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Recent Cases

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TRIAL BY JURY OF ELEVEN IN A FELONY PROSECUTION

State v. McGee[1]

James Edward McGee was charged with the slaying of Ida Mae Rooks and was brought to trial before a twelve-citizen jury. Toward the end of the second day of trial one of the jurors suffered a seizure and was unable to continue. Defendant McGee wished to proceed with trial and, in compliance with the court's direction, signed a memorandum waiving his right to a jury of twelve citizens and consenting to the case being decided by a jury of eleven. The waiver memorandum was also signed by the defense attorney, the prosecutor, and the judge. The jury of eleven found McGee guilty of second degree murder and he appealed on the ground, *inter alia,* that a trial by jury of less than twelve citizens violated the Missouri Constitution, which provides:

> That the right of trial by jury as heretofore enjoyed shall remain inviolate; provided that . . . . in every criminal case any defendant may, with the assent of the court, waive a jury trial and submit the trial of such case to the court, whose finding shall have the force and effect of a verdict of a jury.[2]

The Missouri Supreme Court affirmed the conviction and construed this constitutional provision to mean:

> In *every* criminal case any defendant may . . . with the assent of the court, waive a jury of twelve citizens and submit the trial of such case to a jury consisting of less than twelve citizens.[3]

Since the United States Supreme Court held, in the case of *Patton v. United States,*[4] that the United States Constitution does not prevent the defendant in a felony prosecution from waiving one juror, there has been a definite trend in the decisions of the state courts to construe their state constitutions as similarly allowing such a waiver.[5] With *McGee* Missouri has joined this trend.

The Missouri court relied heavily on *Patton.* Fundamental to the decision in *Patton* was the idea that waiver of the entire jury and waiver of one juror are in substance the same thing—waiver of personal privileges.[6]

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1. 447 S.W.2d 270 (Mo. En Banc 1969).
2. Mo. Const. art. I, § 22(a).
3. 447 S.W.2d at 273.
4. 281 U.S. 276 (1930). This case is directly in point with the case being noted.
5. *See, e.g.,* People v. Clark, 24 Cal. App. 2d 302, 74 P.2d 1070 (1938); *cert. denied,* 304 U.S. 574 (1938); People v. Scudieri, 363 Ill. 84, 1 N.E.2d 225 (1936); State v. Scott, 156 Kan. 11, 131 P.2d 664 (1942); Attorney Gen. *ex rel.* O'Hara v. Montgomery, 275 Mich. 504, 267 N.W. 550 (1936); State v. Zabrocki, 194 Minn. 346, 260 N.W. 507 (1935); *Ex parte* Kortgaard, 66 N.D. 555, 267 N.W. 438 (1936).
6. Patton v. United States, 281 U.S. 276, 312 (1930). *See also,* Note, 43 U. Mo. Bull. L. Ser. 46 (1931).

Since Missouri allows waiver of the entire jury,[7] the court reasoned that it is permissible to waive one juror and have the case tried before a judge and eleven jurors.[8] This line of reasoning provoked a vigorous dissent,[9] but the weight of authority clearly supports the majority interpretation.[10]

Aside from state constitutional requirements, three basic arguments have been forwarded to support the proposition that a defendant in a felony prosecution has no right to waive trial by jury of twelve,[11] thus changing the numerical makeup of the common law fact finding body.[12] First, it has been argued that trial by common law jury (twelve disinterested citizens) is part of the "framework of government."[13] However, at common law trial by jury was considered to be a personal privilege for the protection of the defendant,[14] and as such there is no sound reason to say the defendant cannot waive it in its entirety or in part.[15] This conclusion is readily supportable when one considers that the right to a speedy trial, the right to counsel, and the right against self-incrimination are all secured by the Constitution, yet these can be waived by requesting a continuance, by refusing counsel, or by voluntarily and knowingly signing a confession.

The second basic argument is that the court has no jurisdiction to hear and render judgment in a criminal case in the absence of a complete jury.[16] However, most of the cases supporting this point involve the waiver of an entire jury and were decided before it was held that the United States Constitution does not prevent a waiver of the jury in a criminal case.[17] In *Patton v. United States* the Court expressly stated that the right to trial by jury "is not jurisdictional, but was meant to confer a right upon the accused . . . ."[18] To hold otherwise would mean that all sentences entered upon a plea of guilty would arguably be void for want of jurisdiction.

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7. Mo. CONST. art. I, § 22(a); Mo. R. CRIM. P. 26.01(b).

8. "We agree that complete waiver of a jury and consent to be tried by less than twelve jurors in substance 'amount to the same thing.' " 447 S.W.2d at 273.

9. Judge Seiler refused to accept that both waivers were personal privileges of the defendant. He argued that the fact that both are in substance the same thing means they were both "foreign to the common law . . . . [But not that] they are in substance the same beyond that limited respect." 447 S.W.2d at 277.

10. Cases cited note 5 *supra*.

11. Note, 43 U. Mo. BULL. L. SER. 46 (1931).

12. Thompson v. Utah, 170 U.S. 343 (1898); Rassmussen v. United States, 197 U.S. 516 (1905). *But cf.* Attorney Gen. *ex rel.* O'Hara v. Montgomery, 275 Mich. 504, 267 N.W. 550 (1936) where the Michigan court concluded that the number of jurors at common law was ambiguous at best.

13. Coates v. United States, 290 F. 134 (4th Cir. 1923); Freeman v. United States, 227 F. 732 (2d Cir. 1915); Note, 43 U. Mo. BULL. L. SER. 46, 47 (1931).

14. 3 W. BLACKSTONE'S COMMENTARIES* 379; 2 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1779 (3d.ed. 1858).

15. Patton v. United States, 281 U.S. 276 (1930).

16. Note, 43 U. Mo. BULL. L. SER. 46, 47 (1931).

17. *See, e.g.*, Low v. United States, 169 F. 86 (6th Cir. 1909); Commonwealth v. Rowe, 257 Mass. 172, 153 N.E. 537 (1926); State v. Sanders, 243 S.W. 771 (Mo. 1922); State v. Mansfield, 41 Mo. 470 (1867); Territory v. Ah Wah & Ah Yen, 4 Mont. 149, 1 P. 732, 47 Am. Rep. 341 (1881).

18. 281 U.S. 276, 298 (1930). *Accord*, People v. Clark, 24 Cal. App.2d 302, 74 P.2d 1070 (1938); People v. Scudieri, 363 Ill. 84, 1 N.E.2d 225 (1936); Attorney Gen. *ex rel.* O'Hara v. Montgomery, 275 Mich. 504, 267 N.W. 550 (1936); *Ex parte* Kortgaard, 66 N.D. 555, 267 N.W. 438 (1936).

Finally, it has been argued that the public interest in the life and liberty of a citizen accused of a crime must be protected against infringement by ensuring that sentencing may only follow a jury verdict.[19] However, this argument is weakened by the fact that a defendant has the right to plead guilty and accept the sentence of the judge. In the face of such a public interest this practice of accepting guilty pleas could not be supported, inasmuch as the defendant could falsely plead guilty and thus wrongfully infringe upon the interest of society.[20]

Based on the above discussion, it would appear that Missouri has reached a sound result in *McGee*. However, a careful reading of the Missouri Constitution suggests that, as a matter of constitutional interpretation, the decision may be open to question. Neither the Missouri constitutions of 1820,[21] 1865,[22] nor 1875[23] provided that a defendant could waive a trial by jury and consent to trial before a judge alone. Therefore, when in 1867 the question of waiver of one juror was first presented, the court refused to condone such a procedure,[24] stating that the "right to be tried by a jury of twelve men is not a mere privilege; it is a positive requirement of the law."[25]

However, in 1945 this constitutional provision was changed to provide for waiver of the right to a jury trial in a criminal case. Although the wording, "[t]hat the right of trial by jury as heretofore enjoyed shall remain inviolate . . . ,"[26] was retained,[27] the 1945 provision also provided:

> That in every criminal case any defendant may, with the assent of the court, waive a jury trial and submit the trial of such case to the court, whose finding shall have the force and effect of a verdict of a jury.[28]

Since a defendant may now waive the entire jury in a criminal case it would appear that the right to trial by jury is no longer a "positive requirement of the law," as stated in *Mansfield*,[29] but is a personal privilege which may be waived.[30] The Missouri Court in *McGee* agreed with

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19. Cancemi v. People, 18 N.Y. 128 (1858); Note, 43 U. Mo. BULL. L. SER. 46, 47 (1931).

20. State v. Kaufman, 51 Iowa 578, 2 N.W. 275 (1879); Attorney Gen. *ex rel.* O'Hara v. Montgomery, 275 Mich. 504, 267 N.W. 550 (1936); *Ex parte* Kortgaard, 66 N.D. 555, 267 N.W. 438 (1936).

21. Mo. CONST. art. XIII, § 8 (1820) provided: "The right of trial by jury shall remain inviolate."

22. Mo. CONST. art I, § XVII (1865) provided: "That the right of trial by jury shall remain inviolate."

23. Mo. CONST. art. II, § 28 (1875) provided in part:
> The right of trial by jury, as heretofore enjoyed, shall remain inviolate, but a jury for the trial of criminal or civil cases in courts not of record, may consist of less than twelve men as may be prescribed by law.

24. State v. Sanders, 243 S.W. 771 (Mo. 1922); State v. Meyers, 68 Mo. 266 (1878); State v. Mansfield, 41 Mo. 470 (1867).

25. State v. Mansfield, 41 Mo. 470, 478 (1867).

26. Mo. CONST. art. I, § 22(a).

27. This wording first appeared in the Constitution of 1875. *See* note 23 *supra*.

28. Mo. CONST. art. I, § 22(a).

29. 41 Mo. 470 at 478.

30. The court overruled the *Mansfield, Meyers, and Sanders* cases to establish this proposition.

the United States Supreme Court that the waiver of an entire jury is, in substance, the same as the waiver of one juror,[31] and it follows that the latter is also a personal privilege and its waiver is not prohibited by the Missouri Constitution.

However, it must be noted that this line of reasoning ignores the fact that the 1945 Constitution expressly states "[t]hat the right to trial by jury as *heretofore enjoyed* shall remain inviolate . . . ."[32] It can be argued that the meaning of the entire constitutional provision is dependent upon this initial provision. Therefore, the right to trial by jury is to remain as it existed before the adoption of the 1945 Constitution and the only deviations which will be tolerated are those which are expressly stated.[33] Accordingly, the defendant could not waive one juror and consent to a jury of lesser number than twelve because this was not allowed prior to 1945,[34] and the 1945 Constitution does not expressly permit such a waiver. The majority opinion in *McGee* completely ignores this line of argument.

Nevertheless, there is no reason to suspect that a future case with similar facts would be decided differently. This leaves unanswered, however, the question of how far the decision in *McGee* will be extended. In this connection there are at least three problems to which *McGee* provides no solution. First, the holding of the court is to the effect that the defendant may, with the assent of the court, "submit the trial of such case to a jury consisting of less than twelve citizens."[35] The question left unanswered is *how many* less than twelve? Can the defendant waive more than one juror, thus consenting to trial before a jury of nine, or five, or even two? Though it was asserted by the dissenting opinion in *McGee* that the reasoning of the majority would permit such an occurrence, the Missouri Constitution,[36] the Missouri Rules of Court,[37] and the majority holding all require that the trial judge consent to any waiver regarding the jury. Accordingly, it is doubtful if the sham of a two-member, or even a ten-member, jury will ever occur since it is improbable that a trial judge will allow such a substantial deviation from the established number of twelve jurors.

The second question raised by this decision is whether the defendant can waive the numerical size of the jury at any time and under any circumstances? Though there is no express answer in *McGee,* the defendant is arguably limited as to when he can waive one juror by the facts in this case. Based on this assumption, waiver of a juror would be allowed only after a twelve-citizen jury had been empaneled, the trial had commenced, and one juror became so incapacitated as to be unable to continue.

The final problem raised is as to what occurs if the prosecution objects to a proposed juror waiver and insists upon the case being heard by a twelve member jury? Following the reasoning of the court in *McGee,* which is

31. Patton v. United States, 281 U.S. 276 (1930).
32. Mo. Const. art. I, § 22(a) (emphasis added).
33. State v. McGee, 447 S.W.2d 270 (1969) (dissenting opinion).
34. State v. Sanders, 243 S.W. 771 (Mo. 1922); State v. Meyers, 68 Mo. 266 (1878); State v. Mansfield, 41 Mo. 470 (1867).
35. 447 S.W.2d at 273.
36. Art. I, § 22(a).
37. Mo. R. Crim. P. 26.01(b).

based on the reasoning of the United States Supreme Court in *Patton*, it would appear that the right to waive a twelve member jury is a right inherent to the defendant and the prosecution would have no standing to object. But, in *Singer v. United States*[38] the Supreme Court backed away from the rationale in *Patton* and rejected the contention that the defendant had a right to insist on the waiver of the entire jury in the face of the prosecution's objection. The Court went so far as to say:

> A defendant's *only* constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury . . . .[39]

However, the Missouri Constitution expressly grants the defendant an additional constitutional right, *i.e.* the right to waive, with the judge's consent, the entire jury.[40] The constitution makes no reference to the necessity of the prosecution's consent.[41] Therefore, the Missouri Constitution expands the constitutional right of the defendant as regards trial by jury, and, arguably, allows the defendant to thwart the prosecution's insistence on a twelve citizen jury. But if the trial judge, in the exercise of his discretion, does not consent to the waiver, then "[t]he accused has no absolute right, either by constitution, statute, or court rule, to elect that he shall be tried by the court without a jury."[42]

In conclusion, it appears that Missouri has reached a practical result, supported by the weight of authority,[43] but weak in its constitutional justification. The decision will have the effect of avoiding delay in reaching judicial disposition of a case where a juror is suddenly unable to complete his task and the defendant is willing to continue. The decision is also sound in that it binds the defendant to either one course or the other. No longer can the defendant waive one juror, proceed to trial, and, if convicted, assert that the conviction should be reversed because of a defective

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38. 380 U.S. 24 (1965).
39. *Id.* at 36 (emphasis added).
40. Mo. CONST. art. I, § 22 (a).
41. Though the necessity of the prosecution's consent to waiver of the full jury was not in issue, the Missouri Supreme Court held that the waiver is sufficient as against the defendant's later challenge if it is in the form of a memorandum, signed by the defendant and the defense attorney and approved by the trial judge. State v. Butler, 415 S.W.2d 784 (Mo. 1967). No reference was made to the necessity of the prosecution's consent.
42. State v. Taylor, 391 S.W.2d 835, 836 (Mo. 1965). The court left it to the trial judge's discretion to protect the rights of society which are involved in a jury trial.
43. *See, e.g.*, Patton v. United States, 281 U.S. 276 (1930); People v. Clark, 24 Cal. App. 2d 302, 74 P.2d 1070, *cert. denied*, 304 U.S. 574 (1938); People v. Scudieri, 363 Ill. 84, 1 N.E.2d 225 (1936); State v. Scott, 156 Kan. 11, 131 P.2d 664 (1942); Attorney Gen. *ex rel.* O'Hara v. Montgomery, 275 Mich. 504, 267 N.W. 550 (1936); State v. Zabrocki, 194 Minn. 346, 260 N.W. 507 (1935); *Ex parte* Kortgaard, 66 N.D. 555, 267 N.W. 438 (1936).

jury.[44] Moreover, *McGee* makes a further inroad into defining the personal rights of one accused of a crime. It would now appear clear that in Missouri the right to trial by jury is a personal privilege of the defendant over which he, with the assent of the judge, has complete control.

WILLIAM A. ATKINSON

PROHIBITION—TO PREVENT DISCOVERY PROCEEDINGS

State ex rel. Norfolk and Western Railway Co. v. Dowd.[1]

In an action for damages for wrongful death, plaintiff served a set of 105 interrogatories on the defendant railroad company, which the defendant claimed required a total of 227 separate answers. Defendant filed a general objection, and in the alternative, objected specifically to 86 of the interrogatories. The trial court overruled the general objection, but sustained the specific objections to 21 of the interrogatories and one part of another, indicating its intention to overrule the specific objections to 64 others.[2] Defendant brought an action in prohibition to restrain the re-

44. In prior Missouri cases the conviction had been overturned in a situation exactly like *McGee*. The reason given was that an eleven-member jury is defective. *See* State v. Sanders, 243 S.W. 771 (Mo. 1922); State v. Meyers, 68 Mo. 266 (1878); State v. Mansfield, 41 Mo. 470 (1867), all of which were overruled by the principal case.

1. 448 S.W.2d 1 (Mo. En Banc 1969).
2. Mo. R. Civ. P. 56.01 provides:

(a) Any party may serve upon any party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and the service of appearance or service of process on the party to be interrogated without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained, and except that a plaintiff may be interrogated without service of process. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories under this Rule a party may serve specific written objections to particular interrogatories together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which such objection is made shall be deferred until the objections are determined.

Interrogatories may relate to any matters which can be inquired into under Rule 57, and the answers may be used to the same extent as provided in Rule 57 for the use of the deposition of a party. Interrogatories may require as a part of or with the answers copies of all statements concerning the action or its subject matter previously given by the inter-

spondent judge from ordering it to answer 42 of the interrogatories.[3]

In refusing to issue the writ, the Missouri Supreme Court, *en banc*, held that the trial court had not exceeded its jurisdiction in its ruling on either the general or specific objections. As to the general objection, the court asserted that such a large number of interrogatories was not *per se* oppressive or an abuse of interrogatory practice, and that the determination of oppressiveness was a matter for the trial court. The court added that "[i]t would be a rare case where an appellate court would be justified in prohibiting the trial judge who had refused to strike an entire set of interrogatories."[4]

Upon examination of the trial court's ruling on the specific objections, the court found that a reasonable argument could be advanced that the interrogatories were reasonably calculated to lead to discovery of admissible

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rogating party, or copies of such documents, papers, books, accounts, letters, or photographs, not privileged, as are relevant to the answers required, unless opportunity for their examination and copying be afforded. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective orders as justice may require. The number of interrogatories or sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, undue expense, embarrassment, or oppression. The provisions of Rule 57.01(c) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

(b) The party serving written interrogatories upon a public or private corporation, or a partnership or association may designate the officer, director, general manager thereof, by name or description; and in case of the refusal of any such person to make discovery, the court in its discretion may apply the penalties of Rule 61.

Mo. R. Civ. P. 57.01, as pertaining to Rule 56.01 states:

(b) Unless otherwise ordered by the court as provided by this Rule, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense or any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. The examining party may not inquire as to the contents or substance of statements, written or oral, obtained from prospective witnesses by or on behalf of another party. The production or inspection of any writing obtained or prepared by the adverse party or co-party, his attorney, surety, indemnitor, or agent, in anticipation of litigation or in preparation for trial (except a statement given by the interrogating party) or of any writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 60.01, the conclusions of an expert, shall not be required.

3. §530.010, RSMo 1969 provides:

The remedy afforded by the writ of prohibition shall be granted to prevent usurpation of judicial power, and in all cases where the same is now applicable according to the principles of law.

4. State *ex rel.* Norfolk and Western Ry. v. Dowd, 448 S.W.2d 1, 3 (Mo En Banc 1969).

evidence. Furthermore, it did not appear from the record that the answers would subject relator to unwarranted annoyance, expense or oppression. With this reasonable basis behind the order, the court refused to find an abuse of the trial court's discretion. The court stated:

> Once we arrive at this evaluation of the trial judge's action, that is an end of the matter so far as prohibiting him is concerned, because it has been established over and over that prohibition will not lie to control discretionary judicial action by a lower court.[5]

There can be no question but that a writ of prohibition is the proper remedy to be invoked to restrain an inferior court from assuming jurisdiction where it has none,[6] or from exceeding its jurisdiction by issuing an order it has no power to issue.[7] The writ is a direction to the lower court commanding it to cease in the exercise of a jurisdiction to which it has no legal claim,[8] whether there is a complete lack of jurisdiction or an act in excess of jurisdiction.[9] These are commonly referred to as separate grounds for issuance of the writ, but in principle there is little distinction between the two. Each is an attempt by a court to take judicial action without judicial power or authority for such action.[10] "It is because such tribunal erroneously determines its own jurisdiction that the writ is issued."[11]

As a general rule, prohibition, being an extraordinary writ, will not be available where a party claiming it has an adequate remedy by ordinary means.[12] The writ does not take the place of demurrer, appeal or writ of error.[13] Where discretion lies with the trial court, prohibition will not issue to correct mere error in the exercise of this discretion; rather, there must be an abuse of discretion amounting to an excess of jurisdiction for the writ to be issued.[14]

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5. *Id.* at 3-4.

6. State *ex rel.* McCarter v. Craig, 328 S.W.2d 589, 591 (Mo. En Banc 1959); State *ex rel.* Taylor v. Nangle, 360 Mo. 122, 128, 227 S.W.2d 655, 657 (En Banc 1950); State *ex rel.* Sullivan v. Reynolds, 209 Mo. 161, 163, 107 S.W. 487, 491 (En Banc 1908); State *ex rel.* Kenamore v. Wood, 155 Mo. 425, 428, 56 S.W. 474, 476 (En Banc 1900); State *ex rel.* McCaffery v. Aloe, 152 Mo. 466, 483, 54 S.W. 494, 498 (En Banc 1899).

7. State *ex rel.* Houser v. Goodman, 406 S.W.2d 121, 127 (Spr. Mo. App. 1966); State *ex rel.* City of Mansfield v. Crain, 301 S.W.2d 415, 419 (Spr. Mo. App. 1957).

8. State *ex rel.* Terminal R.R. Ass'n v. Tracy, 237 Mo. 109, 117, 140 S.W. 888, 891 (En Banc 1911); J. HIGH, EXTRAORDINARY LEGAL REMEDIES § 763 (1874).

9. State *ex rel.* Terminal R.R. Ass'n v. Tracy, 237 Mo. 109, 118, 140 S.W. 888, 890 (En Banc 1911).

10. *Id.* at 118, 140 S.W. at 890.

11. F. FERRIS, EXTRAORDINARY LEGAL REMEDIES § 326, 441 (1926). This treatise gives excellent coverage of the history and scope of the writs of prohibition and mandamus.

12. State *ex rel.* McCaffery v. Aloe, 152 Mo. 466, 54 S.W. 494 (En Banc 1899); *see also* 42 AM. JUR. *Prohibition* § 8 (1942).

13. State *ex rel.* City of Mansfield v. Crain, 301 S.W.2d 415, 420 (Spr. Mo. App. 1957).

14. State *ex rel.* Clagett v. James, 327 S.W.2d 278, 290 (Mo. En Banc 1959); State *ex rel.* Allen v. Yeaman, 440 S.W.2d 138, 145 (K.C. Mo. App. 1969). Courts have experienced much difficulty in locating and defining the line between those cases where the court has jurisdiction of the subject matter, yet undertakes to ex-

The federal courts are in substantial agreement that a writ of prohibition is not ordinarily available to an aggrieved party to review a trial court's ruling granting discovery.[15] The basis for this position is that the federal courts do not consider an abuse of discretion as constituting an excess of jurisdiction;[16] rather, an abuse of discretion in the federal courts is considered mere error which is not subject to prohibition.[17] When discretion lies with the lower court in determining whether a motion for discovery will be granted, a writ of prohibition is not available to review the trial court's action in granting discovery because error, if any, would be merely an abuse of discretion and not in excess of jurisdiction.[18] If the granting of the order is within the power of the district court, the court has not exceeded its jurisdiction or violated any law.[19] Even if the appeals court is of the opinion that the order is too broad, it will not substitute its judgment for that of the trial judge.[20] The writ will not issue even where the jurisdiction of the trial court is doubtful; the court of appeals must be able to say that the district court is clearly without jurisdiction to warrant the issuance of a writ of prohibition.[21]

In the past, contrary to the practice in the federal courts, Missouri courts have continuously held that prohibition was the proper remedy where a trial court had improperly required discovery to be made.[22] The

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ceed such jurisdiction, and those where the court has jurisdiction and is simply acting erroneously within such jurisdiction. The determination as to when the erroneous act goes so far beyond the pale of law as to become an excess of jurisdiction can only be made from the peculiar circumstances of the case.

15. Paramount Film Distrib. Corp. v. Civic Center Theatre, Inc., 333 F.2d 358 (10th Cir. 1964); Chemical and Industrial Corp. v. Druffel, 301 F.2d 126 (6th Cir. 1962); *In re* Illinois Cent. RR., 192 F.2d 465 (5th Cir. 1951); Bank Line, Ltd. v. United States, 163 F.2d 133 (2d Cir. 1947); *In re* Terminal R.R. Ass'n v. Moore, 145 F.2d 128 (8th Cir. 1944); *see* Annot., 95 A.L.R.2d 1229 (1964).

16. *In re* Illinois Cent. R.R., 192 F.2d 465, 466 (5th Cir. 1951).

17. Chemical and Industrial Corp., v. Druffel, 301 F.2d 126 (6th Cir. 1962); *In re* Illinois Cent. R.R., 192 F.2d 465 (5th Cir. 1951).

18. *In re* Illinois Cent. R.R., 192 F.2d 465, 466 (5th Cir. 1951).

19. Chemical and Industrial Corp. v. Druffel, 301 F.2d 126, 129 (6th Cir. 1962).

20. *Id.* at 129.

21. *In re* Terminal R.R. Ass'n v. Moore, 145 F.2d 128, 129 (8th Cir. 1944). *But see* Hartley Pen Co. v. United States, 287 F.2d 324 (9th Cir. 1961), wherein the extraordinary writ of mandamus was allowed to issue to restrain the district court from compelling discovery without a finding of an excess of jurisdiction. The Ninth Circuit Court of Appeals stated:

> In our view the remedy is available in an ordinary case within our jurisdiction if ordinary remedies are inadequate and there is present exceptional and extraordinary circumstances which require the issuance of an extraordinary writ to prevent a grave miscarriage of justice. *Id.* at 328.

22. State *ex rel.* Grey v. Jensen, 395 S.W.2d 143 (Mo. En Banc 1965); State *ex rel.* Hof. v. Cloyd, 394 S.W.2d 408 (Mo. En Banc 1965); State *ex rel.* Terminal R.R. Ass'n v. Flynn, 363 Mo. 1065, 257 S.W.2d 69 (En Banc 1953); State *ex rel.* Cummings v. Witthaus, 358 Mo. 1088, 219 S.W.2d 383 (En Banc 1949); State *ex rel.* Kansas City Pub. Serv. Co. v. Cowan, 356 Mo. 674, 203 S.W.2d 407 (En Banc 1947); State *ex rel.* Isbell v. Kelso, 442 S.W.2d 163 (Spr. Mo. App. 1969); State *ex rel.* Williams v. Vardeman, 422 S.W.2d 400 (K.C. Mo. App. 1967); State *ex rel.* Houser v. Goodman, 406 S.W.2d 121 (Spr. Mo. App. 1966); State *ex rel.* Premier Panels, Inc. v. Swink, 400 S.W.2d 639 (St. L. Mo. App. 1966); State *ex rel.* Mid-America Pipeline Co. v. Rooney, 399 S.W.2d 225 (K.C. Mo. App. 1965).

use of the writ for this purpose was justified on the grounds that an order for discovery not within the bounds of rules 56.01 and 57.01[23] was an abuse of the trial court's discretion and that this abuse constituted an excess of jurisdiction for which prohibition was the only adequate remedy.[24] Under this practice there was no substantial difference between a discretionary error and an abuse of discretion, for both would result in an order for discovery not within the bounds of the rules and therefore would be subject to prohibition.[25]

In the case of *State ex rel. Hof v. Cloyd*,[26] the Missouri Supreme Court voiced its growing impatience with applications for prohibition of orders compelling answers to interrogatories.[27] While issuing a writ of prohibition to restrain the trial court's abuse of discretion in ordering answers to certain interrogatories, the court stated that "this court continues to receive an inordinate and apparently unnecessary number of applications to regulate the use of interrogatories."[28] The court reviewed proper discovery procedures and reaffirmed the proposition that whether questions are proper in form and substance is for the determination of the trial judge in the exercise of his discretion. The court did not, in *State ex rel. Hof v. Cloyd*, adopt the federal practice in regard to prohibition of discovery orders, though it clearly indicated a necessity for reducing the number of applications for review of discovery orders.[29]

Although not expressly stated, the Missouri Supreme Court in *State ex rel. Norfolk v. Dowd*[30] indicates an intention to follow the federal position in regard to the issuance of prohibition for control of interrogatory practice. Discussing the degree of error that will be required to constitute an abuse of discretion to the point where prohibition will lie, the court affirms the wide discretion of the trial court and states:

> The proper function of the appellate court in the situation before us is to determine whether as a matter of law the trial court abused its discretion. . . . Parties should realize that the fact that a writ is denied does not mean the trial court is error free. It means only that it has not exceeded its jurisdiction to the point where a writ will lie.[31]

The opinion is notice to the members of the bench and bar that henceforth the appellate courts will not disturb the exercise of discretion by the trial court in ordering answers to interrogatories except in the rare case where

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23. *See* note 2 *supra*.
24. State *ex rel.* Cummings v. Witthaus, 358 Mo. 1088, 219 S.W.2d 383 (En Banc 1949); State *ex rel.* Mid-America Pipeline Co. v. Rooney, 399 S.W.2d 225 (K.C. Mo. App. 1965).
25. Since Missouri cases did not require an abuse of discretion as a matter of law for prohibition to issue, the courts could find an abuse of discretion amounting to an excess of jurisdiction where a federal court would find only discretionary error not subject to prohibition. *See, e.g.*, note 22 *supra*.
26. State *ex rel.* Hof v. Cloyd, 394 S.W.2d 408 (Mo. En Banc 1965).
27. *Id.* at 411.
28. *Id.*
29. 394 S.W.2d 408 (Mo. En Banc 1965).
30. 448 S.W.2d 1 (Mo. En Banc 1969).
31. *Id.* at 4 (Emphasis added).

as a matter of law the trial court has exceeded its jurisdiction. If any reasonable basis for the trial court's order can be found, the order will stand.[32] Except in unusual circumstances, an application for prohibition to control an order compelling answers to interrogatories will be a fruitless effort.[33] The court reaffirms what has been said in previous opinions regarding review of discovery orders and indicates that these principles are to be strictly enforced, concluding that "the appellate court is not equipped to deal with a volume of applications to regulate the use of interrogatories, nor should there be any need for such recourse."[34]

GEORGE M. BOCK

KIDNEY TRANSPLANT—MENTALLY INCOMPETENT DONOR

Strunk v. Strunk[1]

One of two brothers, age 28, suffered "from chronic glomerulus nephritis, a fatal kidney disease."[2] The other brother, age 27, was a mentally incompetent ward of the state with an I.Q. of approximately 35, which corresponds to the mental age of a person six years of age. He also suffered from a speech defect which made communication difficult with those with whom he was not closely acquainted, and had been committed to a state institution.[3] Physicians determined that a kidney transplant was the only hope for the brother with nephritis.[4] A kidney from a cadaver was considered, though it was felt that little chance for survival existed under that course of action.[5] As to the possibility of a kidney from a live donor, all the members of the family, except the incompetent, were tested and rejected as unacceptable "because of incompatibility of blood type or tissue."[6] A testing of the incompetent proved that he was compatible. His mother, acting as a committee, petitioned the county court[7] asking that it grant authority for the transplant. The county court found that, due to "the peculiar circumstances of this case," the transplant would be of benefit to both brothers, since the incompetent "was greatly dependent" upon his brother, both "emotionally and psychologically," and concluded: "that his well-being would be jeopardized more severely by the loss of his brother than by the removal of a kidney."[8]

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32. *Id.* at 3.
33. The unusual circumstances would be where there is a gross abuse of the trial courts discretion, and if the federal practice is followed completely, there would also be the exception exemplified by Hartley Pen Co. v. United States, 287 F.2d 324 (9th Cir. 1961). *See* note 21 *supra.*
34. 448 S.W.2d 1, 4 (Mo. En Banc 1969).

1. 445 S.W.2d 145 (Ky. 1969).
2. *Id.*
3. *Id.* at 146.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

On appeal, the circuit court chancellor, after review of the record,[9] agreed with the county court's findings. On further appeal to the Court of Appeals of Kentucky, the issue presented was stated by the court:

> Does a court of equity have the power to permit a kidney to be removed from an incompetent ward of the state upon petition of his committee, who is also his mother, for the purpose of being transplanted into the body of his brother, who is dying of a fatal kidney disease?[10]

The court, in answer to that question, said "We are of the opinion it does."[11] After examining the statutory power of county courts of Kentucky as to control of incompetent wards,[12] the Court of Appeals held that the county court did not have the necessary authority to order the transplant,[13] but the circuit court did, and, therefore the judgment should be affirmed.[14] The court did "not deem it significant that this case reached the circuit court by way of appeal as opposed to a direct proceeding in that court."[15] Authority for the proposition that chancery courts have the necessary power to allow a transplant under these circumstances was found by the court under the equitable doctrine of "substituted judgment,"[16] the thrust of which is that a court of equity may deal with the estate and personal affairs of an incompetent in the manner in which the court determines he would, were he competent.[17] The court discussed the development of this principle under the English common law and in American jurisdictions,[18]

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9. *Id.*
10. *Id.* at 145.
11. *Id.*
12. KY. REV. STAT. ANN. § 387.230 (1963). Powers and duties of committee; personal charge may be given to another person; compensation.

> (1) The power and duty of the committee of a person of unsound mind shall, in all respects, be the same as those of the guardian of a minor, except as to education.
>
> (2) The court may appoint a person other than the committee to take charge of the person of the person of unsound mind when he is not confined in an asylum, and may order his committee to make necessary provision for his support.

KY. REV. STAT. ANN. § 387.060 (1963). Guardian to control ward and his estate; compensation.

> (1) A guardian shall have the custody of his ward, and the possession, care and management of the ward's property, real and personal. He shall provide for the necessary and proper maintenance and education of the ward out of the estate.

13. 445 S.W.2d 145, 149 (Ky. 1969).
14. *Id.*
15. *Id.*
16. *Id.* at 148.
17. *Ex parte* Whitebread, 2 Mer. 99, 35 Eng. Rep. 878, (Ch. 1816); *In re* Willoughby, 11 Paige 247 (N.Y. 1844). The *Strunk* court states:

> The inherent rule in these cases is that the chancellor has the power to deal with the estate of the incompetent in the same manner as the incompetent would if he had his faculties. This rule has been extended to cover not only matters of property but also to cover the personal affairs of the incompetent.

445 S.W.2d 145, 147 (Ky. 1969). The court relied in part on 27 AM. JUR. 2d *Equity* § 69 (1966).
18. 445 S.W.2d 145, 148 (Ky. 1969).

with emphasis on Kentucky cases.[19] The court, further justifying its position, noted that while statutes had conferred most of the power to deal with incompetents upon the county courts, courts of equity were still free to apply common law principles.[20]

Once the court had answered the jurisdictional question in the affirmative, there was still a question of whether the circuit court's exercise of its equity power was reasonable on the facts of this case. The appellate court stressed the fact that there was seemingly little chance of success from a cadaver transplant or finding another compatible live donor, and that the transplant would be of benefit to both donee and donor due to the dependence of the incompetent on his brother.[21]

A dissenting opinion took issue with the majority on the question of benefit to the donor.[22] The dissenter felt the evidence concerning the psychological effect on the incompetent, should his brother die, did not conclusively establish a benefit to him, and until such time as significant benefit could be proved, the court should not authorize such a transplant.[23] The dissent, it should be noted, was not based on the proposition that equity did not have the necessary jurisdiction or power, but that its power to act was strictly limited by the requirement of benefit to the incompetent and the court could only authorize acts clearly in the best interest of the incompetent.[24]

The court in *Strunk* clearly applied "substituted judgment" where it had never before been applied. While the court asserts "the right to act for the incompetent in all cases,"[25] it also admits that "[w]e are fully cognizant of the fact that the question before us is unique"[26] . . . "[N]o similar set of facts has come before the highest court of any of the states of this nation or the federal courts."[27] It is necessary to note this to put the Kentucky court's action in proper perspective. Lacking any authority squarely in point, it was forced to apply general principles of equity and reached a result carefully limited to the facts of the particular case.[28]

Although the Kentucky Court of Appeals correctly indicated that no court had previously been faced with the same problem presented in *Strunk,* the Supreme Judicial Court of Massachusetts three times has heard similar cases in which the donor and donee were minor twins and reached the same result as *Strunk.*[29] An analysis of those cases reveals striking similar-

19. *Id.*
20. *Id.*
21. *Id.* at 146-47. Support for this finding came in part from the brief filed as amicus curiae by the Kentucky Department of Mental Health.
22. *Id.* at 150.
23. *Id.* at 151.
24. *Id.* at 149-51.
25. *Id.* at 148.
26. *Id.* at 147.
27. *Id.*
28. *Id.* at 146 and 149.
29. Masden v. Harrison, No. 68651 Eq. (Mass. Sup. Jud. Ct., June 12, 1957); Huskey v. Harrison, No. 68666 Eq. (Mass. Sup. Jud. Ct., Aug. 30, 1957); Foster v. Harrison, No. 68674 Eq. (Mass. Sup. Jud. Ct., Nov. 20, 1957). These three cases were never officially reported; reference to them is based on a thorough discussion in the NEW YORK UNIVERSITY LAW REVIEW. See Curran, *A Problem of Consent: Kidney Transplantation in Minors,* 34 N.Y.U. L. REV. 891 (1959).

ities and possibly significant differences. The Massachusetts court, as did the Court of Appeals of Kentucky, concerned itself with the question of benefit to the donor.[30] As in *Strunk,* the deleterious emotional impact of the death of the donee on the donor seemed to be the controlling factor, and the contention of benefit to the donor was buttressed by psychological testimony.[31] Thus, the only authority on the matter would seem to uphold the *Strunk* court's use of the benefit test,[32] and the cases seem consistent viewed from this standpoint.

A seemingly important difference in *Strunk* and the Massachusetts cases is apparent, however, when one examines the situation of the donor more closely. Granted, there are cases holding that both minors and mental incompetents lack the capacity to consent to medical treatment;[33] but one Massachusetts donor[34] was nineteen years old and the other two were fourteen,[35] all three were clearly capable of understanding the nature of the operation and the risks therefrom[36] and each clearly gave his consent in fact.[37] The opinion in *Strunk* gives no indication that the donor was

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30. Curran, *supra* note 29 at 893, 896; Strickel, *Organ Transplantation in Medical and Legal Perspective,* 32 LAW & CONTEMP. PROB. 597, 604 (1967); Sanders and Dukeminier, Jr., *Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation,* 15 U.C.L.A. L. REV. 357, 390 (1967-68); Berman, *The Legal Problems of Organ Transplantation,* 13 VILL. L. REV. 751, 756 (1968).

31. Curran, *supra* note 29 at 893. Curran questions the validity of psychological evidence, as did the dissent in *Strunk.* Curran compares the use of the information to that in Brown v. Topeka Board of Education, 347 U.S. 483, 493-94 (1954), and refers the reader to a critique of that opinion in Cahn, *Jurisprudence,* 30 N.Y.U. L. REV. 150, 157-68 in 1954 ANN. SURVEY AM. L. 809, 816-27 (1955). Curran's criticism is noted in Sanders and Dukeminier, Jr., *supra* note 30, at 604.

32. Masden v. Harrison, No. 68651 Eq. (Mass. Sup. Jud. Ct., June 12, 1957); Huskey v. Harrison, No. 68666 Eq. (Mass. Sup. Jud. Ct., Aug. 30, 1957); Foster v. Harrison, No. 68674 Eq., (Mass. Sup. Jud. Ct., Nov. 20, 1957). The distinction of benefit to the donor arose in Bonner v. Moran, 126 F.2d 121 (D.D.C. 1941), where skin was engrafted from the body of a fifteen year old boy to aid his cousin who had been severely burned. The question in that case, however, involved the sufficiency of the minor's consent to the operation without that of his parents. The court cited cases where informed consent by the minor had been held sufficient to allow the operation, but only when it was to benefit the child. Professor Curran indicates that *Bonner* implies the operation would have been permissible even without any benefit if parental consent had been obtained. Curran, *supra* note 29, at 896, n. 21.

33. "It is generally recognized that infants or persons suffering from general mental incompetence are not legally capable of giving consent on any subject." *Legal Implications of Clinical Investigation,* 8 WM. & MARY L. REV. 359 (1967). See Bonner v. Moran, 126 F.2d 121 (D.D.C. 1941); Sharpe v. Pugh, 270 N. C. 598, 155 S.E.2d 108 (1967) for the general common law rule as to incapacity of minors to consent to medical treatment and Farber v. Olkon, 246 P.2d 710 (Cal. App. 1952), indicating the similar incapacity of incompetents.

34. Masden v. Harrison, No. 68651 Eq. (Mass. Sup. Jud. Ct., June 12, 1957).

35. Huskey v. Harrison, No. 68666 Eq. (Mass. Sup. Jud. Ct. Aug. 30, 1957); Foster v. Harrison, No. 68674 Eq. (Mass. Sup. Jud. Ct., Nov. 20, 1957).

36. Curran, *supra* note 29, at 893, 895-96.

37. *Id.* Professor Curran questions the necessity of parental consent at all given the full understanding of the situation by the minor. He indicates the turn away from the older common law rule of *Bonner* to the more modern position that consent of a child mature enough to understand the significance of the operation is sufficient. Further, Curran indicates this is the position taken in RESTATEMENT,

at all able to comprehend his fate,[38] or that he consented in any manner.[39] Whether this consideration is significant may be a matter of value judgment, but it nevertheless remains a point of distinction between *Strunk* and the Massachusetts cases. Persuasive authority for the proposition that actual consent by an incompetent donor should not be a requirement is implied in a discussion of the Massachusetts case[40] where the writer states that "[a] good argument could be made to allow the operation since the consent of the [minor] would be ineffectual."[41] However, this same author apparently backs away from this position when he further points out that "the court would then be depriving the [child] of one of his vital organs without his consent or, indeed even his intelligent comprehension."[42] Thus, the question of lack of actual consent is not answered by the Massachusetts cases since informed consent was present,[43] nor by *Strunk* in which the issue was not considered.[44]

While lack of actual consent is one of the main questions raised by *Strunk,* another is raised in the dissenting opinion; that is, the availability of a kidney from another source.[45] The dissenter felt it was very important that less compatible donors were available and that the kidney of a cadaver could have been used.[46] However, the dissent recognized that success is not as likely as with a truly compatible donor.[47] This analysis poses the question, should a court refuse to allow a transplant from a mentally incompetent donor where other sources are available, though the chance of failure is substantially greatly increased? Obviously the majority of the *Strunk* court felt a refusal was not warranted on the set of facts presented. However, there is no stock answer and each case must be considered on its own facts.

Missouri courts have not yet been faced with a situation comparable to *Strunk* or the Massachusetts cases, but the strong probability that similar facts will arise impells a consideration of the possible result. Whether probate courts in Missouri could decree a *Strunk* result is open to question. While the restrictive construction given former statutes governing the

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TORTS § 59 (1939). *See also* Lacey v. Laird, 166 Ohio St. 12, 139 N.E.2d 25 (1956). Even the *Bonner* court indicated there are exceptions to the general common law rule. These include emergency situations, emancipated children, situations where parents are too remote, and children close to maturity. The court qualifies each of these, however, with the necessity of benefit to the minor. Bonner v. Moran, 126 F.2d 121, 122-23 (D.D.C. 1941).

38. 445 S.W.2d 145 (Ky. 1969).
39. *Id.*
40. Curran, *supra* note 29.
41. *Id.* at 896.
42. *Id.* at 896.
43. Masden v. Harrison, No. 68651 Eq. (Mass. Sup. Jud. Ct., June 12, 1957); Huskey v. Harrison, No. 68666 Eq. (Mass. Sup. Jud. Ct., Aug. 30, 1957); Foster v. Harrison, No. 68674 Eq. (Mass. Sup. Jud. Ct., Nov. 20, 1957). Curran, *supra* note 29, at 895.
44. 445 S.W.2d 145 (Ky. 1969).
45. *Id.* at 150-51.
46. *Id.*
47. *Id.* at 151.

powers of Missouri probate courts in handling the affairs of incompetents[48] would seem to have been eliminated by the expanded language of the Missouri Probate Code of 1955,[49] certain decisions subsequent to its adoption appear inconsistent with such a result.[50] However, no cases since the 1955 Code have put the necessary questions before the Missouri courts to test the power of probate to use equity principles in dealing with incompetents' affairs. Thus, whether a *Strunk* result could be reached in a Missouri probate court is a matter of conjecture based upon the language of decisions dealing with related powers of the probate courts.

Putting aside the possible jurisdictional limitations creating hurdles for the probate courts of Missouri, would either they or the circuit courts have the necessary authority to apply the equitable principles used in *Strunk* and reach a comparable result? The real question here is whether Missouri recognizes the equitable principles used to give relief in *Strunk*. The answer would seem to be yes. While not expressly referring to the doctrine of "substituted judgment," Missouri courts have applied the same concept in dealing with the estates of incompetents, and, in fact, have

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48. *In re* Cordes' Estate, 116 S.W.2d 207 (St. L. Mo. App. 1938); State *ex rel* Kemp v. Arnold, 234 Mo. App. 154, 113 S.W.2d 143 (St. L. Ct. App. 1938); Scott v. Royston, 223 Mo. 568, 123 S.W. 454 (1909); Johnson v. Payne & Williams Bank, 56 Mo. App. 257 (1894); Finney v. State *ex rel.* Estiss, 9 Mo. 227 (1845).

49. § 472.030, RSMo (1969).

> The court has the same legal and equitable powers to effectuate its jurisdiction and to enforce its orders, judgments, and decrees in probate matters as the circuit court has in other matters and its executions shall be governed by Chapter 513 RSMo, except that all executions shall be returnable within thirty days unless otherwise ordered by the court.

50. *In re* Frech's Estate, 347 S.W.2d 224 (Mo. 1961); Stark v. Moffit, 352 S.W.2d (St. L. Mo. App. 1961). Both *Frech* and *Moffit* take seemingly restrictive views of the powers of probate courts, particularly in light of § 474.030, RSMo (1969). However, the *Frech* court stated, "[t]he probate court . . . is . . . without power to entertain a suit based upon strictly equitable principles." This leaves open the possibility that a probate court could have ordered a kidney transplant when the donor was a ward of that court and incompetent to consent. Thus, the suit was not based upon equitable principles and the court was merely "applying equitable principles" to matters within its jurisdiction. This has been accepted by Missouri courts. The Missouri Supreme Court in *In re* Franz' Estate said, "We have often held that in determining matters within its jurisdiction a probate court may apply equitable principles." *In re* Franz' Estate, 372 S.W.2d 885, 902 (Mo. 1963). The court was quoting *In re* Thomson's Estate, 362 Mo. 1043, 1054, 246 S.W.2d 791, 797 (1952). The court in *Moffit* did discuss the provision and noted, "whatever equitable powers a probate court may exercise . . . must be employed in the discharge of its jurisdiction in probate matters." This is seemingly consistent with the analysis already applied to *Frech*. In discussing *Moffit, Frech,* and other cases in light of the term "purely equitable matters," the Missouri Supreme Court has noted: "[W]e would take the term . . . to mean . . . that such matter . . . originally did not concern the jurisdiction of the probate court in other matters pertaining to probate business." First Nat'l Bank of Kansas City v. Mercantile Bank & Trust Co., 376 S.W.2d 164, 168 (Mo. En Banc 1964). It should be noted also that none of the cases concerning probate jurisdiction decided after the adoption of § 472.030, RSMo (1969) relate to the affairs of incompetents. For a discussion of the effect of the Missouri Probate Code of 1955, see Fratcher, *Trusts and Succession in Missouri,* 30 Mo. L. REV. 82 (1965); Maus, *Probate Law and Practice,* 28 Mo. L. REV. 588 (1963); Welch, *Equity Jurisdiction in Probate Matters Under the New Code,* 1961 WASH. U. L.Q. 309.

relied on the same line of development of the law used by the Kentucky Court of Appeals in *Strunk*.[51] Thus, Missouri law seems to provide the authority for a court acting under its equitable jurisdiction, if in the best interest of the incompetent,[52] to order a transplant. The only remaining consideration involved is advisability. No certain answer can be given to that inquiry. When a Missouri court is faced with the question, it will be required, as was the Kentucky court and the Massachusetts court before it, to examine donee, donor, all the surrounding facts, probably including psychological testimony, and to make a decision based in the final analysis on its own judgment.

Thus, *Strunk v. Strunk*[53] extends the equitable doctrine of "substituted judgment" to allow a court to order a kidney transplant when the donor is incompetent to give his consent. However, under the law of Kentucky, the order must come not from a probate court, because of its limited powers, but only from the circuit court. While arguably a probate court in Missouri could decree the transplant, it is likely that a decree would also have to be granted in circuit court. Further, *Strunk* provides no formula for advisability in every case, but each situation facing a court must be decided on its own particular facts.

GARY S. DYER

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51. See State *ex rel.* Kemp v. Arnold, 234 Mo. App. 154, 113 S.W.2d 143 (St. L. Ct. App. 1938), authorizing allowance out of an incompetent's estate for one owed no legal duty of support by the incompetent because it appeared the incompetent would have supported the relative had he been competent. *See also* Citizen's State Bank of Trenton v. Shanklin, 174 Mo. App. 639, 644, 161 S.W. 341, 343 (K.C. Ct. App. 1913), where the court says "[t]he court, if the estate will justify it, may authorize to be done what it is convinced the insane person would have done had he been in his right mind." The *Shanklin* court cited *In re* Willoughby, 11 Paige 257 (N.Y. 1844) and *Ex Parte* Whitebread, 2 Mer. 99, 35 Eng.Rep. 878 (L.C. 1816) referred to by the Kentucky court in *Strunk*. It should be noted that in both *Kemp* and *Shanklin*, the court was dealing with a case that arose in probate court, but was applying equitable principles. This may add support to the contention that Missouri probate courts have the jurisdiction found lacking in *Strunk*. "Chancery courts have been less restricted in making . . . allowances than courts acting under the statutory authority." *In re* Hoerman's Estate, 247 S.W.2d 762, 765 (Mo. 1952).

52. State *ex rel.* Kemp v. Arnold, 234 Mo. App. 154, 113 S.W.2d 143 (St. L. Ct. App. 1938); Citizen's State Bank of Trenton v. Shanklin, 174 Mo. App. 693, 161 S.W. 341 (K.C. Ct. App. 1913). While neither case adopts the benefit test of *Strunk* and *Bonner*, and neither in fact deals with medical treatment, they do deal with the making of allowances from the estate of an incompetent. The *Kemp* court indicates, in speaking of the court's purpose in acting, that it should be "[p]rotecting and preserving the estate in the manner the incompetent himself would have done if he had retained his faculties." State *ex rel.* Kemp v. Arnold, *supra* at 160, 113 S.W.2d at 147. While this lends support to the doctrine of substituted judgment, it also, at least impliedly, indicates the court must act in the best interest of the incompetent, *i.e.* for his benefit. The *Shanklin* court refers to *ex parte* Whitebread, 2 Mer. 99, 35 Eng. Rep. 878 (L.C. 1816) and reaches a conclusion similar to *Kemp*. Citizen's State Bank v. Shanklin, *supra* at 644, 161 S.W. at 343.

53. 445 S.W.2d 145 (Ky. 1969).

CONSTITUTIONAL LAW: OPERATION OF REVERSION UPON IMPOSSIBILITY OF CARRYING OUT RACIAL LIMITATION NOT A VIOLATION OF FOURTEENTH AMENDMENT

Evans v. Abney[1]

In 1911 Senator Augustus O. Bacon willed to the City of Macon, Georgia, as trustee, certain property to be used as a park exclusively for the white people of Macon. The park, Baconsfield, remained segregated until 1963 when the city, taking the position that the park was a public facility which could no longer be managed and maintained on a segregated basis without violating the constitution, allowed Negroes to use it.[2] Members of the park's Board of Managers then brought suit against the city and certain residuary beneficiaries of Bacon's estate, asking the court to appoint substitute trustees for the municipality. Negro citizens of Macon intervened, alleging that the racial restriction was unconstitutional, and asking the court to refuse to appoint the trustees. Heirs of Senator Bacon also intervened, requesting reversion of the trust property to the estate if the petition were denied. The city resigned as trustee prior to court action. The trial court accepted the resignation, upheld the validity of the racial limitation, held the charitable trust doctrine of *cy pres* not available to alter it, and appointed three individuals as substitute trustees.[3] The court declined to rule on the conditional request for reversion by the heirs. The Georgia Supreme Court affirmed on appeal, holding that there is a right to bequeath one's property to a limited class, that charitable trusts are subject to supervision of a court of equity, and that there is a power to appoint new trustees to prevent failure of the trust.[4]

On appeal the United States Supreme Court reversed, holding that the "public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law."[5] On remand to the Georgia Supreme Court, that court held that the sole purpose for which the trust had been created had become impossible to accomplish and that the trust was terminated. The trial court was directed to pass upon the contentions of the heirs and the successor trustees.[6] The trial court decided that the trust property had, by operation of law, reverted to the heirs; this conclusion was then affirmed by the Georgia Supreme Court.[7]

On a second appeal the United States Supreme Court also affirmed, 6-2, holding that the trust was terminated and that the property reverted to Bacon's heirs.[8] In reaching this result the Court was faced with two

1. Evans v. Abney, 396 U.S. 435 (1970).
2. Watson v. City of Memphis, 373 U.S. 526 (1963).
3. Newton v. City of Macon, 9 RACE REL. L. REP. 309 (Bibb County Super. Ct. Ga., 1964).
4. Evans v. Newton, 220 Ga. 280, 138 S.E.2d 573 (1964).
5. Evans v. Newton, 382 U.S. 296, 302 (1966).
6. Evans v. Newton, 221 Ga. 870, 148 S.E.2d 329 (1966).
7. Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968).
8. Evans v. Abney, 396 U.S. 435 (1970).

basic issues. First, was the racial limitation to be struck from the will through application of the *cy pres*[9] doctrine? Second, if not, was the failure to strike the clause a denial of constitutionally protected rights secured by the fourteenth amendment? The Court responded with a negative answer to both questions.

The first issue arose as a matter of statutory construction since Georgia has codified the common law *cy pres* doctrine.[10] The *cy pres* doctrine allows a court, in a case where a charitable trust has been created, to strike a portion of the will in order to prevent termination of the trust. It has generally been held that there are three prerequisites to the application of the doctrine: (1) creation of a valid charitable trust;[11] (2) presence of a general charitable intent; and (3) impossibility, impractibility, or the illegality of carrying out the particular testamentary purpose.[12] This represents the modern, more liberal interpretation of the doctrine of *cy pres*.[13]

The major drawback to the more liberal interpretation of *cy pres* has been the requirement that the donor have a general charitable intent. This is difficult to find in a case where the donor has provided "for this particular purpose and for no other" or some such similar statement, but the tendency has been to find an implied general intent wherever possible. Some courts have held that such phrases as "for this purpose and no other" merely emphasize the wish of the donor that the property be devoted to the designated purpose as long as possible and do not necessarily indicate a desire that the charitable gift fail if it subsequently becomes impossible to carry out the designated purpose.[14] On the other hand, some authorities take the position that the trust fails where the intention is expressed that it should, or where the donor presumably would have preferred to have the trust fail if the particular purpose is impossible of accomplishment.[15]

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9. Literally, "as nearly as;" this rule of construction has been used by equity courts to give effect to an instrument where the literal meaning would be illegal or impossible to carry out. BLACK'S LAW DICTIONARY 464 (4th ed. 1968).

10. There are two relevant Georgia statutes:

> When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention.

GA. CODE ANN. § 108-202 (1959).

> A devise or bequest to a charitable use will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done shall fail from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator.

GA. CODE ANN. § 113-815 (1959).

Some seventeen states have similar statutes; *see* 4 A. SCOTT, TRUSTS § 399 (1967).

11. The *cy pres* doctrine is not applicable to private trusts, although there is an analogous principle which permits deviation from the terms of the trust in matters relating to the administration of the trust. RESTATEMENT (SECOND) OF TRUSTS § 399, comment *a* at 298 (1959).

12. *See* E. FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES 1, 128 (1950).

13. Fisch, *Changing Concepts and Cy Pres*, 44 CORNELL L.Q. 382, 383 (1959).

14. RESTATEMENT (SECOND) OF TRUSTS § 399, comment *c* at 299 (1959).

15. 4 A. SCOTT, TRUSTS § 399.2 (1967).

Senator Bacon's will contained such a provision limiting the use of the park to the ones "herein specifically authorized."[16] From this provision and another part of the will where the Senator expressed his social philosophy that "in their social relations the two races [Negro and Caucasian] should be forever separate and that they should not have pleasure and recreation grounds to be used or enjoyed, together and in common,"[17] the Georgia courts concluded that Bacon would have rather had the whole trust fail than have Baconsfield integrated (*i.e.,* that the general charitable intent was lacking).[18] The United States Supreme Court upheld this determination since it viewed the construction of wills as essentially a state law question,[19] but pointed out that the failure to apply the *cy pres* doctrine in this case would not prevent another state court from holding *cy pres* applicable in a similar case.[20]

Having determined that the *cy pres* doctrine was not to be applied, the Court was faced with the issue of whether the reversion[21] of the property to the heirs would be a violation of the Constitution. The petitioners argued that there was a violation of the Equal Protection Clause of the fourteenth amendment because the result would be the closing of a public park to avoid integration. However, the fourteenth amendment only prohibits a *state* from denying equal protection of the laws and its prohibition does not directly apply to private action.[22]

The so-called "state action" requirement calls for a certain degree of state involvement. Nevertheless the concept of "state action" has never been clearly defined and there is no synthesis of opinion as to what constitutes state action. In earlier opinions the Court attempted to apply a simple test which required official intrusion upon constitutional rights, but this proved unworkable where a "private" town discriminated,[23] where there was a private election prior to the public election,[24] where a privately owned

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16. The will provided for the land to be used as "a park and pleasure ground" for the benefit of "the white women, white girls, white boys and white children" of the City of Macon. Evans v. Abney, 396 U.S. 435, 439-441 (1970).

17. Evans v. Abney, 224 Ga. 826, 830, 165 S.E.2d 160, 164 (1968).

18. *Id.*

19. Evans v. Abney, 396 U.S. 435, 444 (1970).

20. *Id.* at 447.

21. The reversion in this case arose because of a Georgia statute:

> Where a trust is expressly created, but no uses are declared, or are ineffectually declared, or extend only to a part of the estate, or fail from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs.

GA. CODE ANN. § 108-106(4) (1959).

Senator Bacon made no express provision in his will for reversion of the trust property to his heirs. There is language at one point vesting all title and interest, "including all remainders and reversions" in the City of Macon, but the Georgia Supreme Court found that this language concerned remainders and reversions prior to the vesting of legal title in the City of Macon, as trustee, and not remainders and reversions occurring because of a failure of the trust, which was not contemplated by the Senator. Evans v. Abney, 224 Ga. 826, 831, 165 S.E.2d 160, 165 (1968).

22. Civil Rights Cases, 109 U.S. 3 (1883).

23. Marsh v. Alabama, 326 U.S. 501 (1946).

24. Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947); Terry v. Adams, 345 U.S. 461 (1953).

restaurant that was located within a public building discriminated,[25] or where a state court enforced a racially restrictive covenant in a deed.[26] The test that evolved from these cases, as clearly as can be ascertained, was the "public function" test which was applied in *Evans v. Newton*:[27] where a governmental service is being performed, that performance must be in compliance with fourteenth amendment rights, even if those individuals providing the service are not officially connected with the government.

Although the majority opinion found this to be a case of private discrimination, thus involving no "state action," it did not answer adequately the arguments put forth by Mr. Justice Brennan's dissent concerning the fourteenth amendment. As Brennan points out, there are several grounds upon which a finding of state action could probably have been sustained in *Abney*. A Georgia statute,[28] enacted six years prior to the date of Bacon's will, expressly authorized the devise of land to be held in charitable trust for use as a park open to one race only; a state court had upheld the validity and enforced the reversion that came into operation when discrimination was no longer possible; and as the result of state judicial action a park which has been operated as a public facility for more than fifty years was closed. The strongest of these arguments appears to be that this case represented a form of state-encouraged private discrimination prohibited under the Court's ruling in *Reitman v. Mulkey*.[29] The state encouragement in this case is based on the Georgia statute[30] which specifically authorized the racial limitation in charitable trusts. The effect of the Georgia statute was to encourage discrimination.[31]

However, even if it were conceded that there was state action, in order

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25. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

26. Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948).

27. 382 U.S. 296 (1966).

28. *See* GA. CODE ANN. § 69-504 (1967) which provides:

> Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property. (Acts 1905, p. 117).

29. 387 U.S. 369 (1967). In this case the Court upheld the California Supreme Court's invalidation of an amendment to the California Constitution that would have in effect prevented the state from denying individuals the right to discriminate when selling, leasing, or renting property.

30. *See* note 28, *supra*.

31. The majority dismissed this argument because there was no evidence that Bacon had relied on the statute when drafting his will; but note the similarity between the language of the statute and the terms of Bacon's will. *See* notes 16 and 28, *supra*.

to violate the fourteenth amendment, there must be state action that *discriminates*. It is this discrimination, rather than the state action, that was lacking in *Abney*. The existence of discrimination in regard to the use of the park was eliminated by *Evans v. Newton*[32] where the Court held that the park could not be operated on a segregated basis by the city or by private substitute trustees; thus after *Newton* there was no possible way the park could be operated discriminatorily. As the Court correctly points out, the penalty, the closing of the park, is imposed on Negroes and whites alike. Any possible discrimination has to be based on the premise that the closing for the purpose of avoiding desegregation "generates [in Negroes] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[33] The Court was unwilling to extend the "badge of inferiority" argument to that point. The majority opinion thus implies that while the Negroes have a constitutional right to use the park as long as it is a park, they have no right to insist that it continue to be used as a park.

By summarily dismissing the state action argument, the Court indicates a tendency to avoid this test that has never had a definite standard of application and has been the subject of much comment and criticism.[34] In all probability the Court will continue to "sift facts and weigh circumstances"[35] on a case by case basis. After *Abney* it is clear that all judicial aid in enforcing private discrimination will not necessarily be unconstitutional. But it is unclear why the majority in *Abney* declined to meet squarely the arguments advanced by Justice Brennan in his dissent. One possible answer is that a consequence of ruling that Bacon had no right to limit the beneficiaries of the trust to one race might render illegal trusts that are beneficial to Negroes. However, this could be averted by subjecting discriminatory trusts to a test similar to the one applied to legislation which involves a racial classification. Under *McLaughlin v. Florida*[36] such a legislative classification must have an overriding public purpose and be necessary to the enforcement of the policy.

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32. 382 U.S. 296 (1966).
33. Brown v. Board of Education, 347 U.S. 483, 494 (1954).
34. *See* Lewis, *The Meaning of State Action,* 60 COLUM. L. REV. 1083 (1960); Williams, *The Twilight of State Action,* 41 TEXAS L. REV. 347 (1963).
35. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Reitman v. Mulkey, 387 U.S. 369 (1967).
36. 379 U.S. 184 (1964).

BAD DEBT RESERVES AND THE 351 TRANSFER

Nash v. United States[1]

Prior to 1960 taxpayer James G. Nash and others had operated as partnerships several financial institutions. On June 1, 1960, the partnerships separately incorporated eight different finance businesses in accordance with section 351 of the Internal Revenue Code.[2] Among the partnership assets transferred to the corporations were accounts receivable with a basis to the partnerships of $486,853.69, and reserve for bad debt accounts with balances of $73,028.05, which taken together represented the net book value of the accounts receivable. The Commissioner determined that the partnerships should have included as income in 1960 $73,028.05, the amount of the bad debt reserves. The taxpayer paid the asserted deficiency and sued for refund in the District Court of the Northern District of Alabama.[3] This refund was allowed, but on appeal the United States Circuit Court of Appeals for the Fifth Circuit reversed,[4] holding that the reserves represented prior deductions from taxable income of the partnerships which should be restored to income upon transfer of the accounts receivable.

This holding was directly contrary to the holding of the Circuit Court of Appeals for the Ninth Circuit,[5] and the United States Supreme Court granted certiorari[6] to resolve the conflict. In a brief, seven paragraph opinion, the Supreme Court reversed, rejecting the Commissioner's contention based upon the tax benefit rule. This rule requires that recovery of an item which has produced a tax benefit in a prior year be included as income in the year of recovery. Though the establishment of the reserves had resulted in deductions to the partnerships in prior years (a tax benefit), the Court reasoned that there was no "recovery" because the balances in the reserve accounts were reasonable and the value of the stock received was equal to the "net" value of the receivables.[7] Such a transfer, the Court said, "merely perpetuates the status quo and does not tinker with it for any double benefit out of the bad debt reserve."[8]

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1. 398 U.S. 1 (1970).

2. INT. REV. CODE OF 1954, § 351(a).

(a) General Rule.—No gain or loss shall be recognized if property is transferred to a corporation (including, in the case of transfers made on or before June 30, 1967, an investment company) by one or more persons solely in exchange for stock or securities in such corporation and immediately after the exchange such person or persons are in control (as defined in section 368(c)) of the corporation. For purposes of this section, stock or securities issued for services shall not be considered as issued in return for property.

3. Birmingham Trust National Bank v. United States, 22 AM. FED. TAX R.2d 5202 (1968).

4. Nash v. United States, 414 F.2d 629, 24 AM. FED. TAX R.2d 69-5272 (5th Cir. 1969).

5. Estate of Schmidt v. Commissioner, 355 F.2d 111, 17 AM. FED. TAX R.2d 242 (9th Cir. 1966).

6. 396 U.S. 1000 (1970).

7. 398 U.S. 1 (1970). Justices Black and Stewart dissented, adopting in a brief statement the reasoning of Judge Tuttle's opinion for the court of appeals in the *Nash* case, 414 F.2d 627 (5th Cir. 1969) and in Judge Raum's opinion for the tax court in Schuster v. Commissioner 50 T.C. 98 (1968).

8. 398 U.S. 1, 5 (1970).

While the Court's opinion has provided an answer for the situation, it has failed to resolve completely the conflict of rationales differing courts have used to support their decisions. These rationales concern the accounting techniques for reserves for bad debts, policy reasons behind section 351 and its interplay with section 166.[9] The objective of this note is to outline briefly the conflict among the courts on this issue, and then to attempt to explain the decision of the Supreme Court by considering accounting theory and the purpose of section 351.

The Revenue Act of 1921[10] first expanded the policy of tax free transfer of businesses and business assets to transfers to controlled corporations. Section 351, which was derived from that expansion, permits sole proprietors and partners who desire to incorporate their business to make this transformation to the corporate form without recognizing any gain or loss on their exchange of business assets for stock whenever the transferors retain a minimum of 80% control in the new corporation.[11] In such an exchange the transferor takes the same basis in the stock of the new corporation as he had in the business assets or partnership interest contributed to the corporation.[12] The result is a postponement of gain or loss until the taxpayer disposes of his stock in the new corporation, thus making the option of doing business as a corporation attainable free of any federal income tax barrier.

The treatment of a bad debt reserve in a section 351 transfer has been the source of dispute between the Commissioner and taxpayers for almost a decade. A revenue ruling in 1962[13] resolved the question in the Commissioner's favor by requiring that balances in the reserve account for bad debts of the transferor be restored to income in the year of transfer. This was justified on a tax benefit theory that additions to the reserve taken as deductions by the transferor in previous years were no longer needed once the accounts receivable had been transferred to the corporation.

This theory was adopted by the Tax Court in *Estate of Schmidt v. Commissioner*.[14] There the taxpayer had used the accrual method of accounting for tax purposes and had received permission to use the reserve method of accounting for bad debts, a situation identical to that in the *Nash* case.[15] The attempted transfer of the accounts receivable at "net value" by transferring both the accounts receivable and the reserve for bad debts to the new corporation was disapproved. The Tax Court char-

9. INT. REV. CODE of 1954, § 166(c). This provision allows taxpayers to use the reserve method of accounting for bad debt expense.

10. Revenue Act of 1921, ch. 136, § 202, 42 Stat. 229.

11. INT. REV. CODE of 1954, § 351.

12. If in addition to the stock, money or property is received by the transferor in exchange for the business assets or partnership interest, any gain on the exchange is recognized, but the gain may not exceed the amount of money or the fair market value of property received, and no loss may be recognized. This is the rule for "boot." INT. REV. CODE of 1954, § 351(b).

13. Rev. Rul. 62-128, 1962-2 CUM. BULL. 139.

14. 42 T.C. 1130 (1964).

15. The privilege of using the reserve method is available for both cash method and accrual method taxpayers; thus the problem of tax free transfer confronts both accrual method and cash method taxpayers. *See* Hutton v. Commissioner, 53 T.C. 37 (1969).

acterized the reserve as previously earned income that had escaped taxation by assignment to the reserve as a contingency against debt failure. The court reasoned that since section 351 postpones only gain or loss on the transfer of assets, it would not apply to reserves consisting of previously earned income. The reserve belonged to the taxpayer himself, and would no longer be needed to secure him against bad debt losses; therefore, it should be restored to his income.[16]

On appeal in the *Schmidt* case, the Ninth Circuit Court of Appeals[17] reversed the Tax Court. It attached special significance to the fact that the par value of the stock taken by the taxpayer in exchange for assets of the business indicated that the accounts receivable were being transferred at their "net value," or the value equal to the face amount less the balance held in reserve against bad debts. Requiring restoration of the reserve to the income of the taxpayer forced him to recapture deductions taken in establishing the reserve, while the difference between the face value of the accounts receivable and the consideration received could not under section 351 be recognized as a loss. The court agreed that no loss on the transfer should be recognized, but it reasoned that the recapture was improper. The losses had been recognized in the year of deduction, and until consideration was received which exceeded the net amount of the receivables and disproved the correctness of the original deductions, no recapture should be required.[18] Therefore, the reserve for bad debts account was a valuation account that should be allowed to pass along with the accounts receivable to the transferee corporation.[19]

The Tax Court remained unpersuaded by the Ninth Circuit's reasoning, however, and beginning with *Bird Management, Inc. v. Commissioner*[20] launched a continuing effort to sustain its views. While the *Bird Management* case concerned a section 337 liquidation which is distinguishable from the 351 situation,[21] the Tax Court included in its opinion the following dicta:

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16. Estate of Schmidt v. Commissioner, 42 T.C. 1130 (1964).

17. Estate of Schmidt v. Commissioner, 355 F.2d 111, 17 AM. FED. TAX R.2d 242 (9th Cir. 1966).

18. Section 358 and section 362 govern the basis which the transferee takes in assets received in a § 351 exchange, and they provide, in general, that the transferee takes the same basis as the transferor had in the assets, subject to several adjustments not relevant to the question here. If the reserve for bad debts account is considered an adjustment to the accounts receivable, then under these two sections the reserve should pass with the accounts receivable to the transferee corporation. INT. REV. CODE of 1954, § 358, § 362.

19. In reaching this conclusion, the court distinguished prior decisions of its own. (West Seattle Nat'l Bank v. Commissioner, 288 F.2d 47, 7 AM. FED. TAX R.2d 790 (9th Cir. 1961); Citizens Fed. Sav. and Loan Ass'n v. United States, 290 F.2d 932 (9th Cir. 1961).) In these cases the court had required balances in bad debt reserve accounts recognized as income by corporate taxpayers selling assets pursuant to the provisions of § 337 of the Internal Revenue Code of 1954 relating to liquidation sale. The court said in those situations the excess of the proceeds from sale of the accounts receivable over the net value of the receivables was a recovery of the loss on bad debts since there was no continuity of ownership and the transferor would never again experience the risk of bad debt losses.

20. 48 T.C. 586 (1967).

21. See the *Schmidt* court's explanation in footnote 19 *supra*.

> It is true that in *Estate of Heintz Schmidt v. Commissioner* (citation omitted) the Court of Appeals held that the bad debt reserve may not be added back to income unless the creditor "received" consideration upon the sale of debts sufficient to cover the bad debt reserve. With all due respect, we think the Court of Appeals has misconceived the theory that calls for the inclusion of the bad debt reserve in income. It is not that the creditor has "received" something or "realized" something in the usual sense. Rather, it is an accounting concept that one who has taken a deduction for bad debts in earlier years must, in accordance with that method of accounting, restore that deduction to income in a later year when it becomes clear that no bad debt expense will occur.[22]

The Tax Court followed this by holding for the Commissioner in the section 351 situation in *Schuster v. Commissioner*,[23] and again in *Hutton v. Commissioner*.[24]

The Tax Court was not unanimous in its views, however. In the *Schuster* case[25] Judge Simpson pointed to the purpose of section 351 and argued that while there was no statutory authorization to carry over the bad debt reserves to the transferee, several types of depreciation carryovers were allowed.[26] In urging that the carryover of the reserve be allowed, he pointed to the reorganization situation where carryovers of tax attributes had been permitted before the enactment of section 351.[27]

In 1969 the Tax Court was joined by the Fifth Circuit Court of Appeals which specifically recognized the Tax Court's position when it decided for the Commissioner in the *Nash* case.[28] In its opinion the court expressed its agreement with the Tax Court in emphasizing the nature of a reserve for bad debts as the result of an accounting practice used to protect the business from possible future losses on bad debts. Additions to the reserve, and the related deductions were allowed only to the extent that they could be shown by the taxpayer to be reasonable in light of the expectancies of debt losses, and when those expectancies were foreclosed, such as by sale or transfer of the accounts receivable, the balance of the reserve should be restored to income.

In addition to a tax benefit analysis, the court of appeals in *Nash* expressed concern over tax avoidance; it reasoned that while the reserve was established through deductions from gross income taxed at individual rates, if the reserve were transferred to the corporation and then later

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22. Bird Management Inc. v. Commissioner, 48 T.C. 586, 597 (1967).
23. 50 T.C. 98 (1968).
24. 53 T.C. 37 (1969).
25. Schuster v. Commissioner, 50 T.C. 98, 103 (1968).
26. Judge Simpson referred here to the fact that a § 351 transfer did not trigger recapture of investment credit under § 47(b), nor recapture of excess depreciation under § 1245(b)(3) and § 1250(d)(3).
27. Judge Simpson was referring here to Helvering v. Metro Edison Co., 306 U.S. 522 (1923), allowing deductions of unamortized bond discount to a merger transferee, and to Commissioner v. Sansome, 60 F.2d 931 (1932), requiring a taxpayer to recognize untaxed undistributed profits of pre-1921 operations upon liquidations of a transferee corporation.
28. Nash v. United States, 414 F.2d 629, 24 AM. FED. TAX R.2d 69-5272 (5th Cir. 1969).

abandoned because of improved debt recovery or adoption of another system of accounting for bad debts, the reserve would be restored to the income of the corporation and would be taxed at lower corporate rates. Thus, the result would be not a mere "postponement of the incidence of the tax, but a change in the identity of the taxpayer."[29] The conclusion of the court, then, was that to permit the reserve account to pass to the corporation would allow the taxpayer to recognize as a loss the mere expectancy of debt failure reflected in the balance of the reserve account.

The Supreme Court was certainly justified in granting certiorari on this question. The situation was one that should occur frequently, that is, whenever a sole proprietorship or partnership which used the reserve method of accounting for bad debts for tax purposes incorporates with the transferors retaining 80% control. A uniform and simple solution was required, but the lower court decisions provided solutions that were neither uniform nor simple. By the time the *Nash* case came to the Court, taxpayers were avoiding the Tax Court as a forum on this question, conflicting precedents had been established in the circuit courts, and at least two district court cases[30] had ruled for the taxpayers under the *Schmidt* theory.

The Supreme Court, however, based its decision primarily on an interpretation of section 111[31] and the tax benefit rule, saying that a transfer of accounts receivable at net value is not a "recovery" within the meaning of section 111, and that the reserve against bad debts should follow the risk of noncollection. A better explanation is probably warranted on a question as vigorously disputed as this.

One underlying issue that divides the two positions is the nature and purpose of the reserve account for bad debts. The common view of the Fifth Circuit and the Tax Court is that the reserve is allowed to a given taxpayer as a contingency account against the possibility of future failures to collect presently held receivables. The reasonable estimates of this possibility are allowed as a reduction of taxable income, creating an account of untaxed income of prior periods held against this contingency. The *Schmidt* view, however, characterizes the reserve as a valuation account used to distribute the cost of debt failure to the period of operations, much like the depreciation reserve is used to amortize the cost of nonpermanent capital assets. A quote from a tax article by Albert E. Arent which the

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29. *Id.* at 631.

30. Rowe v. United States, 407 F.2d 1268 (W. D. Ky. 1969), and Scofield v. United States 69-1 U.S. Tax Cas. 9386 (C. D. Calif. 1969).

31. INT. REV. CODE of 1954, § 111(a).

(a) General Rule.—Gross income does not include income attributable to the recovery during the taxable year of a bad debt, prior tax, or delinquency amount, to the extent of the amount of the recovery exclusion with respect to such debt, tax, or amount.

§ 111(b)(4) defines "recovery exclusion" as those recoveries of bad debts, prior taxes, and delinquency amounts which "did not result in a reduction of the taxpayer's tax . . ." in prior tax years. § 111 is the basis of the "tax benefit rule," though it is often applied to recoveries of prior deductions other than bad debts, prior taxes, or delinquency amounts. *See* MERTENS, LAW OF FEDERAL INCOME TAXATION § 7.34-35. (1969 Ed.)

Supreme Court footnoted in its opinion[32] seems to indicate that at least in this situation the Court felt the reserve was a valuation account which adjusted the face value of receivables to their present value.

The *Schmidt* view also seems to be more in accord with accounting theory. On this issue the Accounting Principles Board of the American Institute of Certified Public Accountants has said:

> A so-called reserve for bad debts . . . does not in itself involve retention or holding of assets, identified or otherwise, for any purpose. Its function is rather a part of a process of measurement, to indicate a diminution or decrease in an asset due to a specified cause.[33]

Under correct accounting procedures, then, the reserve would be merely a valuation account used to adjust the face amount of the accounts receivable to their estimated present value. Under these circumstances a carryover of the reserve account to the transferee would be as justifiable as the carryover of the normal depreciation accounts, a practice which, as Judge Simpson pointed out in his *Schuster* dissent,[34] is permitted.

A related question that appears to have gone unconsidered is the point in time when the losses actually occur. Under the accrual method of accounting both income and expenses are entered at the time the obligations are recognized, rather than when they are actually received or paid, in order to match income and expenses more accurately.[35] When a business accepts promises to pay in the future in lieu of cash, it does so knowing that some portion of its receivables will go uncollected. This is a "cost" of producing that income which is presently recognized under the accrual system, and that "cost," if it is to be matched with the income it has produced, should under the accrual system also be presently recognized.

To a cash basis taxpayer, the reserve account should perform the same purpose. The accounts receivable represent the same capital investment to both kinds of taxpayers.[36] The cash basis taxpayer measures his income for tax purposes by measuring the flow out of accounts receivable and into cash, while the accrual basis taxpayer measures the flow of credits into the accounts receivable to determine his income. Both taxpayers, however,

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32. Arent, *Reallocation of Income and Expenses in Connection with Formation and Liquidation of Corporations,* 41 TAXES 995, 998 (1962), as quoted in footnote 5, 398 U.S. at 5.

33. *Accounting Terminology Bulletin No. 1,* 2 A.P.B. ACCOUNTING PRINCIPLES 9515, August 1953, American Institute of Certified Public Accountants, Inc.

34. Schuster v. Commissioner, 50 T.C. 98, 103 (1968).

35. MERTENS, LAW OF FEDERAL INCOME TAXATION, § 12.60-12.94 (1969 Ed.).

36. In considering bad debt reserves for banks the I.R.S. has said in a Treasury Decision at 1947-2 CUM. BULL. 26 the following concerning bad debt reserves of cash basis taxpayers:

> The Tax Court has held that the 'use of the reserve for bad debts is not inherently inconsistent with a cash basis where, as here, the reserve is against a loss of capital only * * * and contains no elements of income that has never been reported. * * * Such a reserve for loss of capital does not differ materially from a reserve for depreciation which is set up on a percentage basis rather than on the basis of actual depreciation suffered.'

will experience some depreciation in value of their capital invested in accounts receivable, and like the depreciation in value of any other non-permanent capital investment, this loss should be amortized to the period of operations in order to recognize the "expense" of this loss during the period when it occurs. These elementary accounting principles are well recognized by textbook authorities.[37]

This amortizing or matching objective of the reserve method of accounting for bad debts bears directly on its treatment in the 351 transfer. When the reserve is not allowed to be transferred along with the receivables, what in effect happens is that the "cost" of accepting receivables in lieu of cash is allocated to the transferee corporation, while the income is recognized by the transferor and the purpose behind the reserve method is thwarted. In the situation where the consideration received for transfer of assets indicates that the receivables were transferred at their net value, this reallocation of costs would seem to be fairly clear.

The Fifth Circuit in its *Nash* opinion was especially troubled by what it characterized as "a change in the identity of the taxpayer"[38] in a situation where reserves transferred to a corporation would later have to be restored to income because of improved debt recovery or abandonment of the reserve method. This would in fact result in taxing at corporate rates what would otherwise have been income to the individual or to the partners. However, where the estimate of the diminution in value of receivables has been reasonable and accurate, the government should not be prejudiced by this situation because the receivables would have been transferred at their then present value, and any appreciation of value due to a general improvement in payment practices of debtors would have occurred after the date of the transfer. This would be no different than an outright sale of the receivables at market value to an independent corporation followed by an appreciation in their value.

The alternative situation, where the corporation would abandon the reserve method and recognize the amount in the reserve account as income, would also cause no prejudice. Any income realized by the corporation in the year of abandonment would be offset in later periods by the deduction for bad debts when the corporation failed to collect. This would be no different than the tax consequences to any given taxpayer who having pre-

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37. H. SIMONS and W. KARRENBROCK, INTERMEDIATE ACCOUNTING 173 (4th ed. 1964):

> Almost invariably some of the receivables arising from sales will prove uncollectible. Uncollectible amounts will have to be anticipated if the charge for them is to be related to the period of the sale, and receivables are to be stated at their estimated realizable amounts. The amount of receivables uncollectible is recorded by a charge to Bad Debts and a credit to Allowance for Bad Debts.

H. FINNEY and H. MILLER, PRINCIPLES OF ACCOUNTING 176 (6th ed. 1965):

> The creation of an allowance for doubtful accounts is intended to accomplish two results, namely:
>
> To charge the loss by the sale of goods to customers whose accounts prove to be uncollectible against the period that caused the loss.
>
> To show the estimated realizable value of the customers accounts.

38. Nash v. United States, 414 F. 2d 629, 631 (5th Cir. 1969).

viously used the reserve method, would abandon that method and begin recognizing losses only after accounts fail when payable. Thus, in either situation, so long as the reserve contained a reasonably accurate balance at transfer, that would be no misallocation of income and little, if any, possibility of tax avoidance.

The real danger of tax avoidance in this situation, then, is a result of permitting overstatements of the reserve account before the transfer or at the time of transfer, rather than permitting the transfer itself. Thus, the effective way to insure against tax avoidance would be to scrutinize the valuation of the reserve to insure that it properly adjusts the balance of the accounts receivable to their present value. The Commissioner presently has the authority[39] to insure against tax avoidance in this manner, and at least one writer has suggested that this would be the better method.[40]

To summarize the analysis of the technical aspects of allowing transfer of the reserve for bad debts, it appears that for a taxpayer who complies or who is forced to comply with section 166, the reserve account is a recognition of costs incurred in producing income of prior periods. To force the taxpayer to recognize this as income results in shifting these costs to the transferee, causing an understatement of the transferee's income as well as an overstatement of the transferor's income.

More important than the technical aspects, however, should be the policy reasons for the existence of section 351: to remove any federal income tax barrier that would otherwise affect the availability of business organizational forms. This same policy is reflected in other sections, including sections 355, 361, and 371.[41] Requiring the taxpayer to recognize as taxable income his reserve for bad debts amounts to placing a pecuniary burden on the decision to incorporate. While the significance of this tended to be diminished or ignored by the Tax Court and the Fifth Circuit, writers have been quick to criticize this aspect of the restoration view,[42] which as one such critic declared, had transformed incorporation under section 351 into a "semi-taxable event."[43]

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39. Since 1959 the Commissioner has had authority under Treas. Reg. § 1.166-4 (1959), to require that excesses or inadequacies in existing reserves be reflected in establishing the addition to the reserve in any current year. In addition, taxpayers are required to file a statement with their return showing volume of charge sales or business transactions on account during the taxable year, total amounts of notes and accounts receivable at the beginning and close of the year, amount of debts charged off against the reserve during the taxable year, and the method of computing the addition to the reserve.

40. Hickman, *Incorporation and Capitalization, the Threat of the Potential Income Item and a Sensable Approach to the Problems of Thinness,* 40 TAXES 974, 978, n.7 (1962).

41. INT. REV. CODE OF 1954, § 355, § 361, § 371.

Section 355 concerns corporate split-ups and spin-offs, § 361 concerns transfers during business reorganizations, and § 371 concerns transfers during reorganization under receivership, foreclosure and certain proceedings under the Bankruptcy Act. All contain provisions for tax free exchanges.

42. 1966 U. ILL. L. REV. 787, 12 N. Y. L. FORUM 145 (1966), 53 MINN. L. REV. 1354 (1969).

43. Arent, *Reallocation of Income and Expenses in Connection with Formation and Liquidation of Corporations,* 40 TAXES 995 (1962).

Legislative history indicates rather clearly that removal of any tax barrier was the underlying intent of Congress. The original provisions were part of the Revenue Act of 1921[44] which were explained in the Senate committee report as follows:

> Section 202 provides new rules for those exchanges or "trades" in which, although a technical "gain" may be realized under the present law, the taxpayer actually realizes no cash profit.

In summary the report stated:

> The preceding amendments, if adopted, will, by removing a source of grave uncertainty and by eliminating many technical constructions which are economically unsound, not only permit business to go forward with readjustments required by existing conditions but also will considerably increase the revenue by preventing taxpayers from taking colorable losses in wash sales and other fictitious exchanges.[45]

It is this policy consideration of removing all tax barriers that distinguishes this problem from that of the treatment of the reserve upon liquidation of business assets.[46] There the failure to restore the reserve to income results in total escape from taxation. Additionally, in the 337 case there is neither possibility nor need to transfer the reserve since the outsider transferee will take the accounts receivable at his own cost basis. While the Tax Court ignored this distinction and relied on liquidation case opinions to support restoration in section 351 cases,[47] the distinction was recognized by both writers[48] and a dissenting opinion[49] who clearly realized the significance of continuity in the tax free transfer philosophy.

In its opinion, the Supreme Court recognized this underlying policy only by a quotation of section 351(a), and chose instead to discuss why the tax benefit rule did not apply. However, the basic purpose of section 351, which is obvious from the mere reading of part (a) of that section, must have been an influential factor in the Court's decision. The Court at least realized the economic realities of the situation when it stated that the transfer of the reserve account "merely perpetuates the status quo and does not tinker with it for any double benefit."[50] While this is a rather negative way of defining the underlying policy, the results of the opinion can only be positive. To have tax administration following accounting theory is desirable; to have tax administration remain a neutral influence on the choice of business form is necessary—no "tinkering" can be tolerated.

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44. Revenue Act of 1921, ch. 136, § 202, 42 Stat. 229.
45. S. Rep. No. 275, 67th Cong., 1st Sess. 10 (1921).
46. INT. REV. CODE of 1954, § 337. *See footnote 19 supra.*
47. Schuster v. Commissioner, 50 T.C. 98 (1968); Estate of Schmidt v. Commissioner, 42 T.C. 1130 (1964).
48. 1966 U. ILL. L. REV., 787, 12 N. Y. L. FORUM 145 (1966), 53 MINN. L. REV. 1354 (1969).
49. Estate of Schmidt v. Commissioner, 42 T.C. 1130 (1964), Simpson dissent in Schuster v. Commissioner, 50 T.C. 98, 103 (1968).
50. 398 U.S. 1, 5 (1970).

MEDICAL MALPRACTICE: WHEN DOES THE STATUTE OF LIMITATIONS BEGIN TO RUN?

Frohs v. Greene[1]

Plaintiff, Mary Frohs, in 1951 received penicillin injections from defendant and other doctors. A short time later she experienced severe pains, but defendants assured her that any possible problems connected with the injections had been counteracted and that the pain she suffered was in no way connected with the injections. They were unable to determine any other cause of her difficulties, however. In 1965 physicians removed an artery from plaintiff's temple which indicated that the severe pains were attributable to defendants' treatment in 1951.

Plaintiff filed an action for medical malpractice against defendants, who demurred to the complaint on the ground that the statute of limitations had run.[2] Plaintiff, however, argued that the statute did not begin to run until she discovered, or by the exercise of reasonable care should have discovered, her injury, thereby urging the court to adopt the so-called "discovery rule" (or, as it is otherwise known, the "capable of ascertainment" test). The trial court sustained defendants' demurrer. Plaintiff appealed to the Oregon Supreme Court which reversed and remanded, adopting the discovery rule but concluding that although sufficient in this case the statute of limitations would bar such an action unless the allegations are sufficient to show that by the exercise of reasonable care plaintiff could not have discovered that her pain was attributable to defendants' injections.[3]

The court was of the opinion that since Oregon had adopted the discovery rule in a "foreign object" case[4] in which a surgical needle had

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1. — Ore. —, 452 P.2d 564 (1969).
2. Ore. Rev. Stat. § 12.110 (1) (1957):
> An action for assault, battery, false imprisonment, for criminal conversion, or for any injury to the person or rights of another, not arising on contract, shall be commenced within two years; provided, that in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit.

It is interesting to note that the statute under which the *Frohs* case arose was amended after the suit was instituted but before it was argued. The amended statute provides:
> An action to recover damages for injuries to the person where in the course of any medical . . . treatment or operation, any foreign substance other than flesh, blood or bone, is introduced and is negligently permitted to remain within the body of a living human person, causing harm, shall be commenced within two years from the date when the injury is first discovered or in the exercise of reasonable care should have been discovered; provided that such action shall be commenced within seven years from the date of the treatment or operation upon which the action is based. ORE. REV. STAT. § 12.110 (4) (1967).

The *Frohs* court did not presume to decide the effect of this amendment. It would appear, however, to introduce confusion because *Frohs* adopts the discovery rule in all cases while the statute only applies to foreign object cases.
3. Frohs v. Greene, — Ore. —, 452 P.2d 564 (1969).
4. Berry v. Branner, 245 Ore. 307, 421 P.2d 996 (1966).

been left in the patient's abdomen, it was impossible to justify applying the rule in that kind of case while refusing to apply it in cases involving negligent treatment and diagnosis.[5] In so extending the discovery rule the court specifically overruled *Wilder v. Haworth,*[6] a malpractice case in which the court refused to accept the discovery rule where the only negligence alleged was in the diagnosis and treatment itself.

In adopting the discovery rule in *Frohs* the court merged two related lines of Oregon cases: those concerning purely negligent diagnosis and treatment, and those concerning foreign objects negligently left in the body. In *Wilder v. Haworth,*[7] decided in 1950, the court refused to apply the discovery rule in a case of negligent treatment, holding that the statute of limitations began to run at the termination of treatment.[8] In the 1964 case of *Vaughn v. Langmack,*[9] which involved the negligent leaving of a surgical needle in the plaintiff's body, the court held that the two year statute of limitations began to run at the time of the wrongful act and not when the needle was discovered. Yet the court overruled this latter decision in 1966, stating that the discovery rule should apply in such a case.[10] The *Frohs* case, by overruling *Wilder,* has allowed the negligent diagnosis and treatment cases to be governed by the discovery rule as well.[11]

The so-called "discovery rule" has been adopted in eighteen states by statutory interpretation of existing statutes of limitation.[12] These states give varying reasons for such interpretations. Some of the courts say that use of any different rule would allow an unjust result, and that they refuse to attribute an unjust or impractical intention in enacting the lim-

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5. Frohs v. Greene, — Ore. —, —, 452 P.2d 564, 565 (1969). Defendant attempted to distinguish the two types of malpractice cases by pointing out that in the foreign object cases proof of the negligent act and the part it played in the injury is reliable, while this reliability is not present in claims for negligent treatment and diagnosis.

6. 187 Ore. 688, 213 P.2d 797 (1950).

7. *Ibid.*

8. *Ibid.*

9. 236 Ore. 542, 390 P.2d 142 (1964).

10. Berry v. Branner, 245 Ore. 307, 421 P.2d 996 (1966).

11. *Cf.* 1 LOUISELL AND WILLIAMS, MEDICAL MALPRACTICE §§ 13.14-13.64 (1969).

12. Arizona: Leech v. Bralliar, 275 F. Supp. 897 (D. Ariz. 1967); California: Tell v. Taylor, 191 Cal. App. 2d 266, 12 Cal. Rptr. 648 (1961); Colorado: Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957); Florida: City of Miami v. Brooks, 70 So. 2d 306 (Fla. 1954); Hawaii: Yoshizaki v. Hilo Hospital, 50 Hawaii 150, 433 P.2d 220 (1967); Idaho: Billings v. Sisters of Mercy of Idaho, 86 Idaho 485, 389 P.2d 224 (1964); Louisiana: Phelps v. Donaldson, 243 La. 1118, 150 So. 2d 35 (1963); Maryland: Waldman v. Rohrbaugh, 241 Md. 137, 215 A.2d 825 (1966); Michigan: Johnson v. Caldwell, 371 Mich. 368, 123 N.W.2d 785 (1963); Montana: Grey v. Silver Bow County, 149 Mont. 213, 425 P.2d 819 (1967); Nebraska: Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962); New Jersey: Rothman v. Silber, 83 N.J. Super. 192, 199 A.2d 86 (1964); New York: Flanagan v. Mt. Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969); North Dakota: Iverson v. Lancaster, 158 N.W.2d 507 (N.D. 1968); Oklahoma: Seitz v. Jones, 370 P.2d 300 (Okla. 1962); Pennsylvania: Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959); Texas: Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967); West Virginia: Bishop v. Byrne, 265 F. Supp. 460 (S.D. W. Va. 1967); Two federal cases have also adopted the discovery rule. Quinton v. United States, 304 F.2d 234 (5th Cir. 1962) (FELA case); Rahn v. United States, 222 F. Supp. 775 (S.D. Ga. 1963) (FTCA case).

itation statute.[13] In *Gaddis v. Smith*[14] the Texas Supreme Court, in justifying its acceptance of the discovery rule in foreign object cases, observed that when a surgeon leaves an object in a patient's body, the patient would not know nor have reason to know that the object was present. The *Gaddis* court also refuted the argument that acceptance of the discovery rule would obliterate the statute of limitations, noting that the question of when a cause of action accrues is a judicial one which must be founded on reason and justice.

The four states which have adopted the rule by statute impose a double limitation by setting a time limit in which the claim must be brought after *discovery* of the injury, not to exceed an ultimate time limit which runs from the date of the negligent act itself.[15] Thus if a physician negligently treats a patient, and the patient does not discover it until sometime later, the patient must bring his action both within a specified period *after this discovery,* and within a specified period running from the negligent act itself.

Under the traditional or "wrongful act" rule the statute of limitations begins to run on the date of the negligent act or omission. A number of courts still follow this rule.[16] In refusing to reject this traditional approach, these courts reason that the legislatures are the proper bodies to change the rules regarding the limitations set by the statute.[17] These

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13. Layton v. Allen, 246 A.2d 794 (Del. 1968). This case does not accept the discovery rule as such since the Delaware statute is not typical. The Delaware statute begins to run when the injury is sustained rather than when the cause of action has accrued; but this case is consistent with the trend, and the reasoning of the court is similar to those decisions adopting the discovery rule. DEL. CODE ANN. tit. 10 § 8118 (1953).

14. 417 S.W.2d 577 (Tex. 1967).

15. ALA. CODE tit. 7, § 25 (1) (Supp. 1955), a limit six months from the time of discovery and six years from the injury, applying to all malpractice cases; CONN. GEN. STAT. REV. § 52-584 (1958), a one year limit from discovery and a three year limit from the negligent act, applying to all malpractice cases; ILL. REV. STAT. ch. 83, § 22.1 (1965), a two year limit from discovery and ten years from the negligent act, limited to foreign object cases; ORE. REV. STAT. § 12.110 (4) (1967), a two year limit from discovery and seven years from the negligent act. This Oregon statute on its face appears to apply only to foreign object cases, but is somewhat confusing in the light of the cited case. *See* note 2 *supra.*

16. ARK. STAT. ANN. § 37-205 (1947); Silvertooth v. Shallenberger, 49 Ga. App. 133, 174 S.E. 365 (1934); Ogg v. Robb, 181 Iowa 145, 162 N.W. 217 (1917); Graham v. Updegraph, 144 Kan. 45, 58 P.2d 475 (1936); Carter v. Harlan Hosp. Ass'n., Inc., 265 Ky. 452, 97 S.W.2d 9 (1936); Capucci v. Barone, 266 Mass. 578, 165 N.E. 653 (1929); Wilder v. St. Joseph Hosp., 225 Miss. 42, 82 So. 2d 651 (1955); Roybal v. White, 72 N.M. 285, 383 P.2d 250 (1963); Jervell v. Price, 246 N.C. 459, 142 S.E.2d 1 (1965); Albert v. Sherman, 167 Tenn. 133, 67 S.W.2d 140 (1934); Peteler v. Robison, 81 Utah 535, 17 P.2d 244 (1932); Murry v. Allen, 103 Vt. 373, 154 A. 678 (1931); Hawks v. De Hart, 206 Va. 810, 146 S.E.2d 187 (1966); McCoy v. Stevens, 182 Wash. 55, 44 P.2d 797 (1935); Reistad v. Manz, 11 Wis. 2d 155, 105 N.W.2d 324 (1960). *But see* 1D. LOUISELL & L. WILLIAMS, TRIAL OF MEDICAL MALPRACTICE CASES § 13.07 (1968 Supp.).

17. Summers v. Wallace Hosp., 276 F.2d 831, 835 (9th Cir. 1960).

> [O]n the other hand such a rule [discovery rule] does run counter to the central idea behind statutes of limitation. They are statutes of repose designed to promote stability in the affairs of men and avoid the uncertainties and burdens inherent in defending against old claims. This being

courts also reason that "statutes of limitations are favorites in the law and cannot be avoided unless the party seeking to do so brings himself strictly within some exception."[18]

These courts, however, apply a considerable number of such exceptions to the wrongful act rule. One is the "fraudulent concealment" exception, which treats a negligent act which is concealed by the defendant as if it were a fraud. Such a characterization prevents the statute from running until the wrong has been discovered.[19] Another exception, the "continuing negligence" exception, treats the wrong as if it were recommitted each time the doctor treats the patient and fails to find his previously committed wrong.[20] This exception would postpone the running of the statute until the termination of the physician-patient relationship. (It has thus become the rule in some jurisdictions that the statute does not begin to run *in any case* until the end of the relationship.[21]) The underlying theory of this rule is that the physician is guilty of malpractice during the entire period of the relationship for not repairing the damage done.[22] Some jurisdictions draw a distinction between the termination of treatment and the termination of the physician-patient relationship.[23] These jurisdictions allow the limitation period to commence even though the patient is still under the care of the negligent doctor, but only if treatment relating to the negligence has been terminated. Missouri is sometimes considered among these jurisdictions.[24]

Missouri has a specific statute of limitation covering malpractice cases,[25] which supplants, as to those cases, other statutes which apply to torts in general.[26] Section 516.140 RSMo 1969 states:

> All actions against physicians, surgeons . . . for damages for malpractice . . . shall be brought within two years *from the date of the act of neglect complained of* . . . .[27]

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so, there is good reason for concluding that the legislature should mark out any departure from that basic purpose as it has done in the case of actions grounded on fraud.

18. National Credit Associates, Inc. v. Tinker, 401 S.W.2d 954, 956 (K.C. Mo. App. 1966); Hunter v. Hunter, 361 Mo. 799, 806, 237 S.W.2d 100, 104 (1951); Shelby County v. Bragg, 135 Mo. 291, 300, 36 S.W. 600, 602 (1896).

19. Annot. 80 A.L.R.2d 368, 401 (1961).

20. *Id.* at 379.

21. Clinard v. Pennington, 438 S.W.2d 748 (Tenn. 1968), rejects the discovery rule in foreign object cases and holds that employment of another doctor is an indication of termination of treatment.

22. De Long v. Campbell, 157 Ohio St. 22, 104 N.E.2d 177 (1952); Bowers v. Santee, 99 Ohio St. 361, 124 N.E. 238 (1919); Gillette v. Tucker, 67 Ohio St. 106, 65 N.E. 865 (1902). *But see* Cook v. Yager, 13 Ohio App. 2d 1. 233 N.E. 326 (1968), which overrules the above Ohio cases and adopts a hybrid form of the discovery rule under which the statute begins to run not upon discovery of the negligence, but upon discovery of the injury.

23. 1 LOUISELL & WILLIAMS, MEDICAL MALPRACTICE § 13.08 (1969).

24. *See* 80 A.L.R.2d 368, 379 (1961).

25. § 516.140, RSMo 1969.

26. §§ 516.100, .280, RSMo 1969.

27. § 516.140, RSMo 1969. (emphasis added).

However, section 516.100, RSMo 1969 states:

> Civil actions . . . can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued; provided, that for the purposes of sections 516.100 to 516.370, the cause of action shall not be deemed to accrue when the *wrong is done* or the technical breach of contract or duty occurs, *but when the damage resulting therefrom is sustained and is capable of ascertainment* . . . .[28]

The inconsistency between the malpractice statute, which indicates the period of limitation starts to run on the date of the "act of neglect complained of," and the general statute, which seems to adopt the discovery rule, has caused some difficulty and confusion in Missouri regarding the question of which statute controls.

The first Missouri case dealing with the problem was *Thatcher v. De Tar*,[29] which involved statutes identical to sections 516.100 and 516.140.[30] The Missouri Supreme Court in that case held that the "act of neglect complained of" was the subsequent treatment of symptoms caused by the failure to discover a needle left in the plaintiff's body. Thus the limitation period did not begin to run until the termination of treatment, since that was the date of the last act of negligence. This interpretation, although emphasizing the specific malpractice statute, transports the date of the beginning of the limitation period to the latest possible time still consistent with the specific statutory language. In 1956 the Missouri court reaffirmed the position taken in *Thatcher,* holding in *Rippe v. Sutter*[31] that when the act, although causing physical injury, is not *legally* injurious until certain consequences occur, the statute of limitations will not begin to run until the date of the consequential "legal" injury. This position was reaffirmed in *National Credit Assn., Inc. v. Tinker*[32] when the court concluded that the date of the act complained of can mean only the date of the last treatment since that is the last act of neglect.

Further confusion developed in 1968 when the court, in *Laughlin v. Forgrave*,[33] reviewed the legislative history of section 516.140 and decided that it clearly showed a legislative intent to treat medical malpractice with particularlity and to establish a specific date on which the statute of limitations should begin to run.[34] The court was of the opinion that the specificity of section 516.140 was intended to create an exception to the general provisions of section 516.100.[35] The court stated that the specific malpractice statute should prevail over the general one, since the specific provision was added as an amendment and thus appeared to be an exception to, or qualification of, the general provision.[36]

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28. § 516.100, RSMo 1969. (emphasis added).
29. 351 Mo. 603, 173 S.W.2d 760 (1943).
30. Mo. Ann. Stat. §§ 1016, 1012 (1939).
31. 292 S.W.2d 86 (Mo. 1956).
32. 401 S.W.2d 954 (K.C. Mo. App. 1966).
33. 432 S.W.2d 308 (Mo. En Banc 1968).
34. *Id.* at 312.
35. *Id.* at 313.
36. *Id.* at 312.

The Missouri Supreme Court in concurrent opinions in *Kauchick v. Williams*[37] and *Smile v. Lawson*[38] held that section 516.280, RSMo 1969,[39] which deals with improper acts that delay the commencement of an action, was statutory authority for the proposition that fraudulent concealment of a cause of action is an improper act which will toll the running of the limitation period for malpractice actions provided in section 516.140.[40] The *Kauchick* case requires that the physician must have had knowledge of his own negligence and that he must have remained silent in order for there to be fraudulent concealment within the purview of 516.280. The court again noted that there was a long standing legislative policy of treating separately limitations fixed by the general limitations statute and those fixed by other statutes which concern specific causes of action such as malpractice.[41] When the legislature placed the malpractice statute of limitations in the general limitations chapter instead of in sections relating directly to doctors or malpractice, the court in *Kauchick* said it must be charged with knowing of the distinction between general limitations statutes and specific limitations statutes. This refuted the defendant's contention that Section 516.300, RSMo, which says that exceptions and bars in the general limitations article are not applicable to limitations periods created by specific limitations statutes,[42] made section 516.280 inapplicable to malpractice. It would therefore appear that the Missouri position is that the statute of limitations begins to run upon termination of treatment[43] unless it is tolled by some fraudulent concealment by the physician.[44] Provided knowledge by the doctor can be shown, silence is enough for concealment.[45]

Judge Finch concurred in the result in *Smile v. Lawson*[46] but disagreed with the majority opinion that silence and knowledge by the doctor constituted fraudulent concealment which tolled the statute of limitations. In his opinion, if silence tolled the statute of limitations by virtue of section 516.280, this was actually a form of the discovery rule, conditioned only upon the doctor's knowledge. If this observation is correct, the discovery rule has been adopted *de facto* in Missouri. He pointed out, however, that the court had recently held that the legislature did not intend to apply the discovery rule established in section 516.100 to malpractice cases.[47]

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37. 435 S.W.2d. 342 (Mo. En Banc. 1968).
38. 435 S.W.2d 325 (Mo. En Banc. 1968).
39. § 516.280, RSMo 1969, states:
If any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time limited, after the commencement of such action shall have ceased to be so prevented.
40. Smile v. Lawson, 435 S.W.2d 325 (Mo. En Banc 1968).
41. Kauchick v. Williams, 435 S.W.2d 342, 346 (Mo. En Banc 1968).
42. § 516.300, RSMo 1969.
43. Thatcher v. De Tar, 351 Mo. 603, 173 S.W.2d 760 (1943).
44. Smile v. Lawson, 435 S.W.2d 325 (Mo. En Banc 1968).
45. Kauchick v. Williams, 435 S.W.2d 342 (Mo. En Banc 1968).
46. 435 S.W.2d 325, 330 (Mo. En Banc 1968).
47. As authority Judge Finch cited: Laughlin v. Forgrave, 432 S.W.2d 308 (Mo. En Banc 1968); Yust v. Barnett, 432 S.W.2d 316 (Mo. En Banc 1968).

Some writers have argued that Missouri *has* adopted the discovery rule,[48] while others advocate that it should be adopted.[49] In any event, it would be desirable for the legislature to clear up the confusion caused by the two conflicting statutory provisions. Since it is patently unfair both to deprive a plaintiff of his cause of action before he knows he has been injured, and to subject doctors to the onerous burden of defending stale claims, which is the effect of the *Frohs* decision, the desirable type of statute is the type discussed above which adopts a double limitation period. This type of statute extends the period for discovery without allowing the plaintiff to sleep on his cause of action after he has discovered the injury.[50] Such a statute would provide certainty in Missouri law. Also, it would prevent any confusion caused in Oregon by the *Frohs* decision which was handed down in the face of two rejections of an all inclusive discovery rule by the legislature and the subsequent legislative adoption of a discovery rule which is limited to foreign object cases.[51]

GERALD D. MCBETH

THE EXTENT OF AN EMPLOYERS DUTY TO RECOGNIZE UNION AUTHORIZATION CARDS

NLRB v. Gissel Packing Co.[1]

The cases of *Gissel Packing Co.*,[2] *Heck's, Inc.*,[3] *General Steel Products, Inc.*,[4] and *Sinclair Co.*[5] were consolidated and certiorari granted by the Supreme Court in order to ascertain the "extent of an employer's duty under the National Labor Relations Act[6] to recognize a union that bases its claim to representative status solely on the possession of union authorization cards . . ."[7] More specifically the Supreme Court had to decide whether

48. *Cf.*, Comment, 63 HARV. L. REV. 1177, 1205 (1950).

49. McCleary, *Malpractice—When Statute of Limitations Commences in Malpractice Actions*, 9 MO. L. REV. 102 (1944); Davis, *Tort Liability and the Statute of Limitation*, 33 MO. L. REV. 171 (1968).

50. Statutes cited note 15 *supra*.

51. Because of the amendment of the Oregon statute (see note 2 *supra*), *Frohs* may not have brought about the degree of certainty desired. Oregon now has a statute which arguably limits the application of the discovery rule to foreign objects cases, apparently in opposition to the *Frohs* decision which clearly adopts the discovery rule in all types of cases.

1. 395 U.S. 575 (1969).

2. NLRB v. Gissel Packing Co., 398 F.2d 336 (4th Cir. 1968).

3. NLRB v. Heck's, Inc., 398 F.2d 337 (4th Cir. 1968).

4. General Steel Products, Inc. v. NLRB, 398 F.2d 339 (4th Cir. 1968).

5. NLRB v. Sinclair Co., 397 F.2d 157 (1st Cir. 1968).

6. The National Labor Relations Act (Wagner Act), 29 U.S.C. § 151 (1964), was approved July 5, 1935. In 1947, it was amended by the Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 141 (1964). There were further amendments made in the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 153 (1964).

7. 395 U.S. 575, 579, (1969).

an employer's duty to bargain can arise without a Board election under the National Labor Relations Act, whether union authorization cards are a reliable enough indicator of employee desires to be a valid method for determining a union's majority status, and whether a bargaining order by the Board is the appropriate remedy when an employer both refuses to bargain upon a union demand which is based on its possession of authorization cards from a majority of the workers in the unit, and at the same time commits unfair labor practices which make a fair election improbable.

All four cases presented essentially the same legal as well as factual issues. The unions began a campaign to organize the employees of four companies and obtained union authorization cards from a majority of these employees. The union then demanded recognition from the employers, using the authorization cards as a basis for their demand. The employers refused, stating that the union authorization cards were inherently unreliable indicators of their employees' desires. Each employer then undertook a vigorous antiunion campaign that led to the filing of several unfair labor practice charges. The National Labor Relations Board[8] found in each case that the employers had violated section 8(a)(1)[9], having engaged in restraint and coercion of their employees. Also, the Board found that the employees were wrongfully discharged because of their union activity, in violation of section 8(a)(3).[10] The Board further decided that the employers had rejected the demand of the unions to bargain, based on union authorization cards, in "bad faith,"[11] finding that the employers were not motivated by "good faith" doubts as to the union's majority status but only desired time in which to destroy the union's majority status. Therefore the Board found that the employers had failed to recognize the unions in

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8. The National Labor Relations Board was created by the Wagner Act of 1935 and amended by the Taft-Hartley Act of 1947. The Board consists of five members, appointed by the President and approved by the Senate. Each member serves a five year term and the President appoints one of the members to serve as Chairman of the Board. Section 8(a)(1) of the Labor-Management Relations Act states that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. Section 7 of the Act states that employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

10. Section 8(a)(3) of the Labor-Management Relations Act states that it shall be an unfair labor practice for an employer by discrimination in regard to hiring or tenure of employment or condition of employment to encourage or discourage membership in labor unions.

In *Gissel,* two employees were told in no uncertain terms by the company vice-president that if they were caught talking to union men, they would be fired. These same employees were later discharged for having attended a union meeting.

In *Heck's,* leading union supporters were discharged shortly after having gotten a majority of the employees to sign union authorization cards. Other employees were interrogated as to their union activities and warned to withdraw their authorization.

11. Section 8(d) of the Labor-Management Relations Act of 1947 provides that it is

> the mutual obligation of the employer and the representatives of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . .

violation of section 8(a)(5).[12] In each case the Board ordered the employer to cease and desist its unfair labor practices and ordered the companies to bargain with the unions.

On appeal, in the *Gissel, Heck's* and *General Steel* cases, the Court of Appeals for the Fourth Circuit sustained the Board's finding that there were 8(a)(1) and 8(a)(3) violations.[13] However, the Board's finding of an 8(a)(5) refusal to bargain was rejected, and the court refused to enforce the Board's order directing the companies to bargain with the unions.[14] However, in *Sinclair Company* the Court of Appeals for the First Circuit sustained all the Board's findings and enforced the bargaining order.[15] Because of the conflict between the circuits[16] over the effect to be given union authorization cards, the Supreme Court granted certiorari.[17]

The employers contended in *Gissel* and the other cases that a union can establish a bargaining obligation only by winning a Board election.

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12. Section 8(a)(5) of The Labor Management Relations Act states that it shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a). Section 9(a) states:

> Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .

13. NLRB v. Gissel Packing Co. 398 F.2d 336 (4th Cir. 1968); NLRB v. Heck's, Inc., 389 F.2d 337 (4th Cir. 1968); General Steel Products, Inc. v. NLRB, 398 F.2d 339 (4th Cir. 1968).

14. The Fourth Circuit stated its position on authorization cards clearly when the court stated in *Heck's:*

> We have recently discussed the unreliability of the cards, in the usual case, in determining whether or not a union has attained a majority status and have concluded that an employer is justified in entertaining good faith doubts if the union's claim when confronted with a demand for recognition based solely upon union authorization cards. We have also noted that the National Labor Relations Act after the Taft-Hartley amendments provides for an election as the sole basis of a certification and restricts the Board to the use of secret ballot for the resolution of representation questions.

NLRB v. Heck's, Inc., 398 F.2d 339, 341 (4th Cir. 1968). This was the Fourth Circuit's position even though it was conceded that the company had threatened employees, engaged in illegal interrogations, illegally offered benefits to employees, and discharged employees because of their union activities.

See also NLRB v. Sehon Stevenson & Co., 386 F.2d 551 (4th Cir. 1967), and its companion case, NLRB v. Logan Packing Co., 386 F.2d 562 (4th Cir. 1967).

15. NLRB v. Sinclair Co., 397 F.2d 157 (1st Cir. 1968).

16. Most of the circuit courts disavow the Fourth Circuit's position on authorization cards, but to varying degrees. *See, e.g.,* Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied,* 341 U.S. 914, (1951); NLRB v. Gotham Shoe Mfg. Co., Inc., 359 F.2d 684 (2d Cir. 1964); NLRB v. Quality Markets, Inc., 387 F.2d 20 (3d Cir. 1967); NLRB v. Phil-Modes, Inc., 396 F.2d 131 (5th Cir. 1968); Atlas Engine Works, Inc. v. NLRB, 396 F.2d 775 (6th Cir. 1968), *petition of certiorari pending*; NLRB v. Clark Products, Inc., 385 F.2d 396 (7th Cir. 1967); NLRB v. Ralph Printing & Lithographing Co., 379 F.2d 687 (8th Cir. 1967); NLRB v. Luisi Truck Lines, 384 F.2d 842 (9th Cir. 1967); Furr's, Inc. v. NLRB 381 F.2d 562 (10th Cir. 1967).

17. NLRB v. Gissel Packing Co., 393 U.S. 997 (1968).

They argued, and the Court of Appeals for the Fourth Circuit agreed,[18] that the Taft-Hartley amendments of 1947 eliminated such alternate routes to majority status as authorization cards. The most common method,[19] and from the Board's point of view the preferred method,[20] is a Board election and certification under section 9(c).[21]

A union, however, is not limited to this method of establishing a bargaining obligation. Section 8(a)(5) of the Taft-Hartley Act states that "it shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with representatives of his employee subject to the provisions of section 9(a)."[22] Section 9(a) states that "representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit. . . ." In regard to this latter section, the Supreme Court stated in *Gissel* that by using the words "designated" or "selected," Congress intended that there should be routes to majority status other than Board conducted elections.[23] Such a position was first recognized by the Supreme Court in *United Mine Workers v. Arkansas Flooring Co.*,[24] in which the Court stated "[i]n the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated § 8(a)(5) of the Act."[25] Relying on the legislative history of the 1947 Taft-Hartley amendments to the Wagner Act, the Supreme Court in *Gissel* stated that Congress never intended to eliminate a union's right to establish a bargaining obligation by proving that they had a card-based majority.[26] In an earlier version of the bill, it was proposed that the Board could find an 8(a)(5) only where an employer refused to bargain with a union already recognized by the employer or one certified by a Board election.[27] This proposal, which would have resulted in the elimination of authorization cards as an alternate route to bargaining status, was rejected by Congress.[28]

The employers' second contention in *Gissel* and the other consolidated cases was that authorization cards are such "inherently unreliable indicators

18. *See* note 14, *supra.*

19. In 1967, the Board conducted 8116 elections under section 9(c) and issued only 157 bargaining orders based on a majority obtained by authorization cards. Levi Strauss, 172 NLRB No. 57, 68 L.R.R.M. 1338, 1342 n. 9 (1968). *See also* J. Sheinkman, *Recognition of Unions Through Authorization Cards,* 3 GA. L. REV. 319 (1969).

20. *See, e.g.,* Aaron Brothers, 158 NLRB 1077 (1967). *Cf.,* General Shoe Corp., 77 NLRB 124 (1948).

21. Section 9(c) of the Act establishes the proper procedures for a Board election and proper certification procedures.

22. *See* note 12, *supra.*

23. 395 U.S. 575, 596 (1969). Both the Wagner Act of 1935 and the Taft-Hartley Act of 1947 used this terminology. The Taft-Hartley Act was never intended to make the Board election the sole basis of a certification as the Fourth Circuit contends.

24. 351 U.S. 62 (1956).

25. *Id.* at 69. *See also* NLRB v. Bradford Dying Assn., 310 U.S. 318, 339-40 (1940); Frank Bros. Co. v. NLRB, 321 U.S. 702 (1943).

26. 395 U.S. 575, 598 (1969).

27. H.R. 3020, 80th Cong., 1st Sess., § 8(a)(5) (1947).

28. H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 41 (1947).

of employee's desires"[29] that they should never be used to establish a bargaining obligation. For this reason they asked the Supreme Court to eliminate the use of authorization cards, thus doing what Congress had refused to do in the 1947 Taft-Hartley amendments. The employers and the Fourth Circuit presented two main objections to their use: (1) that card-based representation is so inferior to the election procedure that it should never be used;[30] and (2) that the union authorization cards are in many cases obtained from the employees through misrepresentation and coercion. The employers contended that union organizers in many cases mislead employees regarding the effect of signing authorization cards. The employees are told or led to believe that the cards are being obtained in order to seek an election to determine union representation, while in reality they are being used to establish the union as the collective bargaining representative.

The Board and the Supreme Court have previously recognized the superiority of the election procedure in most cases.[31] However, where an employer engages in conduct that disrupts and thus prevents a fair election, a bargaining obligation established by authorization cards may be the only way to assure that employees are given a fair and free choice. An objection that the card's purpose is often misrepresented and that signing is often gained by coercion has also been rejected by the Court because it viewed the Board's *Cumberland Shoe Doctrine*[32] as adequate assurance against such tactics by the union.[33] The *Cumberland Shoe Doctrine* requires that the authorization card clearly and unambiguously state on its face that the employee, by signing it, is authorizing the union to represent him in collective bargaining; the wording of the card must not lead the employee to think that he is signing it solely for the purpose of obtaining an election. However, it should be noted that the Court in *Gissel* found nothing inconsistent in a union's handing an employee a card stating its purpose clearly while at the same time telling the employee the card probably will be used to obtain an election. This is because in the vast majority of cases the signing of the cards does result in a Board election.[34]

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29. 393 U.S. 575, 601, (1969).

30. There is a comparison of the card procedure and the election process in NLRB v. S. S. Logan Packing Co., 386 F.2d 562, 564-566 (4th Cir. 1967).

31. United Mine Workers v. Arkansas Flooring Co., 351 U.S. 62 (1956).

32. Cumberland Shoe Corp., 144 NLRB 1268 (1964). The Board's approach toward allegations of misrepresentation in the solicitation of authorization cards was reaffirmed in Levi Strauss & Co., 172 NLRB No. 57, 68 L.R.R.M. 1338 (1968).

33. The Court admits that there have been abuses in the use of authorization cards, and that in several cases union organizers have misrepresented to employees the effect of signing these cards. Note also that the Second Circuit (NLRB v. S. E. Nichols Co., 380 F.2d 438 (2d Cir. 1967)) and the Fifth Circuit (Engineers & Fabricators, Inc. v. NLRB, 376 F.2d 482 (5th Cir. 1967)) have joined the Fourth Circuit in criticizing the Board's *Cumberland Shoe* doctrine.

For scholarly criticism of the Board's policy on authorization cards see Comment, *Union Authorization Cards,* 75 YALE L.J. 805 (1966); Welles, *The Obligation to Bargain on the Basis of a Card Majority,* 3 GA. L. REV. 349 (1969); Browne, *Obligation to Bargain on Basis of Card Majority,* 3 GA. L. REV. 334 (1969); and Comment, *Union Authorization Cards: A Reliable Basis for an N.L.R.B. Order to Bargain?,* 47 TEX. L. REV. 87 (1968).

34. The Board in Levi Strauss, 172 NLRB No. 57, 68 L.R.R.M. 1338, 1341 n. 7 (1968) in explaining the *Cumberland Shoe* doctrine, issued a warning against

Finally the Court in *Gissel* answered the question of whether a bargaining order by the Board is the appropriate remedy. There have been three phases in the Board's handling of the question of when it is proper to issue an order to the employer to bargain based upon a card-based union majority. The approach followed by the Board until 1966 was known as the *Joy Silk Doctrine.*[35] An employer could lawfully refuse to bargain with a union which sought to gain representation through the use of authorization cards, but his refusal must have been based on "good faith" doubts as to the union's majority status. He could then insist that the union prove it was a majority by winning an election. However, if the Board found an absence of "good faith" doubts on the part of the employer, it could then enter a bargaining order. Absence of "good faith" was usually found by the Board if the employer had engaged in independent unfair labor practices or if the employer could provide no reason why he had doubts as to the card-based majority.[36] In 1966, in *Aaron Brothers,*[37] the Board modified the *Joy Silk Doctrine* by requiring the Board to show "bad faith" rather than the employer showing "good faith." The Board also stated that only unfair labor practices *tending to destroy the union's majority* would show "bad faith;" then and only then would the Board issue a bargaining order.

The Board's present approach, as argued before the Supreme Court in *Gissel,* is quite similar to *Aaron Brothers;* i.e., an employer's "good faith" doubts are unimportant. The employer need not recognize the purported card-based majority and can insist on an election, either by filing an election petition himself under section 9(c)(1)(B)[38] or by having the union file

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a mechanical application of the rule without looking at the totality of the circumstances. The Board stated:

> Thus the fact that employees are told in the course of solicitation that an election is contemplated, or that a purpose of the card is to make an election possible, provides in our view *insufficient* basis in itself for vitiating unambiguously worded authorization cards on the theory of misrepresentation. A different situation is presented, of course, where union organizers solocit cards on the explicit or indirectly expressed representation that they will use such cards *only* for an election and subsequently seek to use them for a different purpose. . . ."
>
> The foregoing does not of course imply that a finding of misrepresentation is confined to situations where employees are expressly told in *haec verba* that the 'sole' or 'only' purpose of the cards is to obtain an election. The Board has never suggested such a mechanistic application of the foregoing principles, as some have contended. The Board looks to substance rather than to form. It is not the use or non-use of certain key or 'magic' words that is controlling, but whether or not the totality of circumstances surrounding the card solicitation is such, as to add up to an assurance to the card signer that his card will be used for no purpose other than to help get an election.

35. Joy Silk Mills, Inc. v. NLRB, 85 NLRB 1263 (1949); *enforced,* 87 U.S. App. D.C. 360, 185 F.2d 732 (1950).

36. *See* Snow & Sons, 134 NLRB 709 (1961), *enforced,* 308 F.2d 687 (9th Cir. 1962).

37. Aaron Brothers, 158 NLRB 1077 (1966).

38. Section 9(c)(1)(B) was part of the 1947 Taft-Hartley amendments and provided that an employer could petition for a Board election whenever "one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a)."

the petition. However, whether a bargaining order will issue will depend on "the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election."[39]

In essence the Board's approach as indicated by its action in *Gissel* is to abandon the "good faith-bad faith" distinction which has caused much criticism and controversy.[40] The new standard for issuance of a bargaining order is whether the employer's actions have had a substantial effect on the holding of a fair election. The approach of the Board under both *Joy Silk* and *Aaron Brothers* was concerned with the employer's subjective motivation at the time he rejected the cards. In *Gissel* the Board's emphasis has been shifted to an examination of the nature and extent of the employer's post-bargaining-demand unfair labor practices and their effect on employee rights. In *Gissel* the Supreme Court has approved of the Board's approach to the issuance of a bargaining order but emphasized the Board's qualification that this is not a *per se* rule that any employer unfair labor practice will lead to a bargaining order. The Court pointed out that there is a class of less extreme unfair labor practices which will not sustain a bargaining order.

There are thus three ways that a union can establish a bargaining obligation on the part of the employer: (1) under section 9[41] of the Act (formal approach), which deals with the handling and processing of representation cases; (2) by employer-union agreement that the union, if it has a majority of the employees,[42] will be the bargaining representative of the employees (a consent election);[43] (3) through unfair labor practice proceedings and an order to bargain directed by the Board (*Gissel Packing Co.* case). The overwhelming majority of obligations to bargain are established on the basis of a Board election or with the consent of the employer.[44] Although there has been much discussion and criticism over recognition of unions through authorization cards, the problem comes up in less than two percent of the cases.[45]

As indicated earlier, there can be no doubt that a Board election or consent election is the preferred method of determining the employees' desires; the courts, the Board, the employers, and the unions agree on this.

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39. 393 U.S. 575, 594, (1969).

40. *See* Sheinkman, *Recognition of Union Through Authorization Cards,* 3 GA. L. REV. 319, 331 (1969); and Comment, *Union Authorization Cards: A Reliable Basis for an N.L.R.B. Order to Bargain?,* 47 TEX. L. REV. 87 (1968).

41. *See* note 21, *supra.*

42. An employer may not recognize a minority union. *See* International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961).

43. Section 9(c)(4) provides that:

> Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

44. In Gordon, *Union Authorization Cards and the Duty to Bargain,* 19 L.A.B.L.J. 201 (1968), it states that in a five-and-one-half year period from 1962 through 1967, there were over 40,000 Board elections and only 365 bargaining orders. *See also* note 19 *supra.*

45. NLRB, Supplemental Memo to the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, DAILY LAB. REP. No. 201, Oct. 14, 1968 at x-6.

However, under certain circumstances an employer, by engaging in unfair labor practices (8(a)(1) and 8(a)(3) employer activities) may make a free and fair election impossible. In this situation the authorization card route to majority status is more reliable than an election, and an order to the employer to bargain is the appropriate remedy. This is because the employer by his own acts has destroyed the preferred method of establishing a bargaining obligation.

There are also situations in which the employer's conduct is not an unfair labor practice, and so does not violate the Act, but is sufficiently disruptive of the election so that the Board must set the election aside. The Board then holds a "rerun" election. It has been argued by numerous authorities that these successive "rerun" elections do not deter the employers from future disruptive conduct, but that they do sap employee desire and endanger their job security.[46] Added to this is the fact that employer interference with the first election in most cases proves to be a successful tactic because in most rerun elections the union loses.[47] A good argument can be made that in these cases a bargaining order based on the card majority is necessary to prevent irreparable damage.[48]

PATRICK E. MURPHY

CRITERIA FOR DETERMINING CONSTITUTIONALITY OF ZONING ORDINANCES IN MISSOURI

Ewing v. City of Springfield[1]

Plaintiffs, owners of five contiguous tracts of land, instituted a declaratory judgment action to determine the validity of the zoning ordinance of Springfield, Missouri as applied to their property. The Springfield Court of Appeals held that the zoning classification of the subject property was discriminatory, arbitrary, and unreasonable. Furthermore, the court found that the classification had no substantial relationship to the public health, safety, or general welfare, the question being beyond fair debate.

The *Ewing* decision does not change the existing law or forge ahead into new areas; it is merely typical of zoning cases in general. It exhibits those characteristics, obstacles to analysis, which are common to the decisions in Missouri and most other jurisdictions. Despite these obstacles, there are roughly identifiable criteria applied by the courts.[2] This casenote will attempt to extract the criteria actually used by the Missouri courts in determining whether a zoning ordinance has become so confiscatory as to be unconstitutional as specifically applied to a particular parcel of land.

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46. *See generally* Sheinkman, *Recognition of Unions Through Authorization Cards*, 3 GA. L. REV. 319 (1969).

47. *See* Pollitt, *N.L.R.B. Re-run Elections: A Study*, 41 N.C.L. REV. 209 (1963).

48. *See* Sheinkman, *Recognition of Union Through Authorization Cards*, 3 GA. L. REV. 319, 331 (1969).

1. 449 S.W.2d 681 (Spr. Mo. App. 1970).

2. *See* note 5 *infra* and accompanying text.

The subject property is located on the south side of Sunshine Avenue. It is bordered by Pickwick Avenue to the west and Glenstone Avenue to the east. All the tracts were zoned R-3 (multi-family) to a depth of two hundred feet with four of the tracts zoned partially single family and partially two family beyond that depth.

To the south of the tracts is a residential area which abuts and is contiguous to them. There is no regular or vehicular access to the tracts from this residential area. To the east are a medical clinic and nineteen other parcels of land zoned C-2, which contemplates retail sales use. To the west of the subject property are fifteen tracts also classified C-2 for a distance of 1300 feet. Sunshine Avenue carries the traffic of United States highways 60 and 65 and Missouri Highway 160. The volume of traffic passing the subject property is increasing rapidly.

The plaintiffs sought to have the court declare the R-3 classification of a portion of their tracts unconstitutional on the grounds that the ordinance as applied to their property was discriminatory, arbitrary and capricious, and confiscatory. They also sought the court to declare that the tracts should properly have been rezoned C-2.

The city argued that each element of the plaintiffs' constitutional attack must be clearly demonstrated before the zoning ordinance could be held invalid with respect to a particular parcel of land. The court rejected this argument, saying each zoning case must be considered on its own facts and that no single factor is controlling.

The court found that this particular zoning arrangement constituted spot zoning,[3] but since spot zoning is not necessarily invalid,[4] the court said that the circumstances of the case must be further considered. The factors considered were:

> The use to which nearby property is put, and the authorized land usage or zoning of nearby property; the hardship imposed on the complaining landowner and the extent to which the value of his property is diminished; the effect which removal of the restriction would have on the value of other property in the area; and the relative gain to the public as compared to the hardships imposed on the property owner.[5]

Although the court noted that no single consideration was controlling, it found all of them to be favorable to the plaintiffs' case and held that the

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3. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 5.04 (1968) for a discussion of the various definitions of "spot zoning."

4. State ex rel. Christopher v. Matthews, 362 Mo. 242, 247, 240 S.W.2d 934, 937 (1951).

5. 449 S.W.2d at 689-90. This language comes from Robertson v. City of Salem, 191 F. Supp. 604, 609 (D. Ore. 1961), where the court said that:

> [a]mong the factors bearing upon a decision are the following: the character of the neighborhood; traffic conditions on adjacent streets, the use to which nearby property is put; the authorized land usage or zoning of nearby property; the extent to which the value of the complaining landowner's property is diminished; the effect which removal of restrictions would have on the value of other property in the area; and the relative gain to the public as compared to the hardship imposed upon the property owner.

R-3 zoning classification of the plaintiffs' tracts was discriminatory, arbitrary, unreasonable and confiscatory.[6]

Decisions dealing with a constitutional challenge to zoning ordinances as applied to a particular parcel of land are vaguely written and given little direction. A number of reasons have combined to create this unfortunate circumstance. Since the United States Supreme Court upheld the constitutionality of the concept of zoning in *Village of Euclid v. Ambler Realty Co.*,[7] it has abdicated the field.[8] Thus there are no authoritative, uniform guidelines for the constitutional problems involved. This would not be critical except for the fact that state courts have been less than successful in filling the void left by the Supreme Court.[9]

State courts simply have not written opinions which clearly articulate the constitutional tests based on the due process clause, and the prohibition against the confiscation of private property for public use without just compensation. Often, the Missouri courts have said that the "constitutional issue" amounts only to plaintiff's contention that the zoning ordinance has been applied incorrectly to his property.[10] The typical pattern of these decisions is to review the factors considered relevant, then conclude that the ordinance as applied to the subject property is, or is not, discriminatory, arbitrary and capricious, and confiscatory. This failure by the state courts may be rationalized to some extent, however, by the very nature of the zoning case itself. The zoning case must be based on its own peculiar facts and is, therefore, often of little value as precedent.[11]

> Whether the classification and enforcement of the ordinance is reasonable and constitutional or whether it is arbitrary and unreasonable and therefore unconstitutional depends upon a careful examination of the evidence and the facts and circumstances of each case.[12]

By way of introduction, it must be remembered that zoning is a legislative act.[13] The authority for the enabling legislation is the state's inherent police power.[14] Therefore, the court is not at liberty to substitute

6. The court also held that the ordinance was not invalid as applied to one of the plaintiffs, Safety Federal Savings and Loan Association. Because Safety Federal bought the property knowing of its restricted use, constructed a building conforming to that use, conducted its business with no intention of any other use, and did not contend that the ordinance was unreasonable as applied to itself, the court said it was estopped from challenging the constitutionality of the ordinance.

7. 272 U.S. 365 (1926).

8. *See* 13 Williams, ZONING DIGEST 57 (1961).

9. *See id.* at 67.

10. *See, e.g.*, Ewing v. City of Springfield, 449 S.W.2d 681, 684 (Spr. Mo. App. 1970); Huttig v. City of Richmond Heights, 372 S.W.2d 833, 844 (Mo. 1963); Wrigley Properties, Inc. v. City of Ladue, 369 S.W.2d 397, 398 (Mo. 1963); Landau v. Levin, 358 Mo. 77, 81, 213 S.W.2d 483, 484 (1948).

11. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.12 (1968).

12. City of Richmond Heights v. Richmond Heights Memorial Post Benevolent Ass'n, 358 Mo. 70, 74, 213 S.W.2d 479, 480 (1948). *See also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

13. Urnstein v. Village of Town and Country, 368 S.W.2d 390 (Mo. 1963).

14. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); State *ex rel.* Oliver Cadillac Co. v. Christopher, 317 Mo. 1179, 298 S.W. 720 (En Banc 1927), *error dismissed*, 278 U.S. 662 (1928).

its judgment for that of the legislature unless it appears that the ordinance is arbitrary and unreasonable.[15] And it must also be remembered that it is only the exceptional situation in which the constitutional challenge is successful.

Although it is not clear whether the cases are based on state or federal constitutional grounds,[16] constitutional principles form the outer limits of the state's police power. Moreover, the state may regulate only to the point at which there is still a substantial relationship to the public health, safety, morals or general welfare.[17] Past this point the individual's constitutional rights protect him from further encroachments. Thus an individual property owner's rights are not subject to restrictions "that are not directed towards a proper community purpose."[18] It is unfair to place great burdens upon the individual merely to retain zoning restrictions of relatively little benefit to the community.[19] The equal protection clause operates to provide individuals and groups with equal access to the uses of their property and to guard against "loose or discriminatory administration of the power to grant variances or special permits."[20]

Basically, the relevant criteria used in determining constitutionality are those considered by the court in *Ewing*.[21] Although the court listed the balancing of interests as the last of the factors to be considered, this test should be thought of as the framework within which the other factors are considered.[22] The public benefit which the ordinance is intended to confer is balanced against the hardship placed upon the individual property owner. If the balance is with the public or if the issue is fairly debatable, then the ordinance must be upheld.[23]

The first factor considered relevant by the Missouri courts is the basic character of the neighborhood and whether the classification of the subject property is consistent with the authorized uses of nearby property.[24] Thus

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15. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Allega v. Associated Theatres, Inc., 295 S.W.2d 849 (K.C. Mo. App. 1956).

16. In Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926), the United States Supreme Court said:

> The question is the same under both Constitutions (U.S. and Ohio), namely, as stated by appellee: Is the ordinance invalid in that it violates the constitutional protection 'to the right of property in the appellee by attempted regulations under the guise of the police power, which are unreasonable and confiscatory?'

Apparently, since this statement was made, no state court has bothered to specify under which constitution, state or federal, the violation occurred.

17. Nectow v. City of Cambridge, 277 U.S. 183, 187 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926); Huttig v. City of Richmond Heights, 372 S.W.2d 833, 843 (Mo. 1963).

18. *See* 13 Williams, Zoning Digest 58 (1961).

19. *Id.*

20. *Id.*

21. *See* note 5 *supra,* and accompanying text. It should be noted that within the basic framework of the balancing of interests test, the various criteria overlap.

22. Huttig v. City of Richmond Heights, 372 S.W.2d 833, 842 (Mo. 1963).

23. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926); Landau v. Levin, 358 Mo. 77, 82, 213 S.W.2d 483, 485 (1948). Although the burden of persuasion is beyond fair debate, there is a tendency by the courts to resolve debate short of that point. 1 R. Anderson, American Law of Zoning § 2.19 (1968).

24. Ewing v. City of Springfield, 449 S.W.2d 681 (Spr. Mo. App. 1970).

an ordinance restricting land to residential use in a residential area is a valid exercise of the police power.[25] Furthermore, the fact that "the ordinance establishes here and there small commercial districts . . . does not make it irrational or discriminatory."[26] Accordingly, the Springfield ordinance is not necessarily invalid as applied to the plaintiffs' tracts merely because neighboring or adjacent land is less restricted.[27]

A different result might obtain, however, where the basic character of the neighborhood is considered commercial. *Ewing* is such a case. The court found that the permitted residential use was inconsistent with the nearly total commercial complexion of the neighborhood.[28] The court may find the ordinance unreasonable where adjacent or nearby uses make the land unsuitable for residential use.[29] This result may be found even when the nearby land is in another municipality.[30]

A second criterion used by the court in balancing public and private interests is the extent to which the restriction works a hardship on the individual property owner. "The effect of a regulation which prevents all effective use is a confiscation."[31] Such a regulation is clearly more than a "temporary and reasonable restriction placed upon the land to promote the general welfare."[32] An important distinction in the type of hardship or loss to the property owner should be made. The potential loss due to refusal to rezone[33] the land for a use for which the property has a greater value is not as significant a factor as the loss to the existing value if the classification is maintained.[34] Accordingly, the Missouri Supreme Court upheld a residential classification under which the land had an existing value of $50,000 even though the value of the proposed commercal use was $450,000.[35] Nevertheless, as the court found in *Ewing*, there must be an appreciable loss of value for the ordinance to be held arbitrary and unreasonable.[36] A refusal to rezone which results in a loss through depreciation or prevents sale at a profit is not a controlling factor.[37]

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25. Urnstein v. Village of Town and Country, 368 S.W.2d 390, 392 (Mo. 1963).

26. State *ex rel.* Oliver Cadillac Co. v. Christopher, 317 Mo. 1179, 1195, 298 S.W. 720, 726 (En Banc 1927), *error dismissed,* 278 U.S. 662 (1928).

27. Deacon v. City of Ladue, 294 S.W.2d 616, 625 (St. L. Mo. App. 1956).

28. 449 S.W.2d 681, 690.

29. *See* Wrigley Properties, Inc. v. City of Ladue, 369 S.W.2d 397, 400 (Mo. 1963) where the court discussed the relevant cases.

30. Huttig v. City of Richmond Heights, 372 S.W.2d 833 (Mo. 1963).

31. *Id.* at 842.

32. Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 233, 15 N.E.2d 587, 592 (1938).

33. The doctrine of exhaustion of administrative remedies applies in zoning cases. The property owner requesting a rezoning of his property must go through the administrative hierarchy before he can seek relief in the courts. However, in court, the basis of his suit is the constitutional challenge to the ordinance and not the city's refusal to rezone.

34. Both of these factors, however, will be examined by the court.

35. Wrigley Properties, Inc. v. City of Ladue, 369 S.W.2d 397 (Mo. 1963).

36. 449 S.W.2d 681, 690.

37. Wrigley Properties, Inc. v. City of Ladue, 369 S.W.2d 397 (Mo. 1963); Flora Realty and Investment Co. v. City of Ladue, 362 Mo. 1025, 246 S.W.2d 771 (En Banc 1952).

A regulation is not unreasonable, therefore, merely because a landowner is not able to put his land to the highest and best use or to use his land for a specific desired purpose.[38] Accordingly the hardship imposed upon a landowner by a refusal to rezone his property, located near the Kansas City municipal sports stadium, for use as a parking lot in an area zoned for lodging and boarding houses, clubs, schools, fraternal orders, clinics, and offices for physicians and surgeons was held not unreasonable.[39] Likewise, the economic hardship suffered by a landowner because of a refusal to rezone his tract for one acre minimum area family residential use where the permitted use was three acre minimum lots was held to be not unreasonable.[40]

The effect of removal of the zoning restriction on the value of the other property in the area is another of the criteria in the basic framework. The *Ewing* court felt that commercial zoning of the property would produce no harmful effect on the residential property in the area.[41] Some readjustment of values is usually an incident of any zoning ordinance,[42] but where the reclassification of the property would work to the detriment of the surrounding area, refusal to rezone would be justified.[43] The reasonableness of a particular classification depends upon the requirements of the locality and "what would be reasonable one place might well be unreasonable in another."[44] Thus the court refused to rezone a tract as one acre single family residential in an area of three and five acre tracts because of the detrimental effect to the surrounding area.[45]

The Missouri courts have also viewed the effect of removal of the restriction from a broader perspective. A zoning classification may be upheld in situations in which it would otherwise be overturned were it not for the fact that it is part of and in the furtherance of a general plan designed to foster the ends of health, safety, morals, or general welfare although the restriction itself has no immediate relation to the health, safety, morals, or general welfare.[46] The St. Louis Court of Appeals has observed that such a comprehensive ordinance and its enforcement has a direct beneficial effect on the development values in certain areas.[47] Thus viewed, a refusal to rezone, far from merely suppressing offensive uses, operates, in some situations, to promote the general welfare.[48] This attitude is not inconsistent with the court's liberal attitude in overturning zoning restrictions in metro-

38. Downing v. City of Joplin, 312 S.W.2d 81, 85 (Mo. 1958).
39. Gould v. Kansas City, 316 S.W.2d 571 (Mo. 1958).
40. Flora Realty and Investment Co. v. City of Ladue, 362 Mo. 1025, 246 S.W.2d 771 (En Banc 1952).
41. 449 S.W.2d 681, 690.
42. Strandberg v. Kansas City, 415 S.W.2d 737 (Mo. En Banc 1967).
43. Gould v. Kansas City, 316 S.W.2d 571 (Mo. 1958).
44. Geneva Investment Co. v. City of St. Louis, 87 F.2d 83, 91 (8th Cir.), *cert. denied,* 301 U.S. 692 (1937).
45. Flora Realty and Investment Co. v. City of Ladue, 362 Mo. 1025, 246 S.W.2d 771 (En Banc 1952).
46. Women's Kansas City St. Andrew Soc'y v. Kansas City, 58 F.2d 593 (8th Cir. 1932).
47. Deacon v. City of Ladue, 294 S.W.2d 616, 622 (St. L. Mo. App. 1956).
48. Flora Realty and Investment Co. v. City of Ladue, 362 Mo. 1025, 1042, 246 S.W.2d 771, 780 (En Banc 1952).

politan areas.[49] Taken together, the court is more likely to uphold a zoning restriction on the ground that it is part of a comprehensive zoning plan designed to promote the general welfare in a residential area.

This proposition is supported by the suggestion that in considering the effect of the removal of the restriction the court looks at an element of intent on the part of the community. The courts seem to have given this factor considerable weight in three reported cases[50] involving Ladue,[51] a city described as "essentially one of fine homes and excellent schools and churches."[52] The St. Louis Court of Appeals recognized that the enforcement of Ladue's zoning ordinance has been responsible for the city's development and high property values.[53] It is the intent of the community, if indeed a community may demonstrate its intent, to remain almost totally residential. On the other hand, in invalidating an ordinance of the City of Richmond Heights, the Missouri Supreme Court concluded that

> the refusal to rezone this property is based primarily upon a desire to benefit (or conversely to refrain from possible injury to) the subdivision of Lake Forest, and that it does not constitute a matter of substantial city-wide interest.[54]

Further, the Eighth Circuit Court of Appeals has stated that "a lawful and ordinary use of property is not to be prohibited because repugnant to the sentiments of a particular class."[55]

The effect of the zoning classification on traffic conditions is another relevant factor. Where existing traffic conditions have made the land unsuitable for residential use, an ordinance restricting the land to that use may be confiscatory.[56] Such a condition combined with incompatible uses would

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49. Huttig v. City of Richmond Heights, 372 S.W.2d 833, 839 (Mo. 1963). The Missouri Supreme Court said:

> The Illinois courts seem to have been rather liberal in overturning zoning ordinances when considering their applicability to particular properties in the metropolitan districts. We are interested in these outside cases only to the extent that they may (and do in some instances) logically apply rules similar to ours to given and similar factual situations. Actually, the rules announced by the Illinois courts are almost identical to ours.

This liberal attitude of overturning zoning restrictions in metropolitan areas and the court's inclination to enforce comprehensive plans in certain situations are not all inconsistent. Obviously, they are not both applied in the same case. It depends on the facts of the particular case which attitude will naturally apply to those facts.

50. Wrigley Properties, Inc., v. City of Ladue, 369 S.W.2d 397 (Mo. 1963); Deacon v. City of Ladue, 294 S.W.2d 616 (St. L. Mo. App. 1956); Flora Realty and Investment Co. v. City of Ladue, 362 Mo. 1025, 246 S.W.2d 771 (En Banc 1952).

51. The City of Ladue is located directly west of St. Louis City in Saint Louis County. In 1956, Ladue had a total area of 5000 acres of which 15.22 acres were zoned for commercial use. It is almost totally single family residential.

52. Deacon v. City of Ladue, 294 S.W.2d 616, 618 (St. L. Mo. App. 1956).

53. *Id.* at 622.

54. Huttig v. City of Richmond Heights, 372 S.W.2d 833, 842 (Mo. 1963).

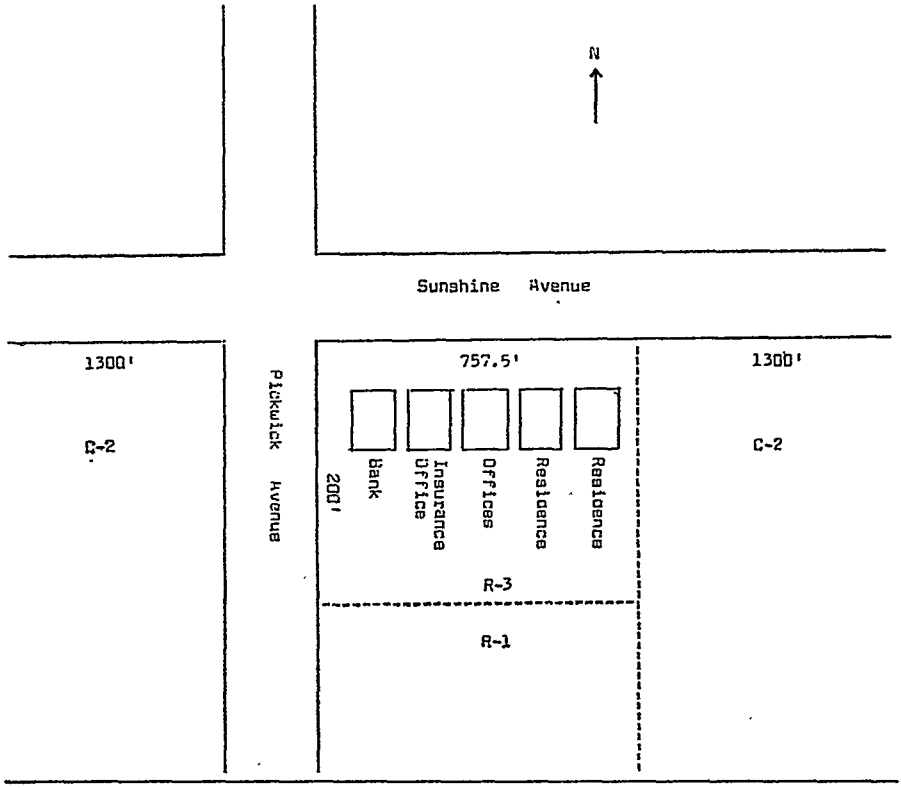
55. Women's Kansas City St. Andrews Soc'y v. Kansas City, 58 F.2d 593, 603 (8th Cir. 1932).

56. Franz v. Village of Morton Grove, 28 Ill. 2d 246, 190 N.E.2d 790 (1963); Rockdale Construction Corp. v. Village of Cedarhurst, 94 N.Y.S.2d 601 (1949), *aff'd* 275 App. Div. 1043, 91 N.Y.S.2d 926, *aff'd* 301 N.Y. 519, 93 N.E.2d 76 (1950).

amount to a confiscation.[57] In *Ewing*, the court drew a distinction between the amount of traffic which would be generated by a zoning change and that which may be characterized as through traffic.[58] The amount generated by the change is the more important factor.[59] Thus, in light of the heavy through traffic on Sunshine Avenue the court found that the relative increase in the amount of traffic which a rezoning would generate to be "relatively insignificant."[60] On the other hand, a refusal to rezone from three acre minimum tracts to one acre minimum tracts was upheld, in part, because the potential increase in traffic would congest the small country roads leading to the area.[61]

Although these criteria are discernible from the opinions of the courts, their basis in law is still unclear. It is suggested that the Missouri courts have a fairly unique opportunity in this field because of the abdication of the United States Supreme Court. The Missouri Supreme Court should develop and articulate a creative position for itself in the growing field of zoning law.

MARVIN TOFLE



57. Del Buono v. Board of Zoning Appeals, 143 Conn. 673, 124 A.2d 915 (1956); Taylor v. Haverford Township, 299 Pa. 402, 149 A. 639 (1930).
58. 449 S.W.2d 681, 691.
59. *Id.*
60. *Id.*
61. Flora Realty and Investment Co. v. City of Ladue, 362 Mo. 1025, 246 S.W.2d 771 (En Banc 1952).