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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 269 (1920).

Comments

JURISDICTION OVER UNLICENSED FOREIGN CORPORATIONS IN MISSOURI

Under what circumstances may a foreign corporation, not authorized to transact business in the state, be sued in Missouri?

Recent national developments in this area of the law,[1] as well as the few latest

1. Comment, 37 CORNELL L.Q. 458 (1952).

Missouri decisions on the point, suggest that some significant changes may be forthcoming.

To place the problem in its proper context it must be recognized as a question of a state's *power* to exercise in personam jurisdiction over a suit against an unlicensed foreign corporation, and as a further question of when Missouri courts will be likely to exercise this potential jurisdiction. The maximum limits of permissible jurisdiction (the power of the state) is ultimately a matter of due process and the interpretations of the United States Supreme Court will set the constitutional limits.[2] But within these bounds a state may exercise its power to any limited extent that seems appropriate, barring, of course, a pattern of discrimination proscribed by the Constitution.[3] Proper service of process upon a corporate agent within the state is assumed in this discussion. Also, jurisdiction over foreign corporations which have been authorized to transact business in Missouri is assured by statute[4] and will not be considered here. The sole question is what sort of facts are necessary to confer jurisdiction over an unlicensed foreign corporation.

Historically, in personam jurisdiction of the courts was founded upon the reality of power over the person of the defendant. Justice Holmes put it that "the foundation of jurisdiction is physical power."[5] In line with this basic concept was the common law view that jurisdiction could not be obtained over a foreign corporation in an action in personam unless the corporation voluntarily submitted thereto, since a corporation was deemed to have no legal existence outside the state of creation. This immunity was apparently based on the supposed inability to obtain personal service in the forum upon the corporation which did not exist beyond the territory of the state of incorporation. This anomalous view prevailed despite early recognition

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2. State *ex rel.* Ferrocarriles Nacionales de Mexico v. Rutledge, 331 Mo. 1015, 56 S.W.2d 28 (1932); Hall v. Wilder Mfg. Co., 316 Mo. 812, 293 S.W. 760 (1927); State *ex rel.* Mills Automatic Merchandising Corp. v. Hogan, 323 Mo. App. 291, 103 S.W.2d 495 (St. L. Ct. App. 1937).

"The question of whether a foreign corporation is doing business in a state in the sense to subject it, without its consent, to the jurisdiction of the courts of that state so that the service of process upon it will support a personal judgment against it, is not one of local law or of statutory construction, but of due process of law under the Fourteenth Amendment to the Constitution of the United States." Fisk v. Wellsville Fire Brick Co., 145 S.W.2d 451, 456 (St. L. Ct. App. 1940). As a constitutional question was involved the case was held to be within the appellate jurisdiction of the Missouri supreme court.

3. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); Bomze v. Nardis Sportswear, 165 F.2d 33 (2d Cir. 1948).

4. § 351.620, RSMo 1949, requires each licensed foreign corporation to maintain a registered office and a registered agent in the state. § 351.630, RSMo 1949, provides for service of process upon such registered agent, and if such agent is not maintained in the state then the secretary of state is irrevocably authorized as agent to accept service of process. Thus any foreign corporation licensed to transact business in Missouri has effectively consented to the jurisdiction of the local courts.

Special statutory provision has also been made for certain types of foreign corporations: §§ 375.160, .210, RSMo 1949 (insurance companies); § 506.210, RSMo 1955 Supp. (non-resident motorists); § 506.330, RSMo 1955 Supp (non-resident watercraft owners); § 508.070, RSMo 1949 (motor carriers).

5. McDonald v. Mabee, 243 U.S. 90 (1917).

that a corporation could, through its agents, make binding contracts and transact business beyond the boundaries of the home state.

With the increasing activity of corporations beyond the territory of their domiciliary states, such an immunity became intolerable. Statutes providing for service of process upon agents of foreign corporations were passed by many states in the mid-nineteenth century. The usual objections to a personal judgment based upon such service are commonly believed to have been summed up in the famous case of *Pennoyer v. Neff*.[6] The doctrine of this case, as interpreted, was that a court had no jurisdiction to render a personal judgment against a non-resident defendant if he was not personally served within the forum, made no general appearance in the action and did not actually consent to the forum's jurisdiction. Despite this doctrine, the judgments under such statutes were generally upheld if the facts brought the case under one of the two main theories which soon developed. The court would seek to infer from all the facts involved, that the corporation: (1) had consented to suit (implied consent theory);[7] or (2) was present in the territory of the forum (presence theory).[8]

Each of these theories, in practice, amounted to a determination of whether the foreign corporation was "doing business" in the state. The business activity was deemed either an implied submission to the jurisdiction of the local courts (consent), or else as a manifestation of the corporate "presence" in the forum.

These theories were, of course, pure fiction since the corporations generally did not actually intend to consent to any exercise of jurisdiction but were merely being held, as a matter of law, as if they had consented. Further, to say a corporation was "present" within the territory of a forum when it was "doing business" there was also a wholly artificial distinction. The so-called corporate presence can be manifested only by the activities of its agents. Logically, this "presence" exists whenever and wherever a corporate agent is acting in a representative capacity and not solely when the agent's activity amounts to the required "doing business." But, nonetheless, these theories and the "doing business" test were generally adopted in the United States and still remain today common criteria with respect to the existence of jurisdiction over a foreign corporation.

A review of the Missouri cases on this problem shows that both of these theories have been followed in this state at varying times and without apparent distinction.[9]

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6. 95 U.S. 714 (1877).
7. St. Clair v. Cox, 106 U.S. 350 (1882).
8. Green v. Chicago B. & Q. Ry., 205 U.S. 530 (1907).
9. Implied consent theory: McNichol v. United States Mercantile Reporting Agency, 74 Mo. 457 (1881); Selby v. Crown Life Ins. Co., 189 S.W.2d 135 (St. L. Ct. App. 1945); Fisk v. Wellsville Fire Brick Co., 145 S.W.2d 451 (St. L. Ct. App. 1940).
Presence theory: Meek v. New York, C. & St. L.R.R., 337 Mo. 1188, 88 S.W.2d 333 (1935); Busch v. Louisville & Nashville R.R., 322 Mo. 469, 17 S.W.2d 337 (1929); State *ex rel.* Mills Automatic Merchandising Corp. v. Hogan, *supra* note 2; Painter v. Colorado Springs & C.C.D. Ry., 127 Mo. App. 248, 104 S.W. 1139 (St. L. Ct. App. 1907).

However, any distinction would involve little more than the different terminology of each fiction and the essential, determining test of whether the foreign corporation was "doing business" has been consistently followed. Nor has the confusion as to the application of theories been limited to Missouri. State courts generally, and even the United States Supreme Court, have applied both the "presence" and the "consent" theories. Indeed, the two thories have been combined in one decision.[10]

Despite the apparent confusion over the justification of jurisdiction, in practice the "doing business" test soon developed a reasonably consistent body of law. The Missouri decisions in this area have largely followed the general holdings throughout the country with no significant deviations.

The earliest Missouri cases involved construction of the Missouri statutes concerning attachment proceedings against foreign corporations. In 1859 the legislature passed an act providing that "all railroad companies who own and operate roads terminating opposite to the city of St. Louis, and whose chief office or place of business is in the city of St. Louis, shall be sued in the same manner, and no other, that railroad companies chartered by the laws of this State are now sued."[11] This act was considered in conjunction with the prior statute providing that foreign corporations were liable to be sued and their property was subject to attachment the same as a non-resident individual.[12] It was held that a foreign railroad corporation by reason of having its chief office or place of business in St. Louis was virtually a resident of the state, subject to ordinary process, and therefore, there was no ground for the issuance of the extraordinary process of attachment.[13]

One early case (and another dissent) indicated that the general provisions for service upon corporations were intended to include foreign as well as domestic corporations.[14] However, subsequent cases held that foreign railroad corporations could not be served by ordinary process of summons, and that jurisdiction under the statute depended on the fact that the corporation had its chief office or place of business in St. Louis.[15] The requirement that the *chief* office or place of business of a foreign railroad corporation had to be located in St. Louis was changed in 1877 by an amendment providing that foreign railroads with lines terminating opposite the state and which had offices or places of business in the state could be sued in the same manner as a domestic corporation.[16] Similar statutes during this period also prescribed the

10. "The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted." People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 87 (1918).

11. Mo. Laws 1858, at 67.

12. c. 34, § 22, RSMo 1855.

13. Farnsworth v. Terre-Haute, A. & St. L.R.R., 29 Mo. 75 (1859).

14. St. Louis v. Wiggins Ferry Co., 40 Mo. 580 (1867); Middough v. St. Joseph & D.C.R.R., 51 Mo. 520 (1873) (dissenting opinion).

15. Robb v. Chicago & A. R.R., 47 Mo. 540 (1871); Middough v. St. Joseph & D.C.R.R., *supra* note 14.

16. Mo. Laws 1877, at 369.

method of service on foreign insurance companies and made such service equivalent to personal service.[17]

In 1879 there was a general revision of the preceding legislation, resulting in a provision for service of summons upon *all* foreign corporations having an office or *doing business* in the state in the same manner as any other defendant.[18] This change would seem to mark the introduction of the "doing business" test into Missouri law.

The case of *McNichol v. United States Mercantile Reporting Agency*[19] first construed this statute and held that service of summons thereunder had the effect of personal service and gave the court jurisdiction to enter a general judgment. This case also held that the statute was constitutional. Employing the implied consent theory, the court said:

> When it goes into another state and engages in the transaction of business, it goes there with the consent, either expressed or implied, of such state; it goes there in presumed assent and submission to the laws of that state, which provide for the service of process upon such corporations.[20]

It should be noted at this point that the test of whether a corporation is "doing business" is employed for various purposes and an undiscerning use of the phrase may lead to confusion.[21] Missouri statutes provide that a foreign corporation which "transacts business" in this state shall procure a certificate of authority to do so from the secretary of state;[22] shall be required to pay a domestication tax or fee;[23] and that every such corporation which fails to comply with these requirements shall be subject to a fine of not less than $1,000.00 and the further penalty of being unable to maintain any suit or action in any of the courts of the state while the requirements have not been met.[24] Thus the numerous cases considering whether a foreign corporation was "doing business" within the meaning of these statutes furnish no direct

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17. c. 84, § 1, RSMo 1855; c. 90, § 3, RSMo 1866.

18. "A summons shall be executed, except as otherwise provided by law, either: . . . fourth, where defendant is a corporation or joint stock company, organized under the laws of any other state or country, and *having an office or doing business* in this state, by delivering a copy of the writ and petition to any officer or agent of such corporation or company, in charge of any office or place of business, or if it have no office or place of business, then to any officer, agent, or employee in any county where such service may be obtained. . . ." (Emphasis added.) § 3489, RSMo 1879.

19. 74 Mo. 457 (1881).

20. *Id.* at 473.

21. "The determination of whether a foreign corporation is 'doing' or 'transacting' business in a state within the meaning of a particular statute is primarily dependent upon the facts and circumstances of the particular case, considered in the light of the purposes and the language of the statute." United Mercantile Agencies v. Jackson, 351 Mo. 709, 713, 173 S.W.2d 881, 883 (1943).

"The criterion for questions of state regulation differs from the tests which control in questions which arise in service of process." Vilter Mfg. Co. v. Rolaff, 110 F.2d 491, 496 (8th Cir. 1940).

22. § 351. 570, RSMo 1949.

23. § 351.585, RSMo 1949.

24. § 351.635, RSMo 1949.

authority on the question of whether a given set of facts are sufficient to confer in personam jurisdiction over a foreign corporation.[25]

The question of just what sort of facts are necessary to constitute "doing business" on which in personam jurisdiction may be based does not readily lend itself to a broad general rule. However, it has been stated:

> While no all-embracing rule has been laid down as to what constitutes doing business by a foreign corporation so as to make it amenable to personal service of process within a given jurisdiction and a solution of the question depends upon the facts of the particular case yet the general rule is recognized that to constitute "doing business" the foreign corporation must have entered the State and engaged there in carrying on and transacting, through its agents, the *ordinary business in which it is engaged.* . . . (Emphasis added.)[26]

Where an officer of a foreign corporation was merely temporarily within the state and was not transacting the ordinary and usual business of the corporation the service upon such officer was held void.[27] Clearly the officer's mere presence did not involve "doing business" within the meaning of the statute and was not sufficient to confer jurisdiction.

In a similar case an agent of a foreign corporation came to Missouri for the sole purpose of investigating a claim for damages against the corporation. It was held that the service of process upon such agent was ineffective and that an agent must be engaged in the state in transacting some substantial part of the ordinary business of such foreign corporation in order that service of process upon him may confer jurisdiction.[28]

Service upon an officer of a foreign corporation was upheld in a case where the only business transacted in Missouri was the management functions of a manufacturing plant in Illinois. Here the foreign corporation was organized by Missouri residents under the laws of Arizona. While the manufacturing operations were carried out in Illinois, the fact that directors' meetings were held, that the corporate funds were kept, and that the executive management was performed in Missouri was sufficient to permit a finding that the firm was "doing business" in the state.[29]

It is commonly stated as a general proposition that single, isolated or sporadic

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25. "A foreign corporation may be doing business in a state to bring it within the jurisdiction of the court and amenable to its process and yet not obtain a status to be regulated by a state statute or bring it within the statutory provision requiring a license for operation of such foreign corporation." State v. Ford Motor Co., 208 S.C. 379, 393, 38 S.E.2d 242, 248 (1946).

26. State *ex rel.* Ferrocarriles Nationales de Mexico v. Rutledge, 331 Mo. 1015, 1036, 56 S.W.2d 28, 38 (1932).

27. Nathan v. Planters Cotton Oil Co., 187 Mo. App. 560, 174 S.W. 126, (K.C. Ct. App. 1915).

28. Painter v. Colorado Springs & C.C.D. Ry., 127 Mo. App. 248, 104 S.W. 1139 (St. L. Ct. App. 1907).

29. Stegall v. American Pigment & Chemical Co., 150 Mo. App. 251, 130 S.W. 144 (St. L. Ct. App. 1910).

transactions or acts do not constitute "doing business."[30] Casual, single purchases by a foreign corporation within a state ordinarily will not be held to constitute "doing business."[31] However, even a single transaction of a continuing nature or of sufficient magnitude may constitute enough activity for jurisdiction. The construction of a pipeline in the state was held to be "doing business" within the meaning of the statute although apparently it involved only a single transaction.[32]

Perhaps the most frequent situation arising under the "doing business" test is that of a sales agent maintained in a state to solicit orders for the foreign corporation. The mere fact that such business is normally interstate in character will not make the defendant immune from service of process in Missouri.[33] However, the rule generally stated by the early cases was that sending a traveling salesman into the state and soliciting orders through him was not "doing business" within the meaning of the statute providing for service of process.[34] The same rule has been applied to service upon a sales representative who is in the state merely to aid distributors and dealers.[35]

The question regarding the maintenance of a freight and passenger soliciting agency or office by a railroad which does not operate any lines within Missouri has arisen with particular frequency. Missouri has generally followed the leading case of *Green v. Chicago, B. & Q. Ry.*,[36] which held that where a railroad maintained a district freight and passenger agent in a state wherein it did not operate any lines that, while the company obviously was doing considerable business of a certain kind, it was not doing business in the sense that it was liable to service. This has often been termed the "mere solicitation" rule.

Later cases, while not overruling the *Green* case, somewhat limited it by applying what some writers have called the "solicitation plus" rule. The leading case of this group is *International Harvester Co. v. Kentucky*[37] which upheld service of process upon an agent of the foreign corporation where its agents not only solicited orders in the state, but also might receive payment there and had authority to accept notes of customers. The distinction from the *Green* case may seem rather

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30. 20 C.J.S., *Corporations* § 1920(b) (1940).
31. St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co., 32 F. 802 (E.D. Mo. 1887); Annot., 12 A.L.R.2d 1439, 1442 (1950).
32. Daniels v. Yarhola Pipe Line Co., 206 S.W. 600 (Spr. Ct. App. 1918).
33. International Harvester Co. v. Kentucky, 234 U.S. 579 (1914).
34. *E.g.*, Bauch v. Weber Flour Mills Co., 210 Mo. App. 666, 238 S.W. 581 (Spr. Ct. App. 1922). This case was also based upon the notion that such jurisdiction might constitute an improper burden upon interstate commerce. This idea has since been rejected. Wooster v. Trimont Mfg. Co., 356 Mo. 682, 203 S.W.2d 411 (1947). *But cf.* Hayman v. Southern Pacific Co., 278 S.W.2d 749 (Mo. 1955) (en banc).
35. Peebles v. Chrysler Corp., 57 F.2d 867 (W.D. Mo. 1932).
36. 205 U.S. 530 (1907). Missouri cases citing and following this decision are: Hayman v. Southern Pacific Co., *supra* note 34; case cited note 26 *supra*; Detmer, Bruner & Mason v. New York Cent. R.R., 229 Mo. App. 702, 80 S.W.2d 222 (K.C. Ct. App. 1935). The rule was also recognized in Meek v. New York, C. & St. L.R.R., 337 Mo. 1188, 88 S.W.2d 333 (1935) (dictum).
37. 234 U.S. 579 (1914).

nebulous but the court expressly declined to depart from that decision, although calling it an "extreme case." It was stated that the *International Harvester* case involved something more than mere solicitation.

The *International Harvester* case (and the "solicitation plus" rule) was followed in *Vilter Mfg. Co. v. Rolaff*,[38] in which a foreign corporation, operating in the state through a sales representative who occupied an office which was identified under the corporation's name in telephone and building directories and who occasionally supervised installations and adjusted complaints, was held to be "doing business" so as to be amenable to process served on the representative.[39]

The foregoing summary of Missouri law in this area has been largely limited to that developed prior to the United States Supreme Court's decision in the case of *International Shoe Co. v. Washington*.[40] The changes which have resulted or which may yet develop from the doctrine of that case are very significant. That opinion apparently came from a reappraisal of the entire problem of jurisdiction over foreign corporations. The facts of the case dealt with the sufficiency of service in a state tax matter but the doctrine there developed is broad enough to include the entire area of non-resident jurisdiction.[41]

The essence of the doctrine seemed to be well stated by Chief Justice Stone in *International Shoe* when he wrote: "[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."[42] At this point, two of the early non-resident motorist statute cases were cited.[43] The decision rejected the customary theories of "presence" and "implied consent." "For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agents within the state which courts will deem sufficient to satisfy the demands of due process."[44]

The touchstone of the decision seems to be the *reasonableness* of the exercise of jurisdiction; that due process will be accorded if it is "reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there."[45] This concept of reasonableness has been amplified by the case of *Perkins v. Benguet Consol. Mining Co.*[46] which stated that

38. 110 F.2d 491 (8th Cir. 1940).
39. See also Williams v. Campbell Soup Co., 80 F. Supp. 865 (W.D. Mo. 1948), which followed the *International Harvester* Co. case although there was no evidence of any activity beyond solicitation of orders.
40. 326 U.S. 310 (1945).
41. Wooster v. Trimont Mfg. Co., *supra* note 34; State v. Ford Motor Co., 208 S.C. 379, 38 S.E.2d 242 (1946).
42. 326 U.S. at 316.
43. Young v. Masci, 289 U.S. 253 (1933); Hess v. Pawlowski, 274 U.S. 352 (1927).
44. 326 U.S. at 316.
45. *Id.* at 317.
46. 342 U.S. 437 (1952).

the essence of the issue in such cases is one of "general fairness" to the corporation.[47] This case expanded the *International Shoe* doctrine somewhat by making it clear that the corporate activities within a state might be sufficiently substantial and of such a nature as to allow a state to entertain a cause of action against a foreign corporation even though the cause of action arose from activities entirely distinct from its activities in the forum. It should be noted that, although this case makes it clear the cause of action does not have to have arisen from the corporate activities within the state, such a fact properly should remain an extremely important consideration in looking to the "reasonableness" of the exercise of jurisdiction in a particular case.

When the cause of action has arisen from the same contacts or activities upon which jurisdiction is sought to be based the evidentiary burden—transportation of witnesses, waste of the defendant's employee's productive time, cost of local counsel—would then seem to be at a minimum. When, however, the cause of action is unrelated to the corporate activities within the forum, the defense of such a suit in the particular forum will quite generally involve a considerable burden upon the corporation. In the *International Shoe* case it was stated that an "estimate of the inconveniences which would result to a corporation from a trial away from its 'home' or principal place of business" was relevant in looking to the "reasonableness" of an exercise of jurisdiction.[48]

One extensive law review comment has analyzed the evidentiary burden in relation to the reasonableness of jurisdiction in considerable detail.[49] The author categorizes the possible situations as follows:

1. Direct claims—the cause of action arises from the acts of an agent within the forum. Ordinarily there would be no special burden involved here; the evidence usually will be within the state.

2. Indirect claims—the cause of action is not based on acts of the agent but is related to the corporate activities within the state. These claims will involve a varying degree of inconvenience to the corporation.

3. Unrelated claims—the cause of action has no relation to the corporation's business within the state. Here the evidence is nearly always outside the state and defense of such suits generally will involve a considerable burden.

The author notes that the character of the corporate activity in the state also

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47. "Today if an authorized representative of a foreign corporation be physically present in the state of the forum and be there engaged in activities appropriate to accepting service or receiving notice on its behalf, we recognize that there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state through such service of process upon that representative. . . . The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case." *Id.* at 444.

48. 326 U.S. at 317.

49. Comment, 104 U. PA. L. REV. 381 (1955).

may be relevant. Jurisdiction is far more likely to be held reasonable if the foreign corporation has been receiving substantial benefits from its activities in the state or if those activities have involved great risk to the local residents, either from economic harm such as from insurance companies, or from risk of physical injury such as from common carriers.

Considerations such as those just listed tend to merge indistinguishably into the doctrine of forum non conveniens. Although this doctrine is theoretically quite distinct, involving a question of *discretion* rather than of *power*, in practical effect the two doctrines are quite similar: a balancing of the conflicting interests is involved.[50]

The use of what previously had been purely discretionary criteria may seem anomalous as a test of jurisdiction. The jurisdiction which was based on physical power was a rather black and white sort of concept. The various fictions through which jurisdiction over foreign corporations was developed brought a vagueness and an ad hoc quality to the decisions which the *International Shoe* case has by no means dispelled. But, as stated by Judge Learned Hand:

> In the end any decision must seem like the fiat of a piepowder court. That will indeed be to some measure true, even though the federal test is applied of balancing the conflicting interests; but at least that will serve to center the inquiry upon those considerations which count with the parties, and to remove it from that world of abstractions—drawn from the analogy of arrest under a capias—in which it has hitherto so helplessly floundered.[51]

At least there is no longer any necessity for dealing in outworn abstractions when the issue has been stated in terms of the considerations actually involved. Also, it should be remembered that the only limitation on the exercise of jurisdiction over foreign corporations is the due process clause of the fourteenth amendment of the United States Constitution, and the criterion of "reasonableness" is now firmly established in the application of that clause.

Perhaps the broadest generalization which may be drawn from the multitude of cases on this subject is that the courts have apparently sought to find that the foreign corporation had in some way established itself within the forum. A great deal of conceptual confusion will be eliminated when courts will freely accept the rationale behind the *International Shoe* decision and acknowledge *activity* as a sole, legitimate ground for jurisdiction, abandoning completely the effort to bring the reasoning within the ancient principles of personal jurisdiction over an individual. Such emphasis upon the corporate activity would, of course, merely be a recognition of what implicitly has been the basis of jurisdiction from the beginning. Nor would

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50. Circuit Judge Learned Hand apparently considers the holding of the *International Shoe* case as identical with the forum non conveniens doctrine in Kilpatrick v. Texas & Pac. Ry., 166 F.2d 788 (2d Cir. 1948). The seeming confusion is difficult to understand in light of the fact that the basic thesis of the *International Shoe* doctrine is largely predicated upon the earlier opinion of Judge Hand in Hutchinson v. Chase & Gilbert, 45 F.2d 139 (2d Cir. 1930).

51. Bomze v. Nardis Sportswear, 165 F.2d 33, 36-37 (2d Cir. 1948).

such recognition be an innovation. It has long been a basic principle of English, French and German law that jurisdiction attaches on the basis of activity; *e.g.* when a contract is made or a tort committed within the country.[52] It should be noted, however, that the English rules leave it within the discretion of the court whether it will exercise such jurisdiction.

The Missouri decisions on the subject since the *International Shoe* case leave uncertain the extent to which the full implications of the new doctrine will be accepted. The first case, *Wooster v. Trimont Mfg. Co.*,[53] quoted from it extensively and with apparent approval. However, the facts of the Missouri case would clearly call for the same result under the usual test of "doing business." The defendant corporation had employed manufacturer's agents to represent it in Missouri and these agents had engaged in numerous activities beyond mere solicitation for many years. So, this case cannot be considered in any manner a departure from the prior existing law in Missouri.

It may be well to note again at this point that the *International Shoe* and *Perkins* decisions of the United States Supreme Court are not binding upon the state courts in a positive manner. That is, those decisions indicate how far a state court may go, consistent with due process, in exercising jurisdiction over foreign corporations, but they do not purport to indicate how far the state courts must or will go. The law of a state still may not extend to suitors access to its courts against foreign corporations as amply as it has power to do under the Constitution.[54]

The most interesting recent Missouri case on the problem is *Hayman v. Southern Pacific Co.*[55] Here a Missouri resident sued a foreign railroad corporation for injuries sustained in California. The corporation did not own or operate railroad lines, equipment or warehouses in the state, but maintained two offices for solicitation of freight and passengers. The corporation was not licensed to do business in the state. The court denied jurisdiction, purporting to follow the case of *Green v. Chicago B. & Q. Ry.*,[56] the early "mere solicitation" case. However, the court, by way of dictum, expressed a very broad general rule for the determination of the case. Judge Hyde expressed it as follows:

> [T]he most reasonable and satisfactory rule is to hold that a state has jurisdiction of *any* action against a foreign corporation which seeks to enforce an obligation or liability arising out of acts done in the state by its agents.[57] (Emphasis added.)

This rule was advanced as reasonably limiting the scope of the *Green* case and as being in conformity with both *Wooster v. Trimont Mfg. Co.* and the *International Shoe* case.

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52. WOLFF, PRIVATE INTERNATIONAL LAW 67-73 (1945).
53. 356 Mo. 682, 203 S.W.2d 411 (1947).
54. Bomze v. Nardis Sportswear, *supra* note 51.
55. 278 S.W.2d 749 (Mo. 1955) (en banc).
56. 205 U.S. 530 (1907).
57. 278 S.W.2d at 752.

When the court said that this was the proper rule for the determination of the case there was a clear implication that all suitors whose alleged cause of action did not arise from the activities of the corporation's agents within the state were to be denied access to Missouri courts. Certainly such a result is not compelled by the constitutional requirements of due process.[58] Whether the full negative, exclusionary implications of the stated rule were really intended is open to question. Applied rigidly, such a rule might often involve serious inconvenience and even injustice, particularly upon Missouri residents.

However, viewed solely in its positive aspects—as a statement of when Missouri courts *would* definitely exercise jurisdiction over a foreign corporation—the rule has much to commend it. The foremost advantage is that it brings a good measure of certainty to an area of the law where it previously has been largely absent. Reduction of the test of jurisdiction to the single operative fact of the cause of action arising from acts of the agent in the state clearly should provide such certainty. The rule stated in the *Hayman* case is in essence the same as that proposed by Professor J. P. McBaine, former dean of the University of Missouri School of Law, in an article in the California Law Review.[59] However, he makes it clear that the rule proposed is to operate in a positive sense only; that the problem presented when the cause of action does not arise out of acts done within the state is beyond the scope of the suggested rule; and that in such cases the factors of convenience and inconvenience assume far greater pertinence and require much closer examination.

The quoted rule of the *Hayman* case, while clearly dictum, was very provocative in that it indicated that the Missouri supreme court might be ready to recognize the changes possible—the wider discretion available to state courts since the *International Shoe* case. However, the most recent Missouri supreme court decision, *Collar v. Peninsular Gas Co.*,[60] also a division No. 1 opinion like the *Hayman* case, apparently reverted completely to the established "doing business" test of the early Missouri cases. Although the language of the *Collar* case seems to be a definite rejection of the broad dictum in the *Hayman* decision, the latter case was merely cited without comment.

The *Collar* case involved a malicious prosecution action against a foreign corporation which had just finished an unsuccessful suit against a former agent in Missouri. The corporation's only activity in the state was the prosecution of the suit which was the basis of the present alleged cause of action. Service was had upon the president of the defendant corporation who had been in Missouri merely to watch the trial of the corporation's suit. It was held that the court had no jurisdiction over the defendant. The court stated:

> The mere fact that service is had in this state upon an officer of a foreign corporation is not sufficient to confer our court with jurisdiction to render a personal judgment against the corporation. In addition to manual service of process, it is essential to its validity and the acquisition of jurisdiction that

58. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

59. McBaine, *Jurisdiction over Foreign Corporations: Actions Arising Out of Acts Done Within the Forum*, 34 CALIF. L. REV. 331 (1946).

60. 295 S.W.2d 88 (Mo. 1956), noted critically in 55 MICH. L. REV. 1168 (1957).

> the foreign corporation be doing business within this state. . . . [I]t is necessary that the foreign corporation be engaged in transacting some substantial part of its usual and ordinary business in this state.[61]

The court discussed the meaning of the *International Shoe* case, but gave it a very limited significance, stating that it "departed somewhat" from the usual doctrine of corporate "presence" in the state. That case was distinguished on the facts with no difficulty. However, the opinion completely ignored the broader implications of that case as respects an increase in the permissible area of state jurisdiction over foreign corporations.

The above comment is not intended as a criticism of the result reached in the *Collar* case. An exercise of jurisdiction under the facts involved might well have been deemed undesirable even though the alleged cause of action did arise from acts of the foreign corporation in Missouri. The broad rule advanced in the *Hayman* case, being merely dictum, clearly was not binding. The Missouri court may very justifiably prefer to limit the exercise of jurisdiction over foreign corporations within the scope of the prior cases under the "doing business" test. However, clear analysis of the respective areas of discretion and power would enable the court to reach future decisions on a much sounder basis. The statements of the court regarding its permissible power under the due process clause of the United States Constitution seem inadvertent. In that regard the opinion stated:

> Some significance must certainly be attached to the fact that the alleged claim before us resulted from the activity of the defendant in filing and prosecuting a suit in this state. However, . . . we do not think that fact alone, unaccompanied by any activity in connection with the usual business of the defendant, would require, *or even permit* the exercise of jurisdiction in the instant case. . . .[62] (Emphasis added.)

This statement might have been referring merely to the existing Missouri law on the subject, but the concluding paragraph of the opinion makes it clear that the court understood that "under the due process clause of the United States Constitution the court had no right to assume jurisdiction over the defendant."[63]

Jurisdiction, broadly speaking, is power—power to hear disputes and to impose or extinguish liability. It is submitted that recognition of the full extent of this power in state courts is important. It means recognition that the limitations of the due process clause depend ultimately upon the interpretations of the United States Supreme Court. A clear understanding of the extent of such power will enable Missouri courts to insure that jurisdiction will be attached whenever the forum is appropriate for a fair and proper determination of the controversy. Regardless of which rules may be adopted as best suited to reach this result, a clear understanding of the scope of the court's discretion certainly is essential. It is submitted that such recognition and understanding should be the first step of the Missouri courts toward joining the current trend of allowing broader jurisdiction over foreign corporations.

RICHARD J. SHIPLEY

61. *Id.* at 90.
62. *Id.* at 92.
63. *Id.* at 93.

MALPRACTICE RECOVERY IN MISSOURI AND ELSEWHERE UPON GENERAL NEGLIGENCE ALLEGATIONS

I. The Basis of the Problem

A recent Missouri case has restated the duty owed the patient by the medical practitioner as follows:

> A physician undertaking the treatment of a patient is required to possess and exercise that degree of skill and learning ordinarily possessed and exercised by the members of his profession in good standing practicing in the same or similar localities.[1]

There is universal agreement among the various jurisdictions that producing an unfortunate or unsuccessful result is not, of itself, evidence that the physician has breached this duty. The interest of society in the encouragement and protection of the healing arts is too high to require such practitioners to warrant their cures. However, when a physician has been negligent, the interest of his injured patient is entitled to consideration.

In the case of *Evans v. Roberts*, where the infant plaintiff's tongue was cut during an adenoid operation performed by defendant, the court stated:[2]

> . . . it does not follow that this rule [providing that unsuccessful treatment is not presumptive of negligence] applies with the same force to an injury done by him to sound and undiseased parts of the plaintiff's person which he was not called upon to treat and did not pretend to treat. If a surgeon, undertaking to remove a tumor from a person's scalp, lets his knife slip and cuts off his patient's ear, or if he undertakes to stitch a wound on the patient's cheek, and by an awkward move, thrusts his needle into the patient's eye, or if a dentist in his haste leaves a decayed tooth in the jaw of his patient and removes one which is perfectly sound and serviceable, the charitable presumptions which ordinarily protect the practitioner against legal blame where his treatment is unsuccessful, are not here available.
>
> It is a matter of common knowledge and observation that such things do not ordinarily attend the service of one possessing ordinary skill and experience in the delicate work of surgery. It does not need a scientific knowledge or training to understand that, ordinarily speaking, such results are unnecessary and are not to be anticipated, if reasonable care is exercised by the operator. When they do happen, then proof of other facts and circumstances having any fair tendency to sustain the charge of negligence will be sufficient to take the question to the jury. . . .

Many situations require that the injured patient be given the benefit of general allegations of negligence. Where specific negligence must be alleged, deserving plaintiffs may be unable to make a submissable case because, by reason of the nature of the treatment, they do not know how or why they were injured. Yet in according consideration to such plaintiffs, the courts must remain mindful of the social interest

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1. Persten v. Chesney, 212 S.W.2d 469, 473 (Spr. Ct. App. 1948).
2. 172 Iowa 653, 658, 154 N.W. 923, 925 (1915).

in the physician. Many courts approach this problem by the application of *res ipsa loquitur* to certain malpractice fact situations. The approach of these courts and their attendant problems will be discussed below and compared with the approach of the Missouri courts.

II. The Approach Through Res Ipsa Loquitur

The doctrine of *res ipsa loquitur* creates an inference of the defendant's negligence when:

> (a) The occurrence resulting in injury was such as does not ordinarily happen if those in charge use due care; (b) the instrumentalities involved were under the management and control of the defendant; (c) and the defendant possesses superior knowledge or means of information as to the cause of the occurrence.[3]

The application of this doctrine to malpractice cases has been summarily rejected in many of the cases.[4] However, such decisions may often be attributed to the fact situations involved, where negligence was alleged upon a basis of mere unsatisfactory results of treatment, and not for separate and independent injury.[5] Other courts have stated that while the doctrine is not applicable in the "ordinary malpractice action"[6] it may be applied in a "restricted class of cases"[7] where the interests of the injured patient sufficiently outweight the interest in protecting the healing arts. Thus the doctrine is applicable where the jury could find that the "consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised,"[8] or where the result of treatment has been "unreasonable and plainly destructive of curative purposes."[9] While the opinion in *Evans v. Roberts,* quoted from above, did not mention *res ipsa loquitur,* it has been the justification for many subsequent applications of the rule. Making such application does not reduce the physician to the status of an insurer, but rather "while preserving to the surgeon all of the protection the law intended [it] will also give to a helpless unconscious patient an assurance of the law's solicitude in his behalf."[10]

Any application of *res ipsa loquitur* to malpractice cases must be compatible with the rule itself, and many of the rejections of the doctrine can be justified upon the basic incompatibility of the facts with the requirements of the doctrine. Recent

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3. Carter v. Skelly Oil Co., 363 Mo. 570, 573, 252 S.W.2d 306, 307 (1952).
4. The classic statement is that of Taft, J., in Ewing v. Goode, 78 Fed. 442, 443 (C.C.S.D. Ohio 1897) as follows:
> If the maxim, "Res ipsa loquitur," were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the "ills that flesh is heir to."

5. Annot., 162 A.L.R. 1265, 1270 (1946).
6. Vonault v. O'Rourke, 97 Mont. 92, 104, 33 P.2d 535, 539 (1934).
7. Engelking v. Carlson, 13 Cal. 2d 216, 221, 88 P.2d 695, 698 (1939).
8. *Ibid.*
9. Mitchell v. Saunders, 219 N.C. 178, 182, 13 S.E.2d 242, 245 (1941).
10. Brown v. Shortlidge, 98 Cal. App. 352, 357, 277 Pac. 134, 136 (1929).

decisions, however, illustrate a trend toward a broadening of the scope of the rule and a relaxation of rigid requirements.

The rule generally refers to an "agency or instrumentality" through which injury is accomplished. Although a recent decision professed an inability to find such an instrumentality involved where bones were broken during electro-shock therapy,[11] most courts have had no such difficulty. The "medical and surgical staffs"[12] have been held to constitute such an instrumentality, as has the patient's own body.[13] The presence of several possible instrumentalities does not bar the use of the doctrine under its most liberal application, even though the specific instrumentality causing injury is not identified.[14]

The agency causing the injury must be within the control and management of the defendant. An old doctrine mentioned in *Whetstine v. Moravec*[15] implies that control of the many factors involved in medical treatment is never possible. This may be the rationale of rejecting *res ipsa loquitur* in the usual case of unsuccessful treatment. It is also possible to find cases where the control requirement has been very strictly applied and the doctrine rejected upon the basis that the defendant's control was imperfect or had ceased.[16] The problem of assigning control to defendant has been somewhat ameliorated in those cases which invoke *res ipsa loquitur* against anyone who had a right of control over the patient during the period when he might have received the injury.

The line of California cases to this effect begins with *Armstrong v. Wallace*,[17] where it was held that a suit against both doctor and hospital did not preclude the application of the doctrine against only one of them. The next development was *Ybarra v. Spangard*[18] where the court applied *res ipsa loquitur* against all persons connected with plaintiff's treatment on the grounds that it would be "manifestly unreasonable for them to insist that he [unconscious patient] identify any one of them as the person who did the alleged negligent act"[19] and that right of control, not actual control, was the proper test. Further extension of this rule has applied it not only to the period of preparation, surgery, and recovery from anesthesia, but also to

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11. Johnston v. Rodis, 151 F. Supp. 345, 347 (D.C. 1957). Insufficient pleading may account for this holding. That an instrumentality was involved is certain. See Quinley v. Cocke, 183 Tenn. 428, 192 S.W.2d 992 (1946).

12. Maki v. Murray Hospital, 91 Mont. 251, 264, 7 P.2d 228, 231 (1932).

13. Whetstine v. Moravec, 228 Iowa 352, 374, 291 N.W. 425, 435 (1940).

14. Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944); Oldis v. La Societe, 279 P.2d 184, 188 (Cal. App. 1955); Frost v. Des Moines Still College, 79 N.W.2d 306 (Iowa 1957).

15. *Supra* note 13, at 369, 291 N.W. at 433.

16. Bollenbach v. Bloomenthal, 341 Ill. 539, 173 N.E. 670, 672 (1930); Henzi v. Benezra, 161 Misc. 490, 292 N.Y.S. 392 (Sup. Ct., App. T. 1936); Guell v. Tenney, 262 Mass. 54, 159 N.E. 451 (1928).

17. 8 Cal. App. 2d 429, 47 P.2d 740 (1935).

18. 25 Cal. 2d 486, 154 P.2d 687 (1944).

19. *Id.* at 492, 154 P.2d at 690.

periods of sedation and semi-consciousness extending several days after initial surgery.[20]

Such a liberalization of the control concept is compatible with the original purposes behind the doctrine. In those instances in which certain defendants can present evidence inconsistent with negligence on their part, the inferences raised against them are destroyed. Furthermore they are not unduly burdened by being required to present such evidence.[21] If the defendant is to be found in sole control of the instrumentalities involved, the acts of plaintiff must be eliminated as causal factors. Although there is authority contra,[22] the better considered rule does not preclude application of *res ipsa loquitur* because involuntary or reflexive acts entered the picture. In *Vergeldt v. Hartzell*,[23] where the dentist defendant's drill slipped from a tooth and injured the plaintiff's mouth, the court applied the doctrine, ruling that the involuntary movements of plaintiff's tongue, if they were causal factors, did not prevent the control of defendant from being complete.

The inference of negligence in the doctrine of *res ipsa loquitur* arises when the incident of injury is something that does not ordinarily happen if those in charge use due care. This element presents a two-fold question in malpractice cases. First, if the doctrine is to be applied, it must be to cases where ordinary laymen on the jury can form an opinion about the subject matter from common knowledge and observation,[24] or from the expert evidence in the case.[25] Second, the doctrine could not be applied where testimony establishes that the unfortunate occurrence does happen even in cases where due care is exercised, and is therefore a risk of the treatment.[26] The California courts have held that a hysterectomy operation[27] and a complicated cancer-osteomyelitis condition[28] "would lie beyond the realm of the common knowledge and experience of laymen as to whether or not this result would ordinarily occur in the absence of negligence."[29] In the first appeal of *Worster v. Caylor*,[30] involving injury to plaintiff's bowel during gall-bladder surgery, the court felt that "men of ordinary understanding of human anatomy" could judge whether the bowel was a healthy, undiseased organ, or whether it was involved in certain scar tissue. *Res ipsa loquitur* was applied in a well-considered opinion, though its value as precedent is doubtful.[31]

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20. Oldis v. La Societe, *supra* note 14.
21. See Leonard v. Hospital, 305 P.2d 36, 41 (Cal. 1957) wherein the evidence of certain defendants entitled them to a non-suit.
22. Bollenbach v. Bloomenthal, 341 Ill. 539, 173 N.E. 670 (1930); Vale v. Noe, 172 Wisc. 421, 179 N.W. 572 (1920).
23. 1 F.2d 633 (8th Cir. 1924).
24. Costa v. Regents, 247 P.2d 21, 28 (Cal. App. 1952).
25. Sherman v. Hartman, 137 Cal. App. 2d 589, 595, 290 P.2d 894, 897 (1956).
26. Engelking v. Carlson, 13 Cal. 2d 216, 220, 88 P.2d 695, 697 (1939); Dees v. Pace, 257 P.2d 756, 769 (Cal. App. 1953).
27. Dees v. Pace, *supra* note 26.
28. Costa v. Regents, supra note 24.
29. Dees v. Pace, *supra* note 26, at 758.
30. 106 N.E.2d 108 (Ind. App. 1952).
31. A later appeal of the same case resulted in a reversal by the Indiana supreme court, rejecting the doctrine of *res ipsa loquitur*, though without specific disapproval of any particular findings in the first opinion. See 231 Ind. 625, 110 N.E.2d 337 (1953).

When the doctrine is modified to allow the inference to be taken from expert evidence as well as from common knowledge, the problem is greatly simplified.

Defendant's evidence to the effect that an injury may occur despite a use of due care by the physician operates to rebut the presumption of negligence that may arise from the occurrence itself. Upon one extreme are the unsuccessful treatment cases wherein it is widely accepted that the result does not create an inference of negligence. Upon the other extreme are those cases involving foreign objects left in a patient's body after surgery, wherein the presumption of negligence is nearly irrebuttable. In a middle ground are those occurrences more specific than mere unsuccessful results, yet which frequently occur even in the exercise of due care, and therefore to which *res ipsa loquitur* is not applicable.

In the situation involving a breaking hypodermic needle, testimony will customarily tend to prove that such needles sometimes break even in the exercise of due care, and evidence of breakage alone does not give the plaintiff the benefits of the doctrine.[32] In applications of the approach that considers certain injuries unavoidable risks of treatment, the courts have rejected *res ipsa loquitur* where the frequency of injury was established as five to nine percent,[33] one and one-half to three percent,[34] and in an extreme case, where the frequency was less than one percent.[35] Nevertheless many opinions do not require plaintiff conclusively and beyond doubt to show that injury never occurs when due care is used, for "it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science"[36] if the requirement were that strict. The weight attached to frequency of occurrence may well depend upon the other factors that are present in the case.

The inability of plaintiff to explain the accident or to assign specific charges of negligence, if not a basic element of the doctrine of *res ipsa loquitur*, is at least explanatory of the basic purpose behind it. Knowledge is as hard to come by in a malpractice situation as in any other negligence situation. The fact that the malpractice plaintiff is often unconsious at the time of his injury makes it even more unreasonable to require of him specific allegations of negligence, when the physician is much more able to provide a detailed explanation. In *Ybarra v. Spangard* the plaintiff's unconscious state at the time of his injury pointed up his inability to allege specific negligence, point out specific defendants, or name specific instrumentalities. In discussing this case, the later case of *Oldis v. La Societe*[37] held that unconsiousness was not intended to be an indispensable element of the application of *res ipsa loquitur* to malpractice cases, but rather that the essence of the doctrine's requirements was the plaintiff's legitimate lack of knowledge, regardless of its cause.

The cases which have harmonized the principles of *res ipsa loquitur* with those of

32. Ernen v. Crofwell, 272 Mass. 172, 172 N.E. 73 (1930).
33. Engelking v. Carlson, *supra* note 26.
34. Farber v. Olkon, 40 Cal. 2d 503, 511, 254 P.2d 520, 525 (1953).
35. Dees v. Pace, *supra* note 26, at 759.
36. Barham v. Widing, 210 Cal. 206, 215, 291 Pac. 173, 177 (1930).
37. 279 P.2d 184 (Cal. App. 1955).

malpractice may be grouped into various classes for purposes of discussion, although such classifying is not judicially sound as a basis for making application or rejection of the doctrine in any given case.

The first recognizable class of fact situations most commonly associated with *res ipsa loquitur* comprises the cases in which a foreign object is left inside plaintiff's body after surgery.[38] There are, however, other situations involving comparable "ulterior acts." Although as discussed above, the mere breaking of a hypodermic needle is not presumptive of negligence, the physician's failure to inform plaintiff of such breakage or his failure to remove the needle fragment may justify an inference of negligence.[39] Also in this general class of cases are those situations involving infection caused by a non-sterile needle.[40]

When the treatment by defendant results in an injury to a healthy portion of plaintiff's body, remote from the area of treatment, while plaintiff is under defendant's control, the doctrine of *res ipsa loquitur* has been applied. Quite often the factor of unconsciousness gives added weight to plaintiff's position. Thus in *Ybarra v. Spangard,* where plaintiff emerged from an appendectomy with severe nerve damage to his arm and shoulder, *res ipsa loquitur* was applied. A frequent situation, as illustrated by *Frost v. Des Moines Still College*[41] and *Oldis v. La Societe,* involves unexplained burns to remote areas of plaintiff's body while he is under defendant's control. In *Wolfe v. Feldman,*[42] a dentist was compelled to force open plaintiff's hand which was in a convulsive grip during the "fighting stage" of anesthesia. In so doing, he broke plaintiff's finger and recovery was allowed under *res ipsa loquitur.*

The leading case of *Evans v. Roberts* involved an injury to a healthy portion of the body, yet one which was within the immediate area of the operation. The examples cited in the opinion, as quoted above, also fit this category. Yet it is this class of fact situations that has created the most vexing problems for the courts. The *Evans* case involved injury to plaintiff's tongue during an adenoid operation. Recovery was allowed there, and also in *Brown v. Shortlidge,*[43] a case with similar facts, *res ipsa loquitur* being applied in the latter case. When a dental polishing drill slipped from plaintiff's tooth and injured the mouth area, recovery was had under the doctrine in *Vergeldt v. Hartzell.*[44] In *Sherman v. Hartman,*[45] *res ipsa loquitur* was held applicable where a blood transfusion needle slipped from plaintiff's vein through the alleged negligence of a hospital nurse, allowing approximately one-half

38. Illustrative of the extensive list of such cases which could be compiled is the following: Leonard v. Hospital, 305 P.2d 36 (Cal. 1956) (surgical clamp); Armstrong v. Wallace, 8 Cal. App. 2d 429, 47 P.2d 740 (1935) (surgical sponge); Mitchell v. Saunders, 219 N.C. 178, 13 S.E.2d 242 (1941) (surgical sponge); Pendergraft v. Royster, 203 N.C. 384, 166 S.E. 285 (1932) (glass).
39. Benson v. Dean, 232 N.Y. 52, 133 N.E. 125 (1921).
40. *E.g.,* Barham v. Widing, 210 Cal. 206, 291 Pac. 173 (1930).
41. 79 N.W.2d 306 (Iowa 1957).
42. 158 Misc. 656, 286 N.Y.S. 118 (N.Y. Munic. Ct. 1936).
43. 98 Cal. App. 352, 277 Pac. 134 (1929).
44. 1 F.2d 633 (8th Cir. 1924).
45. 290 P.2d 894 (Cal. App. 1956).

pint of blood to flow into the tissues of plaintiff's arm. The California courts purport to distinguish cases involving injury within the "field of operation" from those involving injury to "remote areas," allowing application of *res ipsa loquitur* only in the latter type of case.[46] However, this distinction has not been uniformly observed in the cases.[47] This attempt to classify fact situations for greater ease of case analysis has thus not proved entirely satisfactory, as witness the majority and dissenting opinions in *Farber v. Olkon*[48] where the court was unable to agree just what the "field of operation" was.

When a patient has been injured by a physician's medical apparatus or machinery, the cases are in conflict whether *res ipsa loquitur* should be applied. Where the situation involves a simple collapse of such apparatus, it does not differ significantly from the general type of negligence situation, and the better considered view is that the doctrine may be applied.[49] Other cases in this category involve injury, notably burns, from diathermy or X-ray equipment.[50] There is considerable conflict in the cases, and applications, where made, should probably be made without distinguishing this fact situation from other malpractice situations.

By way of summary, it may be said that although the doctrine of *res ipsa loquitur* is well adapted to use in certain types of malpractice situations, its utility has been somewhat limited by the tendencies of the courts to apply its elements very strictly and to reduce fact situations to rigid classes in order to simplify the decision whether to apply or reject the doctrine. Such limited views of the doctrine and its elements subvert its basic principles. As was said in the case of *Ybarra v. Spangard:*

> The present case is of a type which comes within the reason and spirit of the doctrine more fully perhaps than any other. The passenger sitting awake in a railroad car at the time of a collision, the pedestrian walking along the street and struck by a falling object or the debris of an explosion, are surely not more entitled to an explanation than the unconscious patient on the operating table. Viewed from this aspect, it is difficult to see how the doctrine can, with any justification, be so restricted in its statement as to become inapplicable to a patient who submits himself to the care and custody of doctors and nurses, is rendered unconscious, and receives some injury from the instrumentalities used in his treatment.[51]

If the courts are to balance the interests of both physician and injured patient, they are faced with the task of developing more liberal concepts of the elements of *res ipsa loquitur,* and with the avoidance of a formula approach to decision-making which replaces consideration of individual facts with a pat labeling or classifying of situations.

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46. Farber v. Olkon, 40 Cal. 2d 503, 254 P.2d 520 (1953).
47. *Cf.* Sherman v. Hartman, *supra* note 45; Brown v. Shortlidge, *supra* note 43.
48. *Supra* note 46.
49. See Bence v. Denbo, 98 Ind. App. 52, 183 N.E. 326 (1932).
50. *E.g.,* Adamsen v. Magnelia, 280 Ill. App. 418 (1935); Johnson v. Marshall, 241 Ill. App. 80 (1926); Holt v. Ten Broeck, 134 Minn. 458, 159 N.W. 1073 (1916).
51. 154 P.2d at 689.

III. THE APPROACH OF THE MISSOURI COURTS

Although Missouri is not without its share of malpractice cases, the mention of *res ipsa loquitur* in these cases is scant. The doctrine has been hinted at in several such cases and rejected in others, but there is no case clearly showing an application of *res ipsa loquitur* to a malpractice action in Missouri.

Adams v. Hospital[52] involved a patient burned by a hot water bottle through alleged negligence of a nurse. The court stated that if the hospital could be held liable for the nurse's acts then the "injury was such as to authorize the rule of *res ipsa loquitur* to be invoked." However, the statement is mere dictum, inasmuch as the hospital was held immune from tort liability.

In *Eichholz v. Poe,* plaintiff alleged that his jaw had been negligently broken by defendant dentist during a tooth extraction. The non-suit awarded in the trial court was reversed on appeal, the court stating:[53]

> . . . in the light of the authorities, supra, we think the extraction of the tooth, being under the management and control of defendants was sufficiently out of the ordinary course of that which usually happens where ordinary care and skill is employed, in the absence of explanation by defendants to warrant the jury in finding that the tooth was negligently extracted. . . .

This wording is highly suggestive of *res ipsa loquitur* although the court does not mention the doctrine by name, and this case has been later referred to as containing an "intimation" of the doctrine's applicability to malpractice cases.[54]

In *Wilt v. McCallum,*[55] the doctrine was rejected where plaintiff was burned by an exploding anesthetizing device. The court there held that the machinery involved was too complicated for the jury to be able to decide questions of negligence and causation.

The frequency of injury even where due care is exercised was held to preclude the application of *res ipsa loquitur* in *Hill v. Jackson*[56] and *Mitchell v. Poole.*[57] The former case involved a jaw dislocated during a dental extraction, and the *Eichholz* case was distinguished, as involving a more serious type of injury. In the *Mitchell* case defendant's hypodermic needle broke in the dental patient's jaw.

Further intimations of the applicability of *res ipsa loquitur* are found in *State ex rel. American School of Osteopathy v. Daues* where the court stated:[58]

> The partial dislocation of a patient's neck by an osteopathic treatment is so unusual where the treatment is given with ordinary care that a finding of

52. 122 Mo. App. 675, 99 S.W. 453 (K.C. Ct. App. 1907).
53. 217 S.W. 282, 285 (Mo. 1920).
54. Pate v. Dumbauld, 298 Mo. 435, 446, 250 S.W. 49, 52 (1923).
55. 214 Mo. App. 321, 253 S.W. 156 (K.C. Ct. App. 1923).
56. 218 Mo. App. 210, 265 S.W. 859 (K.C. Ct. App. 1924).
57. 229 Mo. App. 1, 68 S.W.2d 833 (St. L. Ct. App. 1934).
58. 322 Mo. 991, 999, 18 S.W.2d 487, 490 (1929). See also the previous opinions in this case: Noren v. American School of Osteopathy, 298 S.W. 1061 (St. L. Ct. App. 1927); *opinion withdrawn on rehearing,* 2 S.W.2d 215 (St. L. Ct. App. 1928).

> negligence against a defendant in control of the treatment is warranted in the absence of an explanation.

However, these comments appear to be mere dictum, inasmuch as specific allegations of negligence were apparently present in the case. The portion of the opinion set forth above was subsequently quoted with approval in *Null v. Stewart*,[59] which involved a surgical sponge left in plaintiff's body following surgery.

Thus the fact situations in the Missouri malpractice cases have been sufficiently extensive to have justified an application of *res ipsa loquitur*. If these intimations have not had the effect of producing such an application, one may be able to speculate as to their significance.

Since no application of *res ipsa loquitur* has been made in a Missouri malpractice case, it would be well to consider how Missouri courts have handled the malpractice situations in which other courts have applied the doctrine. In the classic situation involving the foreign object left in the patient's body after surgery, Missouri has a long line of cases in which plaintiff has been allowed to go to the jury on the basis of general negligence allegations supported by circumstantial evidence.[60] Once the fact is proved that such object was left inside the plaintiff's body, "no one could doubt that such was negligence upon the part of defendant,"[61] and the jury may make such inference from the circumstantial evidence in the case.[62] It is improper however, to require only a finding of the fact; the jury must also be instructed to find that such was negligence, in order to give a recovery to plaintiff.[63] So long as defendant does not show a credible purpose in leaving the object in the incision or plaintiff does not contradict his own petition,[64] plaintiff will be allowed to get to the jury in these cases.

In *Reeves v. Lutz*,[65] plaintiff was allowed to get to the jury on proof that the patient's leg was severely burned by a hot water bottle placed thereon by defendant doctor, despite defendant's evidence that such burns sometimes happened even with due care. The case of *Hague v. Threadgill*[66] involved tongue injury during tonsillectomy. There plaintiff was held entitled to get to the jury upon proof of the injury, its unusual character, and defendant's damaging admissions.

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59. 78 S.W.2d 75 (Mo. 1934).
60. Null v. Stewart, *supra* note 59; Hilton v. Mudd, 174 S.W.2d 31 (St. L. Ct. App. 1943); Ingram v. Poston, 260 S.W. 773 (St. L. Ct. App. 1924); Tate v. Tyzzer, 208 Mo. App. 290, 234 S.W. 1038 (St. L. Ct. App. 1921); Sontag v. Ude, 191 Mo. App. 617, 177 S.W. 659 (St. L. Ct. App. 1915); Reeves v. Lutz, 179 Mo. App. 61, 162 S.W. 280 (St. L. Ct. App. 1914).
61. Reeves v. Lutz, *supra* note 60, at 80, 162 S.W. at 283.
62. Sontag v. Ude, *supra* note 60, at 625, 177 S.W. at 661.
63. Hilton v. Mudd, *supra* note 60, at 37.
64. Boner v. Nicholson, 179 Mo. App. 146, 161 S.W. 309 (St. L. Ct. App. 1913). See also Nevinger v. Haun, 197 Mo. App. 416, 196 S.W. 39 (St. L. Ct. App. 1917).
65. *Supra* note 60.
66. 236 S.W. 895 (St. L. Ct. App. 1921).

In *Coffey v. Tiffany*,[67] the court held plaintiff had made a submissable case by showing that she went to the defendant for treatment with a healthy eye; that she received treatment which would not have injured her eye if done as defendant alleged it had been; that she went away blinded in the eye treated; and that therefore defendant must have negligently used the wrong medicine in his treatment.

In *Krinard v. Westerman*,[68] plaintiff sued on two counts arising out of surgery for uterine tumor: (1) that defendant negligently cut or punctured her bladder; and (2) that defendant negligently injured her left ureter connecting kidney and bladder, causing the left kidney to die. Defendant admitted cutting the bladder, justifying his action on the ground that it was diseased and the cutting was required; he filed a general denial of other allegations. Plaintiff recovered upon the first count by showing that the bladder was not diseased as defendant claimed it had been. Plaintiff recovered on the second count by showing that she entered surgery with a healthy kidney and came out with a lifeless kidney, and that damage to her ureter would cause such a result. It is interesting to note that upon the second count plaintiff did not allege which of three operations by defendant caused the ureter injury, thus indicating that the court did not demand circumstantial evidence of the specific time of injury.

Telaneus v. Simpson[69] involved a plaintiff who had lost the use of a leg, as the parties agreed, because of damage to the anterior crural nerve which runs through the lower abdomen. Plaintiff alleged that defendant had negligently cut the nerve during an appendectomy. Defendant attributed the leg's inaction to a nerve tumor he had noted thereon during the operation, but which he denied cutting into. Plaintiff's evidence, though strongly disputed, was that examinations before and after the surgery had not disclosed any such nerve tumor. The court considered the case a close one, but held that plaintiff had a right to take his case to the jury.

The *Reeves, Tiffany, Krinard,* and *Telaneus* cases indicate that recovery may be had in both "remote area" and "field of operation" injuries if plaintiff can show that he went into defendant's care with a healthy organ and came out with it injured, and that the negligence charged against defendant possibly, though not positively, was the cause of the injury. It is not necessary that the precise time of injury be alleged,[70] nor must it be shown that no other explanation for the injury exists.[71]

Comparison of these Missouri cases with their counterpart fact situations in other states reveals that the result in the "foreign object" cases reached in Missouri is comparable to that achieved in other states through an application of *res ipsa*

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67. 192 Mo. App. 455, 182 S.W. 495 (K.C. Ct. App. 1914), record quashed on point of evidence not considered in this decision, State *ex rel.* Tiffany v. Ellison, 182 S.W. 996 (Mo. 1916).
68. 279 Mo. 680, 216 S.W. 938 (1919).
69. 321 Mo. 724, 12 S.W.2d 920 (1928).
70. Krinard v. Westerman, *supra* note 68.
71. Telaneus v. Simpson, *supra* note 69.

loquitur. The recovery for a burn in the "remote area" case, as in *Reeves v. Lutz,* is quite comparable to the cases of *Frost v. Des Moines Still College* and *Oldis v. La Societe,* cited above.

It is in the "field of operation" cases that Missouri results differ most from the comparable cases elsewhere. *Krinard v. Westerman* is similar upon its facts to *Dees v. Pace*[72] and to *Worster v. Caylor,* yet both of the latter involved rejection of the *res ipsa loquitur* doctrine with no recovery allowed. The Missouri case of *Telaneus v. Simpson* resembles the case of *Engelking v. Carlson*[73] in which the cutting of a nerve in plaintiff's knee was held a risk of surgery and no application of the doctrine was made. These comparisons illustrate that for some time Missouri has been allowing plaintiffs to make out a submissable case with general negligence allegations supported by circumstantial evidence in malpractice situations where the courts of other states have refused to apply *res ipsa loquitur.*

The Missouri court has distinguished pure circumstantial evidence from the approach of *res ipsa loquitur* on the ground that the latter "may be said to rest upon the generic circumstances peculiar to the class of physical causes producing the occurrence, while circumstantial evidence rests upon specific circumstances peculiar to the individual occurrence."[74] This is probably the reason behind the difference between the results achieved in Missouri and those elsewhere. The fact that the approach of general negligence plus circumstantial evidence is built around an individual consideration of one set of specific circumstances has allowed the Missouri courts to handle malpractice cases with that degree of flexibility characteristic of the common law at its best.

Applications of *res ipsa loquitur* elsewhere have tended to produce rigidity characteristic of the "classes of physical causes" approach. Mention has been made of the intimations of *res ipsa loquitur* found in the Missouri cases. It is submitted that these are best explained as a recognition by the Missouri courts that the *res ipsa loquitur* concepts of "control" and the inference that arises "when the occurrence does not ordinarily happen if those in charge use due care" have value as guide posts in deciding cases upon a basis of pure circumstantial evidence. Although not limited by these concepts through a formal adoption of the doctrine in malpractice cases, the Missouri courts have used them to good advantage.

IV. Conclusion

The courts exhibit a trend toward increased recognition of the interests of the patient injured by a physician's malpractice. Much of this trend will be expressed in terms of broadening the usages of general negligence allegations. In states relying upon the *res ipsa loquitur* approach, there has been a questionable tendency to build up formulas and catch phrases to facilitate decision-making in applying or

72. 257 P.2d 756 (Cal. App. 1953).
73. 13 Cal. 2d 216, 88 P.2d 695 (1939).
74. Tayer v. York Ice Machinery Corp., 342 Mo. 912, 922, 119 S.W.2d 240, 244 (1938) (en banc).

rejecting the doctrine. This tendency is being reversed in keeping with the liberalizing trend noted, and these states are now faced with the task of carrying the liberal trend into further usage. The formal application of *res ipsa loquitur* elements and the application of the doctrine only to certain rigidly defined classes of fact situations hamper the most effective use of the doctrine in malpractice cases. It is submitted that these approaches to *res ipsa loquitur* should be replaced with an approach that takes specific note of each individual fact situation upon its own merits. A careful balancing of interests can then be made the basis for an application or rejection of the doctrine in a given case.

In Missouri, which has used the approach of pure circumstantial evidence in malpractice cases, no such rigidity or use of formulas has grown up. The Missouri courts, though taking advantage of the basic concepts of *res ipsa loquitur* as guides for consideration of the cases, have reached and will continue to reach the desired result through an individual consideration of each particular case.

If the present trend continues, whether through a *res ipsa loquitur* approach, liberalized to take full consideration of individual facts—or through the approach of pure circumstantial evidence guided by the basic considerations of *res ipsa loquitur*—the courts will be able to achieve a better balanced consideration of the interests of physician, patient, and society which are involved in malpractice actions.

J. W. ROBERTS

RESTRICTIVE COVENANTS IN MISSOURI: CREATION, ENFORCEABILITY IN EQUITY, AND TERMINATION

An equitable easement or servitude or a restrictive covenant must be created by a writing, and the writing must clearly indicate the intention to create a servitude or restrictive covenant.[1] In the subdivision cases there must be a general plan of development or equity will not enforce the covenant.[2] In a case where a grantor agreed to put restrictions in all lots but only put them on one lot, the court would not enforce the covenant.[3] Also in order for the courts to enforce in equity the grantee must take with notice.[4] The Missouri courts, as well as other courts, have called these restrictions on the use of land negative easements.[5] Since these restrictive covenants restrict the use of land, the courts construe the restrictions very strictly because of the philosophy that land should be free and unencumbered.[6]

1. Chiles v. Fuchs, 363 Mo. 114, 249 S.W.2d 454 (1952); Zinn v. Sidler, 268 Mo. 680, 187 S.W. 1172 (1916).
2. Bagby v. Stewart's Ex'rs, 265 S.W.2d 75 (Ky. App. 1954); Coughlin v. Barker, 46 Mo. App. 54 (St. L. Ct. App. 1891).
3. Buckley v. Mooney, 339 Mich. 398, 63 N.W.2d 655 (1954).
4. Coughlin v. Barker, *supra* note 2.
5. Wilson v. Owen, 261 S.W.2d 19 (Mo. 1953) (en banc); Callaham v. Arenson, 239 N.C. 619, 80 S.E.2d 619 (1954).
6. Gardner v. Maffitt, 335 Mo. 959, 74 S.W.2d 604 (1934); Mathews Real Estate Co. v. National Printing and Engraving Co., 330 Mo. 190, 48 S.W.2d 911 (1932); Missouri Province Educational Institute v. Schlecht, 322 Mo. 621, 15 S.W.2d 770 (1929); Zinn v. Sidler, *supra* note 1.

Usually the complainant will ask for an injunction to prevent breach of the covenant, but where there is actual violation of the restriction a mandatory injunction may be sought.[7] Some courts grant specific performance instead of a mandatory injunction where affirmative action is called for.[8] It is submitted that the mandatory injunction theory is the better theory.

Once a restrictive covenant has been created and is enforceable, the problem of how long the restriction will run has to be determined.

Duration, in General

Some restrictions have express provisions with reference to the duration of the restrictive covenant. Where there is a provision that after a certain number of years the restriction shall be void,[9] or where there is a provision that if a certain number of property owners agree the restriction shall be terminated or extinguished, and this stipulation is met, the restriction will no longer be binding.[10]

Where there is no terminal date the earlier Missouri cases say that it will run indefinitely.[11] But in a later Missouri case the court referring to an equitable problem, said that the restriction will terminate within a reasonable time, depending on the individual case.[12]

Where there is no express duration as to the restrictive covenant or it is to run for a definite number of years, the current problem most often arising is where the restricted neighborhood has changed from what it was when the restrictions were first placed on the property. Because of the changes the property sometimes becomes less valuable by reason of the restrictions, and owners desire to breach the restrictions. As a result the courts are often faced with the problem of whether the covenants will continue to be enforced when there are attempted deviations from the restrictions.

Abandonment

The question arises whether the complainant always will be successful in getting an injunction against breach of a restrictive covenant. The obvious answer is in the negative. In *Duke of Bedford v. British Museum*,[13] an English case which is cited

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7. Forsee v. Jackson, 192 Mo. App. 408, 182 S.W. 783 (K.C. Ct. App. 1916).
8. Windemere-Grant Imp. Ass'n v. American State Bank, 205 Mich. 539, 172 N.W. 29 (1919); Sanford v. Keer, 80 N.J. Eq. 240, 83 Atl. 225 (Ct. Err. & App. 1912).
9. Sanders v. Dixon, 114 Mo. App. 229, 89 S.W. 577 (St. L. Ct. App. 1905).
10. Sharp v. Quinn, 4 P.2d 490 (Cal. 1931); Braun v. Roberts, 175 Kan. 859, 267 P.2d 490 (1954); Cowherd Development Co. v. Littick, 361 Mo. 1001, 238 S.W.2d 346 (1951) (en banc) (renewable); Matthews v. First Christian Church, 355 Mo. 627, 197 S.W.2d 617 (1946) (modified); Van Deusen v. Ruth, 343 Mo. 1096, 125 S.W.2d 1 (1938) (extinguished); Couch v. Southern Methodist University, 10 S.W.2d 973 (Tex. 1928).
11. *E.g.*, Pierce v. St. Louis Union Trust Co., 311 Mo. 262, 278 S.W. 398 (1925).
12. Gardner v. Maffitt, *supra* note 6.
13. 2 Myl. & K. 552, 39 Eng. Rep. 1055 (Ch. 1822).

as the source of the doctrine of abandonment, the facts were that A conveyed a tract of land to B who covenanted that there would be no brew house or any other building save only those necessary to maintain a chief mansion house. Through a long line of mesne conveyances P became the owner of the land which A had retained, and D became the owner of the land which had been conveyed to B. P had let some of his tenants build small buildings on the land which detracted very much from the surrounding area. D put up a museum on his land, which the court readily admitted violated the restrictive covenant in D's deed. However, the court held that because of the way P had caused the surrounding neighborhood to be changed the whole plan had been abandoned, and the court refused to enforce the covenant by way of injunction.

The Missouri case of *Scharer v. Pantler*[14] also involved a problem of abandonment. The grantor put a twenty-five foot front building line restriction on a group of lots which she owned. The grantor violated the restriction herself by building on a fifteen foot line instead of the required twenty-five foot line. All of the people who purchased land from her, with the restriction in the deeds, also built on a fifteen foot line. Then D purchased one of the lots with the above restriction and started building within five feet of the street. P, one of the grantees of the common grantor, brought a suit to enjoin D. In denying an injunction, the court said that all of the parties who purchased the restricted property had abandoned the general plan originally intended and that no one would benefit by the restrictive covenant being enforced.[15]

Clean Hands

Where the complainant also violates the restriction, equity will not give relief, the principle being that he who comes into equity must have clean hands.[16] Yet where several complainants join in the same suit against one who has violated the restriction and one of the complainants has also violated the restriction, this will not bar equitable relief.[17]

Laches

The cases heretofore considered, except for cases involving the clean hands doctrine, are ones where only the defendant does a wrong. Yet the complainant may also be guilty of a wrong. The complainant may be estopped from suing where he has failed to make known to the defendant within a reasonable time that he, the defendant, is violating the restrictive covenant.[18] Technically such a complainant

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14. 127 Mo. App. 433, 105 S.W. 668 (St. L. Ct. App. 1907).

15. See also Goodwin Bros. v. Combs Lumber Co., 275 Ky. 114, 120 S.W.2d 1024 (1938); Loud v. Pendergast, 206 Mass. 122, 92 N.E. 40 (1910); Chelsea Land & Imp. Co. v. Adams, 71 N.J. Eq. 771, 66 Atl. 180 (Ct. Err. & App. 1907); Starkey v. Gardner, 194 N.C. 74, 138 S.E. 408 (1927); Duke of Bedford v. British Museum, *supra* note 13.

16. Loud v. Pendergast, *supra* note 15; Compton Hill Imp. Co. v. Tower's Ex'rs, 158 Mo. 282, 59 S.W. 239 (1900).

17. Compton Hill Imp. Co. v. Strauch, 162 Mo. App. 76, 141 S.W. 1159 (St. L. Ct. App. 1911).

18. Loud v. Pendergast, *supra* note 15; Pappas v. Eighty Hundred Realty Co., 138 S.W.2d 762 (St. L. Ct. App. 1940).

would be guilty of laches. If the complainant does not act, this can be considered as being relied on by the defendant and possibly the defendant's reason for continuing the violation. The decided Missouri cases show that the complainant need act only within a reasonable time.[19] The complainant, to be guilty of laches, must know of the violation.[20]

Acquiescence

Another type of estoppel is where the complainant has allowed violations before, and following the pattern of these violations the defendant also violates the restriction. This type of estoppel is known as acquiescence.[21] The defendant here would be led by the complainant's silence or non-action to believe that the restrictions have been abandoned. Since the whole of the defendant's defense rests on the fact that he relied on past acts not being objected to by the complainant, his defense would be of no avail if he did not rely on those acts.[22] As can readily be seen, acquiescence is closely related to the doctrine of abandonment.

Changed Conditions

In the celebrated New York case of *Trustees of Columbia College v. Thacher*,[23] the property was restricted for residential use. (The property was on the north side of 50th Street, between 5th and 6th Avenues, and is in the heart of what is now Rockefeller Center in New York City.) Yet up to the time Thacher purchased his residence in the restricted area there were people carrying on business in the house he purchased. In addition, an elevated steam railway was built in front of the property and a station house and elevated platform were also built in front of Thacher's property.

The court said:[24]

> . . . "the railway and station affect the premises injuriously and render them less profitable for the purpose of a dwelling-house, but do not render their use for business purposes indispensable to their practicable and profitable use and occupation."[25]
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> . . . This new condition has already affected in various ways and degrees the uses of property in its neighborhood, and property values. It has made the defendant's [Thacher's] property unsuitable for the use to which, by the covenant of his grantor, it was appropriated, and if the covenant can stand anywhere, it surely cannot in a court of equity. . . .

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19. Hall v. Koehler, 347 Mo. 658, 148 S.W.2d 489 (1941); Britton v. School District, 328 Mo. 1185, 44 S.W.2d 33 (1931).

20. Miller v. Klein, 177 Mo. App. 557, 160 S.W. 562 (St. L. Ct. App. 1913).

21. Miller v. Klein, *supra* note 20; Sharer v. Pantler, 127 Mo. App. 433, 105 S.W. 668 (St. L. Ct. App. 1907).

22. Thompson v. Langan, 172 Mo. App. 64, 154 S.W. 808 (St. L. Ct. App. 1913).

23. 10 Abb. N. Cas. 235, 87 N.Y. 311 (1882).

24. *Id.* at 242-244, 87 N.Y. at 319-321.

25. The court is here quoting from the trial court's findings.

> There is, I think, no merit in the respondent's [plaintiff's] suggestion, that the change in the character of the neighborhood is insufficient, so long as it does not extend to all the property affected by the agreement.

The court felt that the non-enforcement of the covenant would not harm the complainant, nor would the enforcement of the covenant benefit the complainant.[26]

In *Mathews Real Estate Co. v. National Printing & Engraving Co.*,[27] a Missouri case, there was a block, bounded by A, B, C, and D streets restricted against any manufacturing business. When these restrictions were put on the land there was no development along the aforesaid streets, but later A street developed into a high-class residential street while the unrestricted side of B street developed along business lines. P bought a restricted lot on B street and D also bought a restricted lot on B street. D started to build a printing plant; P brought this suit to enjoin D from continuing to build. The court said that the restriction against any manufacturing business did not comprehend printing and engraving. The court further said that inasmuch as the change of the neighborhood on the unrestricted side of B street was complete and had occurred before either party had bought, the restriction could not be enforced.[28]

In other cases the Missouri court has enforced restrictions saying that there was not a sufficient change in conditions to justify refusal to enforce. In *Swain v. Maxwell*,[29] the court said that a change in the surrounding area did not constitute such a radical change, and the court enforced the restriction.[30] The Missouri court also has said that a few sporadic violations in the restricted area are not conclusive proof of abandonment.[31]

In *Rombauer v. Compton Heights Christian Church*,[32] the Missouri court set forth what the person who violated the restriction must show in order for the court to deny an injunction. The court said that conditions must have radically changed since the restriction was put in the deed. The court said further that to deny an injunction, the enforcement of the restriction must work an undue hardship on the defendant and be of no substantial benefit to the complainant. From the above

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26. See also Hurd v. Albert, 214 Cal. 15, 3 P.2d 545 (1931); Kneip v. Schroeder, 255 Ill. 621, 99 N.E. 617 (1912); Ewertsen v. Gerstenberg, 186 Ill. 344, 57 N.E. 1051 (1900); Jackson v. Stevenson, 156 Mass. 496, 31 N.E. 691 (1892); Windemere-Grand Imp. Ass'n v. American State Bank, 205 Mich. 539, 172 N.W. 29 (1919); Pickel v. McCawley, 329 Mo. 166, 44 S.W.2d 857 (1931); Charlot v. Regents, 251 S.W. 421 (St. L. Ct. App. 1923); Coughlin v. Barker, 46 Mo. App. 54 (St. L. Ct. App. 1891); McClure v. Leaycraft, 183 N.Y. 36, 75 N.E. 961 (1905); Amerman v. Deane, 132 N.Y. 355, 30 N.E. 741 (1892).

27. 330 Mo. 190, 48 S.W.2d 911 (1932).

28. See also Pickel v. McCawley, *supra* note 26.

29. 355 Mo. 448, 196 S.W.2d 780 (1946) (en banc).

30. See also Porter v. Johnson, 232 Mo. App. 1150 (K.C. Ct. App. 1938).

31. Kraemer v. Shelley, 355 Mo. 814, 198 S.W.2d 679 (1946) (en banc); Compton Hill Imp. Co. v. Strauch, 162 Mo. App. 76, 141 S.W. 1159 (St. L. Ct. App. 1911); Compton Hill Imp. Co. v. Garvey, 162 Mo. App. 88, 141 S.W. 1163 (St. L. Ct. App. 1911).

32. 328 Mo. 1, 40 S.W.2d 545 (1931).

analysis, it can be seen that there is no set standard as to when conditions have so changed that the court will no longer enforce the restriction.[33] The Missouri court felt that the above view followed the famous New York case.[34]

Each case presenting this problem must be decided on its own facts. In some cases where there is a radical change in the neighborhood[35] and the property would be worth much more for a use other than the restricted use, the courts nevertheless have enforced the restrictions.[36] In fact, it has been shown that the complainant need not even be injured to be able to get injunctive relief.[37] So it can be seen that the degree of injury is unimportant.[38] The courts have even allowed the complainant to have injunctive relief where the complainant would have been benefited instead of injured by a denial of injunctive relief.[39]

In restricted subdivisions, the property owners who live on the fringes of the restricted area have to bear a great deal of stress. Where business or the like is approaching the restricted area, this causes a depreciation in the value of the property in the fringe area. In handling this problem, the courts have dealt with it in different ways. Some courts enforce the restriction in the interior of the restricted area while striking down the restriction in the fringe area.[40] Other courts have handled the problem as an all-or-none proposition, *i.e.*, the restriction is normally enforced as to the entirety.[41] It is submitted that the latter approach reaches the desired result more adequately. Under this latter view it matters not if the restriction only has a few years to run, it will still be enforced.[42] These same courts give more consideration to the time element,[43] than do the courts that treat the restricted property on a piecemeal basis.

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33. Porter v. Pryor, 164 S.W.2d 353 (Mo. 1942); Pickel v. McCawley, 329 Mo. 166, 44 S.W.2d 857 (1931); Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918); Proetz v. Central Dist. of Christian & Missionary Alliance, 191 S.W.2d 273 (St. L. Ct. App. 1945); Hall v. Koehler, 347 Mo. 658 (1941) (dictum); Compton Hill Imp. Co. v. Strauch, *supra* note 31 (dictum).

34. Trustees of Columbia College v. Thacher, 10 Abb. N. Cas. 235, 242-244, 87 N.Y. 311, 319-321 (1882).

35. Rombauer v. Compton Heights Christian Church, *supra* note 32; Spahr v. Cape, 143 Mo. App. 114, 122 S.W. 379 (St. L. Ct. App. 1909).

36. Cowherd Development Co. v. Littick, 361 Mo. 1001, 238 S.W.2d 346 (1951) (en banc); Rombauer v. Compton Heights Christian Church, *supra* note 32; Wuertenbaecher v. Feik, 43 S.W.2d 848 (St. L. Ct. App. 1931); Miller v. Klein, 177 Mo. App. 557, 160 S.W. 562 (St. L. Ct. App. 1913); Noel v. Hill, 158 Mo. App. 426, 138 S.W. 364 (St. L. Ct. App. 1911); Spahr v. Cape, *supra* note 35.

37. Miller v. Klein, *supra* note 36; Sanders v. Dixon, 114 Mo. App. 229, 89 S.W. 577 (St. L. Ct. App. 1905).

38. Hall v. Wesster, 7 Mo. App. 56 (St. L. Ct. App. 1879).

39. St. Louis Safety Deposit & Savings Bank v. Kennett Estate, 101 Mo. App. 370, 74 S.W. 474 (St. L. Ct. App. 1903).

40. Downs v. Kroeger, 200 Cal. 743, 254 Pac. 1101 (1927); Clark v. Vaughan, 131 Kan. 438, 292 Pac. 783 (1930).

41. Rombauer v. Compton Heights Christian Church, 328 Mo. 1, 50 S.W.2d 545 (1931); Pierce v. St. Louis Union Trust Co., 311 Mo. 262, 278 S.W. 398 (1925); Proetz v. Central Dist. of Christian & Missionary Alliance, 191 S.W.2d 273 (St. L. Ct. App. 1945); Thornhill v. Herdt, 130 S.W.2d 175 (St. L. Ct. App. 1939).

42. Bolin v. Tyrol Inv. Co., 178 Mo. App. 1, 160 S.W. 588 (St. L. Ct. App. 1913).

43. Loud v. Pendergast, 206 Mass. 122, 92 N.E. 40 (1910); McClure v. Leaycraft, 183 N.Y. 36, 75 N.E. 961 (1905).

CONDEMNATION

Another interesting problem presents itself where a sovereign takes property that has restrictive covenants and uses the property in violation of the restrictions without paying the other property owners compensation for violating the covenants. In a leading Missouri case, *Peters v. Buckner*,[44] there were restrictions that property should only be used for residential purposes. A school district was attempting to condemn a lot in this restricted area for the purpose of putting up a school which would admittedly violate the covenant. The court held that the school district must pay damages to the other property owners for the violation. The court said that the restriction creates a property right and that damages must be paid for taking the right.[45]

This would be an advantage to the restricted property owners over the unrestricted property owners since the unrestricted property would have to be physically damaged or taken before the municipality would have to pay the property owner anything.[46] From this it would seem that the benefit of the restriction would be "property" within the meaning of article I, section 26, of the 1945 Missouri constitution. However, from a practical standpoint damage often need not be paid because a school normally benefits most of the restricted property more than it injures it; only as to property located very near the school building do the benefits fail to offset the injuries.

Some courts have held that these rights are not property rights but are contractual rights cognizable in equity as between the contracting parties, not requiring compensation by the sovereign contemplating a public use of the particular property taken.[47]

ZONING ORDINANCES

Restrictive covenants and city zoning ordinances often are not identical, and when this happens a covenant more restrictive than the zoning ordinance usually will be enforced. Where, for example, residential property has restrictions against business use of the property and the city later zones the area for business, the restrictive covenants have been enforced, although the more liberal zoning law would be a pertinent factor in deciding whether there has been a "change in conditions" in the neighborhood.[48] The court might refuse to enforce the restriction on

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44. 288 Mo. 618, 232 S.W. 1024 (1921) (en banc).

45. See also Riverbank Imp. Co. v. Chadwick, 228 Mass. 242, 117 N.E. 224 (1917); State *ex rel.* Britton v. Mulloy, 332 Mo. 1107, 61 S.W.2d 741 (1933); McLaughlin v. Neiger, 286 S.W.2d 380 (St. L. Ct. App. 1956); Doan v. Cleveland Short Line Ry., 92 Ohio St. 461, 112 N.E. 505 (1915).

46. Hill-Behan Lumber Co. v. Skrainka, 341 Mo. 156, 106 S.W.2d 483 (1937) (en banc).

47. United States v. Certain Lands, 112 Fed. 622 (C.C.D.R.I. 1899); Friesen v. City of Glendale, 209 Cal. 524, 288 Pac. 1080 (1930); Allen v. Detroit, 167 Mich. 464, 133 N.W. 317 (1911). See generally Comment, 38 MICH. L. REV. 357 (1940).

48. Cowherd Development Co. v. Littick, 361 Mo. 1001, 238 S.W.2d 346 (1951) (en banc); Matthews v. First Christian Church, 355 Mo. 627, 197 S.W.2d 617 (1946).

the ground that enforcement would be against public policy. But if the court took this view then the property owners might be able to raise a federal constitutional question under the fourteenth amendment, with reference to the taking of property without due process of law, or under the contracts clause of section 10, article I.

DAMAGES AT LAW

Where equity does not grant an injunction because of changed conditions, it has sometimes given the complainant damages for the breach;[49] in some jurisdictions, it lets the complainant pursue his legal remedies for damages; and some equity courts have completely removed the covenant as a cloud on title.[50]

Now, assuming that equity will not enforce a covenant because of changed conditions and that the covenant meets all of the requirements for running at law, will the law courts give damages for breach of the covenant? The answer to this question seems to be in the affirmative.[51]

In *Rose v. Houser*[52] the Missouri trial court would not specifically enforce the restrictive covenant nor would it allow the complainant any damages for breach of the covenant. The appellate court affirmed the lower court in refusing to grant an injunction but reversed the lower court as to the damages for breach of the covenant. The court in doing this makes it very clear that even though there can be no injunctive relief, because of changed conditions, this still leaves the complainant to his action at law for damages. This was also done in *Weiss v. Leaon*,[53] where a racial restriction could not be specifically enforced by reason of the doctrine of *Shelley v. Kraemer*[54] but where the Missouri court held damages could be recovered for the breach.[55]

Other Missouri cases also have said that the complainant does not lose his action at law just because equity will not grant enforcement.[56]

It seems that the problem of damages where injunctive relief is denied has been

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49. Jackson v. Stevenson, 156 Mass. 496, 31 N.E. 691 (1892); Forsee v. Jackson, 192 Mo. App. 408, 182 S.W. 783 (K.C. Ct. App. 1916) (one cent damage).

50. Barton v. Moline Properties, 121 Fla. 683, 164 So. 551 (1935); McArthur v. Hood Rubber Co., 221 Mass. 372, 109 N.E. 162 (1915); Pickel v. McCawley, 329 Mo. 166, 44 S.W.2d 857 (1931).

51. The problem as to when covenants other than for title run at law is difficult, and is beyond the scope of this Comment.

52. 206 S.W.2d 571 (K.C. Ct. App. 1947).

53. 359 Mo. 1054, 225 S.W.2d 127 (1949) (en banc).

54. 334 U.S. 1 (1948).

55. That damages cannot be recovered in such a case, on federal constitutional grounds, see Barrows v. Jackson, 346 U.S. 249 (1953).

56. Rombauer v. Compton Heights Christian Church, 328 Mo. 1, 40 S.W.2d 545 (1931); Sanders v. Dixon, 114 Mo. App. 229, 89 S.W. 577 (St. L. Ct. App. 1905).

handled by other states in a manner similar to that in Missouri.[57] In fact, damages in this type of situation have sometimes been held excessive.[58]

Dean Pound, in a law review article,[59] expressed the view that when the purpose of restrictions can no longer be carried out, neither equity nor law should enforce them. This view has been taken by some cases[60] and by other scholars.

Judge Clark says in his book[61] that the now useless restriction may still be valid at law. But he says, "it seems much better to treat these as recognized methods of termination of restrictions both 'in equity' and 'at law.' They are similar in general character to the abandonment of an easement and have at times been spoken of as implied conditions of the original grant. Since these doctrines are based on obvious common sense, and are in line with the general policy of disposing of encumbrances on title, especially where no longer of general usefulness, they should receive the same recognition in property law accorded the doctrine of abandonment."[62]

CONCLUSION

The writer submits, in spite of the case law, that once a covenant has no longer any useful benefit and is only a burden on land, it should be removed from the land and the land allowed to be used for its most productive purpose. It is further submitted that in time this view will be adopted by the courts throughout the country.

In the final result, it will be noticed, the Missouri court has recognized "in equity" that covenants restricting the use of land sometimes become outdated and it has at times refused to grant an injunction for the enforcement of an outdated restrictive covenant. But the Missouri court, along with the other states, has continued to give damages at law for the violation of the outdated restriction.

CHARLES G. HYLER

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57. Ewertsen v. Gerstenberg, 186 Ill. 344, 57 N.E. 1051 (1900); Shade v. O'Keefe, Inc., 260 Mass. 180, 156 N.E. 867 (1927); Bull v. Burton, 227 N.Y. 101, 124 N.E. 111 (1919); McClure v. Leaycraft, 183 N.Y. 36, 75 N.E. 961 (1905); Amerman v. Deane, 132 N.Y. 355, 30 N.E. 741 (1892); Casella v. Gallo, 197 App. Div. 825, 189 N.Y. Supp. 531 (1921); Kountze v. Helmuth, 67 Hun 343, 22 N.Y. Supp. 204 (Sup. Ct., Gen. T. 1893); Heitkemper v. Schmeer, 146 Or. 304, 29 P.2d 540 (1934).

58. Doll v. Moise, 214 Ky. 123, 282 S.W. 763 (1926); Caron v. Margolin, 128 Me. 339, 147 Atl. 419 (1929).

59. Pound, *The Progress of the Law, 1918-1919, Equity*, 33 HARV. L. REV. 813 (1920).

60. Riverbank Imp. Co. v. Chadwick, 228 Mass. 242, 117 N.E. 244 (1917); McArthur v. Hood Rubber Co., 221 Mass. 372, 109 N.E. 162 (1915).

61. CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND (2d ed. 1947).

62. *Id.* at 186.

VALUATION OF DISSENTING STOCKHOLDERS' SHARES UNDER AN APPRAISAL STATUTE

At common law fundamental changes in corporate structure could be accomplished only with the consent of all shareholders.[1] Industrial growth and the desire for flexibility in corporate structure, however, indicated the desirability of allowing certain changes of a basic nature without a unanimous vote. Statutes were enacted by state legislatures which enabled corporations to take extraordinary corporate action such as a merger or sale of assets by a vote of a certain prescribed majority.[2] To protect the interest of those who dissented and did not desire to participate in the new business venture, substantially different from that in which they had originally invested, the legislatures provided a remedy whereby the dissenting shareholder could have the value of his shares judicially determined and paid for by the surviving corporation.[3] These acts provide a means of compromising intercorporate conflict. The majority is enabled to proceed with a major corporate change where growth, opportunity or necessity dictate such action, while the interest of the minority is protected by allowing them to withdraw from the enterprise at a fair price.[4]

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1. Voeller v. Neilston Warehouse Co., 311 U.S. 531 (1941); Clearwater v. Meredith, 68 U.S. (1 Wall.) 25 (1864); Chicago Corp. v. Munds, 20 Del. Ch. 142, 172 Atl. 452 (Ch. 1934); 15 FLETCHER, PRIVATE CORPORATIONS § 7063 (1938); STEVENS, CORPORATIONS § 125 (2d ed. 1949).

2. Missouri requires the affirmative vote of two-thirds of the shares entitled to vote. § 351.425, RSMo 1949.

3. There are now such statutes in 43 jurisdictions which grant appraisal in the event of one or more types of change in the corporate structure. These statutes vary as to the situations in which they provide a dissenting shareholder with a remedy. All but one provide the dissenter with a remedy in the case of merger or consolidation, the majority in the case of sale of corporate assets, and some in the case of certain types of charter amendments. For an extensive citation of these statutes, see Note, 60 YALE L.J. 337 (1951).

Missouri provides an appraisal remedy: in the case of merger or consolidation (§ 351.455, RSMo 1949); in the sale or exchange of corporate assets (§ 351.405, RSMo 1949); in limited cases of alterations of share preferences (§ 351.090, RSMo 1949); and in limited cases of redemption of preferred shares (§ 351.205, RSMo 1949).

4. The law's function in this regard is to achieve a necessary balance. The purpose of this type of legislation is well set out in Chicago Corp. v. Munds, *supra* note 1, and Anderson v. International Minerals & Chemicals Corp., 295 N.Y. 343, 67 N.E.2d 573 (1946).

Under an appraisal statute it is possible that a minority shareholder might try to use his appraisal right as a club to enhance the value of his shares. An interesting case in this regard is the Marcus v. Macy & Company dispute in New York, 297 N.Y. 38, 74 N.E.2d 228 (1947). The market value of the 50 shares held by Marcus was a little over $2,000.00. She demanded $20,000.00. Macy's fought her right to an appraisal, but Marcus won in a court of appeals decision. Having won the first round, Marcus secured a court order for a complete audit of Macy's (operating department stores in five states) by an independent C.P.A. On appeal the order was reversed. The court would not allow her to use her appraisal right to extort a value for the shares far in excess of their worth. 273 App. Div. 725, 79 N.Y.S.2d 76, *appeal denied*, 274 App. Div. 822, 81 N.Y.S.2d 199 (1st Dep't 1948).

On the other hand the appraisal remedy has been criticized as being too costly to a small shareholder. For an excellent discussion of costs in appraisal proceedings, see Note, 60 YALE L.J. 337 (1951).

The Missouri supreme court was recently faced with the problem of valuation of the shares of a dissenting minority in *Phelps v. Watson-Stillman Company*.[5] The court held in that case that in order to evaluate shares of stock properly in an appraisal proceeding all the elements of value of that stock must be considered.

The facts of the *Watson-Stillman* case are as follows: A. Leschen and Sons Rope Company, a Missouri corporation, had a capitalization of 30,000 shares of common stock of which 28,022½ were issued and outstanding. Par value was $100.00. The stock was not listed on any stock exchange and had no over-the-counter value. Prior to June of 1953 all of the issued shares were in the hands of fifty-six people, many of whom were descendants of the original founders. The H. K. Porter Company acquired by purchase from these shareholders approximately 70 per cent, 20,116½, of the outstanding shares of the company. The cost of this acquisition was $75.00 per share for 19,840½ of the shares, and $100.00 per share (par value) for 276 employee-owned shares.

The Watson-Stillman Company is a wholly owned subsidiary of the H. K. Porter Company. Pursuant to Missouri statutes,[6] the new majority stockholder, the Porter Company, voted to merge the Leschen Company with the Watson-Stillman Corporation. The merger was effected on July 30, 1953. Seven minority shareholders of the Leschen Company, having objected to the merger, instituted proceedings to have the "fair value" of their stock determined and paid by the surviving corporation.[7]

On trial the proceedings were referred to a referee. He employed a net asset approach to the valuation of the stock in question, taking the corporation's balance sheet as a starting point, making certain adjustments to the figures listed therein, and deriving a net worth of $5,178,512.95. Dividing this figure by the shares issued and outstanding, 28,022½, he computed a per share worth of $184.80. The findings of the referee were affirmed by the St. Louis circuit court and the defendant, Watson-Stillman Company, appealed.

On appeal, the Missouri supreme court reversed. Emphasizing the wide disparity in values which existed in the case, the court held that all elements of value must be considered, and that the singular use of one method of valuation, the net asset method, was error.

I. The Statute

The substantive, as distinct from the procedural, aspects of the Missouri statute providing for an appraisal and payment of the dissenting shareholders' interest are as follows:[8]

> [A]nd [the] . . . shareholder . . . shall make . . . demand on the surviving . . . corporation for payment of the fair value of his shares as of the day prior

5. 293 S.W.2d 429 (Mo. 1956).
6. §§ 351.410-.450, RSMo 1949.
7. § 351.455, RSMo 1949.
8. *Ibid.*

> to the date on which the vote was taken approving the merger [and] . . . the surviving . . . corporation shall pay . . . the fair value thereof.

The statutory terminology used in these appraisal acts has varied considerably.[9] The word *value* has been qualified by a myriad of adjectives. The terms used, generally and with certain limitations, have had little effect on the results reached by the courts. The Missouri act set out above uses the term "fair value." The Missouri supreme court in the *Watson-Stillman* case characterized the significance of such variations from state to state when it said:[10]

> In the various statutes the terms 'value,' 'fair value,' 'fair cash value,' and 'fair market value' are abstract and in a sense perhaps meaningless . . .; they nevertheless have the same general meaning and purposefully if not wisely establish a flexible general standard for fixing value between parties who are either unable or unwilling to voluntarily agree.

The cases dealing with the problem seem to be the legal genesis of the term "instrinsic value."[11] Some courts have used this term to denominate the truth for which they are searching: the amount of exact compensation that a shareholder is entitled to receive for the property he surrenders.[12] The Delaware supreme court, in *Tri-Continental Corporation v. Battye*,[13] has defined this term by stating:[14]

> By value of the stockholder's proportionate interest . . . is meant the true or intrinsic value of his stock which has been taken by the merger.

Regardless of the term used in the statute, it has been the courts' function to give it meaning, save perhaps in the few states that require market value to be used exclusively.[15]

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9. For a classification of these acts according to the terminology used see Robinson, *Dissenting Shareholders: Their Right to Dividends and the Valuation of Their Shares*, 32 COLUM. L. REV. 60 (1932); Lattin, *Remedies of Dissenting Stockholders Under Appraisal Statutes*, 45 HARV. L. REV. 233 (1931); STEVENS, CORPORATIONS § 128 (2d ed. 1949).

10. *Supra* note 5, at 433.

11. The term first appears to have been used in an early Massachusetts case, Cole v. Wells, 224 Mass. 504, 113 N.E. 189 (1916).

12. The Delaware courts have repeatedly used this term. Jacques Coe & Company v. Minneapolis-Moline Co., 31 Del. Ch. 368, 75 A.2d 244 (Ch. 1950); *In re* General Realty & Utilities Corp., 29 Del. Ch. 480, 52 A.2d 6 (Ch. 1947); Chicago Corp. v. Munds, 20 Del. Ch. 142, 172 Atl. 452 (Ch. 1934).

There seems to be some misunderstanding about the meaning of the term. Two cases, Cole v. Wells, *supra* note 11, and American General Corp. v. Camp, 171 Md. 629, 190 Atl. 225 (1937) leave the impression that the term denominates a net asset approach to the valuation problem. A comment in 51 MICH. L. REV. 713 (1953) follows this classification. In is submitted, however, that the term is used by the courts today to signify the method of valuation in which all values are considered, and does not singularly refer to the net asset method.

13. 31 Del. Ch. 523, 74 A.2d 71 (Sup. Ct. 1950).

14. *Id.* at 526, 74 A.2d at 72.

15. Although the problem of valuation in the *Watson-Stillman* case arose under an appraisal statute, the same basic issue may arise in litigation in other ways. In Tanner v. Lindell Ry., 180 Mo. 1, 79 S.W. 255 (1904), an early Missouri case, majority shareholders had sold all of the corporate property. The minority sued to enjoin on the ground that the action was unauthorized. For equitable reasons, the court denied

II. EXTRANEOUS PROBLEMS UNDER AN APPRAISAL STATUTE

Simply stated, the legal problem is: What is the value of a share of stock?[16] Several extraneous factors qualify this problem under an appraisal statute. Under these statutes unfairness or bad faith is immaterial.[17] The remedy given to the dissenting minority provides them with the opportunity of withdrawing from the changed enterprise at a fair price without any necessity of showing unfairness, mismanagement or bad faith by the dominant group. Nor does the existence of this remedy necessarily preclude other methods of recourse for judicial relief.[18] The fact that a stock does or does not, as in the principal case have an ascertainable market value has only a qualified significance.[19] The same basic considerations would apply to the valuation of a share which has a determinable market and to those which do not. An established market value is not conclusive and is but one of the several values that a court will consider in arriving at the fair value of a share.[20]

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the injunction, but did state that one of the remedies available to the minority in a proper proceeding was to obtain the value of their stock. The right to recover was based upon a conversion theory. See also Hicks v. Forsyth Electric & Water Co., 330 Mo. 839, 50 S.W.2d 1045 (1932).

The problem of valuation may also arise as a major ingredient in the consideration of the fairness of some proposed corporate action. In Sterling v. Mayflower Hotel Corp., 33 Del. Ch. 293, 93 A.2d 107 (Sup. Ct. 1952) minority shareholders sought to enjoin a merger on the ground that its terms in exchange of stock were unfair to them. The court in determining the fairness of the exchange, was faced with a comparative evaluation problem of the two shares. The methods used by a court to determine the value of shares under an appraisal statute would be applicable in any instance of fundamental corporate change where the value of shares was in question.

16. For general discussions of the problem see BALLANTINE, CORPORATIONS §§ 298-99 (rev. ed. 1946); 2 BONBRIGHT, VALUATION OF PROPERTY 826-36 (1936); 15 FLETCHER, PRIVATE CORPORATIONS § 7063 (1938); STEVENS, CORPORATIONS § 125 (2d ed. 1949); Lattin, *supra* note 9; Robinson, *supra* note 9; Comment, 51 MICH L. REV. 713 (1953); Notes, 16 BROOKLYN L. REV. 86 (1949); 40 CALIF. L. REV. 140 (1952); 47 HARV. L. REV. 847 (1934); 1 MD. L. REV. 338 (1937); 9 TEMP. L.Q. 239 (1935); 60 YALE L.J. 337 (1951); Annot., 38 A.L.R.2d 442 (1954).

17. Homer v. Crown Cork & Seal Co., 155 Md. 66, 141 Atl. 425 (1928); 2 BONBRIGHT, *op. cit. supra* note 16.

18. This is a major problem of its own. Some states provide by statute that the appraisal remedy is exclusive. *e.g.*, MICH. STAT. ANN. §§ 21.44, 21.54 (1937). In Adams v. United States Distributing Corp., 184 Va. 134, 34 S.E.2d 244 (1945) the court states that the weight of authority, in the absence of fraud or illegality, is that the statutory remedy precludes other forms of relief. Where there has been fraud or oppression by the majority and the legislature has been silent on the subject, however, other remedies may be available to the minority. May v. Midwest Refining Co., 121 F.2d 431, *cert. denied*, 314 U.S. 668 (1941).

19. Market value is used here in the restricted sense of unadjusted market quotations. The use of a hypothetical market value is discussed later in this comment.

20. Jacques Coe & Co. v. Minneapolis-Moline Co., 31 Del. Ch. 368, 75 A.2d 244 (Ch. 1950); *In re* General Realty & Utilities Corp., 29 Del. Ch. 480, 52 A.2d 6 (Ch. 1947); Chicago Corp. v. Munds, 20 Del. Ch. 142, 172 Atl. 452 (Ch. 1934); Ahlenius v. Bunn & Humphreys, 358 Ill. 155, 192 N.E. 824 (1934); Republic Finance & Investment Co. v. Fenstermaker, 211 Ind. 251, 6 N.E.2d 541 (1937); American General Corp. v. Camp, 171 Md. 629, 190 Atl. 225 (1937); Cole v. Wells, 224 Mass. 504, 113 N.E. 189 (1916); Perkins v. Public Service Co., 93 N.H. 459, 45 A.2d 210 (1946); Application of Behrens, 61 N.Y.S.2d 179 (Sup. Ct. 1946), *aff'd*, 271 App. Div. 1007, 69 N.Y.S.2d 910 (1st Dep't 1947); Roessler v. Security Savings & Loan Co., 147 Ohio St. 480, 72 N.E.2d

It is also to be noted the Missouri statute specifically provides that the shareholder is entitled to the value of his property "as of the day prior to such date on which such vote was taken approving the merger."[21] Such a provision is common in appraisal statutes.[22] The theory is that a shareholder is entitled to the value of his property as it stood at the time of the change which the law has authorized the majority to take. No element of damages arises. This is to be distinguished from cases in which the majority has taken unauthorized action or acted in bad faith and the minority has been allowed to recover the worth of their shares as enhanced by the corporate action.[23]

III. Methods of Valuation

A. *In General*

The courts, given the abstract statement that a dissenting shareholder has the right to the value of his shares when a major corporate change has been effected, must derive the constituent elements of such a value. An insight into the manner in which this has been accomplished is best achieved by realizing that the process is not one which may be worked out with a mathematical certainty invariably applicable to all situations.[24] This has been repeatedly emphasized by the courts. As a New York court said in *Application of Behrens*:[25]

> While there is no legal formula which can be enunciated or applied in valuation proceedings, the appraisal remaining a matter of judgment on the facts in each case, the Court can reiterate accepted principles which, simply stated, are that the appraisal should take account of market value, investment value, and net asset value. . . . The weight to be attached to each factor will naturally vary in accordance with the facts of each case, . . .

The courts have been chary of stamping one system of valuation as the exclusive method to be used. They have realized that the considerations of value of an investment corporation may be significantly different from those of an industrial research organization.

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259 (1947); Austin v. City Stores, 89 Pa. D. & C. 57 (C.P. 1953); Adams v. United States Distributing Corp., 184 Va. 134, 34 S.E.2d 244 (1945).

A few states provide by statute that market value shall be conclusive. *E.g.*, N.J. Stat. Ann. § 14:3-5 (1937).

21. § 351.455, RSMo 1949.

22. In the Matter of Fulton, 257, N.Y. 487, 178 N.E. 766 (1931), the court discusses this element at length. See also American General Corp. v. Camp, *supra* note 20; 2 Bonbright, *op. cit. supra* note 16.

23. Jones v. Missouri-Edison Elec. Co., 233 Fed. 49 (8th Cir. 1916). The court finding that the majority had acted in bad faith allowed the minority to recover the value of their stock with a subsequent appreciation that had accrued as a result of the merger.

24. The courts have recognized this almost from the beginning. In Jones v. Missouri-Edison Elec. Co., *supra* note 23, at 52, an early case, the court said, "the very nature of the case precludes proof of value and damage with precision of a mathematical computation. It is one which calls for the exercise of judgment upon consideration of every relevant evidential fact or circumstance."

25. 61 N.Y.S.2d 179, 182 (Sup. Ct. 1946), *aff'd*, 271 App. Div. 1007, 69 N.Y.S.2d 910 (1st Dep't 1947).

Certain alternative standards or measures of value have been recognized. These standards by which the worth of a share is determined may be divided into two distinct categories. In the first group are those values for which a definite mathematical figure may be achieved. Included within this classification, either because they have been used by a court or advocated by a commentator, are market value, asset value, a capitalization of earnings or dividends, and a hypothetical market value. These values, determined either by the accountant or the investor, have two justifications for their use in an appraisal proceeding in that they: (1) reflect upon the proportional worth of a share in the corporate enterprise, and (2) are ascertainable in a mathematical sense. It is submitted that the use of any value which could meet these two requisite elements would be justified in the solution of the valuation problem.

In the second category are certain vague, relative concepts such as future potential, place in the industry, and caliber of management which have a definite bearing upon the value of a shareholder's interest but for which no definite arithmetical figure may be achieved.[26] The use of such elements of worth in an appraisal proceeding is an almost infinite variable, covering the entire spectrum of corporate enterprise.

It is these relative factors, that vary largely from case to case, which make the appraisal proceeding a matter of judgment.[27] The use of the relative concepts and their influence on the determinable values will be shown as this Comment is developed. As a general summation, the courts have taken values which justifiably exist in a case, weighted them by a consideration of the intangible factors which bear upon the worth of the stock, and from a weighted average achieved the desired result.[28]

B. *Market Value*

As previously indicated, market value, where existent, has been accepted by the courts as only one of the many elements to be considered. The weight to be

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26. The list of such intangibles that may be emphasized as having relative bearing upon the worth of a share of stock is almost infinite. The appellant's brief in the *Watson-Stillman* case contained twelve separate factors which were claimed to have an influence on the shares in question. Several of these factors were definite values. The remainder were such intangible considerations as trend of operation, position in the industry, and future prospects. Research of the cases will turn up any number of such imponderables which could be emphasized in a given case as having a definite bearing on the worth of a share of stock.

27. The distinction that is being drawn should be emphasized. Throughout the remainder of this comment the word "value" will be used to denote those factors for which a definite mathematical result may be reached.

28. There are a series of Delaware cases which clearly illustrate the considerations and computations of a court in reaching its final result of a dollars and cents figure. Among others, see Sterling v. Mayflower Hotel Corp., 33 Del. Ch. 293, 93 A.2d 107 (Sup. Ct. 1952); Sporborg v. City Specialty Stores, 123 A.2d 121 (Del. Ch. 1956); Heller v. Munsingwear, Inc., 33 Del. Ch. 593, 98 A.2d 774 (Ch. 1953); Jacques Coe & Co. v. Minneapolis-Moline Co., 31 Del. Ch. 368, 75 A.2d 244 (Ch. 1950).

given market value will vary with the circumstances and the jurisdiction.[29] Market value, while seemingly a definite figure expressing the opinion of experienced investors, is subject to certain flaws which render it too uncertain to receive judicial approval as an exclusive valuation method.[30] It is subject to a certain degree of control or manipulation,[31] the market itself is subject to external factors that cause momentary fluctuations,[32] and there may be many instances in which the market may reflect the proposed action long before it becomes a reality.[33] Since value is to be determined as of a fixed time, an injustice may result either to the minority or the surviving corporation if that moment happened to occur when a fluctuation in market price has occurred which does not truly bear on the worth of the stock in question. Because of these uncertainties, market value does not sufficiently satisfy the legal standard to allow it to be used as an exclusive determination. It is merely one of the several values which a court will take into consideration where it validly exists.

C. *Net Asset Value*

The sole use of the net asset method was held to be error in the *Watson-Stillman* case. It is, however, readily ascertainable and does have economic import. As such, it qualifies as one of the values which a court will use. The net asset theory may have either of two distinct implications. The first is that the merger situation is to be equated with a dissolution of the corporation.[34] The second might be denominated

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29. A few states provide that market value shall be a conclusive determination by statute. See note 20 *supra*. The New York statute uses the term "value." Several commentators have reached the conclusion that there is a thread running through the New York cases that market value will be heavily weighted, if not a conclusive value, where a stock is listed and active. Comment, 17 FORD L. REV. 259 (1948); Annot., 38 A.L.R.2d 442, 458 (1954).

30. While the view that market value should not be an exclusive determination had been advanced before 1930, it is interesting to note that much of the law under these appraisal statutes was developed during that decade.

31. Petry v. Harwoood Electric Co., 280 Pa. 142, 124 Atl. 302 (1924); Austin v. City Stores, 89 Pa. D. & C. 57 (C.P. 1953). 2 BONBRIGHT, *op. cit. supra* note 16, points out that the dividend policy of the corporation is in the hands of the majority. This point is also emphasized by Robinson, *supra* note 9.

32. Chicago Corp. v. Munds, 20 Del. Ch. 142, 172 Atl. 452 (Ch. 1934); Note, 9 TEMP. L.Q. 239 (1935).

33. The comtemplated action may be operative on the market long before it is formally taken. In the Matter of Fulton, 257 N.Y. 487, 178 N.E. 766 (1931); Note, 1 MD. L. REV. 338 (1937).

34. Two early cases applied this theory, Cole v. Wells, 224 Mass. 504, 113 N.E. 189 (1916) and Petry v. Harwood Electric Co., *supra* note 31. In the latter case, the Pennsylvania supreme court allowed preferred shareholders to recover the par value of their stock on the theory that the merger was a dissolution.

In American General Corp. v. Camp, 171 Md. 629, 190 Atl. 225 (1937), the Maryland court uses quite direct language that a merger is a hypothetical dissolution. It goes on to say, however, that market value, a capitalization of earnings, and the value of goodwill should also be considered. This would seem to impair its standing as a case which advocates the use of a liquidation theory since on liquidation none of these factors would have a bearing on the aliquot portion a shareholder would be entitled to receive.

The Missouri court specifically rejects the analogy to a liquidation in the principal

an adjusted net asset approach in that the shares are to be valued as a continuing interest in a going concern. It is the latter of these two possible interpretations which is the truer determination of the value that is contemplated by the statute.[35] The shareholder has bought into a going concern. He has been deprived by majority action of his interest in the active enterprise. And it is for this interest that he should be remunerated. The use of a liquidation value is inappropriate. It makes the merger situation the equal of the dissolution, omitting all of the factors that are incident to the corporation's worth as a going concern. With the exception of the few early cases that have applied a liquidation-type theory, very few courts unequivocably advocate the use of such a system. Like market value, the net asset per share value takes its place as one of all of the elements of value which are to be considered in appraising the value of the stock.[36]

D. *Capitalization of Earnings or Dividends*

A third value which may be definitely ascertained and is consequently important as a method is a capitalization of earnings or dividends, sometimes called the investment value.[37] Its weakness, of course, is that it assumes the existence of earnings or dividends over a sufficient period of time. Its value as a method is that it provides a reasonably definite method of ascertaining the value of intangible assets such as goodwill, and avoids the selection of an arbitrary figure. As a theoretical matter where it can be validly applied, a capitalization of earnings or dividends approaches close to being the true value which the courts are striving to attain. One of the prominent considerations of the investor is the return which he will receive, and it is by the employment of this computation that a true measure of such a value may be achieved. It is subject to the weakness noted above, which precludes its singular use as a valuation method. And it must, therefore, join the other significant values as but one of many to be considered, perhaps weighted and employed in the proper situation.[38]

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case. 293 S.W.2d at 432. It said, "Despite the analogy and even its possible advisability, the A. Leschen and Sons Rope Company was not in point of fact liquidated . . . it was merged or consolidated under the statutes . . . and the dissenting stock must be valued accordingly."

35. Heller v. Munsingwear, 33 Del. Ch. 593, 98 A.2d 774 (Ch. 1953); Chicago Corp. v. Munds, *supra* note 32; Application of Behrens, 61 N.Y.S.2d 179 (Sup. Ct. 1946), *aff'd*, 271 App. Div. 1007, 69 N.Y.S.2d 910 (1st Dep't 1947).

36. To the effect that book value in an unadjusted sense has no bearing on the valuation problem, see Borg v. International Silver Co., 11 F.2d 147 (2d Cir. 1925); Ahlenius v. Bunn & Humphreys, 358 Ill. 155, 192 N.E. 824 (1934); Homer v. Crown Cork & Seal Co., 155 Md. 66, 141 Atl. 425 (1928).

37. A case which clearly shows the use of this method is *In re* Northwest Greyhound Lines, 41 Wash. 2d 672, 251 P.2d 607 (1952).

The New York courts call this method, or something which approaches it, the investment value of a share. It is a more comprehensive classification than a capitalization of earnings or dividends per se, including such factors as position in the industry, prospects of the business and the industry, and a comparison of the securities of the company in question with other securities available on the market. Whatever it is denominated, it is to be noted that all of the factors listed are related to the earning capacity of a share. Application of Behrens, *supra* note 35.

38. Where both a capitalization of earnings and dividends exists in a case, the Delaware courts will give each an independent weight. See cases cited note 28 *supra*.

E. *Hypothetical Market Value*

It has been advocated that the use of a hypothetical market value would be the solution to the valuation problem.[39] The theory of such a method is that a share is to be valued at what it would have been worth on the market place on the valuation date without the influence of the corporate change. The market value of a share, if existent, is taken as a starting point. It is then adjusted by considering such relative factors as management, prospects for growth, cash position, and external factors which may have influenced the market. By the exercise of judgment, the appraiser gives these elements a dollars and cents value which is added to or substracted from the market quotation to determine the fictitious value of a share. This is then the hypothetical market value of a share. It is submitted that this approach does not add anything new in the way of a solution to the valuation problem.[40] A hypothetical book value of a share is not a value of a share that exists in its own right. It is the result of the thought processes of the appraiser, and is just as much a matter of judgment as any process now being used by the courts. Another flaw in such an approach is that it assumes an active market. Without such a market, the result of active trading, the methods of asset and earnings valuation would have to be used. In such a case a hypothetical market value becomes nothing more than a name for the legal result. The use of such a method is but an approach to the problem of valuation which heavily emphasizes market value. Where there is a strong market in the shares in question, the courts will give it appropriate weight under the valuation methods now being used.[41]

IV. Conclusion

The general test that has been developed by the courts is a sound approach to the valuation problem. After some uncertain groping when initially faced with the problem, they developed the theory, now widely accepted, that all elements which have a bearing on the worth of a share must be considered. These elements may be divided into two groups:

A. Those which have been denominated in this note as values in that they are definitely ascertainable in an arithmetic sense and have a definite relation to the true value of a share. There are three such values: market value; asset value; and a capitalization of earnings or dividends.[42]

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39. 2 Bonbright, *op. cit. supra* note 16; Comment, 51 Mich. L. Rev. 713, 718 (1953). Bonbright traces the source of such a theory to In the Matter of Fulton, *supra* note 33.

40. The Missouri court in the principal case specifically rejects the use of a "hypothetical market value" derived by determining a market value for corporations "similar" to the Leschen Company, then "relating" such values to the Leschen Company and obtaining a purported worth for the shares in question.

41. Sterling v. Mayflower Hotel Corp., 33 Del. Ch. 293, 93 A.2d 107 (Sup. Ct. 1952), illustrates the considerations of a court in determining the strength of a market value of a share. The court considered the fact that the market value of the shares had been driven upward by an offer to buy shares at well above market quotations.

42. It is not advocated that this list of determinable values be necessarily exclusive. It is possible that other values may be developed which might be significant in appropriate cases. See, *e.g.*, Sporborg v. City Specialty Stores, 123 A.2d 121 (Del. Ch.

B. Those relative concepts which bear upon the worth of a share such as the trend of the corporation's operations, the caliber of its management and its position in its industry. In a mathematical sense these elements cannot be derived by any computation. They represent vague considerations whose use in every case is but a matter of the personal judgment of the appraiser. According to the use which such concepts have, they may be categorized as follows:

1. Those elements which, although emphasized by the courts as influencing the worth of the stock, are included as a constituent element of one of the determinable values. The values derived by a capitalization of earnings or a capitalization of dividends would be the significant values within which a large group of such concepts would be included. For example, a capitalization of earnings would encompass such subservient factors as the caliber of management, the earnings' history of the corporation, and the trend of its operations since these elements are all reflected in the earnings of a corporation. A capitalization of dividends would include the investment yield of a corporation and its investment value as a going concern.

2. Those elements which go to determine the weight which any value should be given in reaching the final result of the court. Corporate or shareholder action which had distorted the market value would influence the weight to be given to market value. The nature of a corporation's assets would determine the weight to be given its net asset value. The frequency with which dividends had been paid, although also included within a capitalization of dividends, might have some influence on the weight to be given to the dividend value of a share.[43]

3. Those elements which are in a sense nothing more than contentions of the litigants over the accounting methods to be used. Such considerations as to whether the existence of a reserve is proper or whether assets have been over-amortized would fall within this group. In almost any case the correctness of the accounting procedure may be contested.[44]

1956), in which the court was faced with the valuation of shares of a merchandising corporation. The use of a sales value derived by capitalizing sales was advocated. The court rejected the use of such a value. The case, however, does illustrate the possible development of new value concepts.

It is also to be noted that these values may not all exist in any given case and that their weight is a matter of judgment. Even where all of these values do exist one of them might be given conclusive weight over the others for particular reasons which exist in a case.

43. In Application of Behrens, 61 N.Y.S.2d 179, 183 (Sup. Ct. 1946), *aff'd* 271 App. Div. 1007, 69 N.Y.S.2d 910 (1st Dep't 1947), the court says, "The nature of the business, the nature of the assets, their liquidity and profitable use, are factors bearing upon the weight to be given to net asset value." In Austin v. City Stores, 89 Pa. D. & C. 57 (C.P. 1953), the effect of a series of such factors and their influence on the value to which they are related is discussed.

44. Heller v. Munsingwear, 33 Del. Ch. 593, 98 A.2d 774 (Ch. 1953) (valuation of net assets); Jacques Coe & Co. v. Minneapolis-Moline Co., 31 Del. Ch. 368, 75 A.2d 244 (Ch. 1950) (over-amortization of assets); *In re* General Realty & Utilities Corp., 29 Del. Ch. 480, 52 A.2d 6 (Ch. 1947) (validity of a tax liability); Perkins v. Public Service Co., 93 N.H. 459, 45 A.2d 210 (1946) (depreciation and certain charges to expense).

4. Those elements which may become arbitrary adjustments to the weighted-average value of a share. It is possible that some element of a corporation's worth might not be related to any of the ascertainable values and yet is of such significance in a given case that its omission would be unjust. In such a case, the appraiser would have to give such an element an arbitrary value and adjust the share value accordingly.

If there is criticism of the methods of valuation used by the courts, it would seem to stem from some unconscious feeling that a share of stock should have a value in its own right that may be mathematically derived for use in a valuation proceeding. It would appear that it is not so much the share that is being valued, as the dissenters' proportional interest in the going concern. The consideration of all elements of value is best calculated to reach the desired result. It is true that the problem is one for the economist and the accountant, but they can do no more than elaborate on the basic structure which the courts have constructed. The comprehensive test which the Missouri supreme court adopted, has been established so that the variable specifics of any given case may be considered where proper. In any other method there lurks the danger of inflexibility.

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