents are not yet as "rights conscious" as more populous states and because the expense and time involved in appealing matters settled in justice courts and municipal courts beyond the district court level is prohibitory.

ALAN B. JOHNSON

IMPLIED CONSENT FOR INTOXICATION TESTS

Ever since automobiles became more than a novelty, the problem of the drinking operator has been an increasing threat to the health, welfare, and safety of the people of the United States. In Wyoming the incidence of drinking in fatal accidents has increased from 20.7% in 1957 to 28.1% in 1961.¹

Wyoming, like the other states, has been cognizant of this problem. We have a statute providing for a fine of not more than one hundred dollars or not more than thirty days in jail, or both, plus suspension of a license, if a person is convicted of driving while "under the influence of intoxicating liquor to a degree which renders him incapable of safely driving a motor vehicle."²

However, obtaining a conviction for this offense under the statute, requires proof beyond a reasonable doubt that the defendant "has taken into his stomach a sufficient quantity of intoxicating liquor so as to deprive him of the normal control of his bodily or mental faculties." *State v. Dobbs*.³ In its form prior to 1955 the statute placed an almost impossible burden on the prosecution and very few convictions were obtained. Basically, the problem was one of proof. Establishing intoxication required testimony as to the outward symptoms shown by the defendant, and convincing witnesses were hard to obtain.

In recognition of this fact, Wyoming added to its statute in 1955⁴ a provision allowing the results of various chemical tests to be admitted as evidence, and setting up a presumption that any person shown by such tests to have ".15% or more by weight of alcohol" in his blood stream will be presumed to be under the influence of intoxicating liquor to a degree which renders him incapable of safely driving a motor vehicle. This aids in the solution of the problem of proof by reducing the question to a matter of reliable objective standards. However, the problem of the drunken driver has not been eliminated, for the simple reason that there are no means provided in the statute compelling anyone to undergo these tests; they were and still are purely a matter of voluntary submission. For this reason, only those persons who are confident that the tests will vindicate them ever volunteer. For what it is worth the prosecution may be able to comment upon the refusal to take a test,⁵ but this is a poor sub-

1. Traffic Accident Facts, 1961, prepared by the Accident Reports Section of the Wyo. Highway Dept.
2. Wyo. Stat. § 31-129 (1957).
3. 70 Wyo. 26, 244 P.2d 280, 284 (1952).
4. Chapter 97, § 1 Session Laws of Wyo. (1955).
5. *State v. Durrant*, 188 A.2d 526 (Delaware, 1963); *City of Columbus v. Waters*, 124 N.E.2d 841 (Ohio, 1954); *State v. Buek*, 80 Idaho 296, 328 P.2d 1065 (1958); *State v. Gatton*, 60 Ohio App. 192, 20 N.E.2d 265 (1938); *State v. Benson*, 230 Iowa 1168, 300 N.W. 275 (1941). Contra, see *State v. Serverson*, 75 N.W.2d 316 (North Dakota, 1956); *People v. Stratton* 286 App. Div. 323, 143 N.Y.S.2d 362, aff. 133 N.E.2d 516, 1956; *People v. Stratton* 286 App. Div. 323, 143 N.Y.S.2d 362, aff. 133 N.E.2d 516 (1956); *Duckworth v. State*, 309 P.2d 1104 (Oklahoma, 1957).

stitute for the tests and probably not the solution that the legislators were hoping for when they added the chemical tests provision to the statute.

At the present time the alternative is for the arresting officers to force the defendant to submit to the intoxication tests. This is especially tempting where the defendant is unconscious. This procedure probably violates several of the defendant's constitutional rights and therefore is likely to be inadmissible as evidence.

The main constitutional issue likely to be raised, if the tests are forced, is that the taking of the blood, breath, urine, or whatever, constitutes an unreasonable search and seizure in violation of the Fourth Amendment to the United States Constitution, and Article 1, Section 4, of the Wyoming Constitution. If the evidence is so obtained, it is inadmissible as evidence against the defendant.⁶

Clearly, the taking of a body sample is considered to be a search and seizure within the meaning of the Fourth Amendment.⁷ The question then to be resolved is whether the search is reasonable and lawful. A search and seizure will be lawful if made pursuant to a valid search warrant,⁸ if made as incident to a lawful arrest,⁹ or if made with the consent of the person.¹⁰ Since we are assuming that the consent of the person involved has not been obtained, we will examine the other two possibilities only.

The law of arrest is well settled and a summary should suffice. A lawful arrest for a misdemeanor such as drunken driving may be made pursuant to a valid warrant of arrest, or if the misdemeanor is actually committed in the presence of the arresting officer.¹¹ If one of these two elements is present, the officer may search the person of the defendant for evidence.¹² An officer could not arrest without a warrant on his mere suspicion that the person is drunk. If the arrestee is later acquitted because of the difficulty of proving drunkenness, the officer might be subject to civil liability.

The Wyoming Supreme Court set out the requirements of a valid search warrant in *State v. Patterson*.¹³ The opinion points out that the supporting affidavit must be supported by probable cause and not merely information and belief.

The second possible constitutional objection to forcing the tests and

6. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Silverman v. U.S.*, 365 U.S. 505 (1961).

7. *State v. Wolf*, 53 Del. 88, 164 A.2d 865 (1960); *State v. Kroening*, 274 Wis. 266, 79 N.W.2d 810 (1957).

8. Wyo. Const. art. 1, § 4; *State v. Peterson*, 27 Wyo. 185, 194 Pac. 342 (1920); *Wiggins v. State*, 28 Wyo. 480, 206 P. 373 (1922).

9. *Wiggin v. State*, supra note 8 at 491; *State v. George*, 32 Wyo. 223, 231 Pac. 683 (1924). Pac 683 (1924).

10. *Tobin v. State*, 36 Wyo. 369, 255 Pac 788 (1927).

11. *State v. George*, supra note 9 at 231.

12. *Wiggin v. State*, supra note 8.

13. *Supra* note 8.

attempting to use the results as evidence is that they would probably violate the Wyoming Constitution Article I, Section 11, which states that "No person shall be compelled to testify against himself in any criminal case . . .".¹⁴

There are two views as to the meaning of this provision in the various state constitutions. The majority view is that it only applies to testimonial compulsion.¹⁵ The minority view is that this provision protects from all evidence which requires the active participation of the defendant to obtain, but does not protect from evidence taken from him which merely requires his passive cooperation. Under this view, whether he consented or not would be immaterial.¹⁶ A second minority group applies the protection to all evidence taken from a defendant without his consent including any real evidence taken from his person. Wyoming has had no occasion to meet this issue squarely. However, dictum indicates that the Wyoming court may follow the minority view and apply the restriction to any evidence taken from a person without permission.¹⁷

If Wyoming restricts the meaning of Article 1 Section 11 to testimonial compulsion as many of its neighbors do¹⁸ there would be no problem. If, however, Wyoming would follow the minority view, under any of the tests which require active participation, the evidence would be inadmissible.¹⁹ It is submitted, however, that all of the chemical tests for alcohol in the blood could be performed without defendant's active participation. Of course every one of the tests could be performed without his consent.

The third possibility is that these tests would fall within the *Rochin v. California* rule.²⁰ That case held inadmissible under the due process provision²¹ evidence which was obtained by such a process as "shocks the conscience." It seems highly unlikely that chemical intoxication tests, including blood tests, would shock the conscience. The Supreme Court of Arizona has held that a defendant who refuses to submit to a drunkometer test may be compelled to do so by any force reasonably necessary to fit the apparatus over his head; and that the use of such force does not violate due process.²² A Kansas case has held that chemical tests for intoxication do not violate due process.²³

Clearly these constitutional barriers are formidable enough to prevent the effective use of the Wyoming intoxication test statute if suspects are

14. The Fifth Amendment to the Constitution of the United States is similar, but it has been held in *Twining v. New Jersey*, 211 U.S. 78 (1908) not to be a fundamental right binding on the states under the Fourteenth Amendment.

15. McCormick, *Handbook of the Law of Evidence*, 264; 8 Wigmore on Evidence § 2263; *People v. Trujillo*, 32 Cal.2d 105, 194 P.2d 681 (1948).

16. *Bartletta v. McFeeley*, 107 N.J.Eq. 141, 152 A. 17 (1930); *State v. Sturtevant*, 96 N.H. 99, 70 A.2d 909 (1950); *Aiken v. State*, 16 Ga. App. 848, 86 S.E. 1076 (1915); *People v. Sturman*, 209 Mich. 284, 176 N.W. 397 (1920).

17. *State v. George*, supra note 9 at 236, (dictum).

18. *Idaho State v. Buek*, supra note 5; (*New Mexico*) *Breithaupt v. Abram*, 58 N.M. 385, 271 P.2d 827 (1959); (*Colorado*) *Vigil v. People*, 134 Col. 126, 300 P.2d 545 (1956).

forced to submit to the tests. For this reason it has been proposed that an "implied consent" statute be added to the Wyoming Driver's Licensing Law.²⁴ Basically, such a provision would make the driving on Wyoming highways an implied consent to submit to an intoxication test if arrested on a charge of drunken driving. Upon a refusal, the driver's license of the suspect would be subject to forfeiture. This will not force the drinking driver to submit to an intoxication test, but it would accomplish the legislative purpose by removing him from the highways.

Such a statute would avoid the constitutional objections to the forced use of intoxication tests which have been discussed above. It would appear that the arrest required by the implied consent statute, coupled with the implied consent, would be sufficient to overcome any objection as to unlawful search and seizure.²⁵ There may be a serious question as to whether this arrest provision will protect against an unlawful search and seizure when the defendant was unconscious. There is some authority for the proposition that a person must have understood that he was being arrested.²⁶ However, in *State v. Cram*²⁷ an unconscious person was arrested and given an intoxication test, with the approval of the Supreme Court of Oregon. However, the question apparently was conceded by counsel and not raised on appeal in that instance. If the defendant is conscious and does actively object, he will not be forced to take the tests but his driver's license will be subject to revocation.

Since any evidence obtained by the means provided under the statute would be lawfully acquired, it would not be subject to the self-incrimination provision of the Wyoming Constitution.²⁸

As already pointed out, intoxication tests probably do not shock the conscience so as to violate the Fourteenth Amendment to the United States Constitution, even when performed on an unconscious body. The implied consent statute would provide the additional assurance of implied consent should this question ever arise.

If such a statute were to be enacted, it would have to meet the requirements of substantive and procedural due process to be valid. These requirements are, of course, based on the Fourteenth Amendment to the United States Constitution.

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19. Possibly even under the minority view a blood test would be admissible as it does not require any active participation of the defendant. One would do well to remember that it may be an unreasonable search and seizure, however, and thereby be inadmissible under the doctrine of *State v. George*, supra note 9.
 20. 342 U.S. 165 (1952).
 21. U.S. Const., Amend. 14.
 22. *State v. Berg*, 76 Ariz. 96, 259 P.2d 261 (1953). (Overruled on another point).
 23. *Lee v. State*, 187 Kan. 566, 571, 358 P.2d 765 (1961).
 24. Report No. 63-8 of the Wyoming Legislative Council (1962).
 25. The implied consent *without* the arrest has been held insufficient in *New York, Schutt v. Macduff*, 205 Misc. 43, 127 N.Y.S.2d 116 (1954).
 26. 6 C.J.S., Arrest § 1, 571.
 27. 176 Ore. 577, 160 P.2d 283 (1945).
 28. *State v. George*, supra note 9, holds that evidence obtained as the result of a lawful search and seizure would not violate the privilege against self-incrimination.

The requirements of substantive due process are threefold. The statute must be directed at a matter properly subject to state regulation; the means selected must bear a real and substantial relationship to the objective of the regulation; and the measure must not be unreasonable, arbitrary or capricious.²⁹ Controlling drunken driving is certainly a valid object of state regulation; an implied consent statute would undoubtedly bear a real and substantial relationship to this control in that it would tend to decrease the amount of drunk driving; and there is nothing arbitrary, unreasonable or capricious about such a statute. Hence, it should meet the tests of reasonableness without difficulty.³⁰

The primary requirements of procedural due process are adequate notice and an opportunity to be heard; an implied consent statute patterned after the Uniform Implied Consent Act would stand the test of procedural due process. The Uniform Act provides for notice and a hearing.³¹

It would appear then, that such a statute would be constitutional. This is strengthened by cases, in states which have adopted such statutes, wherein the constitutionality of the implied consent statute was challenged to no avail.³² In only one instance have they been invalidated, and that was the New York case already noticed.³³ After a provision for arrest was amended into the statute, it was sustained.³⁴

The big question remaining is whether it would improve the situation. At least three reasons appear to indicate that it should. First, the pressure of possible loss of driving privileges will encourage borderline persons to take the tests; secondly, persons who know the tests will prove they are drunk and refuse to take them may be removed from the highways as a threat to the safety and welfare of others; and third, knowledge of the existence of the statute may deter people from drinking before they drive.

It seems clear that the provision in the Wyoming Statutes providing for intoxication tests is not functioning as the legislators had hoped it would. It further appears that the addition of an implied consent provision would assist in obtaining adequate regulation and control of the

29. *Nebbia v. New York*, 291 U.S. 502, 525 (1934). The due process provision of the Wyoming Constitution, Article I, Section 6, has been interpreted the same way in *McGowey v. Swan*, 17 Wyo. 120, 96 Pac. 697 (1908).

30. *Lee v. State*, supra note 22, at p. 770 state: "The statute does not compel one in plaintiff's position to submit to a blood test, and does not require one to incriminate himself within the meaning of constitutional provisions. And *neither is it violative of due process.*" (emphasis supplied).

31. Uniform Vehicle Code § 6-205. 1 (d).

31. Uniform Vehicle Code § 6-205. 1 (d).

32. (Kansas) *Lee v. State*, supra note 22; (South Dakota) *Stenstand v. Smith*, 116 N.W.2d (1962); (North Dakota) *Timm v. State*, 110 N.W.2d 359 (1961); (Idaho) *State v. Buek*, supra note 5; (Nebraska) *Prucha v. Dept. of Motor Vehicles*, 172 Neb. 415, 110 N.W.2d 75 (1961).

33. *Schutt v. Macduff*, supra note 24.

34. *Anderson v. Macduff*, 208 Misc. 271, 143 N.Y.S.2d 257 (1955); *Combes v. Kelly*, 152 N.Y.S.2d 934 (1956); *Taylor v. Kelly*, 9 Misc. 2d 240, 171 N.Y.S.2d 909 (1957); *Clancy v. Kelly*, 7 A.D.2d 820, 180 N.Y.S.2d 923 (1958).

drinking driver. Such a statute or a similar one has already been adopted by ten states.³⁵ It could be done in Wyoming through the addition of such a provision to Wyo. Stat. §31-250, (1957) patterned after the following Uniform Vehicle Code Provision:

31-250 (b) (1) Any person who operates a motor vehicle upon the public highways of this State shall be deemed to have given consent, subject to the provisions of sec. 31-129, to a chemical test or tests of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood if arrested or otherwise taken into custody for any offense and if the arresting officer shall have reasonable cause to believe that prior to his arrest the person was driving under the influence of intoxicating liquor. The test or tests shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle upon the public highways of the State while under the influence of intoxicating liquor. The law enforcement agency by which such officer is employed shall designate which of the aforesaid tests shall be administered.

(2) Any person who is dead, unconscious or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent provided by subsection (b) (1) of this section and the test or tests may be administered, subject to the provisions of 31-129.

(3) If a person under arrest refuses upon the request of a law enforcement officer to submit to one or more chemical tests designated by the law enforcement agency as provided in subsection (b) (1) of this section, none shall be given, but the department, upon the receipt of a sworn report of the law enforcement officer that he had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle upon the public highways of this State while under the influence of intoxicating liquor and that the person had refused to submit to the test upon the request of the law enforcement officer, shall revoke his license or permit to drive, or any nonresident operating privilege; or if the person is a resident without a license or permit to operate a motor vehicle in this State, the department shall deny to the person the issuance of a license or permit for a period of six months after the date of the alleged violation, subject to review as hereinafter provided.

(4) Upon revoking the license or permit to drive, or nonresident operating privilege of any person, or upon determining that the issuance of a license or permit shall be denied to the person, as hereinbefore in this section directed, the department shall immediately notify the person in writing and upon his request shall

35. (Idaho) Idaho Code (1961 Supp.) §§ 49-352 to 49-355; (Kansas) Gen. Stat. of Kan. Ann. (1961 Supp.) §§ 8-1001 to 8-1004; (Minnesota) Laws of Minn. 1961, ch. 454; (Nebraska) Rev. Stat. of Neb. (1961 Supp.) § 39-727.03 et. seq.; (New York) McKinney's Cons. Laws of N.Y. Ann. (1961 Supp.) Vehicle & Traffic Law § 1194; (North Dakota) N.D. Century Code Ann. (1961 Supp.) § 39-20-01 to 39-20-12; (South Dakota) S.D.C. (1960 Supp.) § 44.0302-2 et. seq.; (Utah) Utah Code Ann. (1961 Supp.) § 41-6-44.10; (Vermont) Vt. Stat. Ann. (1959 Supp.) Title 23 §§ 1188 to 1194; and (Virginia) Acts of Assembly 1962, ch. 625. 36. *Supra* note 24.

afford him an opportunity for a hearing in the same manner and under the same conditions as is provided in section 31-273 (4) for notification and hearings in the cases of discretionary suspension of licenses, except that the scope of such a hearing for the purposes of this section shall cover the issues of whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle upon the public highways of this State while under the influence of intoxicating liquor, whether the person was placed under arrest, and whether he refused to submit to the test upon request of the officer. Whether the person was informed that his privilege to drive would be revoked or denied if he refused to submit to the test shall not be an issue. The department shall order that the revocation or determination that there should be a denial of issuance either be rescinded or sustained.

(5) If the revocation or determination that there should be a denial of issuance is sustained after such a hearing the person whose license or permit to drive or nonresident operating privilege has been revoked, or to whom a license or permit is denied under the provisions of this section, shall have the right to file a petition in the District Court to review the final order of revocation or denial by the department in the same manner and under the same conditions as is provided in section 6-211 in the cases of discretionary revocations and denials.

(6) When it has been finally determined under the procedures of this section that a nonresident's privilege to operate a motor vehicle in this State has been revoked, the department shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he has a license.

A simple alternative to this amendment might be available by stamping a consent on the license and thereby making the consent a condition precedent to driving privileges on the state's highways. There is some precedent in hunting license provisions which provided for consent to be searched in some states.

Two problems to be considered in connection with this alternative are the Schutt case,³⁶ which invalidated a New York statute because it did not provide for an arrest, and the possible problem of out-of-state drivers. Everyone driving in Wyoming obviously consents to the provisions on the license he must purchase, but out-of-state drivers clearly do nothing to give such consent. To reach them will require that the consent be given through use of the highways, and if nonresidents must be so treated, complications could be divided by treating residents in the same way.

GERALD RAY MASON

WARRANTY AS A LAWYER'S TOOL IN MOTOR VEHICLE CASES

A, B and C, taking some beer with them, left the tavern to drive home. A was driving his new car, B and C were guests. A was driving 85 miles per hour and refused to slow down when asked. At this point a defective rivet in the right front rim fell out causing the tubeless tire to go flat. The care went out of control and wrecked. Serious injury to the occupants resulted.

These are the facts of *Ford Motor Co. v. Arguello*, decided by the Wyoming Supreme Court on June 19, 1963.¹

Let us suppose that B, paralyzed from the waist down, with no hope of recovery and with a young wife and two children, enters your office and relates this story. Immediately you are filled with apprehension, for this case is loaded with obvious problems!

You have three prospective defendants, the first being the driver who is insured as to the driver's liability. The guest statute is clearly applicable, there is an assumption or risk problem, a possible joint enterprise problem, and there is a very real proximate cause issue.

The second prospective defendant is the dealer, who may be liable for possible misrepresentation as to the fitness of the car. It would be indeed difficult to convince the court or a jury that this injury resulted from the dealer's negligent inspection and preparation of the car for sale. As to the liability of the dealer, one still encounters the problems of assumption of risk, contributory negligence, imputed negligence, and proximate cause.

The manufacturer is the third possible defendant. The burden of proving that the manufacturer was negligent in the manufacturing or in the inspection of rivets presents a tremendous problem. Assumption of the risk, contributory negligence, imputed negligence, and proximate cause present additional obstacles. However, *res ipsa loquitur* may be helpful in proving negligence.

But what about warranty? Does the dealer warrant the products he sells to be safe? Does the manufacturer warrant its products?

Neither the plaintiff-appellee's brief² nor the opinion of the Wyoming Supreme Court give any indication that a warranty theory was alleged or relied on in this modern replica of *MacPherson v. Buick Motor Company*.³

This article is devoted to an analysis of express and implied warranty

1. *Ford Motor Co. v. Arguello*, 382 P.2d 886 (Wyo. 1963).

2. No. 3054. Filed June 20, 1962.

3. *MacPherson v. Buick Motor Company*, 217 N.Y. 382, 111 N.E. 1050 (1916). A Cardozo opinion.

as a lawyer's tool under the Uniform Commercial Code as adopted in Wyoming.⁴

Historically, implied warranty grew out of express warranty in the early nineteenth century. Both express and implied warranty are actions on contract, and both result in "strict liability" to the warrantor. The development of warranty as a legal concept has been recent, rapid, legislative, and judicial.⁵

The Uniform Sales Act was first to crystallize the law of warranty.⁶ The Uniform Sales Act has been superseded by the Uniform Commercial Code in many jurisdictions. Wyoming adopted a slightly modified version of the Uniform Commercial Code in 1961.⁷

EXPRESS WARRANTY. The Uniform Commercial Code section 2-313 superseded Uniform Sales Act sections 12, 14, and 16 in governing statutory express warranty. An express warranty may be written or oral or may arise from the showing of a sample or model.⁸ It may arise from "any affirmation of fact or promise made by the seller."⁹ The express warranty must be reasonably relied upon by the buyer and thus become "part of the basis of the bargain";¹⁰ however, it must be distinguished from mere "puffing" or "seller's talk." An affirmation merely of the value of the goods, or commendation of the goods, does not create a warranty.¹¹

It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty.¹²

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4. A good discussion comparing the Uniform Sales Act and Wyoming's two warranty cases with the provisions of the Uniform Commercial Code is found in White, Sales Warranties Under Wyoming Law and the Uniform Commercial Code, 14 Wyo. L.J. 246 (1960). See also Day, Manufacturers' Liability for Breach of an Implied Warranty, 14 Wyo. L.J. 55 (1959). (This article contains a good discussion of the privity requirement as it existed in 1959, and points out the trend to overrule privity as a condition to warranty); Salt Lake Hardware Co. v. Connell, 47 Wyo. 145, 34 P.2d 123 (1933); International Harvester Co. v. Leifer, 42 Wyo. 283, 293 Pac. 381 (1930).
 5. Prosser, Torts, § 83, at 493-4. (2d ed. 1955). Prosser, The Implied Warranty of Merchantable Quality, 27 Minn. L. Rev. 117 (1943). Corman, The Implied Warranty of Fitness for Particular Purpose, 1958 Wis. L. Rev. 219.
 6. Uniform Sales Act §§ 12-16 Wyo. Stat. §§ 34-177 to -181 1957, Superseded by the U.C.C. in 1961.
 7. Uniform Commercial Code §§ 2-313 to -318, Wyo. Stat. §§ 34-2-313 to -318 (1957) (Supp. 1963); Wyo. Stat. § 34-2-318 (1957) (Supp. 1963) differs materially from the official code version.
 8. Uniform Commercial Code § 2-313(1), Wyo. Stat. § 34-2-313(1) (1957) (Supp. 1963).
 9. Uniform Commercial Code § 2-313(1), Wyo. Stat. § 34-2-313(1) (1957) (Supp. 1963); Loomis Bros. v. Queen, 17 Pa. D.&C. 2d 482, 46 Del. Co. 79 (1958); Mack v. Coogan, 8 Chester County 233 (Pa.).
 10. *Ibid.*
 11. Uniform Commercial Code § 2-313(2), Wyo. Stat. § 34-2-313(2) (1957) (Supp. 1963); Vold, Sales, 430-1 (2d ed. 1959); for a collection of cases on advertising as mere puffing or statements of fact, see 158 A.L.R. 1413, point 5. For the effect of advertising on products liability generally see 75 A.L.R.2d 112, 128-40.
 12. Uniform Commercial Code § 2-312(2), Wyo. Stat. § 34-2-312 (1957) (Supp. 1963); Hansen v. Firestone Tire and Rubber Co., 276 F.2d 254 (6th Cir. 1960); Mack v. Coogan, 8 Chester Co. 233 (Pa.).

Whether or not the affirmation made gives rise to an express warranty is usually a question of fact for the jury but may, under certain circumstances, be decided as a question of law by the court.¹³

IMPLIED WARRANTY: MERCHANTABILITY; USAGE OF TRADE; FITNESS FOR PARTICULAR PURPOSE.

The implied warranty of merchantability is provided for in section 2-314 of the Uniform Commercial Code. From a practical standpoint, this is probably the most important of the warranties.

A warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.¹⁴ The code sets forth criteria for determining whether goods are merchantable.¹⁵ The goods must (among other things) be fit for the ordinary purposes for which such goods are used.¹⁶ Where the goods are suitable to some degree for the intended purpose, whether or not they are suitable to the degree which makes them acceptable is a jury question.¹⁷

The implied warranty of fitness for particular purpose is found "where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and the buyer is relying on the seller's skill or judgment to select or furnish suitable goods."¹⁸

The concept of "particular purpose" acquires more meaning when it is contrasted with "ordinary purpose for which such goods are used."¹⁹ Thus, this warranty is by definition more narrow than the implied warranty of merchantability. It is sufficient that the seller has reason to know that the goods are to be used for a particular purpose,²⁰ and parol evidence is admissible to show such knowledge and reliance.²¹ The purchase of goods by trade name does not preclude the finding of reliance on the implied warranty of fitness for particular purpose.²²

Other implied warranties may arise from course of dealing or usage of trade.²³

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13. Oral Warranty — Fact or Law Question, 67 A.L.R.2d 619.
 14. Uniform Commercial Code § 2-314(1), Wyo. Stat. § 34-2-314(1) (1957) (Supp. 1963); subject to exclusion or modification under § 2-316.
 15. Uniform Commercial Code § 2-314(2), Wyo. Stat. § 34-2-314(2) (1957) (Supp. 1963).
 16. Uniform Commercial Code § 2-314(2), Wyo. Stat. § 34-2-314(2) (1957) (Supp. 1963); *Grucella v. General Motors Corp.*, 10 Pa. D.&C. 2d 65 (Pa.).
 17. *Loomis Bros. Corp. v. Queen*, 46 Del. 79, 17 D.&C. 2d 482 (Pa. 1958).
 18. Uniform Commercial Code § 2-315, Wyo. Stat. § 34-2-315 (1957) (Supp. 1963) subject to exclusion or modification under § 2-316.
 19. Uniform Commercial Code § 2-314(2)(c), Wyo. Stat. § 34-2-314(2)(c) (1957)
 20. Uniform Commercial Code § 2-315, comment 1. (Supp. 1963).
 21. *Lebanon Co., L.J. 385* (Pa.); *Holland Furnace Co. v. Jackson*, 106 Pittsb. Leg. J. 341 (Pa.).
 22. Implied warranty of fitness on sale of article by trademark, trade name, or other particular description. 90 A.L.R. 410.
 23. Uniform Commercial Code § 2-314(3), Wyo. Stat. § 34-2-314(3) (1957) (Supp. 1963) subject to exclusion or modification under § 2-316.

EXCLUSION AND MODIFICATION OF WARRANTIES. The Uniform Commercial Code section 2-316 covering exclusion or modification of warranties is a tool of self-defense for manufacturers against numerous spurious claims brought by plaintiffs searching for a deep pocket which a jury could sympathetically pick for their benefit.²⁴

Freedom of contract is the essential defense in behalf of the disclaimer clauses.²⁵

The purpose of section 2-316 is to protect the buyer from "surprise" in the form of unbargained for and unexpected language.²⁶ Under the code the express warranty and the implied warranty of fitness for particular purpose are more easily excluded and modified than is the implied warranty of merchantability. To exclude an implied warranty of merchantability or any part of it "the language must mention merchantability and in the case of a writing must be conspicuous."²⁷ This language of the code should be sufficient to void the disclaimer of implied warranty found in most automobile contracts.²⁸

The provisions for exclusion of warranties must be interpreted in a manner consistent with the general purpose of the code, that is, to promote fair dealings in business contracts.²⁹ In order to forfeit all of the buyer's warranty rights the exclusion under section 2-316 should be so clear and specific that there can be no doubt as to the meaning of the contract and the intent of the parties.³⁰

Under the code a contract providing "This contract contains the entire agreement between the parties. There are no warranties, express or implied other than herein stated," has been held insufficient to exclude either implied warranty of merchantability or implied warranty of fitness for particular purpose.³¹

24. 1 Corbin, *Contracts*, § 128 (Supp. 1961); Wooters, *Warranty Disclaimers and Limitations of remedy under the Uniform Commercial Code*, 43 B.U.L. Rev. 396, 407 (1963).

25. *Hall v. Everett Motors, Inc.*, 340 Mass. 430, 165 N.E.2d 107 (1960).

26. Uniform Commercial Code § 2-316, comment 1.

27. Uniform Commercial Code § 2-316(2), Wyo. Stat. 34-2-316(2) (1957) (Supp. 1963). Conspicuously defined, Uniform Commercial Code § 1-201(10), Wyo. Stat. § 34-1-201(10) (1957) (Supp. 1963).

28. *Henningson v. Bloomfield Motors Inc. and Chrysler Corp.*, 32 N.J. 358, 161 A.2d 69 (1959), 75 A.L.R.2d 1. (This case gives a good example of a manufacturer's disclaimer clause which would not pass the U.C.C. test.)

29. *L.&N. Sales Co. v. Little Brown Jug, Inc.*, 12 Pa. D.&C. 2d 469.

30. *Hartman v. Green*, 17 Som. Leg. J. 341, 35 Wash. Co. 111 (Pa.) (dictum). Necessity of buyer's actual knowledge of disclaimer of warranty of personal property, 160 A.L.R. 357.

31. *Holland Furnace Co. v. Jackson*, 106 Pittsb. Leg. J. 341 (Pa.), *L.&N. Sales Corp. v. Green*, 17 Som. Leg. J., 35 Wash. Co. 111 (Pa.). *Miller & Co. v. Gibbs*, 6 Lebanon L. J. 344; *Levitz Furniture Co. v. Fields*, 6 Lebanon L. J. 385 (Pa.) (an implied warranty of fitness for particular purpose was not excluded by a provision in the contract where the buyer acknowledged receipt of the goods, "having first examined and tested it, and found it to be in first class condition, and as represented by the seller"); *Tumpson Co. v. Castelli*, 20 Beaver Co. L.J. 127 (Pa.); validity of provision of contract of sale of personal property negating implied warranties. 117 A.L.R. 1350; see also 133 A.L.R. 1363.

This section of the code does not solve the problem of disclaimer found in contracts of adhesion such as the motor vehicle manufacturers offer the purchaser.³² But the courts have a remedy for such situations on the grounds of lack of consideration and unconscionability.³³

CUMULATION AND CONFLICT OF WARRANTIES. "Warranties whether express or implied shall be construed as consistent with each other and as cumulative."³⁴ If such construction is unreasonable, then the intention of the parties governs.³⁵ Express warranties displace inconsistent implied warranties other than the implied warranty of fitness for particular purpose.³⁶

THIRD PARTY BENEFICIARIES OF WARRANTIES are provided for in section 2-318. This provision amounts to a statutory exception to the privity rule. Wyoming defines the third party beneficiary to be "any person who may reasonably be expected to use, consume, or be affected."³⁷ In this respect it is more liberal than is the official Uniform Commercial Code section which provides that the third party beneficiary is "any natural person who is in the family or household of his buyer or who is a guest in his home."³⁸

The Wyoming version is subject to two interpretations. Whether it moves privity back one step to permit suit against the immediate vendor's supplier or whether it casts the entire requirement of privity to the four winds is uncertain. The latter view appears more in keeping with modern trends.

Under the officioal version of the Uniform Commercial Code, Arguello would clearly not be a third party beneficiary to any warranties to A because he was not a member of the family or a guest in A's house. Under the Wyoming version Arguello could have qualified .

Whether or not Wyoming's provision yields a different result is uncertain. In *Thompson v. Reedman Motors and General Motors Corp.*³⁹ a non-family auto guest was injured when the accelerator pedal stuck in a new Chevrolet. The court found that plaintiff-guest was not a third

32. Contracts of Adhesion, in this context, are those in which one party is in a position to be able to offer the other a rigid unbargained "contract" on a take it or leave it basis; see generally, Ressler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 Colum. L. Rev. 629 (1943); Wooters, *Warranty Disclaimer under the U.C.C.*, 43 B.U.L. Rev. 396 (1963).

33. Uniform Commercial Code § 2-302, Wyo. Stat. § 34-2-302 (1957) (Supp. 1963); Uniform Commercial Code § 2-719, Wyo. Stat. § 34-2-719 (1957) (Supp. 1963); *Henningson v. Bloomfield Motors and Chrysler Corp.*, 32 N.J. 358, 161 A.2d 69 (1960).

34. Uniform Commercial Code § 2-317, Wyo. Stat. § 34-2-317 (1957) (Supp. 1963); *L.&N. Sales Co v. Stuski*, 188 Pa. Sup. 117, 146 A.2d 154 (1958).

35. Uniform Commercial Code § 2-317, Wyo. Stat. § 34-2-317 (1957) (Supp. 1963); express warranty as excluding the implied warranty of fitness, 164 A.L.R. 1231.

37. Wyo. Stat. § 34-2-318 (1957) (1963 Supp.).

38. Uniform Commercial Code § 2-318.

39. *Thompson v. Reedman Motors and General Motors*, 199 F. Supp. 120 (E.D. Pa. 1961).

party beneficiary under the Uniform Commercial Code, *but this did not bar his suit* against the dealer and manufacturer on a warranty theory.⁴⁰

It appears that Wyoming's 2-318 may better represent existing law than does the uniform version. It also seems apparent that the code provision on third party beneficiaries may be overlooked when it would otherwise bar recovery.⁴¹

Courts in the past have contented themselves with inventing "a remarkable variety of highly ingenious, and equally unconvincing theories to get around lack of privity between plaintiff and defendant."⁴² No less than twenty-nine different theories to accomplish this result have been identified.⁴³

Today the trend is no longer to get around the unjustness of the privity requirement, but rather to overrule or disregard it as a condition to suit against a seller of any product in a condition dangerous for its intended use.⁴⁴ Dean Prosser indicates that the recent cases "give the definite im-

40. Citing *Mannsz v. Macwhyte Co.*, 155 F.2d 445, 449 (3rd Cir. 1946) (defective wire rope) *held*, the requirement of privity between the injured party and the manufacturer of the article which injured him has been obliterated under Pennsylvania law; *Jarnat v. Ford Motor Company*, 191 Pa. Super. 422, 156 A.2d 568 (1959) (defective steering mechanism on truck); *Magee v. General Motors Corp.*, 177 F. Supp. 101 (W. D. Pa. 1953); 213 F.2d 899 (3rd Cir. 1954); 124 F. Supp. 606 (W. D. Pa. 1954); *aff'd per cur.*, 220 F.2d 270 (3rd Cir. 1955) *accord*: *Allen v. Savage Arms Corp.*, 52 Luzerne Leg. R. 159 (Pa.) (here the court expressly did not base its decision on § 2-318 but rather on the ground of foreseeable area of harm) *followed*: *Picker X-Ray Corp. v. General Motors Corp.*, Mun. Ct. of App. D. C., 185 A.2d 919 (1962) (defective steering mechanism on car) *cited with approval*: *Greenman v. Yuba Power Products, Inc.*, 27 Cal. Rptr. 697, 377 P.2d (1962) (defective power tool) *same result*: *General Motors Corp. v. Dodson*, 47 Tenn. App. 438, 338 S.W.2d 655 (1960) (defective brakes) *held* manufacturer was the actual entity with which buyers were dealing, the dealer from whom the purchase was made was merely a conduit or subterfuge; therefore, no privity problem. *See also*: *Wilson v. American Chain and Cable Co.*, 216 F. Supp. 32 (E. D. Pa. 1963).

41. See authorities cited note 40 *supra*.

42. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 *Yale L.J.* 1099, 1124 (1960).

43. Gillam, *Products Liability in a Nutshell*, 37 *Ore. L. Rev.* 119, 153-55 (1957).

44. *Supra* notes 39 and 40; *Spence v. Three Rivers Builders and Masonry*, 353 *Mich.* 120, 90 *N.W.2d* 873 (1958) (defective cinder blocks) *held* remote buyer has action against manufacturer either in implied warranty or negligence; *Continental Copper and Steel Industries v. Cornelius, Inc.*, 104 *So. 2d* 40 (Fla. App. 1958) (defective electrical cable) *held* privity is not necessary to recovery on implied warranty; *B. F. Goodrich v. Hammond*, 269 *F.2d* 501 (10 Cir. 1959) (defective tire) *held* wrongful death action based on implied warranty of fitness not barred because of lack of privity; *Jarnat v. Ford Motor Company*, 191 *Pa. Super.* 422, 156 *A.2d* 569 (1959) (defective Kingpin) *held* against manufacturer even though privity not present; *Peterson v. Lamb Rubber Co.*, 343 *P.2d* 261 (Cal. App. 1959) (defective abrasive wheel) *held* employee of purchaser could sue on implied warranty; *Hinton v. Republic Aviation Corp.*, 180 *F. Supp.* 31 (S.D. N.Y. 1959) (defective airplane) *held* privity not necessary between passenger and manufacturer for implied warranty wrongful death action; *Middleton v. United Aircraft Corp.*, S.D. N.Y. 1960, 6 *An. Cos.* 17957 (airplane); *Beck v. Spindler*, 99 *N.W.2d* 670, 684 (Minn. 1959) (defective house trailer) *held* recovery allowed; *McAfee v. Cargill, Inc.*, 121 *F. Supp.* 5 (S.D. Cal. 1954) (dog food); *Kruper v. Proctor & Gamble Co.*, 113 *N.E.2d* 605 (Ohio 1953) (wire in soap) reversed on other grounds 117 *N.E.2d* 7 (1953); *Pillers v. R. J. Reynolds Co.*, 117 *Miss.* 490, 78 *So.* 385 (1918) (human toe in chewing tobacco); *Henningson v. Bloomfield Motors and Chrysler Corp.*, 32 *N.J.* 358, 161 *A.2d* 69 (1960) (defective steering); *Strahlendorf v. Walgreen Co.*, 16 *Wis. 2d* 421, 114 *N.W.2d* 823 (1962) (strong dicta-toy airplane) *held* for defendant on other grounds; Chap-

pression that the dam has bursted and those in the path of the avalanche would do well to make for the hills."⁴⁵ As the assault on the citadel of privity nears completion common sense and justice appear victors, but the courts have yet to clear the debris.

AS A LAWYER'S TOOL warranty is a potent and complicated weapon. Because the concepts of express and implied warranty are recent in origin and rapid in development, there is a certain amount of understandable confusion and conflict in the courts. Warranty is an independent remedy which may be claimed alternatively with or instead of the tort action for negligence when both are applicable.⁴⁶ The unsuccessful pursuit of one is not *res judicata* to the other.⁴⁷

Liability does not depend upon knowledge of defects or negligence on the part of the seller. He is strictly liable when warranty is found.⁴⁸ The seller has bound himself unqualifiedly to the existence of the characteristics or qualities warranted; and absolute liability against the warrantor is available to the buyer or third party beneficiary of the warranty who was injured by the non-existence of such characteristics or qualities.⁴⁹

The burden of proof resting upon the plaintiff entails merely a demonstration of the fact that the goods did not have the properties warranted. The plaintiff is not required to show the technical causation of the failure of the goods to match their warranty.⁵⁰

Counsel would be well advised to give immediate notice of the alleged breach of warranty to the warrantor.⁵¹

Contributory negligence is not a defense to the contract action of

man v. Brown, 198 F. Supp. 78 (Hawaii D. 1961) (hula skirt caught fire). Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)* 69 Yale L.J. 1099 (1960). Keeton, *Products Liability—Liability without Fault and the Requirement of a Defect*, 41 Tex. L. Rev. 855 (1963). Goldberg, *Implied Warranty—The Privity Requirement in Personal Injury Cases*, 1963 Wis. L. Rev. 660 (1963). McCurdy, *Warranty Privity in Sales of Goods*, 1 Huston L. Rev. 201 (1964).

45. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1113 (1960).

46. Prosser, *Torts*, p. 491 (2d ed. 1955); Belli *Modern Trials*, Vol. 1, 297 (1954).

47. Silverman v. Oil City Glass Bottle Co., 110 Pittsb. Leg. J. 221 (Pa.) (here the court rejected the theories of election of remedies, estoppel, and *res judicata*). *Dam v. Lake Aliso Riding School*, 6 Cal.2d 395, 57 P.2d 1315 (1936). *Koser v. Hornback*, 365 P.2d 988 (Idaho 1954). 12 A.L.R. 778; 131 A.L.R. 847.

48. Prosser, *Torts*, p. 494 (2d ed. 1955).

49. *Hanson v. Firestone Tire and Rubber Co.*, 276 F.2d 254 (6th Cir. 1960); *Rogers v. Toni Home Permanent Co.*, 147 N.E.2d 612 (Ohio 1959); *Bahlmon v. Hudson Motor Car Co.*, 288 N.W. 309 (Mich. 1939).

50. See authorities cited note 49 supra; a good discussion of the problems involved is found in Keeton, *Products Liability—Proof of Manufacturer's Negligence*. 49 Va. L. Rev. 675 (1963).

51. Uniform Commercial Code §§ 2-607, 714, Wyo. Stat. 34-2-607, 714 (1957) (Supp. 1963). *Notice Required: Whitfeld v. Jessup*, 31 Cal.2d 826, 193 P.2d 1 (1948); *Baum v. Murray*, 23 Wash.2d 890, 162 P.2d 801 (1945); *Columbia Axle Co. v. Amer. Auto. Ins. Co.*, 63 F.2d 206 (6th Cir. 1963); see *Williston, Sales*, § 484-A, n.8; Belli, 1 *Modern Trials* § 47, p. 305; Uniform Sales Act § 49. *No Required: Kennedy v. Woolworth Co.*, 205 App. Div. 648, 200 N.Y.S. 121 (1923). *Filing Considered Notice: Silverstein v. Macy & Co.*, 266 App. Div. 5, 50 N.Y.S.2d 916 (1943); see *Williston, Sales*, § 484.

warranty.⁵² However, the courts have reached the same result by finding "lack of due care," "avoidable harm," and "failure to heed warning" on the theory that the injury did not proximately result from the breach of warranty.⁵³ In these cases the buyers' training, skill, and knowledge with respect to the proper use of the product is a factor.⁵⁴ The use of contributory negligence as a defense to warranty should be distinguished from its use as a factor in mitigating damages.⁵⁵ The cases seem to indicate that "the problem is reduced to one of what the consumer has a right to expect," that is, "a product reasonably fit for the purpose for which it is sold."⁵⁶

The confusion between warranty and similar tort remedies is found in other areas too.

Generally the statute of limitations applied is for the longer contract period; however, some courts have held the shorter tort period applicable to warranty.⁵⁷ Whether the statute starts to run at the time of the sale or at the time the defect is discovered is also a subject of dispute.⁵⁸

A conflict as to whether tort or contract treatment should be applied also exists with respect to survival of actions,⁵⁹ assignability of claims,⁶⁰

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52. *Challis v. Hartloff*, 136 Kan. 823, 18 P.2d 199 (1933). (failure to discover that flour was poisonous); *Simmons v. Coca Cola*, 181 Kan. 35, 309 P.2d 633 (1957) (failure to discover matches in Coke); *Bahlman v. Hudson Motor Co.*, 290 Mich. 683, 288 N.W. 309 (1939) (express warranty of seamless car top; injury caused by seam when car rolled over); *Hansen v. Firestone Tire Co.*, 276 F.2d 254 (6th Cir. 1960) (driving on defective tire); *Kassouf v. Lee Bros. Inc.*, 26 Cal. Rptr. 276 (1962) (failure to discover worms in Hershey bar); *Vasallo v. Sabatte Land Co.*, 27 Cal. Rptr. 814 (1963) (defective milk bottle); *Chapman v. Brown, Hawaii* 198 F. Supp. 78 (1962) (hula skirt ignited); see also *Rosenfeld, The Role of Contributory Negligence in Warranty Actions*, 36 So. Cal. L. Rev. 490 (1963).
53. *Missouri Bag Co. v. Chemical Delinting Co.*, 214 Miss. 13, 58 So. 2d 71 (1952) (use of bags known to be defective); *Nelson v. Anderson*, 245 Minn. 445, 72 N.W.2d 861 (1955) (continuing use of oil burner after notice that it was smoking); *Fredenhall v. Abraham & Strauss, Inc.*, 279 N.Y. 146, 18 N.E.2d 11 (1938) (failure to heed instructions on cleaning fluid label); see also *Friedman, Sales — Implied Warranty — Foreseeability as a Limitation to Liability*, 9 Wayne L. Rev. 383 (1963), citing *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962); *Keeton, Products Liability — Proof of the Manufacturer's Negligence*, 49 Va. L. Rev. 675, 691 (1963).
54. Compare: *McSpedon v. Kunz*, 271 N.Y. 131, 2 N.E.2d 513 (1963) ("humble housewife" cooking pork); *Eisenbrook v. Gimble Bros., Inc.*, 281 N.Y. 474, 24 N.E.2d 131 (1939) ("sophisticated chef" cooking pork).
55. *Chapman v. Brown*, 198 F. Supp. 78, 86 (Hawaii 1962). (The court said — dicta — that it was reasonable to believe that the courts of Hawaii, which had not spoken, would consider contributory negligence as mitigating damages).
56. *Prosser, The Assault upon the Citadel (Strict Liability to the Consumer)*, 60 Yale L.J. 1009 (1960).
57. *Prosser, Torts* pp. 483, 493 (2d ed. 1955); *Jones v. Boggs & Buhl, Inc.*, 355 Penn. 242, 49 A.2d 379 (1946); *Rubino v. Utah Canning Co.*, 123 Cal. App. 2d 18 (1954); *contra: Challis v. Hartloff*, 136 Kan. 823, 19 P.2d 199 (1933).
58. *Citizens Util. Co. v. American Locomotive Co.*, 15 App. Div. 2d 473, 222 N.Y.S.2d 246 (1962). (held, the statute of limitations became operative from the date of the sale, and the buyer's inability to ascertain the quality or condition of the product at the time of sale is irrelevant) For a good discussion of this and *contra* cases see "Breach of Warranty — Action Held to Accrue When Goods Sold Rather Than When Defects Discovered." 63 Columbia L. Rev. 773 (1963).
59. *Prosser, Torts* p. 483 (2d ed. 1955). An action may survive in contract when it dies in tort.
60. *Prosser, Torts* p. 483 (2d ed. 1955). A contract may be assignable where a tort claim is not.

venue,⁶¹ attachment,⁶² summary judgment,⁶³ set-off,⁶⁴ counterclaim,⁶⁵ wrongful death,⁶⁶ interest,⁶⁷ immunities,⁶⁸ and damages.⁶⁹

It appears to make no difference whether warranty damages are treated as tort or contract. Courts have been willing to treat warranty damages for personal injury as within the contemplation rule for breach of contract.⁷⁰ The Uniform Commercial Code has followed suit by providing that "limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable"⁷¹

CONCLUSION

In the Arguello case the jury in the iDstrict Court⁷² found that *both* A's "gross negligence or wilful and wanton misconduct"⁷³ and Ford Motor Company's negligence in the manufacture and inspection were "concurrent proximate causes of the accident."⁷⁴ Thus, B obtained a judgment against both in the amount of \$103,000. A settled, Ford appealed, and the Wyoming Supreme Court affirmed with Justice Grey dissenting.

Whether the allegations of negligence against Ford should have been allowed to go to the jury, or whether the verdict should stand are matters upon which reasonable men differ. Dissenting opinions are not common in our Supreme Court.

Ford's negligence in the manufacture and inspection of rivets in its Michigan plant is at best difficult to prove. The practical and technical problems involved present a real challenge to the Wyoming attorney. Warranty has much to offer in such cases.

Modern case law and statutes indicate that warranty is a favored

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61. Prosser, Torts p. 483 (2d ed. 1955). Contract venue may offer more latitude.
 62. Prosser, Torts p. 483 (2d ed. 1955). A contract suit may open the way to such remedies as attachment.
 63. Prosser, Torts p. 484 (2d ed. 1955). A contract suit may open the way to such remedies as summary judgment.
 64. Prosser, Torts P. 484 (2d ed. 1955). A contract may be available as a set off.
 65. Prosser, Torts p. 484 (2d ed. 1955). A contract may be available as a counter claim.
 66. Prosser, Torts p. 494 (2d ed. 1955). Recovery under warranty for wrongful death is generally not allowed. *contra*: Hinton v. Republic Aviation Corp., 180 F. Supp. 31 (S.D. N.Y. 1959); B. F. Goodrich v. Hammond, 269 F.2d 501 (10th Cir. 1959).
 67. Prosser, Torts p. 483 F.N. 73 (2d ed. 1955). A contract action may carry interest where a tort action does not.
 68. Prosser, Torts p. 483 (2d ed. 1955). Some immunities, such as those of municipal corporations or charities may prevent recovery in tort but not in contract.
 69. Prosser, Torts pp. 484, 494 (2d ed. 1955).
 70. Ryan v. Progressive Stores, 225 N.Y. 388, 175 N.E. 105 (1955), 74 A.L.R. 339. (*held* grocer liable for new loaf of bread plus foreseeable damages from eating bread with pin in it) Royal Box Co. v. Munro, 284 Mass. 446, 183 N.E. 223 (1934). (*held*, box manufacturer liable for new boxes plus candy damaged by oily boxes) Stonebrick v. Highland Motors, 171 Ore. 418, 137 P.2d 986 (1943) (damages are recoverable for personal injuries directly and naturally resulting from breach of implied warranty of fitness of an automobile bumper jack).
 71. Uniform Commercial Code § 2-719, Wyo. Stat. § 34-2-719 (1957) (Supp. 1963).
 72. District Court of Uinta County — Judge Christmas.
 73. Wyo. Stat. § 31-233 (1957) (Guest Statute).
 74. Ford Motor Co. v. Arguello, *supra* note 1, at 891.

remedy for the favored consumer. Wyoming statutes lead this trend; however, in Wyoming, unlike most states, warranty is a dormant remedy. This lack of use is no indication of its potential as a lawyer's tool. Wyoming attorneys would do themselves and their clients a real service if they were to allege warranty along with or in place of negligence when it is applicable.

WILLIAM D. BAGLEY

THE RECORD SYSTEM, PERFECTION OF A SECURITY INTEREST AND SUBSEQUENT PURCHASERS OR CREDITORS

The motor vehicle record system in Wyoming is based principally on three statutes. These are the registration, certificate of title, and Wyoming Uniform Commercial Code Statutes.¹

The registration statute is primarily a revenue measure whereby owners of motor vehicles are required annually to register their vehicles, pay the registration fees and obtain registration (license) plates. A certificate of title is a prerequisite to registration.² A registration receipt is presented to the owner showing his name, the manufacturer or dealer and a description of the vehicle. No liens or encumbrances are noted on the receipt.³ Registration is not required of non-resident owners until the vehicle has been in the state for ninety (90) days, with certain enumerated exceptions.⁴

The certificate of title statute provides in substance that every owner of a motor vehicle must obtain an official certificate of title from the state board of equalization or any county clerk before the motor vehicle can be registered in Wyoming and that all registered motor vehicles must have a certificate of title prior to operation on the highways. The application must set forth any liens or encumbrances upon the vehicle and must be under oath.⁵ Upon being satisfied that the applicant is the owner of the vehicle, the county clerk will issue the certificate of title which will show among other things all liens or encumbrances on the vehicle.⁶ The certificate is good as long as the vehicle is owned by the same person⁷ and is required to be recorded by the county clerk and open to public inspection.⁸

Upon passage of the original Uniform Commercial Code provision,⁹ considerable confusion arose as to whether or not filing of a security agreement or financing statement¹⁰ was necessary to perfect a security interest in motor vehicles. This was due in part to the wording of Wyo. Stat. Sec. 34-9-302 (1957) (Supp. 1963), Laws 1961, ch. 219, Sec. 9-302, and in part to other statutes which were not repealed when the Uniform Commercial

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1. Wyo. Stat. § 31-19 (1957) (Supp. 1963), as amended, Laws 1963, ch. 12, § 1; Wyo. Stat. § 31-32 (1957) (Supp. 1963), as amended, Laws 1961, ch. 8, § 1; Wyo. Stat. § 34-9-302 (1957) (Supp. 1963), as amended, Laws 1963, ch. 185, §§ 1, 2.
 2. Wyo. Stat. § 31-32 (1957) (Supp. 1961).
 3. Wyo. Stat. § 31-19 (1957) (Supp. 1963).
 4. Wyo. Stat. § 31-68 (1957) (Supp. 1959).
 5. Wyo. Stat. § 31-33 (1957) (Supp. 1961); Wyo. Stat. § 31-34 (1957).
 6. Wyo. Stat. § 31-36 (1957); cited in *General Credit Corp. v. First National Bank of Cody*, 74 Wyo. 1, 283 P.2d 1009 (1955).
 7. Wyo. Stat. § 31-36 (1957).
 8. Wyo. Stat. § 31-41 (1957).
 9. Wyo. Stat. § 34-9-302 (1957) (Supp. 1961), in part repealed and in part amended (Supp. 1963).
 10. Defined by Wyo. Stat. § 34-9-105 (h) (1957) (Supp. 1961) and Wyo. Stat. § 34-1-201 (37) (1957) (Supp. 1961).

Code was passed.¹¹ The 1963 legislature attempted to eliminate the ambiguity by amending several statutes and repealing others. Wyo. Stat. Sec. 31-37 (f) (1957) of the certificate of title statutes which required filing of an encumbrance instrument concurrently with delivery of the certificate of title with the encumbrance noted thereon was repealed,¹² but nearly the same language and procedure was included in the Uniform Commercial Code provision which was passed.¹³ Wyo. Stat. Sec. 10-104, Laws 1961, Ch. 219, Sec. 10-104, which was redundant, was repealed and Wyo. Stat. Sec. 31-40 (1957) of the certificate of title statutes pertaining to duplicate certificates was rewritten.

The mechanics for perfecting a security interest in a motor vehicle¹⁴ required to be licensed are provided by Wyo. Stat. Sec. 34-9-302 (4) (1957) (Supp. 1963). In general, the secured party must file a financing statement or security agreement in the county clerk's office *and* the security interest must be endorsed by the clerk on the certificate of title. If the vehicle is new and is sold, the dealer must deliver the security agreement and the other necessary papers¹⁵ for a certificate of title to the county clerk's office.¹⁶ The clerk will file the security agreement, make out a certificate of title, and endorse the security interest on the certificate of title.

Of primary importance is the relationship of the certificate of title statutes to the Uniform Commercial Code¹⁷ in regard to perfecting a security interest and the effects on subsequent purchasers or creditors.

In *Sterling Acceptance Co. v. Grimes*,¹⁸ the plaintiff brought an action in replevin against purchasers of a new automobile which was purchased in the ordinary course of business from the inventory of an auto dealer. Prior to the sale, a security agreement had been entered into between the plaintiff and the dealer covering new and used vehicles and proceeds from the sale thereof. The security agreement was filed pursuant to the Pennsylvania Uniform Commercial Code statutes. Under the Motor Vehicle Code, no regular certificate of title could come into being for a new vehicle until a sale thereof, but a dealer was permitted to obtain a dealer's certificate of title. Such a dealer's certificate of title was obtained for the new automobile involved and the encumbrance was noted thereon pursuant to a Vehicle Code statute which provided for notation of liens on certificates of title and, as such, would be notice to creditors, subsequent mort-

11. Wyo. Stat. § 31-27 (1957), Laws 1957, ch. 230, § 27; Laws 1961, ch. 219, § 10-102.

12. Laws 1963, ch. 185, § 4.

13. Wyo. Stat. 34-9-302 (1957) (Supp. 1963).

14. Motor Vehicle Defined by Wyo. Stat. § 31-12 (1957) (Supp. 1963), Laws 1963, ch. 65, § 1; Wyo. Stat. § 31-30 (b) (1957).

15. See Wyo. Stat. § 31-33 (1957) and Wyo. Stat. § 31-33.1 (1957) (Supp. 1963), Laws 1961, ch. 2, § 2, for the necessary papers.

16. "Statement of origin" defined in *Trumbull Chevrolet Sales Co. v. Seawright*, 134 So. 2d 829 (Fla. 1961); see also *Killingsworth v. West Way Motors, Inc.*, 87 Ariz. 74, 347 P.2d 1098 (1959).

17. Note, Uniform Commercial Code — Motor Vehicles — Filing Required to Perfect Security Interests, 60 Mich. L. Rev. 242 (Dec. 1961).

18. 194 Pa. Super. 503, 168 A.2d 600 (1961).

gagees and purchasers. The dealer, upon sale of the vehicle to the defendant, did not remit the proceeds to the plaintiff. The defendant purchaser contended that, under the Uniform Commercial Code, Section 9-307, a purchaser in the ordinary course of business¹⁹ takes free of perfected security interests. Although not clear, the plaintiff's contention apparently was that the Uniform Commercial Code did not apply because of the notation on the dealer's certificate of title. The court held that where the Uniform Commercial Code and the Vehicle Code deal with the same subject matter and the statutes are in *pari materia* they should be considered concurrently whenever possible and effect should be given to both. With this basis, the court went on to say that inventory lienors cannot defeat rights of buyers in the ordinary course of business by noting the encumbrance on a dealer's certificate of title which was not required to be obtained and that upon sale of a new auto by a dealer in the ordinary course of business, the buyer takes free of perfected security interests even if the buyer knows of the terms of the security agreement.²⁰

In Wyoming, like Pennsylvania, a certificate of title for a new car does not come into existence until the new car is first sold.²¹ Apparently then, under Wyo. Stat. Sec. 9-302 (4) (1957), (Supp. 1963), it would be sufficient in order to perfect an inventory security interest in a new car to merely file the financing or security agreement.

*Taylor Motor Rental, Inc. v. Associates iDscout Corporation, Inc.*²² is another case where the contention of a buyer in the ordinary course of business was asserted. Here, the defendant perfected a security interest according to the then existing provisions of the Uniform Commercial Code in an auto purchased by McCurry Motors, Inc. McCurry Motors in turn sold the auto to the plaintiff corporation (appellant). The defendant, not being paid for the auto from the proceeds of the sale, seized the auto from the plaintiff and the plaintiff sued to replevy. The facts disclosed that the plaintiff was a corporation with interlocking officers, shareholders, and directors with McCurry Motors and that Fred McCurry managed both corporations and acted for both in applying for the certificate of title in the name of the plaintiff. This relationship was sufficient to deny the plaintiff the status of a purchaser in the ordinary course of business.

Three Wyoming problems concerning the 1963 procedure for perfecting a security interest²³ are apparent. First, it is not a uniform provision. Wyoming has departed completely from the official alternative of Section 9-302 of the 1958 Uniform Commercial Code's official text, resulting in

19. Defined by Wyo. Stat. § 34-1-201 (9) (1957) (Supp. 1963), Laws 1961, ch. 219, § 1-201.

20. Wyo. Stat. § 34-9-307 (1957) (Supp. 1963), Laws 1961, ch. 219, § 9-307.

21. *Sterling Acceptance Co. v. Grimes*, 194 Pa. Super. 503, 168 A.2d 600 (1961). No certificate of title necessary for earth moving equipment, In the Matter of Kowalski, 202 F.Supp. 897 (D. Conn., 1962).

22. 196 Pa. Super. 182, 173 A.2d 688 (1961).

23. Wyo. Stat. § 34-9-302 (4) (1957) (Supp. 1963), Laws 1963, ch. 185, § 1-2.

non-uniformity, a primary purpose of the Code, which will probably lead to anomalous decisions causing more trouble than cure.²⁴

Second, the system requires a dual filing which is cumbersome, non-uniform, and provides a further chance for error. Simplicity in the law of security transactions plus uniformity among the states are the two main reasons for having uniform laws. The purpose behind a certificate of title law is to reach the point where reliance can be had upon the certificate of title as to the rights of various persons in the vehicle.

The Uniform Commercial Code's 1958 official text in substance provides two alternatives to filing a financing statement for states which have enacted certificate of title laws requiring the indication of all security interests on the certificate of title. The second alternative²⁵ made an exception to notation on the certificate of title for inventories held for sale. The reason for such an exception is that to require the notation on each certificate for every motor vehicle would be an unreasonable burden. Filing the financing statement would be sufficient for motor vehicles held in inventory. The Wyoming legislature in adopting Wyo. Stat. Sec. 9-302 (4) (1957) (Supp. 1963), has made no mention of situations involving a dealer's inventory.

A preliminary question is whether a motor vehicle held in the inventory of a dealer for sale is a "motor vehicle required to be licensed," as Wyo. Stat. Sec. 9-302 (4) (1957) (Supp. 1963), pertains only to such vehicles. No specific definition for this phrase is present in either the Uniform Commercial Code or the Wyoming Motor Vehicle Code. No attempt will be made to speculate as to what the Wyoming courts will hold if this question is presented, but several Motor Vehicle Code statutes do exist which may be used to judicially interpret this phrase.²⁶

If a motor vehicle held by a dealer in inventory is one not "required to be licensed," then apparently Wyo. Stat. Sec. 9-302 (1) (1957) (Supp. 1963), will control, in which case filing alone without notation on the certificate of title will be sufficient to perfect the security interest unless the particular arrangement comes within one of the specifically enumerated

24. See article, Does Article 9 of the Uniform Commercial Code Achieve its Purpose? Coogan and Albrecht, Uniform Commercial Code Co-ordinator, Annotated, p. 631, Matthew Bender & Company (1963).

25. Wyo. Stat. § 34-9-302 (3) (1957) (Supp. 1963) provides "The filing provisions of this Article do not apply to a security interest subject to a statute. (a) . . . Alternative B-(b) of this state which provides for central filing of security interests in such property, or in a motor vehicle which is not inventory held for sale for which a certificate of title is required under the statutes of this state if a notation of such a security interest can be indicated by public official on a certificate or a duplicate thereof."

26. See generally Wyo. Stat. Title 31 (1957) (Supp. 1963); see Wyo. Stat. § 31-57 (1957) (Supp. 1963), Laws 1963, ch. 5, § 1, for dealer license plates; see Wyo. Stat. § 31-37 (d) (1957), for requirements when dealer is a transferee; see Wyo. Stat. § 31-19 (1957) (Supp. 1963), for persons required to register motor vehicles generally; see Wyo. Stat. § 31-32 (1957) (Supp. 1963) for certificates of title.

exceptions to filing.²⁷ If a motor vehicle held by a dealer in inventory is deemed to be a motor vehicle "required to be licensed," then the statute²⁸ says that both filing and notation on the certificate of title is necessary for perfection of a security interest and no exception is made for the dealer-inventory situation. Kentucky and Pennsylvania courts have indicated their feeling on this question in the cases of *Lincoln Bank and Trust Co. v. Queenan*²⁹ and *Howarth v. Universal C.I.T. Credit Corporation*.³⁰

In the *Lincoln Bank* case,³¹ the court by its holding, created a dual filing system for Kentucky similar to the method which Wyoming arrived at by legislation³² but made an exception to filing in the case of a dealer's inventory. At the present time, Kentucky and Wyoming are the only Code states requiring a dual filing system to perfect a security interest in a motor vehicle. The Kentucky case is important in Wyoming, not because the case required a dual filing system, but because of the dicta discussed after the conclusion that a dual system was established. The court said, "We may judicially notice that the inventory of any dealer in motor vehicles is likely to include used vehicles. . . . Literally, therefore, KRS 186.195³³ (statute requiring liens to be noted on registration receipt held to be equivalent to a certificate of title) would apply. . . . However, one of the important reforms effected by the Code in the field of security financing is the concept of a floating lien on shifting collateral, whereby a security interest may be created by one agreement and perfected by one notice covering a changing inventory. Each item of the inventory is automatically freed of the security interest as it goes into the hands of a buyer in the ordinary course of business." The court then said that a statute requiring dual filing is incompatible where the financing statement covers an inventory of vehicles that are not required by the Code to be identified individually and that notation of a lien was not required to perfect a security interest in a dealer's inventory.

The *Howarth* case³⁴ involved an action by *Howarth*, a trustee in bankruptcy of a car dealer, to recover from a finance company the value of property transferred to it within four months of bankruptcy. Among other automobiles, there were eleven used vehicles covered by a Trust Receipts agreement and a filed financing statement. The trustee contended that the security interest was not perfected unless the lien was noted on the certificate of title to the used cars. Section 203 (b) of the Pennsylvania

27. Wyo. Stat. § 34-9-302 (a) through (f) (1957) (Supp. 1963), Laws 1963, ch. 195, § 1, 2.

28. Wyo. Stat. § 34-9-302 (4) (1957) (Supp. 1963), Laws 1963, ch. 185, § 1, 2.

29. 344 S.W. 2d 383 (Ky. 1961); 60 Mich. L. Rev. 242; Annot., Boston College Ind. and Com. L. Rev. 43 (Fall, 1961) and Uniform Commercial Code Coordinator, Annotated, p. 311, Matthew Bender & Co. (1963); Whiteside & Lewis, Kentucky's Commercial Code — Some Initial Problems in Security, 50 Ky. L.J. 61-85 (1961).

30. 203 F. Supp. 279 (W.D.Pa. 1962).

31. *Lincoln Bank & Trust Co. v. Queenan*, 344 S.W.2d 383 (Ky. 1961).

32. Wyo. Stat. § 34-9-302 (4) (1957) (Supp. 1963).

33. Ky. Rev. Stat. § 186-195 (1962).

34. *Howarth v. Universal C.I.T. Credit Corp.*, 203 F. Supp. 279 (W.D. Pa. 1962).

Motor Vehicle Code³⁵ provided a method whereby a person could show a lien on the certificate of title.³⁶ Section 207(c) provided that a dealer was not required to apply for a certificate of title for cars in inventory.³⁷ The court in holding for the finance company said, "We cannot perceive any good reason why a lender engaged in wholesale financing cannot perfect a valid security interest in used cars by the same method he employs to perfect a valid security interest in new cars." As to new cars, a security interest could be perfected by filing only, as no certificate of title for a new car came into existence until the sale thereof.³⁸ In striking down such a dual filing requirement as contended for, the court further commented that such a dual filing arrangement would require a dealer's prospective creditor to demand an inspection of the dealer's certificate of title to each used car in inventory as well as a search of the filed records and that such an arrangement would also require that a lender who engages in wholesale financing of used cars would have to insist that the dealer obtain a new certificate of title for each used car acquired.³⁹

The third problem, and a good example of the results of a departure from the suggested Code provisions, is the place of filing requirements. Wyo. Stat. Sec. 9-302(4) (1957) (Supp. 1963), says to perfect a security interest in a motor vehicle required to be licensed, filing must be in the office of the county clerk of the county in which said vehicle is located. Wyo. Stat. Sec. 9-401(c) (1957) (Supp. 1963), the general place of filing statute, says that the proper place to file in order to perfect a security interest is in the office of the county clerk for the county in which the debtor has his principal place of business, if any, otherwise his residence. If the debtor is not a resident, then the place to file is in the office of the secretary of state of the state of Wyoming.⁴⁰ Although Wyo. Stat. Sec. 9-302(4) (1957) (Supp. 1963), pertains to a specific type of goods and would probably control, the provisions are ambiguous and should be cleared up. *In the Matter of Babcock Box Co.*,⁴¹ illustrates the problem created where a filing is required in two places. Here, the Massachusetts statute covering the place of filing requirements to perfect a security interest required dual filing, first in the office of the state secretary and second in the office of the clerk of the town where the debtor had his place of business. The secured party filed a financing statement with the secretary of state, but did not file with the city clerk. This error was held to be sufficient to defeat the

35. Purdon's Penn. Stat. Title 75 § 203(b) (1960).

36. Similar to Wyo. Stat. § 9-302(4) (1957) (Supp. 1963).

37. Similar to Wyo. Stat. § 31-37(d) (1957).

38. Similar to Wyo. Stat. § 31-33 (1957) (Supp. 1963), Laws 1961, ch. 2, § 1; *In the Matter of Kowalski*, 202 F. Supp. 897 (D. Conn. 1962), no certificate of title necessary for earth moving equipment.

39. Finance Company not dealer must properly record lien, *Joel Strickland Enterprises, Inc. v. Atlantic Discount Co.*, 137 So. 2d 627 (Fla. 1962); see also *Matter of Shepler*, 58 Lanc. L.R. 43, 54 Berks L.J. 110.

40. Out of state lender failed to file with the Secretary of the Commonwealth as required within the four month period, *In the Matter of Dumont - Airplane and Marine Instruments, Inc.*, 203 F. Supp. 511 (S.D.N.Y. 1962).

41. 200 F. Supp. 80 (D. Mass. 1961).

secured party's status as a holder of a perfected security interest. Further, only actual knowledge⁴² of the contents of the financing statement could help the petitioner in his assertion that a good faith filing in an improper place is nevertheless effective as provided by Wyo. Stat. Sec. 9-401 (2) (1957) (Supp. 1963).⁴³

More filing provisions are set forth in the situation where a debtor changes his place of business or residence.⁴⁴ In this event, after four months, the secured party must refile his security agreement in the proper county to keep his filing effective. This rule applies to both changes of residence or business by the debtor within the state and to the situation where a debtor moves from another state to a Uniform Commercial Code state.⁴⁵ *Churchill Motors, Inc. v. A. C. Lohman, Inc.*, involved a motor vehicle sold by a conditional vendor to a conditional vendee in Rhode Island.⁴⁶ The conditional sales contract was perfected in Rhode Island and no certificate of title law existed for notation of liens thereon. Several days later, the conditional vendee drove the auto to Pennsylvania and sold it to an auto dealer without knowledge of the security interest. The auto dealer secured a certificate of title pursuant to the Pennsylvania statutes and sold the auto to the defendant in Pennsylvania who in turn took it to New York and sold it to the plaintiff, warranting title. All transactions in Pennsylvania took place within four months from the time when the auto was brought into the state. The Uniform Commercial Code was not in effect in New York at the time of the transactions within that state. After nearly a year, the original conditional vendor, who perfected his security interest in Rhode Island, located the auto in the possession of the plaintiff and took possession from him. Upon judgment for the plaintiff for recovery of the purchase price, the court held (1) that the plaintiff never acquired title superior to the conditional vendor, hence the defendant was liable for his breach of warranty; (2) the court will look to the state where the contract was made to determine if the conditional sales contract was perfected; (3) the four months is not a grace period for filing in the new location, but is an absolute period of protection designed to give a vendor adequate time to make an investigation and to locate the property. The protection of the security interest ceases upon expiration of the four month period; and (4) issuance of the clean certificate of title to the auto dealer did not

42. See *Uptown National Bank of Chicago v. Purvis*, 26 Ill. App. 2d 473, 168 N.E.2d 791 (1960), for dicta as to actual knowledge; see *In re German*, 285 F.2d 740 (Cir. Ill., 1961), as to constructive notice.

43. The good faith argument of the petitioner was based upon the U.C.C. § 9-401 (2), which states that: "A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this Article and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement." "Good faith" filing discussed in 68 Com. L.J. 253 (Sept. 1963); "good faith" argument rejected in *In the Matter of Lux's Superette, Inc.*, 206 F. Supp. 368 (E.D.Pa. 1962).

44. Wyo. Stat. § 34-9-401 (3) (1957) (Supp. 1963), Laws 1961, ch. 219, § 9-401.

45. Wyo. Stat. § 34-9-401 (4) (1957) (Supp. 1963), Laws 1961, ch. 219, § 9-401.

46. 229 N.Y.S.2d 570, 16 A.D.2d 560 (1962).

give him any right superior to that of the conditional vendor. Two propositions are clear from this case. First, a motor vehicle may be brought into Wyoming from a state which does not require notation of a lien on the certificate of title and sold to a purchaser who may take subject to a pre-existing perfected security interest; and second, upon removal of collateral to another state having the Uniform Commercial Code, or to another county, the secured party may have to refile his security interest before the expiration of four months to retain a continuing perfected status.⁴⁷

The rules of priority between unperfected security interests and persons who take priority over the same, including lien creditors, are provided by Wyo. Stat. Sec. 9-301 (1957) (Supp. 1963).⁴⁸ As to security interests created in Wyoming, a subsequent purchaser of a used or new motor vehicle will take free of security interests which are not perfected by filing and notation on the certificate of title.⁴⁹ Upon compliance with the two required steps,⁵⁰ the security agreement will take effect and be in force as to all creditors and subsequent purchasers.⁵¹

A number of situations may exist where there will be conflicting security interests in the same motor vehicle. The most common will involve dealers, manufacturers, financing institutions who engage in inventory financing, and takers of chattel paper.⁵² Priorities among conflicting security interests are generally governed by Wyo. Stat. Sec. 34-9-312 (1957) (Supp. 1963) and the sections cited. They will not be individually discussed due to the variety of facts which control their application.

Another problem which was foreseen and apparently alleviated by the 1963 legislators is in regard to duplicate certificates of title. Under the old Wyo. Stat. Sec. 31-40 (1957), it was a relatively simple procedure to obtain a duplicate certificate of title from the county clerk upon payment of \$1.00. It was thereby possible for a dishonest person to borrow on his vehicle, deliver a clean original title to the lender in compliance with the old Wyo. Stat. Sec. 31-37 (f) (1957), and in the five day interval before the original was submitted to the county clerk for notation of the encumbrance, apply for and immediately receive a clean duplicate which could again be

47. In the Matter of Dumont Airplane & Marine Instruments, Inc., 203 F. Supp. 511 (S.D.N.Y. 1962); Commercial Credit Corp. v. Bongiorno, 45 Erie Leg. J. 92 (Pa. 1961).

48. Girard Trust Corn Exchange Bank v. Warren Lepley Ford, Inc. (No. 2), 13 Pa. D. and C.2d 119 (1957).

49. Sterling Acceptance Co. v. Grimes, 194 Pa. Super. 503, 168 A.2d 600 (1961); In re Lux's Superette, Inc., 206 F. Supp. 368 (D.C. 1962); Slaughter v. Brown, 57 Lanc. Rev. 417 (1962); Purchase money security interest, G.M.A.C. v. Manheim Auto Auction, 25 D. and C.2d 179, 57 Lanc. Rev. 457 (1962); but see Churchill Motors, Inc. v. A. C. Lohman, Inc., 229 N.Y.S.2d 570, 16 A.D.2d 560 (1962) which holds that Manheim deemed overruled by Casterline v. General Motors Acceptance Corp., 195 Pa. Super 344, 171 A.2d 813 (1961).

50. Wyo. Stat. § 34-9-302 (4) (1957) (Supp. 1963).

51. Wyo. Stat. § 34-9-302 (4) (1957) (Supp. 1963).

52. Defined by Wyo. Stat. § 34-9-105 (b) (1957) (Supp. 1963).

used as collateral for a second loan.⁵³ *Union National Bank and Trust Co. v. Geyer Auction*⁵⁴ is a case involving such a fraudulent use of a duplicate certificate of title.⁵⁵ In this Pennsylvania case the owner of an original "clean" certificate of title, Meyers, applied and received a "clean" duplicate certificate of title by representing the loss of his original when in fact it was not lost. Meyers then used the original for a loan from the plaintiff. The plaintiff followed the statutory requirements necessary under the Vehicle Code to secure his loan. Later, Meyers secured a second loan from a bank using the "clean" duplicate certificate of title which was assigned to the defendant. The question considered by the court was "does the improper issuance of a duplicate certificate of title render the original certificate of title void when the original certificate of title has been pledged to an innocent lender"? The court held that the original was not void when given to the innocent plaintiff who had no knowledge of the fraud. "Where two innocent persons are the victims of the fraud or mistake of a third person, and neither victim could have been reasonably expected to take steps to detect or to prevent the fraud or mistake, the victim who first acquired the muniments of title should prevail, for precedency in time, where the equities are in other respects equal, gives priority in law."

Wyo. Stat Sec. 31-40 (1957), was amended in 1963 to prevent situations as above.⁵⁶ Upon loss of a certificate of title, the owner must submit an affidavit requesting a duplicate which, in the discretion of the county clerk, can be issued on the eleventh day after the affidavit is filed. An alternative of posting an indemnity bond is permitted for a duplicate certificate requested to be issued prior to the eleventh day. Further, a capital letter notation is written on the face of the certificate as notice that it is a duplicate and may be subject to the rights of persons under the original certificate. This notation would apparently permit a secured party to prevail over a subsequent bona fide purchaser or creditor who relied upon the clean duplicate when purchasing or lending as they would be on notice that other prior rights may exist. Such a purchaser or lender should proceed with extreme caution and should at least forestall their transaction for a minimum of ten days. Although the legislature has closed many of the avenues for fraud by the use of two certificates of title, it is still possible for two clean certificates to be obtained and both later used to obtain serve as notice. A suggested improvement by legislation is to proceed on the premise that it is rare when an honest person actually loses his original loans within a few days time before anything appears on the records to

53. The requirement in Wyo. Stat. § 31-37 (f) (1957), repealed by Laws 1963, ch. 185, § 4 but substantially re-enacted in Wyo. Stat. § 34-9-302 (4) (1957) (Supp. 1963), that an encumbrance be recorded within five days does not apply until the owner has been issued an original or substitute certificate. *General Credit Corp. v. First Natl. Bank of Cody*, 74 Wyo. 1, 283 P.2d 1009 (1955).

54. 19 Pa. D. and C.2d 98 (1958).

55. Certificate of title procured by false representations is void ab initio, *Hertz Corp. v. Hardy*, 197 Pa. Super. 466, 178 A.2d 833 (1962).

56. Wyo. Stat. § 31-40 (1957) (Supp. 1963), Laws 1963, ch. 185, § 3.

certificate of title; hence such a person should bear the risk and expense of posting an indemnity bond for the duration of time that a duplicate certificate of title is outstanding.⁵⁷

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57. For additional references to the provisions of the Uniform Commercial Code, see Uniform Commercial Code Co-ordinator annotated, 1963, Matthew Bender and Company, Inc. For discussion and citations to Article 9 of the U.C.C. see Rudolph, Secured Transactions Under the Commercial Code, 14 Wyo. L. J. 220-38 (1960); Lee, Perfection and Priorities Under the Uniform Commercial Code, 17 Wyo. L. J. 1 (1962); Note, Motor Vehicle Certificates of Title in Wyoming, 11 Wyo. L.J. 47 (Fall, 1956).

THE PUBLIC SERVICE COMMISSION AND MOTOR CARRIERS

Wyoming has regulated motor carriers by law since 1927 when the first motor carrier law was passed.¹ The present motor carrier act has been in effect since 1957, as amended. The motor carrier act (hereinafter called the Act) defines four types of motor carriers to which the Act applies. They are common, contract, private, and interstate. The Public Service Commission (hereinafter called the Commission) is required to administer the Act so as to attain the stated objectives of promotion of safety on the highways, the collection of a fair and adequate compensatory fee for the commercial use of publicly constructed highways, and the maintenance of a proper transportation structure.² To determine whether an individual is affected by the Act, he should ask himself if he is operating a motor vehicle³ on state highways⁴ for the purpose of financial gain. If the answer is yes, then, in all probability, he is a motor carrier⁵ and as such he is subject to the rules and regulations of the Public Service Commission.

The Act exempts motor carriers who operate wholly within a municipality or who go outside the municipality to adjacent airports; farmers who own vehicles with an unladen weight of less than 10,000 pounds and use such vehicle to haul their own produce or commodities; transportation of school children; transportation of sick, injured, or deceased persons by ambulance or hearse; transportation by motor vehicle owned by the United States; and transportation of the United States mails.⁶

COMMON CARRIERS: There are two types of common carriers; the regular route and the irregular route. The regular route common carrier transports, by motor vehicle, persons or property over state highways along specified routes with fixed termini as the public may require.⁷ The irregular route common carrier differs in two respects from the regular route; first, he is limited to the carrying of six specific commodities; second, he operates over irregular routes without fixed termini.⁸ Either type of common carrier's service must be available to any and all members of the public who desire such service insofar as his facilities enable him to perform the service.⁹

Common carriers, by statute, are considered public utilities.¹⁰ As such

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1. Ch. 98, Session Laws of Wyoming, (1927).
 2. Wyo. Stat. § 37-132 (1957).
 3. Wyo. Stat. § 37-131 (k) (1957).
 4. Wyo. Stat. § 37-131 (h) (1957).
 5. Wyo. Stat. § 37-131 (m) (1957).
 6. Wyo. Stat. § 37-134 (1957).
 7. Wyo. Stat. § 37-131 (m) (1957).
 8. Wyo. Stat. § 37-131 (n) (2) (1957). The commodities which can be transported under this certificate are: (1) livestock; (2) petroleum and petroleum products; (3) oil field equipment and supplies, except water; (4) persons in special charter operations; (5) bulk cement; (6) household goods.
 9. *Mt. Tom Motor Lines, Inc. v. McKesson & Robbins, Inc.*, 325 Mass. 45, 89 N.E.2d 3 (1949).
 10. Wyo. Stat. § 37-133, 137 (1957).

their rates and fares are set by the Public Service Commission.¹¹ The Commission is required to insure that the carrier furnishes adequate and sanitary transportation facilities; that insurance policies are filled by companies authorized to do business in Wyoming and are in force to cover cargo, public liability, and property damage.¹² Commission regulations require common carriers to file an annual report on forms mailed to the carrier; in addition, a common carrier must file a time schedule of his operations.¹³

The prerequisite for a common carrier to operate in Wyoming is the acquisition of a certificate of convenience and necessity from the Commission. The certificate is obtained by proper application to the Commission pursuant to Wyo. Stat. § 37-147 (1957). There is no form available from the Commission for compiling the required information for a regular route certificate, but there is a form available for an irregular route application.¹⁴ The information required is listed in rule nine (9) of the Public Service Rules and Regulations and Wyo. Stat. § 37-148 (1957). This information is used by the Commission in considering an applicant's qualification for rendering the proposed service and his financial ability to provide such service.¹⁵ The Commission may attach to the exercise of the privilege sought under the certificate, terms and conditions deemed proper to protect the public interest or what the public convenience and necessity require for a proper transportation system. However, any applicant legally operating on January 1, 1935, or on the beginning of any calendar year thereafter as a common carrier and rendering satisfactory service is presumed to be serving the public convenience and necessity, and said applicant is entitled to a certificate or renewal as a matter of right.¹⁶ A certificate of convenience and necessity is granted only after a hearing before the Commission at which time it determines if the prospective hauler is willing to transport property from one place to another for all persons that desire to employ him and whether the transporting will involve a public interest.¹⁷ The final decision as to issuance is in the sound discretion of the Commission which can be reversed by a district court only on a showing of abuse of discretion. In *Robinson v. Gallagher Transfer and Storage* there was an application to extend Robinson's service over

11. Wyo. Stat. § 37-137 (1957); Rule 31, Public Service Commission Rules and Regulations Governing Motor Carriers.

12. Wyo. Stat. § 37-137 (1957). Insurance requirements are found in part two of the rules and regulations of the Public Service Commission. Rule two prescribes the minimum amounts for motor carriers both for injury to persons and for cargo liability.

13. Rule 4, Public Service Commission Rules and Regulations Governing Motor Carriers (revised 1963).

14. Wyo. Stat. § 37-147 (1957) lists the information required. In addition *Robinson v. Gallagher Transfer and Storage Co.*, 58 Wyo. 69, 125 P.2d 157 (1942) has various parts of an application in the opinion.

15. Wyo. Stat. § 37-145 (1957).

16. Wyo. Stat. § 37-146 (1957).

17. *Weaver v. Public Service Commission of Wyo.*, 40 Wyo. 462, 278 P. 542 (1929); Rule 9(c), Public Service Commission Rules and Regulations Governing Motor Vehicles (revised 1963).

a route already given to Gallagher. The Commission allowed the extension of service. In reversing the district court, which found the Public Service Commission had abused its power, the Wyoming Supreme Court indicated that any showing of abuse of discretion must be exceedingly strong, especially in light of the fact that only the applicant for the extension testified. The court said:¹⁸

It is our view that it was the purpose of the legislature to place matters of this character in the sound discretion of the commission, with its power broadened so as to obtain and apply pertinent facts and conditions not so easily determined by the courts. Should the commission abuse its discretion in handling matters of this kind, then the courts may well be invoked to correct such abuse. Each case must in large measure stand upon its own facts and circumstances.

The Commission may, in its discretion, allow a competitive carrier to operate where the present carrier fails to provide the proper service called for in its certificate or which the public is entitled to receive.¹⁹ The issuance of the certificate is dependent, not on the need of the carrier for business, but upon a showing of a general public need for transportation where no reasonably adequate service existed.²⁰ Hence, the Commission need not allow a presently operating carrier an opportunity to furnish the required service.²¹ At the hearing the burden of proof is on the one seeking the certificate, and he carries this burden by presenting witnesses who are prospective shippers of the applicant.

CONTRACT CARRIERS: The Act defines a contract carrier as any carrier, other than a common motor carrier, who engages in the transportation of persons or property by a motor vehicle on and over the highways of the state for compensation.²² A permit, applied for on a Public Service Commission form, is necessary before a contract carrier can operate.²³ The issuance of the permit is governed by a very wordy statute which initially states that the permit shall be immediately issued upon proper compliance with the Act, but this is conditioned upon there being no showing that the permit will result in impairment or competition with any common carrier serving the same route. If there is such a showing, a hearing before the Commission is required before the permit is granted, and the Commission may attach terms and conditions to protect the common carrier. The statute concludes, qualifying all prior statements, by providing that if the contract carrier permit is to transport property over

18. *Robinson v. Gallagher Transfer and Storage Co.*, 58 Wyo. 69, 125 P.2d 157 (1942).

19. *Russell v. Calhoun et al.*, 51 Wyo. 448, 68 P.2d 591 (1937). This case was the second of three involved in this controversy to amend a certificate of convenience and necessity. The first was *Russell v. Calhoun*, 51 Wyo. 439, 68 P.2d 588. The third was *Russell v. Calhoun*, 51 Wyo. 463, 68 P.2d 597 (1957).

20. *Ibid.*

21. Cases cited note 19 *supra*.

22. Wyo. Stat. § 37-131 (o) (1957).

23. Wyo. Stat. § 37-150-151; Rule 11, Public Service Commission Rules and Regulations (revised 1963).

irregular routes, the Commission cannot find that the permit sought competes with a common carrier.²⁴ The result has been that any contract carrier who applies for a permit cannot be denied the permit if he applies for an irregular route. There is no distinction between resident and non-resident applicants. This is in contrast to Colorado which requires a formal hearing for contract carrier permits and allows common carriers who might be affected to appear.²⁵

Thus the Public Service Commission would seem to be in the position of being able effectively to regulate competition as to common carriers, yet the Commission cannot deny a contract carrier applicant a permit where it competes with either a regular or irregular route common carrier as long as the permit is to operate over an irregular route.

Contract carriers are regulated in a different manner from the common carrier.²⁶ Theoretically, a contract carrier serves particular shippers or a limited number of shippers under a contract with each shipper to be served. One fallacy here is that there is no statutory requirement as to a contract, hence negotiations may be minimal. The contract carrier is under no duty to haul for all persons, and there is nothing to restrain him from showing favor or preference between shippers who deal with him as he makes no claim to be holding himself out to serve all of the public. The contract carrier must refrain from offering his services to the public, i.e., that he is available to any and all of the public who wish to hire him as in the case of a common carrier, in order to maintain his status as an independent contract carrier.

The fact that carriers are fully aware of the implications of Wyo. Stat. § 37-153 (1957) is shown by the fact that in the two year period from September 1, 1960, to August 31, 1962, only eighteen common carriers were certified compared to 549 contract carriers.²⁷ By definition a contract carrier engages in transportation of both persons and property for compensation.²⁸ Hence, he carries or transports the same items as common carriers. The contract carrier must agree to charge not *less* than the rate or fare required to be charged by common carriers rendering the same class and kind of service over the same route (s) or area proposed to be served by the applicant and include a description of the equipment to be used.²⁹ Note that there is no upper limit on the rate a contract carrier can charge.

OTHER CARRIERS: There are three other types of permits which

24. Wyo. Stat. § 37-153 (1957).

25. Sept. 1960-Aug. 1962, Twenty-Fourth Biennial Report of the Public Service Commission of Wyoming.

26. Wyo. Stat. § 37-138 (1957); Rule 11, Public Service Commission Rules and Regulations (revised 1963).

27. Public Service Commission Report, supra note 25.

28. Wyo. Stat. § 37-131 (o) (1957).

29. Wyo. Stat. § 37-138 (1957); Rule 11, Public Service Commission Rules and Regulations (revised 1963).

are required by carriers of which only two, private and interstate, are commonly used. A private motor carrier transports employees or property in the furtherance of a private enterprise by the owner or for the purpose (s) of lease, rent, or bailment.³⁰ The private carrier permit application is made pursuant to the Public Service Commission application forms which are furnished upon request. The principal requirement is that the applicant give a complete statement of the nature of his business so the Commission may determine if the proposed operations will constitute private carrying.³¹ Issuance is immediate unless the applicant's information is insufficient to show that he is a bona fide private carrier or unless safety regulations will be violated.³² There is no insurance requirement for private carriers. The Commission's power has been limited by a Supreme Court ruling that it is unconstitutional to require private carriers to abide by the Commission rules pertaining to common carriers.³³

Interstate carriers consist of other than a common or contract carrier who transports persons or property for compensation, by motor vehicle, from one state to another.³⁴ Interstate carrier permits are applied for on forms available from the Public Service Commission. Principally the application requires a statement of whether the applicant intends to carry property or passengers or both, a description of the equipment to be operated, and proof that authority has been granted to the applicant by the Inter-State Commerce Commission.³⁵ The permit will be issued immediately upon application if the applicant has complied with all the requirements and the safety regulations.³⁶ The Federal Motor Carrier Act provides for close coordination with the state in regulating interstate transportation by stating:³⁷

The act applies to the transportation of passengers and property by motor carriers engaged in interstate commerce, and expressly disclaims any effect upon the power of a state to tax or to authorize carriers to do an intrastate business.

FEES (see accompanying chart): Enforcement authority for regulation and rules as to collection of the fees lies in the Board of Equalization.³⁸ These compensatory fees are payable in advance from towing motor vehicles.³⁹ The fees from all other motor carriers are due and payable on the fifteenth day of the month after the month in which they were traveled. If not paid they become a lien on all motor vehicles for which such fees are delinquent. If the fees are thirty days overdue or the vehicle

30. Wyo. Stat. § 37-131 (p) (1957).

31. Rule 12 (a), Public Service Commission Rules and Regulations (revised 1963).

32. Rule 12 (c), Public Service Commission Rules and Regulations (revised 1963).

33. Authorities cited note 17 supra.

34. Wyo. Stat. § 37-131 (q) (1957).

35. Rule 13 (a), Public Service Commission Rules and Regulations (revised 1963).

36. Rule 13 (c), Rule 28, Public Service Commission Rules and Regulations (revised 1963).

37. 49 U.S.C.A. § 302 (b) (c) (1963).

38. Wyo. Stat. § 37-170 (1957).

39. Wyo. Stat. § 37-171 (1957).

on which the fees are due is about to be moved out of the state, the Board of Equalization can seize and sell said vehicle after four weeks notice published in the proper newspaper. The Board of Equalization is also empowered to bring suit on behalf of the state against any person owing compensatory fees.⁴⁰

All motor carriers must maintain records, which are subject to audit by the Board of Equalization, from which certified monthly reports of total ton miles traveled on state highways are made to the Board on forms furnished by the Board. In this regard each operator of a commercial vehicle must deposit a bond with the Board. This bond is not required if the fees are paid in advance or if the operator is operating over regular routes between fixed termini and operators who have been a resident of this state for more than one year and have not had their permits cancelled for non-payment of compensatory fees.⁴¹

SUMMARY: If a person is hauling solely his own property he should consider whether he wants to get a private permit and be subject to the Commission's rules and regulations or whether to make use of a contract or common carrier. If the person involved is hauling other people's goods, he must consider whether he wants to be a contract carrier, a common carrier, or discontinue hauling other people's goods and become a private carrier (if he will still have to haul his own property). The answer should be arrived at by a consideration of the factors herein discussed.

The principal problem or weakness in the Act lies in the inability of the Act to provide for a means whereby the Commission has discretion to protect Wyoming residents holding contract permits from excessive competition by nonresidents requesting similar authority. It would appear desirable to give the Commission discretionary power similar to that over common carriers so that the granting of the permits could be on the basis of actual competition with other contract carriers and on the basis of fitness to perform the proposed service.⁴² This would give protection to the Wyoming contract carriers similar to that enjoyed by contract carriers in our neighboring states.⁴³

THOMAS J. RARDIN

40. *Ibid.*

41. Wyo. Stat. § 37-172 (1957).

42. Rule 12(a), Public Service Commission Rules and Regulations (revised 1963).

43. Public Service Commission Report, *supra* note 25.

FEE SCHEDULE (37-169)
FEEES FOR USE OF HIGHWAYS BY CERTAIN
GASOLINE POWERED VEHICLES

Unladen Weight	Amount	How Paid
1. 4,000 lbs. or less	\$ 6.00 per year	\$.50 per month, payable in advance for number of months remaining in year when issued.
2. 4,000 to 6,000 lbs.	\$12.00 per year	\$1.00 per month, payable in same manner as No. 1.
3. 6,000 to 8,000 lbs.	\$24.00 per year	\$2.00 per month, payable in same manner as above.
4. 8,000 to 10,000 lbs.	\$36.00 per year	\$3.00 per month. Payable in same manner as above.
5. 10,000 to 12,000 lbs.	\$48.00 per year	\$4.00 per month. Payable in same manner as above.
6. 12,000 lbs. & up	For freight & express service, fee is 1½ mills per ton mile* on the unladen weight. For passenger service, fee is \$.017 per mile traveled on Wyoming state highways.	

FEEES FOR CERTAIN VEHICLES NOT USING GASOLINE FOR FUEL

*Unladen Weight	Amount	How Paid
1. 4,000 lbs. or less	\$12.00 per year	\$1.00 per month. Payable in advance for number of months remaining in year when issued.
2. 4,000 to 6,000 lbs.	\$30.00 per year	\$2.50 per month. Payable in same manner as above.
3. 6,000 to 8,000 lbs.	\$48.00 per year	\$4.00 per month. Payable in same manner as above.
4. 8,000 to 10,000 lbs.	\$66.00 per year	\$5.50 per month. Payable in same manner as above.
5. 10,000 to 12,000 lbs.	\$90.00 per year	\$7.50 per month. Payable in same manner as above.
6. 12,000 lbs. & up	For freight and express service there is an additional fee on special fuels of \$.07 per gallon on diesel fuel and \$.05 on butane or propane or mixture thereof. For passenger service the fee is \$.025 per mile traveled on Wyoming state highways by said vehicle.	

*UNLADEN WEIGHT -37-131 (u): as therein defined.

*TON MILE: unladen weight times number of miles traveled on state highways divided by 2,000.

IN THE SUPREME COURT, STATE OF WYOMING
OCTOBER TERM, A. D. 1964

In the Matter of Rules of)
)
the Supreme Court of Wyoming)

ORDER

It is ordered that Rule 6 and subdivision (h) of Rule 12, Rules of the Supreme Court, be amended to read as follows, the amending portions being in italics and the deleted portions indicated by asterisks:

RULE 6
MOTIONS

Motions submitted to this court shall be filed with the clerk in five copies. Prior to the filing, a copy of the motion shall be served on the adverse party or his attorney or record. A motion directed to subject matter which may substantially affect the disposition of a case shall *at the time of filing* be supported by a memorandum of points and authorities in five copies. Such memorandum shall prior to the filing be served upon the adverse party or his attorney of record who within ten days after such service may file and serve similar memorandum. The court may resolve a motion without oral argument or may order a hearing. All motions not previously determined shall stand for hearing or submission at the time regularly assigned for the hearing of the case.

RULE 12
BRIEFS

(h) Briefs in Original Cases. In all cases originally begun in this court, * * * *the party shall file five copies of his pleading together with like number of copies of brief supporting his position. Any party against whom such relief is sought shall file such response and briefs as the court may direct.*

It is further ordered that this order be published in the advance sheets of the ensuing volume of the *Wyoming Reporter*; that these changes in the Rules of the Supreme Court become effective ninety days from the date of this order; and that this order be spread at length upon the journal of this court.

Dated at Cheyenne, Wyoming, this 9th day of October, 1964.

BY THE COURT
/s/ GLENN PARKER
Chief Justice

IN THE SUPREME COURT, STATE OF WYOMING
 APRIL TERM, A. D. 1964

In the Matter of Wyoming)
)
 Rules of Civil Procedure)

ORDER

The Supreme Court of the United States having adopted a number of amendments to the Federal Rules of Civil Procedure for the United States District Courts on January 21, 1963; and in the interest of preserving the uniformity between the Federal Rules of Civil Procedure and the Wyoming Rules of Civil Procedure, the Permanent Rules Committee having recommended to the Supreme Court of Wyoming that subdivision (a) of Rule 5, subdivisions (a) and (b) of Rule 6, subdivision (a) of Rule 7, subdivision (a) of Rule 14, subdivision (d) of Rule 15, subdivision (c) of Rule 24, subdivision (a) (1) of Rule 25, subdivision (e) of Rule 26, subdivision (b) of Rule 28, subdivisions (a) and (c) of Rule 50, subdivisions (c) and (e) of Rule 56, and Form 22 be amended and that subdivision (d) of Rule 50 and Form 28 be adopted; and it appearing upon consideration that the recommendations are well taken;

It is ordered that such rules and Form 22 be amended and subdivision (d), Rule 50, and Form 28 adopted to read as follows, amending portions being in italics and deleted portions indicated by asterisks:

RULE 5.

SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.

(a) Service: When Required. *Except as otherwise provided in these rules, * * * every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties. * * * No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.*

RULE 6.
 TIME.

(a) Computation. In computing any period of time prescribed or allowed by these rules, *by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default * * * from which the designated period of time begins to run * * * shall not * * * be included. The last day of the period so computed * * * shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is * * * not a Saturday, a Sunday, * * * or a legal holiday. When the period of time prescribed or*

allowed is less than 7 days, intermediate *Saturdays*, *Sundays*, and *legal holidays* shall be excluded in the computation. * * * *As used in this rule, "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the governor or legislature of the State of Wyoming.*

(b) *Enlargement.* When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court, or a commissioner thereof, for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules * * * 50 (b), 52 (b), 58 (b), (d) and (e), 60 (b), 73 (a) and (g), and 75 (a), except to the extent and under the conditions stated in them.

RULE 7.

PLEADINGS ALLOWED; FORM OF MOTIONS.

(a) *Pleadings.* There shall be complaint and an answer; * * * a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third party complaint, if * * * a person who was not an original party *is summoned under the provisions of Rule 14*; and * * * a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

RULE 14.

THIRD-PARTY PRACTICE.

(a) *When Defendant May Bring in Third Party.* * * * *At any time after commencement of the action* a defendant, * * * as a third-party plaintiff, * * * may cause a summons and complaint *to be served* upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. *The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action.* * * * The person * * * served *with the summons and theird-party complaint*, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon

shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. *Any party may move to strike the third-party claim, or for its severance or separate trial.* A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

RULE 15.

AMENDED AND SUPPLEMENTAL PLEADINGS.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. *Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense.* If the court deems it advisable that the adverse party plead * * * to the supplemental pleading, it shall so order, specifying the time therefor.

RULE 24.

INTERVENTION.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon * * * the parties * * * as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

RULE 25.

SUBSTITUTION OF PARTIES.

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court * * * may order substitution of the proper parties. * * * The motion for substitution may be made *by any party or* by the successors or representatives of the deceased party * * * and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons. *Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.*

RULE 26.

DEPOSITIONS PENDING ACTION.

(e) Objections to Admissibility. Subject to the provisions of *Rules 28(b) and 32(c)*, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

RULE 28.

PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN.

(b) In Foreign Countries. In a foreign * * * country, depositions * * *

may be taken (1) on notice before a * * * person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before * * * a person * * * commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or * * * a letter rogatory shall be missed * * * on application and notice and on * * * terms * * * that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. o o o A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. * * * A letter rogatory may be addressed "To the Appropriate * * * Authority in (here name the country)." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

RULE 50.

MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

(a) *Motion for Directed Verdict: When Made * * *; Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. *The order of the court granting a motion for a directed verdict is effective without any assent of the jury.*

(c) Same: Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, * * * the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court * * * has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict * * * .

* * * * *

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

RULE 56.

SUMMARY JUDGMENT.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, *answers to interrogatories*, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, *answers to interrogatories*, or * * * further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

FORM 22-A.

SUMMONS AND COMPLAINT AGAINST
THIRD-PARTY DEFENDANT

* * * *

STATE OF WYOMING)		IN THE DISTRICT COURT
) ss.		FIRST JUDICIAL DISTRICT
COUNTY OF LARAMIE)		
		Civil Action No. _____
A. B.,)	
Plaintiff)	
v.)	
C. D.,)	
Defendant and Third-Party Plaintiff)	SUMMONS
v.)	
E. F.,)	
Third-Party Defendant)	

To the above-named Third-Party Defendant:

You are hereby summoned and required to serve upon _____, plaintiff's attorney whose address is _____, and upon _____, who is attorney for C. D., defendant and third-party plaintiff, and whose address is _____, an answer to the third-party complaint which is herewith served upon you * * * within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint. *There is also served upon you herewith a copy of the complaint of the plaintiff which you may but are not required to answer.*

Dated _____, 19__.

Clerk of Court.

(Seal of District Court)
STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

IN THE DISTRICT COURT
FIRST JUDICIAL DISTRICT

Civil Action No. _____

A. B.,)	
Plaintiff)	
v.)	
C.D.,)	
Defendant and Third-Party Plaintiff)	THIRD-PARTY
v.)	COMPLAINT
E. F.,)	
Third-Party Defendant)	

1. Plaintiff A. B. has filed against defendant C. D. a complaint, a copy of which is hereto attached as "Exhibit C."

2. (Here state the grounds upon which C. D. is entitled to recover from E. F., all or part of what A. B. may recover from C. D. The statement should be framed as in an original complaint.)

Wherefore C. D. demands judgment against third-party defendant E. F. for all sums that may be adjudged against defendant C. D. in favor of plaintiff A. B.

Signed: _____
Attorney for C. D., Third-Party Plaintiff
Address: _____

FORM 22-B.

MOTION TO BRING IN THIRD-PARTY DEFENDANT

Defendant moves for leave, as third-party plaintiff, to cause to be served upon E. F. a summons and third-party complaint, copies of which are hereto attached as Exhibit X.

Signed: _____
Attorney for Defendant C. D.
Address: _____
Notice of Motion

(Contents the same as in Form 19. The notice should be addressed to all parties to the action.)

Exhibit X

(Contents the same as in Form 22-A.)

FORM 28.

SUGGESTION OF DEATH UPON THE RECORD UNDER
RULE 25 (a) (1)

A. B. [describe as a party, or as executor, administrator, or other representative or successor of C. D., the deceased party] suggests upon the record, pursuant to Rule 25 (a) (1), the death of C. D. [describe as party] during the pendency of this action.

It is further ordered that this order be published in the advance sheets of the new ensuing volume of the WYOMING REPORTER; that these changes in the Wyoming Rules of Civil Procedure become effective ninety days from the date of this order; and that this order be spread at length upon the journal of this court.

Dated at Cheyenne, Wyoming, this 13th day of July, 1964.

BY THE COURT
/s/ GLENN PARKER
Chief Justice

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