

### Corporations--Derivative Action--Beneficial Owner Required to Post Security (Murdock v. Follansbee Steel Corp., 114 F. Supp. 690 (W.D. Pa. 1953))

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solution would be to amend the statute to require a showing of either conspiracy, as is now the rule, or parallel behavior *plus* the intent to restrain commerce.



CORPORATIONS—DERIVATIVE ACTION—BENEFICIAL OWNER REQUIRED TO POST SECURITY.—In a derivative action against a Delaware corporation and its directors, plaintiff sought damages for fraud, mismanagement and waste, and rescission of certain agreements. A Pennsylvania statute required a *holder* of less than five per cent of any class of outstanding stock to post security for reasonable litigation expenses.<sup>1</sup> Defendant moved pursuant to this statute, to require the plaintiff, the conceded *beneficial holder* of five per cent of stock, to furnish such security. In granting the motion, the Court *held* that by *holder* of five per cent, the statute meant holder of *record*. *Murdock v. Follansbee Steel Corp.*, 114 F. Supp. 690 (W.D. Pa. 1953).

Since all shareholders are, in the final analysis, damaged by a wrong to the corporation, and since individual suits would be impractical, equity afforded relief in the form of a stockholders' derivative suit.<sup>2</sup> This remedy was long the chief deterrent to fraudulent corporate management.<sup>3</sup> The suit is available only where a cause of action has accrued to the corporation, which, after proper demand, the directors fail to prosecute.<sup>4</sup> Although damages, in the first instance, inure to the corporation,<sup>5</sup> they may benefit the shareholder by way of increased dividends and serve to protect his investment.<sup>6</sup>

Instances of abuse, however, were not uncommon.<sup>7</sup> Unfounded

<sup>1</sup> PA. STAT. ANN. tit. 12, § 1322 (Purdon, 1953). The Pennsylvania statute was applied under the rule of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 554 (1949), wherein a similar New Jersey statute was applied to a Delaware corporation, in a derivative action brought in New Jersey.

<sup>2</sup> See *Continental Securities Co. v. Belmont*, 150 App. Div. 298, 302, 303, 134 N.Y. Supp. 635, 638, 639 (2d Dep't), *aff'd*, 206 N.Y. 7, 99 N.E. 138 (1912); *Hichens v. Congreve*, 4 Russ. 562, 576, 38 Eng. Rep. 917, 922 (Ch. 1828); BALLANTINE, CORPORATIONS § 145 (Rev. ed. 1946).

<sup>3</sup> See *Cohen v. Beneficial Industrial Loan Corp.*, *supra* note 1 at 548.

<sup>4</sup> See *Hawes v. Oakland*, 104 U.S. 450, 460 (1881).

<sup>5</sup> See *Isaac v. Marcus*, 258 N.Y. 257, 264, 179 N.E. 487, 489 (1932); *Smith v. Hurd*, 53 Mass. (12 Metc.) 371, 385 (1847).

<sup>6</sup> See BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 222 n.3 (1933).

<sup>7</sup> "A stockholder's derivative suit may be a useful agency or it may be grossly abused for purposes far removed from any desire to do a service to the corporation represented." *Weinberger v. Quinn*, 264 App. Div. 405, 409, 35 N.Y.S.2d 567, 572 (1st Dep't 1942), *aff'd mem.*, 290 N.Y. 635, 49 N.E. 2d 131 (1943); see *Continental Securities Co. v. Belmont*, 83 Misc. 340, 343, 144 N.Y. Supp. 801, 804 (Sup. Ct. 1913), *aff'd*, 168 App. Div. 483, 154 N.Y. Supp. 54 (2d Dep't 1915), *aff'd mem.*, 222 N.Y. 673, 119 N.E. 1036 (1918).

suits were brought for their nuisance value, to harass directors into private settlements.<sup>8</sup> Litigation also resulted from shareholder-attorney agreements wherein suits were solicited to earn attractive legal fees, with a total disregard for the corporate well-being.<sup>9</sup> The problem was further aggravated by decisions which cast doubt upon the directors' right to reimbursement from the corporation after successfully defending such actions.<sup>10</sup> State legislators, therefore, were confronted with the two-fold problem of curtailing extortionate corporate litigation without stifling legitimate claims.<sup>11</sup>

To solve these problems, "security for expenses" statutes were enacted.<sup>12</sup> The benefit to be derived from successful litigation was considered indicative of one's good faith. Shareholders of less than a statutory minimum, whose anticipated benefit was negligible, were presumed to be activated by ulterior purposes and discouraged from bringing the suit by the requirement of posting security for corporate litigation expenses.<sup>13</sup>

Why the Court, in the instant case, decided that ownership of the statutory minimum had to be of record, does not clearly appear. The Court apparently relied upon the fact that registration of stock constitutes continuing notice to the corporation of plaintiff's ownership. Therefore, if at any time before judgment that ownership falls below the statutory minimum, the corporation may require security.

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For an extensive discussion of "strike suits," see Note, 34 COL. L. REV. 1308 (1934).

<sup>8</sup> See Note, 34 COL. L. REV. 1308 n.1 (1934).

<sup>9</sup> See WOOD, SURVEY AND REPORT REGARDING STOCKHOLDERS' DERIVATIVE SUITS 57 (N.Y. Chamber of Commerce 1944). See also *Winkelman v. General Motors Corp.*, 48 F. Supp. 504, 514 (S.D.N.Y. 1942), *aff'd sub. nom. Singer v. General Motors Corp.*, 136 F.2d 905 (2d Cir. 1943) (attorneys' fees totalled nearly one million dollars).

<sup>10</sup> Compare *New York Dock Co. v. McCollum*, 173 Misc. 106, 16 N.Y.S.2d 844 (Sup. Ct. 1939), with *Solimine v. Hollander*, 129 N.J. Eq. 264, 19 A.2d 344 (Ch. 1941). See Washington, *Litigation Expenses of Corporate Directors in Stockholders' Suits*, 40 COL. L. REV. 431 (1940).

<sup>11</sup> See *Isensee v. Long Island Motion Picture Co.*, 184 Misc. 625, 629, 54 N.Y.S.2d 556, 559 (Sup. Ct. 1945); see Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 170, 190 (1936).

<sup>12</sup> See, e.g., N.Y. GEN. CORP. LAW § 61-b (holders of less than 5% of any class of outstanding stock or \$50,000 market value, may be required on defendant corporation's motion to furnish security for defendant's reasonable litigation expenses); CAL. CORP. CODE § 834 (Deering, 1953) (security requirement is determined by the court in a pre-trial hearing); PA. STAT. ANN. tit. 12, § 1322 (Purdon, 1953) (holders of less than five per centum of the outstanding shares of any class of stock may be required to furnish security on defendant's motion).

<sup>13</sup> See *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 552 (1949); *Noel Assoc., Inc. v. Merrill*, 184 Misc. 646, 655, 53 N.Y.S.2d 143, 152 (Sup. Ct. 1944); see Ballantine, *Abuses of Shareholders Derivative Suits: How Far is California's New "Security for Expenses" Act Sound Regulation?*, 37 CALIF. L. REV. 399, 403 (1949).

In addition, the Court defined stockholder as stockholder of record. Thus, without expressing an opinion, it impugned the right of the beneficial owner to qualify as a shareholder in order to bring the action in the first instance.<sup>14</sup> In so doing, the Court used cases which, with one exception,<sup>15</sup> are clearly distinguishable.<sup>16</sup> The discussion occupies the novel position of being not only against the weight of authority,<sup>17</sup> but even in apparent contradiction with the decision in the case itself. It would seem that a decision obligating the plaintiff to post security must necessarily imply his right to sue. If the Court entertained doubt as to that right, one cannot see why it required the plaintiff to go through the futile act of posting security.

Regardless of the *right* to sue, however, a security requirement, levied without regard to the extent of the beneficial owner's interest, has the practical effect of denying him access to the remedy of a derivative action. It is this precise feature of the California "security for expenses" statute that has been vigorously attacked.<sup>18</sup>

That security be required because of the technicality of record as opposed to non-record ownership, regardless of the extent of plaintiff's interest, seems to have no basis in logic or in the intention of the legislature. This technicality does not diminish the amount of plaintiff's stock. If the extent of his interest is in any way indicative, as the legislature thought it to be, this decision will discourage many legitimate suits. Restrictions on the right to maintain derivative ac-

<sup>14</sup> According to the Pennsylvania statute, it is merely necessary to allege that the ". . . plaintiff was a *stockholder* at the time of the transaction of which he complains, or that his stock devolved upon him by operation of law from a person who was a stockholder at such time." PA. STAT. ANN. tit. 12, § 1321 (Purdon, 1953) (emphasis added).

<sup>15</sup> Bankers National Corp. v. Barr, 7 F.R.D. 305 (S.D.N.Y. 1945).

<sup>16</sup> Schwartz v. The Olympic, Inc., 74 F. Supp. 800 (D. Del. 1947) (beneficial owner contested a merger); Salt Dome Oil Corp. v. Schenck, 41 A.2d 583 (Del. Sup. Ct. 1945) (beneficial owner sought appraisal); Lee v. Riefler & Sons, Inc., 43 F.2d 364 (M.D. Pa. 1930) (plaintiff was not the real owner of the stock but held it as collateral security).

<sup>17</sup> "For certain purposes, and for the enjoyment of specific privileges, such as to vote and receive dividends, it may be necessary, as between him and the corporation, that he should be registered as a stockholder. But as the absolute owner of the stock, he is, to the exclusion of every other person, entitled to prosecute an action for injury to it, or to himself as the proprietor thereof." Ervin v. Oregon Ry. and Nav. Co., 62 How. Pr. 490, 492 (N.Y. Sup. Ct. 1882); see H F G Co. v. Pioneer Pub. Co., 162 F.2d 536 (7th Cir. 1947); Singer v. State Laundry, Inc., 188 Misc. 583, 68 N.Y.S.2d 808 (Sup. Ct. 1947); O'Connor v. International Silver Co., 68 N.J.Eq. 67, 59 Atl. 321 (Ch. 1904), *aff'd*, 68 N.J.Eq. 680, 62 Atl. 408 (Ct. Err. & App. 1905); Great Western Ry. v. Rushout, 5 De G. & S. 290, 64 Eng. Rep. 1121 (Ch. 1852); BALLANTINE, CORPORATIONS § 148 (Rev. ed. 1946).

<sup>18</sup> Since from 7% to 45% of all stock is held unregistered or in a "street name," a significant portion of corporate stockholders are denied relief. See Hornstein, *The Future of Corporate Control*, 63 HARV. L. REV. 476, 480 (1950); Ballantine, *Abuses of Shareholders Derivative Suits: How Far is California's New "Security for Expenses" Act Sound Regulation?*, 37 CALIF. L. REV. 399, 415 (1949).

tions increase the temptations to corporate fraud.<sup>19</sup> Though the derivative suit has been abused, the abuses are insignificant as compared with the results which might follow if corporate directors attain the unbridled immunity this decision seems to portend.



**CORPORATIONS — SALE OF CORPORATE ASSETS — DISSENTING SHAREHOLDER NOT LIMITED TO RIGHT OF APPRAISAL.**—A representative action by a dissenting minority stockholder was brought to enjoin a plan of reorganization<sup>1</sup> under Section 20 of the New York Stock Corporation Law, whereby his shares of stock would be converted into voting trust certificates of a newly formed corporation. Defendants contended that the plaintiff's sole remedy was the right of appraisal under Section 21 of the New York Stock Corporation Law. On cross motions for judgment on the pleadings, the Court granted the plaintiff's motion and *held* that the proposed plan was violative of Section 20, and that the plaintiff was not limited to his right of appraisal, but may invoke equity's aid where the proposed plan is oppressive, *ultra vires* and illegal. *Eisenberg v. Central Zone Property Corp.*, 306 N.Y. 58, 115 N.E.2d 652 (1953).

At common law, before a sale of corporate assets could be effectuated, unanimous consent of all the stockholders was required.<sup>2</sup> The reason advanced for this rule was to protect the minority stockholder from unjust and oppressive treatment by the majority. The rapid growth of corporations, with their increasingly large number of stockholders, however, made it virtually impossible for a corporation to obtain the required unanimous consent; thus, further growth was stifled. It was not surprising that abuses arose. Minority stockholders, by means of "strike suits," compelled the corporation to buy their stock at exorbitant prices.<sup>3</sup>

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<sup>19</sup> Ballantine, *supra* note 18, at 416.

<sup>1</sup> The proposed plan: defendant corporation was to sell all its assets (real estate) to a newly formed Delaware corporation which was to pay for it with its own stock. A voting trust agreement would be effectuated, and, upon dissolution of the defendant corporation, each stockholder was to receive a voting trust certificate representing his shares. In addition to normal voting rights, the trustees would have the right to sell all the stock of the Delaware corporation, with the added provision that they might deduct from the selling price sufficient funds to form a third corporation which was to lease the property from the buyer.

<sup>2</sup> See *Eisenberg v. Central Zone Property Corp.*, 306 N.Y. 58, 66, 115 N.E.2d 652, 655 (1953); *Matter of Fulton*, 257 N.Y. 487, 493, 178 N.E. 766, 768 (1931); see PRASHKER, CASES AND MATERIALS ON CORPORATIONS 870 (2d ed. 1949).

<sup>3</sup> See *Matter of Timmis*, 200 N.Y. 177, 181, 93 N.E. 522, 523 (1910).