

## **Answer Must Be Verified as to All But Self-Incriminating Matter When Complaint Has Been Properly Verified**

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—*The Hearst Corp. v. Vanderbilt*,<sup>135</sup> motivated by the liberal approach of the CPLR, as reflected in section 3026, and the manifest importance of time in the particular case, held that such defective verification was excusable under the circumstances.

In that case, plaintiff sought a temporary injunction against picketing pending trial of a claim for a permanent injunction. Defendant moved to dismiss on the ground that the complaint was defectively verified, *i.e.*, the attorney who verified did not have "actual knowledge of portions of the contents." The court acknowledged that "formal application" would require a dismissal and yet refused to dismiss. The court extended the liberal construction required of pleadings by section 3026 to the defective verification of a complaint, where there is no substantial prejudice to the defendant and where, as here, time is of the essence.

This court has further emasculated the already weak verification process. The value of this decision will not be assessed here since there is a plethora of information dealing with the virtues of verification.<sup>136</sup> Suffice it to note that now, in addition to the failure of district attorneys to prosecute for fraudulent verification, the courts, or at least the court in the instant case, will ignore a factor basic to verification—knowledge of the facts—and thus render verification little more than certification.

*Answer must be verified as to all but self-incriminatory matter when complaint has been properly verified.*

Another problem of verification arose in the Supreme Court of Erie County. In *Knight v. Maybee*<sup>137</sup> the action was one for damages arising from an accident between a truck, in which plaintiff was a passenger, and a car operated by defendant. Plaintiff's verified complaint alleged that defendant was driving while drunk and was found guilty of that crime in a criminal proceeding.<sup>138</sup>

Defendant's motion to strike out the paragraphs pertaining to his conviction was denied. He then served an unverified answer denying several allegations but remaining silent on those he found objectionable. Defendant moved to force plaintiff to accept his answer. In denying defendant's motion, the court indicated that the defendant must serve an answer verified as to those matters on which he "would not be privileged from testifying on the ground of self-incrimination."

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<sup>135</sup> 44 Misc. 2d 542, 254 N.Y.S.2d 309 (Sup. Ct. 1964).

<sup>136</sup> For a suggestion that all pleadings be verified see 6 N.Y. JUD. COUNCIL REP. 46 (1940), 7 N.Y. JUD. COUNCIL REP. 42-43 (1941). For an indication that verification has lost most of its value see 7B MCKINNEY'S CPLR 3020, *supp.* commentary 72 (1964).

<sup>137</sup> 44 Misc. 2d 152, 253 N.Y.S.2d 59 (Sup. Ct. 1964).

<sup>138</sup> In fact, defendant had an appeal pending from that conviction.

This case has its significance in the illustration of the difference between CPLR 3020(a) and its predecessor, Section 248 of the CPA. The wording of section 248 caused the courts to conclude that where there was any matter in a complaint to which defendant was exempt from pleading in his answer (in this case an incriminating passage regarding defendant's drunken state) his whole answer did not have to be verified.<sup>139</sup> CPLR 3020(a) has modified the former provision. The CPLR indicates that where a pleading is verified all subsequent pleadings must be verified except "as to matter in the pleading concerning which the party would be privileged from testifying as a witness." Hence, the court held that defendant must verify those parts of his pleadings not referring to his conviction for drunken driving; while under Section 248 of the CPA the whole answer would not have needed verification.

*CPLR 3013: Demand for equitable relief not fatal to complaint if facts alleged merely show basis for legal relief.*

Despite the clear intent of previous code sections to effect a merger of law and equity,<sup>140</sup> courts seemed reluctant to give full effect to that purpose. Instead, courts required that a complaint conform to a "theory of the pleadings," thereby necessitating a distinction between equity and law actions at the pleading stage.<sup>141</sup> While CPLR 103(a), which is identical with previous code sections abolishing distinctions between law and equity,<sup>142</sup> could not accomplish such change itself, the combined effect of two other sections, CPLR 3013 and CPLR 3026, is to remove the main judicial stumbling blocks to the effective merger of law and equity.

In *Lane v. Mercury Record Corp.*,<sup>143</sup> an action to compel an accounting of royalties claimed under a recording contract, the appellate division, affirming, held that a demand for equitable relief alone was not fatal to the complaint even though it was determined that plaintiff was entitled only to money damages for breach of contract. The court found the complaint sufficient<sup>144</sup> under CPLR 3013 since the statements were particular enough to give defendant notice of the transactions intended to be proved

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<sup>139</sup> "Verification may be omitted . . . where the party . . . would be privileged from testifying as a witness concerning an allegation or denial contained in the pleading."

<sup>140</sup> N.Y. CODE OF CIV. PROC. § 62; CPA § 8.

<sup>141</sup> See, e.g., *Terner v. Glickstein & Terner, Inc.*, 283 N.Y. 299, 28 N.E.2d 846 (1940); *Jackson v. Strong*, 222 N.Y. 149, 118 N.E. 512 (1917).

<sup>142</sup> *Supra* note 140.

<sup>143</sup> 21 App. Div. 2d 602, 252 N.Y.S.2d 1011 (1st Dep't 1964).

<sup>144</sup> See *Foley v. D'Agostino*, 21 App. Div. 2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964).