CORPORATIONS: CONFIDENTIAL, TENTATIVE STUDIES HELD NOT TO BE CORPORATE "BOOKS" UNDER SHAREHOLDER INSPECTION STATUTE

IN *State ex rel. Jones v. Ralston Purina Co.*,[1] the Supreme Court of Missouri recently held that tentative corporate studies in the nature of confidential inter-office communications prepared solely for the information of management were not within a shareholder's statutory right of inspection as corporate "books."

Relying upon the Missouri shareholder inspection statute,[2] plaintiff sought to inspect Ralston Purina's preliminary profit and loss statement, its monthly profit analysis, and its detailed tentative balance sheet.[3] The request was denied and plaintiff petitioned for a writ of mandamus to compel the corporation to permit inspection. He also sought to enforce the statutory forfeiture of $250 against the corporate officer who refused to honor his inspection request. The trial court determined that the documents were not "books" within the meaning of the inspection statute, and thus denied both of the shareholder's prayers.[4] The St. Louis Court of Appeals held,[5] to

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[1] 358 S.W.2d 772 (Mo. 1962).

[2] MO. ANN. STAT. § 351.215 (1949). The statute provides:

"1. Each corporation shall keep correct and complete books and records of account and shall also keep minutes of the proceedings of its shareholders and board of directors; and shall keep at its registered office or principal place of business in this state books in which shall be recorded the number of shares subscribed, the names of the owners of the shares, the numbers owned by them respectively, the amount of shares paid, and by whom, the transfer of said shares with the date of transfer, the amount of its assets and liabilities, and the names and places of residence of its officers, which books shall be kept open for the inspection of all persons interested. Each shareholder may at all proper times have access to *the books of the company,* to examine the same, and under such regulations as may be prescribed by the by-laws. (Emphasis added.)

"2. If any officer of a corporation having charge of the books of the corporation shall, upon the demand of a shareholder, refuse or neglect to exhibit and submit them to examination, he shall, for each offense, forfeit the sum of two hundred and fifty dollars."

[3] Ralston Purina's preliminary profit and loss statement is a summary of the activities of the many departments and divisions of the corporation. The monthly profit analysis showed the tonnage and production of the divisions, the breakdown of all expenses, and the profit or loss for any given month for the various products. The tentative balance sheet is more detailed than the regular company balance sheet. 358 S.W.2d at 774. The petitioner, a retired employee as well as shareholder of the corporation, had been able to see and inspect the documents in question while employed by the corporation, and he sought to continue such inspection subsequent to retirement. *Id.* at 773.

[4] *Id.* at 776.

[5] State *ex rel.* Jones v. Ralston Purina Co., 343 S.W.2d 631, 640 (Mo. App. 1961).

the contrary, that the documents were "books" within the meaning of the statute, since the information contained in them would enable the shareholder better to understand the affairs of the corporation and thus to protect his interests. The Supreme Court of Missouri, considering the case on transfer,[6] however, sustained the decision of the trial court.

Before enactment of shareholder inspection statutes such as the Missouri statute involved in the *Ralston Purina* case, the American common law had recognized that, because he is an owner, every shareholder has the right at reasonable times and places to inspect the books and papers of the corporation.[7] In order to exercise his right, however, a shareholder first has to show a proper purpose for inspection.[8] Historically, this condition precedent to the right of inspection allowed an opportunity for resistance by corporate officers to efforts by minority shareholders to exercise their inspection privilege. This resistance became so notorious and so successful[9] that toward the end of the nineteenth century, legislatures throughout the United States found it advisable to enlarge the right of inspection by making it absolute.[10] Notwithstanding this experience and

[6] The respondent corporation based its application for transfer on Mo. CONST. art. V, § 10 which allows transfer of a case to the state's high court because of the general interest or importance of a question involved in the case, or for the purpose of re-examining the existing law. Respondents' Application for Transfer to the Supreme Court of Missouri, p. 6.

[7] See, *e.g.*, Guthrie v. Harkness, 199 U.S. 148 (1905); Otis-Hidden Co. v. Scheirich, 187 Ky. 423, 219 S.W. 191 (1920); Klotz v. Pan-American Match Co., 221 Mass. 38, 108 N.E. 764 (1915); William Coale Development Co. v. Kennedy, 121 Ohio St. 582, 170 N.E. 434 (1930).

[8] *E.g.*, News-Journal Corp. v. State *ex rel.* Gore, 136 Fla. 620, 187 So. 271 (1939); Lehman v. National Benefit Ins. Co., 243 Iowa 1348, 53 N.W.2d 872 (1952); Albee v. Lamson & Hubbard Corp., 320 Mass. 421, 69 N.E.2d 811 (1946); Bank of Giles County v. Mason, 199 Va. 176, 98 S.E.2d 905 (1957). See also Estate of Bishop v. Antilles Enterprises, Inc., 252 F.2d 498 (3d Cir. 1958).

[9] See State *ex rel.* Watkins v. Donnell Mfg. Co., 129 Mo. App. 206, 210, 107 S.W. 1112, 1113 (1908).

[10] See Crouse v. Rogers Park Apartments, Inc., 343 Ill. App. 319, 322, 99 N.E.2d 404, 405-06 (1951); 2 HORNSTEIN, CORPORATION LAW AND PRACTICE § 611 (1959).

For example, a statute providing that certain books and records are subject to inspection by the shareholders enlarges the common law right pertaining to those particular books by making the right unqualified, thus entitling a shareholder to the aid of the court to secure the inspection without first showing a proper purpose. See, *e.g.*, Loveman v. Tutwiler Inv. Co., 240 Ala. 424, 199 So. 854 (1941); Lehman v. National Benefit Ins. Co., 243 Iowa 1348, 53 N.W.2d 872 (1952); State *ex rel.* McClure v. Malleable Iron Range Co., 177 Wis. 582, 187 N.W. 646 (1922).

However, the courts of some states have construed their statutes to be declaratory of or a re-enactment of the common law right. See State *ex rel.* O'Hara v. National Biscuit Co., 69 N.J.L. 198, 54 Atl. 241 (Sup. Ct. 1903); Lauer v. Bayside Nat'l Bank, 244 App. Div. 601, 280 N.Y. Supp. 139 (1935); Hagy v. Premier Mfg. Corp., 404 Pa. 330, 172 A.2d 283 (1961).

the resulting legislative response, the general trend of recent acts has been, as at common law, to require a shareholder to show a proper purpose reasonably related to his interests before he may invoke the statutory right of inspection.[11] Moreover, the courts of some states whose statutes ostensibly confer an absolute right are reluctant to recognize so unqualified a right. Accordingly, they hold that, although the statutory right of inspection is absolute, issuance of a writ of mandamus is still discretionary with the court, conditional upon the showing of proper purpose.[12] In such cases, of course, an improper purpose is an affirmative defense which must be raised and proved by the corporation.[13]

The scope of the right granted by inspection statutes has been construed differently in various jurisdictions. At common law, once the shareholder has discharged his burden of showing a specific interest and proper purpose, his right of inspection is very broad. Corporate "books" at common law customarily includes all books, papers, and records generally (including books of account, contracts, federal reports, other data of the corporation concerning assets, liabilities, contracts, operations, and practices).[14] It has even been held to encompass correspondence between the controlling officers pertaining to the internal affairs of the corporation.[15] Unlike the broad definition of "books" at common law, however, the statutory scope of "books" is dependent on two variables: the language of the statute, and the judicial interpretation of the right conferred thereunder. If the statute does not specifically mention certain books, the scope is viewed to be co-extensive with that at common law, thus making absolute the shareholder's inspection rights to all books and papers from which he can derive any information that will

[11] A provision of this type is recommended in ABA-ALI MODEL BUS. CORP. ACT § 46 (1953). See, *e.g.*, CAL. CORP. CODE § 3003; ILL. ANN. STAT. ch. 32, § 157.45 (Smith-Hurd 1954); OHIO REV. CODE ANN. § 1701.37 (C) (Page Supp. 1962).

A case applying the Illinois statute is Morris v. Broadview, Inc., 385 Ill. 228, 52 N.E.2d 769 (1944). See Rutledge, *Significant Trends in Modern Incorporation Statutes*, 22 WASH. U.L.Q. 305, 331-33 (1937).

[12] See, *e.g.*, Foster v. White, 86 Ala. 467, 6 So. 88 (1889); State *ex rel.* Theile v. Cities Serv. Co., 31 Del. (1 W.W. Harr.) 514, 115 Atl. 773 (1922); White v. Manter, 109 Me. 408, 84 Atl. 890 (1912); Weinhenmayer v. Bitner, 88 Md. 325, 42 Atl. 245 (1898). *Contra*, Venner v. Chicago City Ry., 246 Ill. 170, 92 N.E. 643 (1910); *In re* Steinway, 159 N.Y. 250, 53 N.E. 1103 (1899).

[13] See note 12 *supra*.

[14] See Kemp v. Sloss-Sheffield Steel & Iron Co., 128 N.J.L. 322, 26 A.2d 70 (Sup. Ct. 1942).

[15] See Otis-Hidden Co. v. Scheirich, 187 Ky. 423, 219 S.W. 191 (1920).

enable him better to protect his interests.[16] If, on the other hand, the statute enumerates certain books,[17] it is interpreted judicially in one of two ways.

Some courts construe the statutes literally, allowing inspection rights to encompass only the books specifically enumerated in the statute.[18] Statutes so construed, therefore, are of limited scope, making absolute the shareholder's common law right only as to those particular books mentioned. But these courts, far from considering the statutes to be exclusive, generally hold that the common law right obtains as to the books and records not specified or included within the statutory provision. Thus, by literal construction, the shareholder has a certain and expeditious means of securing inspection within the limited scope of the statute and retains his less expeditious common law right for those documents not within the statute. Other courts, however, construe the statutes liberally, holding that the right extends to such books and records as are reasonably comprehended within the terms and intendment of the statutory specification, even though the books and records are not specifically enumerated in the statute.[19]

Prior to *Ralston Purina,* the Supreme Court of Missouri had neither ruled directly on a common law inspection right, nor construed the Missouri statute affording inspection rights to shareholders, though it had recognized the existence of a right of inspection in cases involving other issues.[20] The lower appellate courts of Missouri, while holding the general common law right of inspection to be available,[21] had construed the nature of the statutory right

[16] See, *e.g.,* Rulon v. Silverman, 79 Colo. 525, 246 Pac. 788 (1926); Stone v. Kellogg, 165 Ill. 192, 46 N.E. 222 (1896); Lewis v. Brainerd, 53 Vt. 519 (1881); State *ex rel.* McClure v. Malleable Iron Range Co., 177 Wis. 582, 187 N.W. 646 (1922).

[17] *E.g.,* CAL. CORP. CODE § 3003 (share register, books of account, and minutes of proceedings); DEL. CODE ANN. tit. 8, § 220 (1953) (stock ledger); ILL. ANN. STAT. ch. 32, § 157.45 (Smith-Hurd 1954) (books and records of account, minutes, record of shareholders); N.Y. BUS. CORP. LAW § 624 (shareholders' record and minutes of proceedings).

[18] See, *e.g.,* State *ex rel.* Costello v. Middlesex Banking Co., 87 Conn. 483, 88 Atl. 861 (1913); State *ex rel.* Cochran v. Penn-Beaver Oil Co., 34 Del. (4 W.W. Harr.) 81, 143 Atl. 257 (1926); *In re* Steinway, 159 N.Y. 250, 53 N.E. 1103 (1899).

[19] See Ontjes v. Harrer, 208 Iowa 1217, 227 N.W. 101 (1929); State *ex rel.* McClure v. Malleable Iron Range Co., 177 Wis. 582, 187 N.W. 646 (1922).

[20] See, *e.g.,* Bromschwig v. Carthage Marble & White Lime Co., 334 Mo. 319, 328, 66 S.W.2d 889, 893 (1933); Union Nat'l Bank v. Hunt, 76 Mo. 439, 445 (1882).

[21] "The right of a stockholder to examine and inspect all the books and records of a corporation at all seasonable times and to be thereby informed of the condition of the corporation and its property is a common-law right. . . . And the existence of this right under the common law has been fully recognized in this state." State *ex rel.* Doyle v. Laughlin, 53 Mo. App. 542, 546 (1893). "When the right does not

to be absolute and vested in all shareholders.[22] However, these courts had failed to establish conclusively whether, under the statute, a writ of mandamus could be denied if the defense of improper purpose were successfully raised by the corporation.[23]

The statutory scope of corporate "books," as distinct from the nature of the right to inspect them, had been defined in only one Missouri case before the *Ralston Purina* decision.[24] The St. Louis

rest on a statute, it is not absolute . . . ." State *ex rel.* Johnson v. St. Louis Transit Co., 124 Mo. App. 111, 118, 100 S.W. 1126, 1128 (1907).

Accord, State *ex rel.* Holmes v. Doe Run Lead Co., 178 S.W. 298 (Mo. App. 1915); State *ex rel.* Haeusler v. German Mut. Life Ins. Co., 169 Mo. App. 354, 152 S.W. 618 (1912); State *ex rel.* English v. Lazarus, 127 Mo. App. 401, 105 S.W. 780 (1907).

[22] In State *ex rel.* Wilson v. St. Louis & San Francisco Ry., 29 Mo. App. 301, 307 (1888), the court stated: "The statute . . . gave the relator a right to the inspection claimed; and where a party has a legal right to a thing, the motive which may prompt him in demanding his right is not the proper subject of a judicial investigation." The court also stated, in State *ex rel.* Spinney v. Sportsman's Park & Club Ass'n, 29 Mo. App. 326, 331 (1888), that "where the right is clear, the fact that the information sought to be obtained might be used for improper purposes is wholly immaterial."

Accord, State *ex rel.* Watkins v. Cassell, 294 S.W.2d 647, 651 (Mo. App. 1956) (statute confers right of inspection in absolute terms); State *ex rel.* Holmes v. Doe Run Lead Co., *supra* note 21, at 300 (statute vouchsafes right which is ordinarily regarded as absolute); State *ex rel.* Haeusler v. German Mut. Life Ins. Co., *supra* note 21; State *ex rel.* Johnson v. St. Louis Transit Co., *supra* note 21; State *ex rel.* English v. Lazarus, *supra* note 21.

See generally Hocker, *Stockholder's Right to Inspect Corporate Books and Records in Missouri,* 8 J. Mo. B. 100 (1952); Winger, *Stockholder's Right to Inspect Corporate Books and Records in Missouri,* 4 J. Mo. B. 133 (1948).

[23] In the *Doe Run* case, *supra* note 22, at 300-01, the court, after noting that an inspection statute such as the one involved here "vouchsafes to a stockholder a right which is ordinarily regarded as absolute," stated that a court could refuse to issue a writ of mandamus, which is discretionary in nature, if it felt that the purpose of the inspection request was detrimental to the interests of the corporation.

The *Doe Run* dictum was quoted by the court in State *ex rel.* Manlin v. Druggists' Addressing Co., 113 S.W.2d 1061, 1065 (Mo. App. 1938), but that case was technically decided on other grounds.

On the basis of these cases, it has been contended that, while Missouri still recognizes the statutory right of inspection as absolute and unqualified as a substantive rule of law, the courts have whittled away its absolute character through the exercise of discretion in issuing the writ of mandamus. See Winger, *supra* note 22, at 130.

An opposing point of view is that the *Doe Run* and *Druggists' Addressing Co.* cases did not affect the absolute and unqualified nature of the statutory inspection right, even as to the issuance of the writ of mandamus for a proper purpose, because these cases are not genuine holdings on the point. But even if the cases did make the right less absolute, it is further contended that, by enactment of § 351.215 in the 1943 statute, the legislature repudiated the qualification. See Hocker, *supra* note 22.

As a further complication of the issue, the St. Louis Court of Appeals later stated that a court may refuse to grant a writ of mandamus if it appears that inspection is sought for an evil, improper, or unlawful purpose. However, the court granted the writ even though the shareholder was seeking inspection for at least questionable reasons. State *ex rel.* Watkins v. Cassell, *supra* note 22.

The Supreme Court of Missouri did not utilize its opportunity to clarify the law on this question in the instant case. See note 30 *infra.*

[24] *Cf.* State *ex rel.* Smalley v. Sterns Tire & Tube Co., 202 S.W. 459, 460 (Mo. App.

Court of Appeals in *State ex rel. Watkins v. Cassell*[25] interpreted the term broadly by holding that both the common law and statutory right of inspection extended to "all books, records, papers, contracts or other instruments which will enable the stockholder better to protect his interest and perform his duties as a stockholder." This same court heard *Ralston Purina* on intermediate appeal and reversed the trial court's dismissal in reliance on its holding in the *Cassell* case.[26] The supreme court rejected the *Cassell* interpretation concerning the scope of the statute and held that, while the shareholder's right was absolute, the definition of "books" was limited to those books which were required by law to be kept.[27] The court failed to state its reasons for choosing the strict rather than the liberal construction of the statute, but its reasons can be ascertained by considering the effect of each of the three alternatives which were available to the court.

The court could have held the statutory scope of "books" to be co-extensive with that at common law. However, a liberal, all-inclusive definition of the term, coupled with an absolute statutory right to inspect, would afford no protection whatsoever against a shareholder desiring to inspect the books for purposes harmful to the company. The court was obviously concerned about the confidential nature of the documents and the harmful effects to the corporation that could result if the information they contained were obtained by the wrong persons.[28] Therefore, by its express

1918), where the appellate court did indicate that the statute means *all* "books" of the corporation, but without defining what was included in the term "books."

[25] 294 S.W.2d 647, 652 (Mo. App. 1956).

[26] State *ex rel.* Jones v. Ralston Purina Co., 343 S.W.2d 631, 640 (Mo. App. 1961).

[27] Books required to be kept by the first sentence in § 351.215, note 2 *supra*, are: a stock book, a book in which the amounts of its assets and liabilities are to be recorded, a book in which the names and residences of its officers are to be recorded, and books and records of account and minutes of the proceedings of its shareholders and boards of directors.

[28] As a preliminary to its holding that the documents in question are confidential inter-office communications and not "books," the court stated:

"The company considers the information contained in the documents so confidential and feels that the disclosure of it is potentially of such danger to the company that even the top officials and directors do not retain their copies, but after being reviewed by them all copies are collected by and retained in the comptroller's office." 358 S.W.2d at 774-75.

The corporation, while not believing, or having any reason to believe, that this shareholder would make any improper use of the information he might gain, still did not want to be compelled to show him the documents. The corporation argued that if it were compelled to do so in this case, it would likewise be required to allow inspection by other shareholders, including some who *might* use the information gained to harm the other shareholders of the corporation. 343 S.W.2d at 634.

rejection of the broad construction,[29] the court apparently desired to protect the interests of the other shareholders and of the corporation itself from such possible abuses.

The second alternative open to the court was to hold that although the right of inspection was absolute and co-extensive with the common law right, issuance of a writ of mandamus to enforce the right is discretionary with the court and may be denied in certain circumstances. Thus the court could interpose itself to protect the corporation and the other shareholders from abuse of the privilege. The court made no response to this alternative,[30] which, though affording flexibility in the application of the statutory right, would provide no predictable standard and would place the burden of showing abusive intent on the corporation. Also, at least theoretically, it could bring about an anomalous result under the Missouri statute.[31]

The last alternative, to hold that the statutory scope of "books" is limited to those specifically enumerated in the statute, was, as we have seen, selected by the court. One might justifiably criticize this construction if he adheres solely to the rationale that a shareholder should be able to inspect the books and papers that *he* owns to learn about the affairs of the corporation that *he* owns. By this view, the decision in *Ralston Purina,* at best, makes the shareholder's right to inspect records and documents not enumerated in the statute slower and more difficult, and, at worst, denies it altogether.[32] But of equal importance with the right of each individual shareholder to know about the affairs of *his* corporation, is the right of all the other shareholders and the corporation to have *their* interests pro-

[29] 358 S.W.2d at 777.

[30] Respondents' counsel, presumably seeking resolution of the disagreement among the authorities, discussed in note 23 *supra,* concerning whether a Missouri court may deny the writ of mandamus to compel statutory inspection if the corporation proves the shareholder's improper purpose, specifically requested the supreme court to decide this issue. "[I]t is of general interest and of great importance to [corporations and their shareholders] . . . that they also be informed by an informative decision of this Court as to the principles which should be followed by the lower courts in granting or denying a writ of mandamus in cases such as this and the basis for review of such actions above." Respondents' Brief, pp. 60-61.

[31] Since the statute not only requires inspection of the books, but also provides for a monetary forfeiture, enforcement of which is not discretionary, against the corporate officer denying such right, a court applying this alternative could conceivably find itself in the position of denying a writ of mandamus to compel a corporation to allow inspection, but in the same case having to enforce a forfeiture against the corporation for refusing to produce the books for inspection.

[32] Such inspection would, of course, be denied only when the shareholder failed to sustain the burden of showing a proper purpose as required by the common law.

tected. A judicial application of the inspection statute should certainly strive to accommodate each of the two considerations.

The decision in *Ralston Purina* seems to have achieved a fairly equitable resolution between individual interests and the interests of other shareholders and the corporation. The court accomplished this result by rejecting the liberal construction of statutory corporate "books," and acknowledging that statutory and common law inspection involve separate and distinct rights by impliedly recognizing the availability of the broader common law right of inspection to petitioners who properly invoke it.[33] *Ralston Purina* thus allows the shareholder an unqualified right to inspect the books named in the statute, impliedly recognizes his common law right to inspect the other corporate records and documents, and still offers protection to the remaining shareholders and to the corporation from the abuses which might result if unqualified inspection of all the corporate documents and papers were allowed. For these reasons, the decision limiting the statutory scope of corporate "books" provides a sound policy result.

[33] "The petition for the alternative writ invoked and was based solely upon that statute, and the case having been heard and determined in the trial court on that theory, it will be reviewed here on the same theory. . . . This effectively forecloses consideration of any question with reference to relator's common law right of inspection, there being no such issue in the case." 358 S.W.2d at 775-76.

For comprehensive discussion of the common law and statutory inspection rights, see FLETCHER, PRIVATE CORPORATIONS §§ 2213-57 (perm. ed. rev. repl. 1952); Annots., 22 A.L.R. 24 (1923); 43 A.L.R. 783 (1926); 59 A.L.R. 1373 (1929); 80 A.L.R. 1502 (1932); 174 A.L.R. 262 (1948).