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Stockholders' Derivative Suits in Southern Jurisdictions

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NOTE

STOCKHOLDERS' DERIVATIVE SUITS IN SOUTHERN JURISDICTIONS

The stockholders' derivative suit has been of increasing prominence during the past several decades. As an action in equity instituted by individual stockholders, the suit is representative in nature in that the stockholder prosecutes the action for all stockholders who are similarly situated. Yet, as the suit is in behalf of the corporate entity and not the stockholders personally, it is derivative.[1]

As in most other areas of corporate law in southern jurisdictions, there exists no comprehensive body of statutory or case law dealing with all facets of stockholders' derivative suits. The greater part of the body of law in this field has been developed in those jurisdictions which are the nation's commercial centers. As one of the incidents of industrialization and expanding corporate activity, the stockholders' derivative suit can be expected to become a more familiar problem to the courts of the southern states. The purpose of this note is to indicate by comparison the present status of the stockholders' derivative suit in the following southern jurisdictions: Alabama, Arkansas, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Caroline, Tennessee and Virginia.

The Requirement of Demand

Essentially, the prosecution of a cause of action accruing to the corporation is a matter to be decided by the directors as a responsibility inherent in their managerial capacity. Thus, as a condition precedent to the bringing of a derivative suit, the complaining stockholder should first seek relief within the corporation. The nature of this requirement was defined and set forth in the United States Supreme Court opinion of *Hawes v. Oakland*.[2] That case declared it to be essen-

1. For a general discussion of stockholders' derivative suits see BALLANTINE, CORPORATIONS c. XI (rev. ed. 1946); DODD AND BAKER, CORPORATIONS 600-69 (2d ed. 1951); 13 FLETCHER, PRIVATE CORPORATIONS §§ 5939-6045 (perm. ed. rev. repl. 1943); Glenn, *The Stockholder's Suit—Corporate and Individual Grievances*, 33 YALE L. J. 580 (1924); *Hays, A Study in Trial Tactics: Derivative Stockholders' Suits*, 43 COLUM. L. REV. 275 (1943); Hornstein, *Legal Controls for Intracorporate Abuse—Present and Future*, 41 COLUM. L. REV. 405 (1941); Note, 36 B.U.L. REV. 78 (1956). A treatment of the recent developments is indicated in Hornstein, *The Future of Corporate Control*, 63 HARV. L. REV. 476 (1950). See also the discussion by Chief Justice Hughes in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 318-24 (1936).

2. 104 U.S. 450 (1881). The requirements there stated were adopted as Equity Rule No. 94 in the federal courts, later changed to Equity Rule 27,

tial that the stockholder demand of the board of directors that they remedy the alleged wrong incurred by the corporation, unless from the circumstances such demand would be a futile gesture, and that the stockholder demand action by the body of stockholders, or show that such was unreasonable under the circumstances. All the southern jurisdictions require such a demand upon the directors, or a showing that such demand would have been useless.[3]

The southern jurisdictions express no such uniformity as to whether demand must also be made upon the stockholders. The requirement that the minority stockholder demand that the stockholders as a body take action is founded upon the theory that ultimate corporate control is vested in the stockholders, and upon the desire of the courts to ascertain whether the plaintiff's claim has substance. In determining whether under the circumstances this requirement is reasonable, courts must balance the right of the majority to control the corporation against the necessary protection which must be accorded minority interests.

The Mississippi,[4] Tennessee[5] and Virginia[6] courts adopt the view of the *Hawes* case that demand must be made upon the stockholders unless such a requirement would be unreasonable. The Virginia Supreme Court, in a case where the defendant-director was also the majority stockholder, held that this fact did not excuse a demand

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which is now part of Rule 23(b) of FED. R. CIV. P. It requires that "the complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."

3. Alabama: Mudd v. Lanier, 247 Ala. 363, 24 So.2d 550, 560 (1945); Hagood v. Smith, 162 Ala. 512, 50 So. 374 (1909); Montgomery Light Co. v. Lahey, 121 Ala. 131, 25 So. 1006 (1899). Arkansas: Red Bud Realty Co. v. South, 153 Ark. 380, 241 S.W. 21 (1922). Florida: Orlando Orange Groves Co. v. Hale, 107 Fla. 304, 144 So. 674 (1932). Georgia: GA. CODE ANN. § 22-711 (1935); Chalverus v. Wilson Mfg. Co., 212 Ga. 612, 94 S.E.2d 736 (1956); Harris v. Eagle-Bridges Co., 212 Ga. 599, 94 S.E.2d 381 (1956). Kentucky: Roush v. First Nat'l Bank & Trust Co., 310 Ky. 408, 220 S.W.2d 984 (1949). North Carolina: Hill v. Erwin Mills, Inc., 239 N.C. 437, 80 S.E.2d 358 (1954); Jordan v. Hartness, 230 N.C. 718, 55 S.E.2d 484 (1949). South Carolina: Thompson v. Thompson, 214 S.C. 61, 51 S.E.2d 169 (1948). Tennessee: Akin v. Mackie, 310 S.W.2d 164 (Tenn. 1958); Range v. Tennessee Burley Tobacco Growers Ass'n, 298 S.W.2d 545 (Tenn. App. 1955). *cert. denied*, 78 Sup. Ct. 11 (1957), see O'Neal, *Business Associations—1957 Tennessee Survey*, 10 VAND. L. REV. 992, 994 (1957); Peeler v. Luther, 175 Tenn. 454, 135 S.W.2d 926 (1940). Virginia: Liggett v. Roanoke Water Co., 126 Va. 22, 101 S.E. 55 (1919).

4. Beckett v. Planters' Compress & Bonded Warehouse Co., 107 Miss. 305, 65 So. 275 (1914).

5. McCampbell v. Fountain Head Ry., 111 Tenn. 55, 77 S.W. 1070 (1903). An interesting case is Lockhart v. Moore, 25 Tenn. App. 456, 159 S.W.2d 438 (1941) where it was held that instead of bringing derivative action, since plaintiff was the sole stockholder, she should have requested the corporation to bring the suit. When the corporation refused the stockholder should have called a stockholder's meeting, elected new officers and had a resolution passed that the corporation institute the suit.

6. Virginia Passenger & Power Co. v. Fisher, 104 Va. 121, 51 S.E. 198 (1905).

on the apparently dominated board of directors, but that demand on the body of stockholders was not necessary.[7] A Mississippi court in a similar situation ruled that demand on both the directors and stockholders was not necessary.[8] Elsewhere, Georgia and Kentucky have adopted the *Hawes* rule in their corporation statutes.[9] In Florida, the statute which entrusts the management of the corporation to the board of directors has been construed to remove the requirement of demand on stockholders, at least where it is impractical.[10] Although Alabama has a similar statute,[11] as do most jurisdictions throughout the country, the courts of that state have not so construed it as making demand on the stockholders unnecessary.[12] Indeed, the Alabama Supreme Court has established a strict requirement of demand upon shareholders: "[T]he rule in Alabama is that as a predicate for such a suit in addition to appealing to the corporate directorate there must be an appeal to the stockholders . . . 'without regard to the nature of the suit.' "[13]

In this case it was argued that since the majority stockholders could not ratify the alleged fraudulent activity of the directors, an appeal to the stockholders would be useless. The court held that this was "not sufficient to take the case out of the general rule."[14]

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7. *Ibid.*

8. See note 4 *supra.*

9. "[T]here must be shown— . . . 5. . . . that he made an earnest effort to obtain redress at the hands of the directors and stockholders, or why it could not be done, or it was not reasonable to require it . . . ." GA. CODE ANN. § 22-711 (1935). See NADLER, GEORGIA CORPORATION LAW §§ 411-19 (1949) for a discussion of the stockholder derivative suit in Georgia in relation to this statute. KY. REV. STAT. ANN. § 271.605 (1955). The Kentucky statute has been construed to be the same as FED. R. CIV. P. 23(b). Levitan v. Stout, 97 F. Supp. 105, 115 (W. D. Ky. 1951).

10. FLA. STAT. ANN. § 608.09 (1956). In relation to this statute it was stated that "if it was within the power of stockholders to take such matters out of the hands of directors, in cases of emergency, it would be impossible to issue a legal call for a stockholders' meeting and have them act or refuse to take action in time for any contemplated proceedings to be of value to the corporation or to complaining stockholders." Orlando Orange Groves Co. v. Hale, 107 Fla. 304, 144 So. 674, 678 (1932). However, the opinion of the case on rehearing seems to modify this view somewhat, pointing out that defendants were majority stockholders and that a demand would thus be useless. 119 Fla. 159, 161 So. 284 (1935).

11. ALA. CODE ANN. tit. 10, § 22 (Supp. 1955).

12. It was argued in American Life Ins. Co. v. Powell, 262 Ala. 560, 80 So.2d 487 (1955), that such a statute vested the management of the corporation in the board of directors and thus the stockholders had no right to interfere. The court did not think the argument persuasive. Howze v. Harrison, 165 Ala. 150, 51 So. 614 (1910) states the general proposition that the board of directors is controlled by the stockholders.

13. American Life Ins. Co. v. Powell, 262 Ala. 560, 80 So.2d 487, 493 (1955). It was alleged that the directors had profited personally from transactions between the corporation and its customers.

14. *Ibid.* The problem of whether the complaining stockholder must seek relief from the body of stockholders is discussed in Stickells, *Derivative Suits—The Requirement of Demand Upon the Stockholders*, 33 B.U.L. REV. 435 (1953). See also, Comment, 33 N.Y.L. REV. 71 (1958); note, 48 MICH. L. REV.

In Arkansas, North Carolina, and South Carolina there have been no specific rulings on this point. However, as the courts of these states have cited and quoted from the *Hawes* decision on several occasions,[15] they may well adopt its reasoning when this issue is fully presented.

The commentators and several courts take the position that demand upon the stockholders should only be required where the alleged wrong is capable of ratification by the stockholders or where the stockholders are in a position to take prompt action.[16] Though this seems a preferable view, it must be recognized that the reported cases from the southern jurisdictions indicate a strict requirement of demand upon the stockholders. Apparently, such demand will be excused only when it would be extremely unreasonable. However, in some of the federal courts[17] there has been a recent tendency to construe federal rule 23 (b)[18] liberally in regard to when a demand on the stockholders is necessary.

Standing to Sue

An issue frequently litigated is whether a stockholder has standing to sue when he has acquired his interest after the alleged wrong has been committed against the corporation. As established in the *Hawes* case, and as now set forth in rule 23(b) of the Federal Rules of Civil Procedure, it must be alleged

87 (1949); Note, 6 U. CHI. L. REV. 269 (1939). The cases from all the various jurisdictions are collected in Annot., 72 A.L.R. 628 (1931).

15. Arkansas: Red Bud Realty Co. v. South, 153 Ark. 380, 241 S.W. 21 (1922); Red Bud Realty Co. v. South, 96 Ark. 281, 131 S.W. 340 (1910) (cases involving misappropriation of funds by directors); North Carolina: Ham v. Norwood, 196 N.C. 762, 147 S.E. 291 (1929) stockholder must exhaust all remedies within the corporation before he can maintain suit as individual stockholder for corporation). South Carolina: Equitable Trust Co. v. Columbia Nat'l Bank, 145 S.C. 91, 142 S.E. 811, 819-20 (1928) (demand not necessary where it would be ineffectual, though not alleged in complaint that plaintiff had attempted to have grievances redressed within the corporation).

16. "Petitioner was not required by general equitable principles or by Equity Rule 27 [FED. R. CIV. P. 23 (b)] to appeal to the stockholders before bringing [This suit], as the action complained of here was not one which the stockholders could ratify." Rogers v. Guaranty Trust Co., 288 U.S. 123, 143-44 (1933) (dissenting opinion, on point not reached by majority). To the same effect is Continental Securities Co. v. Belmont, 206 N.Y. 7, 99 N.E. 138 (1912). The Delaware courts seem to have substantially abrogated the rule by not saying anything about demand on the body of stockholders. Sohland v. Baker, 15 Del. Ch. 431, 141 Atl. 277 (Sup. Ct. 1927).

"An application to the shareholders and the calling of a shareholders' meeting seems an exceedingly unreasonable requirement. It erects a needless barrier to legitimate shareholders' suits which are expensive and burdensome at best." BALLANTINE, CORPORATIONS § 145 at p. 346 (rev. ed. 1946). See also STEVENS, CORPORATIONS 802-3 (2d ed. 1949).

17. Berg v. Cincinnati, Newport & Covington Ry., 56 F. Supp. 842 (E.D. Ky. 1944) (no demand on stockholders necessary where the shares were numerous and widely held). See also Delaware & Hudson Co. v. Albany and Susquehanna R.R., 213 U.S. 435 (1909). *Contra,* Bruce & Co. v. Bothwell, 8 F. R. D. 45 (S.D.N.Y. 1948).

18. See note 2 *supra.*

> that the plaintiff was a stockholder at the time of the transaction of which he complains or that his shares thereafter devolved to him by operation of law.[19]

The southern states have largely adopted this view. Florida,[20] North Carolina[21] and Tennessee[22] cases hold that one must own shares in the corporation contemporaneously with the time of the alleged wrong. As with the requirement of demand, Georgia[23] and Kentucky[24] statutes embody the federal rule, which precludes a transferee who acquires his shares subsequent to the particular transaction.

The reasons frequently presented in support of this view are that only a stockholder at the time of the wrong can decide whether to institute suit, that a stockholder cannot transfer the right to make this decision, that in the typical case the transferee will not be injured by this prior wrong and that until one acquires his shares of ownership he can have no interest in the affairs of the corporation.[25]

Alabama is the only southern jurisdiction which allows one who was not a stockholder at the time of the alleged wrong to maintain a derivative suit for the benefit of the corporation. Here an old case[26] is frequently cited for this proposition. The court in that case relied on a now outdated treatise[27] which stated that the rule laid down in

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19. FED. R. CIV. P. 23(b)(1).

20. "[S]tockholders have no standing to attack mismanagement of the corporation prior to acquisition of their stock." News-Journal Corp. v. Gore, 147 Fla. 217, 2 So.2d 741, 743 (1941) quoting 6 THOMPSON, CORPORATIONS § 4499 (2d ed. 1909).

21. Moore v. Silver Valley Min. Co., 104 N.C. 534, 10 S.E. 679 (1890) (plaintiff was the equitable owner and though it was uncertain when he acquired his shares, they were acquired after most of the fraudulent transactions took place; held that the complaint did not state a cause of action).

22. "'A shareholder who has acquired his shares after an unauthorized transaction has taken place certainly can not place his complaint on the ground that he has suffered a wrong, or that his equitable rights have been infringed.'" McCampbell v. Fountain Head Ry., 111 Tenn. 55, 77 S.W. 1070, 1075 (1903) quoting 1 MORAWETZ, CORPORATIONS § 265 (2d ed. 1886).

23. GA. CODE ANN. § 22-711 (6) (1935). Hurt v. Cotton States Fertilizer Co., 145 F.2d 293 (5th Cir. 1944), *cert. denied*, 324 U.S. 844 (1945), held that under both the Georgia statute and rule 23(b) of Federal Rules one must be a stockholder at the time of the alleged transaction. To same effect is Mathews v. Fort Valley Cotton Mills, 179 Ga. 580, 176 S.E. 505 (1934); Alexander v. Searcy, 81 Ga. 536, 8 S.E. 630 (1889).

24. KY. REV. STAT. ANN. § 271.605 (1955). "One not a stockholder until after the time the alleged improper dividends were declared cannot sue on behalf of the stockholders existing at that time." Neff v. Gas & Electric Shop, 232 Ky. 66, 22 S.W.2d 265 (1929), 18 KY. L.J. 387 (1930). Also, Zahn v. Transamerica Corp., 162 F.2d 36, 48 (3d Cir. 1947), 61 HARV. L. REV. 359 (1948), 96 U. PA. L. REV. 276 (1947), is declaratory of Kentucky law on this point though plaintiff's action was held not to be derivative.

25. The reasons for the view that one must be a shareholder at the time of the wrong were ably presented by Commissioner Roscoe Pound in Home Fire Ins. Co. v. Barber, 67 Neb. 644, 93 N.W. 1024 (1903) which has since become a leading case on the subject.

26. Parson v. Joseph, 92 Ala. 403, 8 So. 788 (1891). The suit resulted in the enjoining of a transfer of stock to a subscriber in exchange for over-valued property.

27. 1 MORAWETZ, PRIVATE CORPORATIONS § 269 (2d ed. 1886). There has been

Hawes was intended only as a rule of practice to prevent collusion of the parties to obtain diversity jurisdiction. The decisions which adhere to this position reason that the right to complain is a part of the entire bundle of rights transferred with the stock, and that it would be inconsistent to allow the transferee other rights but deny him the right to complain of a wrong incurred by the corporation.[28] Further, it is denied that one could reasonably infer that the transferee paid less for his shares knowing that the corporation had possibly lost assets or had otherwise been wronged.

Though most commentators[29] have argued that the mere fact that one acquires his interest after the alleged wrong should not alone prevent the stockholder from maintaining the action, the trend as indicated by state statutes[30] has been to adopt the viewpoint of rule 23(b). This has been due, at least in part, to the alleged abuses connected with the derivative suit in recent years.

An unsettled and rather controversial question is whether rule 23(b) is a rule of practice of the federal courts pertaining only to procedure, as some courts have felt,[31] or whether it embodies substantive law. Under the doctrine of *Erie R.R. v. Tompkins*[32] a sharp question would be raised if a federal court had to decide whether to apply a state law which was contrary to rule 23 (b).[33] The Advisory Committee for the federal rules has stated that a failure to amend rule 23(b) infers that the final determination should be the result of litigation, and that if it is decided that the rule is substantive, then it should be amended so as not to apply in those jurisdictions which have adopted the view contrary to rule 23(b).[34] It is to be noted that the federal courts have

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some support for this interpretation and it is arguable that the *Hawes* case was so intended.

28. The various reasons are set forth in Pollitz v. Gould, 202 N.Y. 11, 94 N.E. 1088 (1911) which for years was the leading case for this view. New York has since adopted the contemporaneous ownership rule by statute. N.Y. GEN. CORP. LAW § 61.

29. See BALLANTINE, CORPORATIONS § 148, at 352-53 (rev. ed. 1946); Seasongood, *Right of a Stockholder Suing in Behalf of a Corporation, To Complain of Misdeeds Occurring Prior to His Acquisition of Stock*, 21 HARV. L. REV. 195 (1907); Sykes, *Right of Stockholder to attack Transactions Occurring Prior to His Acquisition of Stock*, 4 MD. L. REV. 380 (1940); Note, 6 MARQ. L. REV. 170 (1922). For collection of cases on this point see Annot., 148 A.L.R. 1090 (1944).

30. See, *e.g.*, CAL. CORP. CODE § 834 (Deering 1947); DEL. CODE ANN. tit. 8, § 327 (1953); N.Y. GEN. CORP. LAW § 61.

31. Perrott v. United States Banking Corp., 53 F. Supp. 953, 956 (D. Del. 1944); Piccard v. Sperry Corp., 36 F. Supp. 1006, 1009-10 (S.D.N.Y. 1941). See also in this regard Parson v. Joseph, 92 Ala. 403, 8 So. 788 (1891).

32. 304 U.S. 64 (1938).

33. The problem is raised and explored in 3 MOORE, FEDERAL PRACTICE § 23.15 (1948). See also Ilsen, *Recent Cases and New Developments in Federal Practice and Procedure*, 16 ST. JOHN'S L. REV. 1, 40-44 (1941); Comment, 26 FORDHAM L. REV. 694 (1958) (to the effect that post-Erie lower federal courts have held rule 23(b) to be procedural); Note, 38 COLUM. L. REV. 1472, 1480-84 (1938).

34. MOORE, *op. cit. supra* note 33.

followed rule 23(b) in cases where there was no state law expressed, or where the status of the state law was not clear.[35]

A related problem is presented when the present stockholder's transferor would be barred by laches, acquiesence or participation and thus precluded from complaining of the alleged wrong. In such a case, the stockholder is said to be the holder of "guilty" shares. Perhaps the majority of courts hold that the present stockholder is also barred regardless of whether he had any knowledge of the wrong.[36] This is the position taken in Tennessee.[37] However, the same Alabama case as mentioned previously is also recognized as a leading proponent of the view that in order for a subsequent transferee to be estopped he must have taken the stock with knowledge that a valid defense could have been asserted against his transferor.[38] Since this rule operates only as a personal bar, it would seem supportable in that it allows an equity court greater discretion. However, this view is a decided minority, likely because of the same reasons given for requiring contemporaneous ownership of stock.

Since the derivative suit is an equity proceeding, it appears sufficient that the plaintiff hold only an equitable interest[39] in the corporation's stock, and it has been held that it is not necessary that the plaintiff

35. *In re* Western Tool & Mfg. Co., 142 F.2d 404 (6th Cir. 1944). It was stated that any distinction between federal and state law was not material to the decision. "The conclusion is that the point is not a settled one under the law of New Jersey. Under such circumstances the proper course seems to be to follow the rule laid down in Rule 23(b). . . . Until the state law is found to be in conflict it seems clearly the duty of a lower federal court to follow the rules which the Supreme Court has promulgated for its guidance." Gallup v. Caldwell, 120 F.2d 90, 95 (3rd Cir. 1941).

36. "[T]he weight of authority is that a transferree of "guilty" shares is in the same position as his transferrer with respect to suing on account of transactions prior to the transfer even when he is a purchaser without notice; and that he is estopped to sue, therefore, without regard to his good faith, if his transferrer was estopped." BALLANTINE, CORPORATIONS § 148, at 353 (rev. ed. 1946). See Note, 23 MINN. L. REV. 484, 488 (1939). For collection of cases where the transferror was guilty of laches see Annot., 148 A.L.R. 1100 (1944).

37. McCampbell v. Fountain Head R.R., 111 Tenn. 55, 77 S.W. 1070 (1903). It was held that as the transferor was guilty of laches, the transferee was also barred regardless of his knowledge of the transferror's incapacity to maintain suit. The court ruled that plaintiff had not made out a case in equity to take management out of control of majority stockholders or to wind up the railroad as an insolvent corporation.

38. "If the transferee purchased the shares in good faith, and without notice of the fact that the prior holder had precluded himself from suing, he would have as just a title to relief as if he had purchased from a shareholder who was under no disability . . ." Parson v. Joseph, 92 Ala. 403, 8 So. 788, 789 (1891). See also STEVENS, CORPORATIONS § 171, at 812 (2d ed. 1949).

39. Endsley v. Darring, 249 Ala. 381, 31 So. 2d 317 (1947) (equitable owner of one-half of the shares enforced a constructive trust in favor of the corporation to recover corporate property). "[An] owner of the equitable title, or an equitable interest in the title, to the shares of stock is not prevented by the Georgia statute or the Federal Rule from maintaining a suit which seeks to protect stock in which he has such an ownership or interest from impairment or loss." Hurt v. Cotton States Fertilizer Co., 145 F.2d 293, 295 (5th Cir. 1944), *cert. denied*, 324 U.S. 844 (1945). See also 13 FLETCHER, PRIVATE CORPORATIONS § 5976 (perm. ed rev. repl. 1943).

allege that he is a holder of record.[40] The amount of interest that the plaintiff owns is of some note.[41] Statutes[42] in some jurisdictions require that a complaining stockholder with less than a prescribed amount of stock post security for the defendant's expenses. No such statutes have been enacted in the southern jurisdictions, and there does not appear to be any specific common-law requirement of this type. Smallness of holdings may cause some courts to inquire into the motives that prompted the suit,[43] but it is apparent that the consideration will be directed primarily toward the basis and sufficiency of plaintiff's claim rather than the extent of his stock interest.

Defenses: Laches and Statutes of Limitations

Professor Ballantine states that "laches is perhaps the most common and effective defense against a derivative suit by a minority stockholder."[44] As in other equitable actions, a complaining stockholder will usually be barred by laches if the applicable statute of limitations has run against him. Generally, the statute of limitations begins to run from the time of the wrong.[45] However, if the directors are guilty of fraud or if defendants have concealed the wrong, the statute does not run until the wrong was or should have been discovered.[46]

40. Richardson v. Blue Grass Mining Co., 29 F. Supp. 658 (E.D. Ky. 1939). A corporation was formed for the purchase of coal mining property by stockholders from Kentucky and Tennessee, each state being equally represented in the ownership. Though the Tennessee group had not received their stock, it was held they could institute proceedings in favor of the corporation.

41. Nussbaum v. Nussbaum, 186 Ga. 733, 199 S.E. 169 (1938) (as plaintiff had only one share in corporation which was to qualify him to bring suit he did not have sufficient interest to sue in behalf of the corporation). See Notes, 39 B.U.L. REV. 78-80 (1956); 34 COLUM. L. REV. 1308 (1934) dealing with smallness of holdings in relation to improper motive or "strike suits." See note 61 *infra*.

42. See, *e.g.*, N.Y. GEN. CORP. LAW § 61-b which provides that if plaintiff owns less than 5% of the stock or if his interest amounts to less than $50,000, he may be requested to put up security to pay expenses, including attorney fees.

42. In the related problem of inspection of the corporation's books, FLA. STAT. ANN. § 608.39 (1956) provides that inspection of the books will be available to "a record holder of not less than one per cent of the outstanding shares." It was held in Soreno Hotel Co. v. State *ex rel.* Otis Elevator Co., 107 Fla. 195, 144 So. 339 (1932) that as to a stockholder who held more than one per cent of the stock the statute made inspection of the books a matter of right. However, it was held that the statute did not infringe the common-law right of a stockholder who held less than the prescribed amount of stock to inspect the books where a "proper purpose" was shown.

43. See note 61 *infra*. See Carson, *Further Phases of Derivative Actions Against Directors*, 29 CORNELL L.Q. 431 (1944); Note, 34 COLUM. L. REV. 1308 (1934).

44. BALLANTINE, CORPORATIONS § 151, at 361 (rev. ed. 1946).

45. Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 15 S.W. 448 (1891); Anderson v. Bundy, 161 Va. 1, 171 S.E. 501, 509 (1933); Winston v. Gordon, 115 Va. 899, 80 S.E. 756 (1914). See 13 FLETCHER, PRIVATE CORPORATIONS § 5886 (perm. ed. rev. repl. 1943). As to statutes of limitations in actions against directors generally, see 3 *id.* §§ 1304-06.

46. "Though the trust [relationship of directors to corporation and stockholders] was not express, it was the kind of constructive trust as to which

Further, a complaining stockholder may also be barred by laches even though the statutory period has not run, if the delay is prejudicial to the defendant. Where a majority of the stockholders authorize an act which is not a valid exercise of power without unanimous consent, a dissenting minority stockholder must give notice of his dissent seasonally or he will be held to have acquiesced in the majority's action.[47] Whether the stockholder in pursuing his claim is guilty of laches will depend on the circumstances of each particular case.[48]

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the statute of limitations does not begin to run until the concealed right is or should be discovered." Stout v. Oates, 217 Ark. 938, 234 S.W.2d 506, 510 (1950). See, *e.g.* Blackburn's Adm'x v. Union Bank & Trust Co., 269 Ky. 699, 108 S.W.2d 806, 812 (1937); Pepper v. Dixie Splint Coal Co., 165 Va. 179, 181 S.E. 406, 412 (1935). See also 3 FLETCHER, PRIVATE CORPORATIONS § 1306.1 (perm. ed. rev. repl. 1943).

47. "His quiescence on these subjects must be regarded in equity as acquiescense in the acts of the corporation in respect to them, otherwise the greatest injustice and injury might be inflicted upon the whole body of stockholders, as well as the community at large, who have an interest in the successful prosecution of the road to final completion." *Ex parte* Booker, 18 Ark. *338, *346 (1857) (mandamus proceeding to restrain corporation from violating its charter, and to restrain collection of subscription which plaintiff refused to pay alleging that planned course of railroad was not as specified in the charter).

48. Alabama: Kessler & Co. v. Ensley Co., 141 Fed 130 (N.D. Ala. 1905), *aff'd*, 148 Fed. 1019 (5th Cir. 1906), *cert denied*, 205 U.S. 541 (1907); Cole v. Birmingham Union Ry., 143 Ala. 427, 39 So. 403 (1905) (suit brought 10 years after alleged wrongful transaction and 2 years after plaintiff admittedly knew about it). See also, Parson v. Joseph, 92 Ala. 403, 8 So. 788 (1891). Arkansas: Hughes Mfg. & Lumber Co. v. Culver, 126 Ark. 72, 189 S.W. 850 (1916) (plaintiff not barred by laches as she had consulted attorney as soon as discovery of the fraud and brought suit upon his investigation and advice). Florida: Brensinger v. Margaret Ann Super Markets, Inc., 192 F.2d 458, 461 (5th Cir. 1951) (plaintiff barred by laches and Florida statute of limitations); Redstone v. Redstone Lumber & Supply Co., 101 Fla. 226, 133 So. 882 (1931) (irregularly conducted directors' meetings cured by stockholders' acquiesence or subsequent ratification); Sommers v. Apalachicola Northern R.R., 85 Fla. 9, 96 So. 151 (1923). Georgia: Chalverus v. Wilson Mfg. Co., 212 Ga. 612, 94 S.E.2d 736 (1956) (president while in military service had continued to draw a salary and had used his authority to draw checks on corporation for his own personal use; held that plaintiff had acquiesced and participated in the acts and thus was estopped to complain). See also Mountain Manor Co. v. Greenoe, 205 Ga. 619, 54 S.E.2d 629 (1949); Mathews v. Fort Valley Cotton Mills, 179 Ga. 580, 176 S.E. 505 (1934); Bridges v. Southern Bell Tel. & Tel. Co., 136 Ga. 251, 71 S.E. 161 (1911). "The act of purchasing and owning and voting stock in one railroad company by another railroad company may be *ultra vires* so far as the public are concerned; but we do not think that a stockholder who has acquiesced for 15 years, and who has received money from the corporation by reason of the illegal act, should be allowed to make that question." Alexander v. Searcy, 81 Ga. 536, 8 S.E. 630, 634 (1889). Kentucky: Shannon's Co-Ex'rs v. Shannon Spring Bed Mfg. Co., 313 Ky. 463, 230 S.W.2d 457 (1950) (plaintiff could not protest against redemption where he had given his consent or participated in the ultra vires act); Browning v. Mullins, 12 Ky. L. Rep. 41, 13 S.W. 427 (1890). Mississippi: Hinds County v. Natchez, J. & C.R.R., 85 Miss. 599, 38 So. 189 (1905); Berry v. Broach, 65 Miss. 450, 4 So. 117 (1888) (defense that sale of corporate assets was ultra vires as all stockholders did not consent not sustained due to acquiescence). South Carolina: King v. Ligon, 180 S.C. 224, 185 S.E. 305 (1936) (plaintiff who was attempting to retire her stock while corporation was in receivership to escape proration was estopped because she did not make her intention known during an attempted corporate refinancing). Tennessee: McCampbell v. Fountain Head R.R., 111 Tenn., 55, 77 S.W. 1070 (1903) (plaintiff barred by laches where it could be found that he

There is some conflict in the decisions as to which statute of limitations is applicable where it is alleged that a director is guilty of mismanagement.[49] Some cases state that the basis of the action is negligence and thus apply the statute of limitations for tort actions; others, on the theory of fiduciary relationship between the director and corporation, rule that the alleged wrong is a breach of trust, bringing into operation a contract statute. An example of the former view is an Alabama case[50] which was an action against bank directors for mismanagement, alleging that improper loans had been made and that the directors had paid out an illegal dividend. It was held that the action was in tort and was thus barred by the one year statute of limitations. In a similar situation, where it was alleged that bank directors had made improvident loans, the Arkansas Supreme Court held[51] that although the directors were negligent the applicable statute

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had given his consent or that there had been acquiescense); Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 15 S.W. 448 (1891); Kirtland v. Purdy University, 75 Tenn. 243 (1881) (stockholders attempted to void prior proceeding which established a corporate indebtedness; held that the prior proceedings were fair and there had been acquiescense by majority stockholders and some of the petitioners). "[S]tockholder who has acquiesced for nine years and received money from the corporation by reason of the illegal act, should not be allowed to . . . question [the validity of the act]." Cullen v. Coal Creek Min. & Mfg. Co., 42 S.W. 693, 697 (Tenn. Ch. App. 1897).

For collection of cases dealing with Laches, acquiescence and ratification see Annots., 16 A.L.R.2d 467, 481 (1951); 70 A.L.R. 53 (1931); 10 A.L.R. 370 (1921).

49. A Tennessee decision is often cited for the proposition that directors are not express trustees. "The language . . . that 'directors are trustees' . . . is rhetorically sound, but technically inexact. It is a statement often found in opinions, but is true only to a limited extent. . . . They are trustees in the sense that every agent is a trustee for his principal, and bound to exercise diligence and good faith. . . . They more nearly represent the managing partners in a business firm than a technical trustee. At most, they are implied trustees, in whose favor the statutes of limitation do run." Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 15 S.W. 448, 453 (1891). If directors were treated as express trustees, the statute would not run during the time they held that position. The case states the accepted view, though there is language to the contrary in some of the earlier decisions. See, *e.g.*, Ventress v. Wallace, 111 Miss. 357, 71 So. 636 (1916) which held in a receiver's suit against a bank directorate for long-continued negligence, the action was not barred by the statute of limitations as the receiver had acted promptly. It was unnecessary to determine whether the defendants were trustees of an express trust or at most only implied trustees; however, it was stated: "We think the ruling that the statute of limitations does not begin to run in favor of a director in a case of this kind until he surrenders his office is the more reasonable and supported by better authority." 71 So. at 462. The case and the subject is discussed in Annot., 1917A L.R.A. 980. See also, Coxe v. Huntsville Gas Light Co., 106 Ala. 373, 17 So. 626 (1895).

50. Blythe v. Enslen, 209 Ala. 96, 95 So. 479 (1922). Other cases holding that a tort statute applies include Anderson v. Anderson, 23 F.2d 331 (N.D. Ga. 1927) *aff'd* 28 F.2d 1007 (5th Cir. 1928); Winston v. Gordon, 115 Va. 899, 80 S.E. 756 (1914). See Note, 39 COLUM. L. REV. 842, 851 (1939).

51. Magale v. Fomby, 132 Ark. 289, 201 S.W. 278 (1918) (a three year statute of limitations barred plaintiff's claim). Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 15 S.W. 448 (1891) is an example of a court holding that a contract statute was applicable. Though either a tort or contract statute can be applied, the preference would seem to be in favor of a tort statute in cases dealing with mismanagement by directors.

of limitations was that for express oral contracts. This conclusion was apparently based on the contractual nature of the loans made by the directors.

The corporation statutes of most southern states contain various provisions for limitation of actions which are applicable to specific types of derivative suits. Both North Carolina[52] and South Carolina[53] have statutory limitations for suits against bank directors. Virginia's restrictive statute which provided an absolute limitation of action against any director after two years from the alleged wrong was recently repealed.[54] The Georgia statute[55] provides, instead of a statute of limitations, that plaintiff must allege that he has acted promptly. Arkansas,[56] Florida,[57] Kentucky[58] and Tennessee[59] have statutes to the effect that a director will be liable for illegal dividends or wrongful withdrawals of capital unless he dissents from the board action. These statutes provide a two-year period of limitations.[60]

Motive

A complaining stockholder's motive in bringing a derivative action may be highly significant. However, most courts will seldom inquire into motive beyond determining if the suit is brought in the interest

52. N.C. GEN. STAT. § 1-33 (1953) provides for a three year statutory period after discovery of the facts.

53. S.C. CODE § 10-143(9) (1952) provides for six year period after discovery of the facts.

54. The old statute was repealed by Va. Acts 1956, C. 428. It was replaced by VA. CODE ANN. § 13.1-5(b) (1956) which is a codification of section 6 of Model Business Corporation Act. The Model Act provides: "No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation sball be invalid by reason of the fact that the corporation was without capacity of power to do such act or to make or receive such conveyance or transfer, but such lack of capacity or power may be asserted: . . . (b) In a proceeding by the corporation, whether acting directly or through a receiver, trustee, or other legal representative, or through shareholders in a representative suit, against the incumbent or former officers or directors of the corporation." ALL MODEL BUSINESS CORPORATION ACT § 6 (1950). North Carolina has a similar provision in their new corporation statute. N.C. GEN. STAT. § 55-18 (Supp. 1957) this statute also provides that in an action to enjoin a transfer or conveyance, plaintiff has the burden of proof that he had not assented to the act prior to bringing his suit. See also N.C. GEN. STAT. § 55-32 (Supp. 1957) which specifies certain instances other than that in the ultra vires provision where directors will be liable. The provision has a three year period of limitation.

55. GA. CODE ANN. § 22-711 (1935).

56. ARK. STAT. ANN. § 64-606 (1957).

57. FLA. STAT. ANN. § 608.54 (1956).

58. KY. REV. STAT. ANN. § 271.275 (1955).

59. TENN. CODE ANN. § 48-212 (1956).

60. The director will be liable for either negligent or willful withdrawals of capital in violation of this statute. In order to dissent from the board action, the dissenting vote must be recorded in the minutes of the meeting and if the director is absent his dissent must be submitted in writing within a certain specified period or a reasonable time. See Note, 41 COLUM. L. REV. 686, 693-97 (1941). For new developments in statutes of limitation, see Note, 63 HARV. L. REV. 1177, 1214 (1950). For a collection of cases dealing with statutes of limitations in stockholder's derivative suits, see Annot., 123 A.L.R. 346 (1939).

of a rival or competitor.[61] This reluctance is reflected in the relatively few cases in which the courts have given any real consideration to the plaintiff's motive. The basis for this reluctance seems to be derived from the feeling that if plaintiff's claim is not patently frivolous or improper, his reasons for bringing the suit are not a proper matter for judicial inquiry. It is also felt that the result of such delving would intimidate minorities from asserting bona fide claims.

Georgia seems to be the only southern jurisdiction in which this issue has been raised. In *Macon Gas Co. v. Richter*,[62] a minority stockholder's suit to enjoin an increase in capital stock was sustained, even though the directors had contended that plaintiffs had "bought up the 15 shares of stock in order to obstruct the interests of a majority of the stockholders, and to make themselves a nuisance, and in order to force the defendants for the sake of peace to purchase their stock at an exorbitant price . . . ."[63]

The court relied on an earlier Georgia case[64] that had taken an extreme position in refusing to inquire into motive even where it was alleged that the plaintiff was bringing the suit in the interests of a rival. In a recent Georgia decision,[65] where a stockholder was challenging the constitutionality of a state statute which was beneficial to the corporation, the rationale of the two prior cases was approved. Thus it would appear that Georgia has adopted the orthodox view, refusing to inquire into the plaintiff's motive.

It seems quite arguable that where a stockholder is suing in a representative capacity to assert a claim in favor of the corporation instead of a personal right, the plaintiff's motive is a pertinent consideration. In such a case the stockholder's property rights are only indirectly involved. Further, the dubious character[66] of many derivative actions

61. See, *e.g.*, Johnson v. King-Richardson Co., 36 F.2d 675 (1st Cir. 1930); Hodge v. United States Steel Corp. 64 N.J. Eq. 111, 53 Atl. 533 (Ch. 1902). Motive is discussed in BALLANTINE, CORPORATIONS § 149 (rev. ed. 1946); 13 FLETCHER, PRIVATE CORPORATIONS §§ 5877-79 (perm. ed. rev. repl. 1943); Rohrlich, *Suits in Equity by Minority Stockholders as Means of Corporate Control*, 81 U. PA. L. REV. 692, 719 (1933); Note, 36 B.U.L. REV. 78, 91-95 (1956). Cases involving the stockholder's motive when suing in his own right and in favor of the corporation are collected in Annots., 67 A.L.R. 1470 (1930); 148 A.L.R. 1090, 1101 (1944).

62. 143 Ga. 397, 85 S.E. 112 (1915). The corporate charter provided that any increase in capital stock required the consent of two-thirds of the common stockholders and that in no case would the capital stock exceed the aggregate of $500,000. The court held an increase in excess of this figure was in effect an amendment of the charter and thus required the consent of all the stockholders.

63. *Id.* at 401, 85 S.E. at 114.

64. Central R.R. Co. v. Collins, 40 Ga. 583 (1869).

65. Hansell v. Citizens and So. Nat'l Bank, 213 Ga. 205, 98 S.E.2d 622, 627 (1957) (stockholder of the bank was challenging a state statute which authorized certain banks to establish branch banks; held that fact that statute was beneficial to the corporation did not preclude plaintiff's action which alleged that establishing a branch bank was ultra vires).

66. The charge most frequently leveled at the stockholder's derivative suit

in the past several years would seem to indicate a need for remedy. The use of the broad power of equity's discretion in expanding the scope of inquiry into a stockholder's motive could avoid legislative action which would likely be so severe as to discourage valid claims.

Parties Who Should be Joined

Where it is alleged that a director has injured the corporation and it is against him that relief is sought, he is, of course, a proper party to the action and should be made a defendant.[67] All courts agree that the corporation must be made a party to the action, as the suit is brought in its behalf.[68] Ordinarily, the corporation is made a party

other than an improper motive of the stockholder in bringing the suit is that the suit is only of nuisance value in relation to the real interests of the corporation. For an appraisal of most of the alleged abuses in derivative suits see Hornstein, *Legal Controls for Intracorporate Abuse—Present and Future*, 41 COLUM. L. REV. 405-07, 425-29 (1941). Where the plaintiff-stockholder is in complete control of the action, it is alleged that the defendant directors may pick a plaintiff who is actually controlled by the directors and the resulting decree favorable to the defendants would bar a subsequent action by a non-participating stockholder unless he could prove the collusion. See note 77 *infra*.

67. Tutwiler v. Tuscaloosa Coal, Iron & Land Co., 89 Ala. 391, 7 So. 398 (1890) is an example. There, the corporation had purchased land from the defendant director. A minority stockholder alleged that the director had defrauded the corporation in the sale of the land. The court held it was necessary that the director be made a defendant in the action.

As in all cases where relief is sought against a party he should be joined. Thus in Montgomery Traction Co. v. Harmon, 140 Ala. 505, 37 So. 371 (1904) it was held where the parent corporation controlled the defendant, subsidiary corporation and its stock was being transferred from the subsidiary to the parent corporation and by the parent to an individual, it was proper that the individual transferree be made a party to the suit.

As to parties in stockholder derivative suits generally, see 13 FLETCHER, PRIVATE CORPORATIONS §§ 5994-6002 (perm. ed. rev. repl. 1943).

68. Alabama: "The Corporation . . . is also properly made a defendant." American Life Ins. Co. v. Powell, 262 Ala. 560, 80 So.2d 487, 488 (1954). Altoona Warehouse Co. v. Bynum, 242 Ala. 540, 7 So. 2d 497 (1942) stated that it is usually indispensable that the corporation itself be joined as party to the action. Arkansas: "The corporation is a necessary party to such an action and is named and brought in that appropriate orders may be made not only to protect all the corporate rights, but also that through it the rights and equities of individual shareholders may be worked out and preserved." Red Bud Realty Co. v. South, 153 Ark. 380, 241 S.W. 21, 27 (1922). Georgia: Wagner v. Biscoe, 190 Ga. 474, 9 S.E. 2d 650 (1940) held that a non-resident corporation is an indispensable party to action brought by minority stockholder. Also, Greenwood v. Greenblatt, 173 Ga. 551, 161 S.E. 135 (1931). See NADLER, GEORGIA CORPORATION LAW § 414 (1950). Kentucky: Reid v. Salyer, 281 Ky. 755, 137 S.W. 2d 421 (1940). North Carolina: Douglas v. Richmond & Danville R.R., 106 N.C. 65, 10 S.E. 1048 (1890). This was an action for removal to federal court by a Virginia corporation which controlled a majority of the shares of the North Carolina corporation. Plaintiffs were minority stockholders and citizens of North Carolina. It was held as the corporation was an indenspensable party there was not the requisite diversity required for federal court jurisdiction. Other cases in point are Deaderick v. Wilson, 67 Tenn. 108 (1874); Black v. Huggins, 2 Tenn. Ch. 780 (1877); Charleston Ins. and Trust Co. v. Sebring, 5 S.C. Eq. 342 (1851); Mount v. Radford Trust Co., 93 Va. 427, 25 S.E. 244 (1896).

See also Winer, *Jurisdiction Over the Beneficiary Corporation in Stockholders' Suits*, 22 VA. L. REV. 153, 155-58, 167-73 (1935); Notes, 50 YALE L.J. 1261, 1266 (1941); 48 YALE L.J. 1082, 1086 (1939); 44 YALE L.J. 1091 (1935).

defendant, as it answers through its agents whose position is typically antagonistic to that of the complaining stockholders.[69] In Kentucky, by statute, the corporation is aligned as a party plaintiff.[70] The effect of this statute was to defeat diversity jurisdiction in a federal district court case[71] where individual defendants were citizens of Kentucky and minority stockholders were citizens of two other states. After granting the defendants' motion to re-align the Kentucky corporation as a party plaintiff, the court held that the action was without substantial diversity.

The corporation takes a passive part in the proceedings and can generally interpose no affirmative defense in behalf of defendant directors.[72] In almost all cases it is improper to use corporate funds to assist directors or officers in their defense.[73] When the corporation is in the hands of a receiver, the receiver is treated as the corporation and must be made a party to the stockholder's derivative action.[74] Also, the complaining stockholder must demand relief against the receiver,[75] and the other requirements of derivative suits are generally applicable.[76]

69. "The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him, and made to act in a way detrimental to his rights." Doctor v. Harrington, 196 U.S. 579, 587 (1905). See also, Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 522 (1947). A recent 5-to-4 opinion of the Supreme Court held that for the purposes of diversity jurisdiction antagonism between the parties is to be determined on the fact of the pleadings and the nature of the controversy. Smith v. Sperling, 354 U.S. 91 (1957), 71 HARV. L. REV. 126, 26 FORDHAM L. REV. 704 (1958).

70. KY. REV. STAT. ANN. § 271.605 (1955).

71. Levitan v. Stout, 97 F. Supp. 105, 115 (W.D. Ky. 1951). The court held that the Kentucky statute embodied substantive law and thus was binding on federal courts in Kentucky. The effect of the statute is that in order for a stockholder of a Kentucky corporation to bring a derivative suit in federal court the defendants must be domiciled elsewhere.

72. See, *e.g.*, Otis & Co. v. Pennsylvania R. R., 57 F. Supp. 680 (E.D. Pa. 1944). The court stated that where fraud was alleged against the directors, the cause of action was in favor of the corporation and thus corporation should not set up affirmative defenses. However, if the cause of action was to endanger corporate interests, the corporation could then set up affirmative defenses. See Washington, *Stockholders' Derivative Suits: The Company's Role, and a Suggestion*, 25 CORNELL L.Q. 361 (1940); Note, 43 YALE L.J. 661, 663 (1934).

73. BALLANTINE, CORPORATIONS § 154 (rev. ed. 1946). In Esposito v. Riverside Sand & Gravel Co., 287 Mass. 185, 191 N.E. 363 (1934) it was held that the president of the corporation could use corporate funds and assert affirmative defenses to avoid the appointment of a receiver for the corporation.

74. Coyle v. Skirvin, 124 F.2d 934 (10th Cir. 1942). See 13 FLETCHER, PRIVATE CORPORATIONS § 5999 (perm. ed. rev. repl. 1943).

75. Scholl v. Allen, 237 Ky. 716, 36 S.W.2d 353 (1931). It was stated that when a corporation is in the hands of a receiver, he is the proper party to maintain the suit against the directors, thus a demand on him and his refusal were prerequisites to the stockholder bringing the action. See also the language in Deering v. Stites, 257 Ky. 403, 78 S.W.2d 46, 49-51 (1934).

76. Maynard v. Pratt, 181 Ga. 74, 181 S.E. 579 (1935). In an application to intervene brought by stockholders alleging wrongful conduct by receivers, it was held to be no error to dismiss the bill where no reasons was given for suit being brought by stockholders instead of the corporation. Sigwald v.

Control, Intervention and Settlement

The stockholder who brings the suit after refusal of the corporation to remedy the alleged wrong ordinarily controls the suit for the benefit of the corporation. Though representative of other stockholders, this plaintiff generally has complete control of the suit throughout the processes of litigation. Thus the orthodox rule allows this plaintiff to discontinue or reach a settlement for what may be his own purposes, without considering other stockholders who are not parties of record.[77] In a Kentucky case, *Bernheim v. Wallace*,[78] it was stated that the stockholder who controlled the suit could dismiss anytime before adjudication of the rights of those whom he was representing.[79] Plaintiff had dismissed the action without prejudice while the appeal was still pending. However, the parties had reached a settlement, and the court was convinced that the rights of other stockholders had not been infringed. Perhaps a more protective view was adopted by a later Kentucky case[80] in which a county treasurer was plaintiff in a derivative action for the benefit of the county to recover funds wrongfully taken by former officers. There it was stated that "suit

City Bank, 82 S.C. 382, 64 S.E. 398 (1909) (where receiver was one of the parties charged by complaining stockholder with wrongdoing, no demand need be made on receiver, and plaintiff need not have the receiver removed as suit could continue with receiver as a party defendant).

77. See, *e.g.*, Mathews v. American Tobacco Co., 130 N.J. Eq. 470, 23 A.2d 301, 308 (Ch. 1941). "He controls the litigation and may discontinue his action at will, until there be a decree affecting the rights of the class or until others of the class have intervened in the suit." White v. British Type Investors, 130 N.J. Eq. 157, 21 A.2d 681, 683 (Ch. 1941). See BALLANTINE, CORPORATIONS § 152 (rev. ed. 1946); 13 FLETCHER, PRIVATE CORPORATIONS § 6019 (perm. ed. rev. repl. 1943); Hornstein, *Problems of Procedure in Stockholders' Derivative Suits*, 42 COLUM. L. REV. 574, 583-94 (1942); McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 YALE L.J. 421 (1936); Note, 44 YALE L.J. 534 (1935). For a candid appraisal of the plaintiff's position see Hornstein, *Legal Controls for Intra Corporate Abuse—Present and Future*, 41 COLUM. L. REV. 405, 425-27 (1941).

The decree will be res judicata as to another suit on the same claim. Liken v. Shaffer, 64 F. Supp. 432 (N.D. Iowa 1946); Mathews v. American Tobacco Co., *supra*. See BALLANTINE, CORPORATIONS § 155 (rev. ed. 1946). However, the decree may be set aside for fraud or collusion. Consent decrees have been held to have the same effect as a decree from actual litigation. Gerith Realty Corp. v. Normandie Nat'l Securities Corp., 154 Misc. 615, 276 N.Y. Supp. 655 (Sup. Ct. 1933), *aff'd*, 241 App. Div. 717, 269 N.Y. Supp. 1007 (1st Dep't 1934), *aff'd*, 266 N.Y. 525, 195 N.E. 183 (1935). Rohrlich, *The New Deal in Corporation Law*, 35 COLUM. L. REV. 1167, 1187 (1935), argues that the decree should be res judicata only when there has been litigation on the issues.

78. 186 Ky. 459, 217 S.W. 916 (1920).

79. "That a plaintiff or defendant who is a party of record and who sues or defends . . . for the use and benefit of numerous other parties, who are not represented except by him, may at any time before the rights of the class for whom he sues or defends have been adjudicated by the court in which the action is pending or by the court to which an appeal may be prosecuted, dismiss without prejudice the suit. . . ." *Id.* at 469, 217 S.W. at 920. The case and subject of dismissal is discussed in Annot., 8 A.L.R. 950, 954 (1920). The editor there states that the general rule is that one does not have the absolute right of dismissal after a decree has been issued.

80. Commonwealth v. Plummer, 235 Ky. 506, 31 S.W.2d 897 (1930). See Annot., 91 A.L.R. 587, 594-96 (1934).

will not be dismissed if the substantial rights of other parties have accrued and injustice will be done then by permitting the discontinuance and it is usually required that bad faith or collusive action be shown."[81]

The rule has developed in some courts that the plaintiff in representing the corporation is acting in something of a fiduciary capacity, and thus cannot dismiss or compromise purely for his own benefit or if the corporation would be prejudiced.[82] Under this view, to protect this fiduciary relationship, the court's decision is determinative on the issue of dismissal. Rule 23(c) of the Federal Rules requires approval of the court and notice to other stockholders before the action can be terminated,[83] and though several states have adopted this position by statute[84] the corporation laws of the southern states contain no such provision. This view, and indeed this issue, seems seldom to have been argued before the state courts of these southern jurisdictions.

Ordinarily, another stockholder will be allowed to intervene in the action, unless he is under some incapacity.[85] However, the mere fact that one is allowed to become a party to the action does not mean that the control of the suit is transferred to the intervenor. Yet, it is apparent that once other stockholders are joined as plaintiffs in the action, the stockholder who controls the litigation cannot dismiss or settle without some consideration of their interest.[86] In order for the intervening stockholder to acquire control of the suit, it is generally necessary for him to show that the present parties are in collusion

81. Commonwealth v. Plummer, *supra* note 80, at 508, 31 S.W.2d at 898.

82. See, *e.g.*, Whitten v. Dabney, 171 Cal. 621, 154 Pac. 312 (1915); National Power & Paper Co. v. Rossman, 122 Minn. 355, 142 N.W. 818 (1913). It has also been held that a stockholder must account to the corporation for what he has received in a private settlement. Clarke v. Greenberg, 296 N.Y. 146, 71 N.E.2d 443 (1947).

83. "A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule [includes stockholders' derivative suits] notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." FED. R. CIV. P. 23(c). See 3 MOORE, FEDERAL PRACTICE § 23.24 (1948).

84. COLO. REV. STAT. ANN., R. CIV. P. 23 (1953); PA. STAT. ANN., tit. 12, R. CIV. P. 2230 (1951).

85. "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion." FLA. STAT. ANN. § 63.09 (1943); BALLANTINE, CORPORATIONS § 153 (rev. ed. 1946); see Hornstein, *Problems of Procedure in Stockholders' Derivative Suits*, 42 COLUM. L. REV. 574, 575-79 (1942); Notes, 63 HARV. L. REV. 1426 (1950); 54 HARV. L. REV. 833 (1941). Cases are collected in Annot., 135 A.L.R. 838 (1941). In the federal courts intervention is allowed under FED. R. CIV. P. 24.

86. Mayflower Inv. Co. v. Brill, 137 Fla. 287, 188 So. 205 (1939) (intervenor could have plaintiff's motion set aside when the intervenor was given no notice of the petition for dismissal).

or that the suit is being brought in bad faith.[87] The same is true where a stockholder wishes to intervene to interpose a defense in favor of the corporation.[88]

Discovery

As a practical matter, whether a derivative suit can be maintained will in many instances depend upon the availability of information needed to make a case against the defendants, or upon the methods available for obtaining the needed information. The nature of the proceedings in a derivative action typically places a stockholder against one who has peculiar knowledge of the circumstances surrounding the matter under contention. Thus, the complaining stockholder is often put to a great deal of time and expense in obtaining sufficient information on which to maintain his action.[89] The processes available for acquiring this information can thus be of great importance.

In most of the southern jurisdictions the common method for obtaining the needed information is the traditional bill of discovery in equity.[90] The plaintiff's ability to gain information may well be limited

87. "Generally, even after intervention, the original plaintiff continues to be *dominus litus*. There can be only one manager of a suit, or one united group acting through the same counsel. But an intervener may have the conduct of the cause committed to him when the court finds that the action is not being prosecuted with vigor and reasonable capacity." White v. British Type Investors, Inc., 130 N.J.Eq. 157, 21 A.2d 681, 684 (1941). In Atlanta Laundries, Inc. v. National Linen Services Corp., 81 F. Supp. 650 (N.D. Ga. 1948), a stockholder was attempting to intervene in an action by the corporation against third parties. It was held that intervention would not be allowed where a stockholder had not appealed to the directors, to exhaust his corporate remedies. Though the petition was for intervention, the court stated that the stockholder was attempting to obtain control of the suit, and that it would not be allowed when motivated by a difference of opinion as to the procedure and technique followed in the course of the litigation by the corporation. See also Kirtland v. Purdy University, 75 Tenn. 243 (1881). The court there indicated that under proper circumstances stockholders would be allowed to intervene to contest prior proceedings.

88. *E.g.*, Eggers v. National Radio Co., 208 Cal. 308, 281 Pac. 58 (1929). See also Cornell v. Sims, 111 Ga. 828, 36 S.E. 627 (1900) (intervener alleged that through fraud, corporation was refusing to defend suit; intervention allowed). For collection of cases where stockholders wished to interpose defenses in favor of the corporation see Annot., 33 A.L.R. 2d 473 (1954).

In the federal courts, it has been held that a stockholder seeking to intervene under rule 24 must comply with the requirements set forth in rule 23(b). Thus he must have owned his stock at the time of the wrong complained of and have exhausted his remedies within the corporation unless such would have been useless. See Piccard v. Sperry Corp., 36 F. Supp. 1006 (S.D.N.Y. 1941).

89. As to some of the various means used to acquire information see Hornstein, *Legal Controls for Intracorporate Abuse—Present and Future*, 41 COLUM. L. REV. 405, 416-22 (1941). In connection with Powell v. American Life Ins. Co., 262 Ala. 560, 80 So. 2d 487 (1954), it was held in *Ex parte* American Life Ins. Co., 262 Ala. 543, 80 So. 2d 299 (1954), that oral examination of directors would not be allowed where plaintiff's bill was unverified. The court indicated that in proper circumstances a stockholder would be allowed to examine defendant directors as a means of discovery.

90. Almost all states have enacted the equity practice of discovery in

unless he already knows sufficient facts upon which to frame a bill which will meet established discovery requirements.[91] Further, if the orthodox chancery practice is followed, plaintiff is not allowed discovery until after the pleadings in the main action are filed.[92]

In Tennessee it is necessary to join the corporation officers as parties to the discovery bill, as the bill will not lie against the corporation itself.[93] By statute in Mississippi[94] the corporate officers need not be parties to the discovery bill. When interrogatories are propounded to a corporation in Alabama, the applicable statute[95] directs that they be answered by officers cogizant of the facts requested. As to what is required for a proper bill of discovery, an Alabama court[96] has stated that "the bill is sufficient, if it shows that the information sought is material, indispensable to complainant in the prosecution of his suit, within the knowledge of the other party, and the proof not available to complainants by other means."[97]

The broad scope of discovery allowed by the Federal Rules[98] has made the federal courts an attractive forum for the minority stockholder, provided of course, that he can meet the requirements set out in rule 23(b). However, in recent years a trend is evident among the states to liberalize their discovery provisions.[99] Notable within the

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their statutes. See, *e.g.*, TENN. CODE ANN. § 24-902 (1956), which provides for the taking of depositions and is declaratory of traditional equity requirements. See also 2 GIBSON, SUITS IN CHANCERY §§ 1184-92 (Crownover ed. 1956). Corporations come within the operation of these statutes. United States Tire Co. v. Keystone Tire Sales Co., 153 S.C. 56, 150 S.E. 347 (1929).

91. Generally a plaintiff can only obtain facts revelant to his case and not the defendant's defense. He may be limited to discovery of only those who are made defendants, and not other witnesses. See 9 FLETCHER, PRIVATE CORPORATIONS §§ 4250, 4662-65 (rev. ed. perm. 1931); 13 FLETCHER, PRIVATE CORPORATIONS § 6021 (perm. ed. rev. repl. 1943). The plaintiff may not go on a "fishing trip"; his bill must clearly set out the information that is requested. See generally RAGLAND, DISCOVERY BEFORE TRIAL 39-53, 54-61 (1932).

92. This would seem to require that the stockholder show compliance with precedent requirements to maintaining the action in his pleadings before he can have discovery. See RAGLAND, *op. cit. supra* note 91.

93. It was held that since a corporation answers under seal instead of under oath it could not be indicted for false swearing. Home Indemnity Co. v. Bogue, 168 Tenn. 493, 79 S.W.2d 580, 581 (1935). To the same effect are American Lead Pencil Co. v. Musgrave Pencil Co., 170 Tenn. 60, 91 S.W.2d 573 (1936) and Smith v. St. Louis Mut. Life Ins. Co., 2 Tenn. Ch. 599 (1876).

94. MISS. CODE ANN. § 1292 (1942). It was held in Southern Ry. v. Buckeye Cotton Oil Co., 126 Miss. 562, 89 So. 228 (1921) that corporate officers did not have to be made a party to discovery proceedings.

95. ALA. CODE ANN., tit. 7, § 480 (1940).

96. King v. Livingston Mfg. Co., 180 Ala. 118, 60 So. 143 (1912).

97. *Id.* at 123, 60 So. at 144. It is to be noted that the proper procedure to compel the corporation to show a stockholder the books and corporate records is mandamus.

98. FED. R. CIV. P. 26-37. Rule 33 as to interrogatories is applicable to corporate officers. See 4 MOORE, FEDERAL PRACTICE § 33.07 (2d ed. 1950). See generally, Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205 (1942); Pike & Willis, *The New Federal Deposition-Discovery Procedure: I*, 38 COLUM. L. REV. 1179 (1938).

99. See Note, 68 HARV. L. REV. 673 (1955).

southern jurisdictions are Arkansas[100] and Kentucky,[101] which have adopted discovery statutes patterned after the Federal Rules; and Florida, by statute,[102] allows depositions to be taken anywhere allowed by the Federal Rules.

Plaintiff's Counsel Fees and Director's Indemnity

On the question of plaintiff's counsel fees the southern states apparently are in accord with the views prevailing throughout the country. Since the recovery in a successful derivative suit is in favor of the corporation and not the stockholder,[103] in what is normally expensive litigation, it is the policy of most courts to grant a liberal allowance for the plaintiff's expenses, including a reasonable attorney's fee.[104] Though it has been argued that attorney's fees foster litigation, without this reward there would be little stimulus for a minority stockholder to attempt such a difficult task even where it was clear that defendants had wronged the corporation. Plaintiff's counsel fees are not allowed, however, where the recovery is bene-

100. ARK. STAT. ANN. § 28-347 to-361 (Supp. 1957). See the note on this statute in 7 ARK. L. REV. 314 (1953).

101. KY. R. CIV. P. 26-37 (1957).

102. FLA. STAT. ANN., R. CIV. P. 1.21 (1956). For entire discovery provisions see rules 1.21 to 1.34. For discussions on the Florida statute see Mehrtens, *Depositions and Discovery in Florida,* 1 U. FLA. L. REV. 149, 161-3 (1948); White, *Our New Deposition-Discovery Rules,* 21 FLA. L.J. 239 (1947).

103. "The general rule is that no proportionate judgment can be allowed a stockholder in a derivative stockholder's suit." Liken v. Shaffer, 64 F. Supp. 432, 441 (N.D. Iowa 1946). The entire judgment is in favor of the corporation. Altoona Warehouse Co. v. Bynum, 242 Ala. 540, 7 So. 2d 497 (1942). See 13 FLETCHER, PRIVATE CORPORATIONS §§ 6027-28 (perm. ed. rev. repl. 1943). Apparently *contra* is Uffelman v. Boillin, 19 Tenn. App. 1, 82 S.W.2d 545 (1935), where it was held in a suit against directors for the purchase price of stock sold to individuals, the suit being for the use of the corporation, that no recovery would be allowed those stockholders who had participated in the transaction, who were guilty of laches or who were the holders of "guilty" shares. See also Chounis v. Laing, 125 W. Va. 275, 23 S.E.2d 628 (1942), which recognized the general rule but held that in peculiar circumstances of the case (a former ultra vires settlement which was concluded by majority shareholders who were also the defendants in the instant case) that recovery would be in favor of the complaining stockholders.

104. See, *e.g.,* Decatur Mineral & Land Co. v. Palm, 113 Ala. 531, 21 So. 315 (1896). It was reasoned that if corporation itself had filed the bill, its attorney would be entitled to reasonable attorney fees; thus the same is true where the corporation refused to sue and suit had to be brought by minority stockholders. Fee was fixed on basis of the evidence, thus recognizing the benefit plaintiff had acquired for the corporation. Ely Jellico Coal Co. v. Matthews, 144 Ky. 331, 139 S.W. 796 (1911). (Plaintiff entitled to a reasonable attorney's fees where suit resulted in directors paying back to corporate treasury allowances for services rendered which were improperly made); Grant v. Lookout Mountain Co., 93 Tenn. 691, 28 S.W. 90 (1894) (minority stockholders were entitled to counsel fee where suit resulted in fraudulent conveyance being set aside; the fees were a lien on the land recovered). See Hornstein, *The Counsel Fee in Stockholder's Derivative Suits,* 39 COLUM. L. REV. 784 (1939); Comment, 30 CALIF. L. REV. 667 (1942). See cases collected in 152 A.L.R. 909 (1944) and 39 A.L.R.2d 580 (1955).

ficial only to the stockholders.[105] Furthermore, some courts have not allowed plaintiff any attorney's fees where the recovery creates no fund from which such expenses could be reimbursed, as where the relief is of a preventive nature, such as the enjoining of an ultra vires act.[106] The better view, however, allows the plaintiff his attorney's fees in any suit which has benefited the corporation.[107]

Seldom has a director recovered from the corporation his expenses incurred in defending himself in a stockholders' derivative suit.[108] Ordinarily, the corporation does not benefit from the director's successful defense, as it does when a complaining stockholder is successful. However, it is felt by many commentators that when the director is successful, he is similarly entitled to reimbursement.[109] Basically,

105. Red Bud Realty Co. v. South, 96 Ark. 281, 131 S.W. 340 (1910) (where result of suit was of benefit to stockholder, but not to corporation itself, plaintiff was not allowed attorney's fees nor was defendant director entitled to his expenses); Burley Tobacco Co. v. Vest, 165 Ky. 762, 178 S.W. 1102 (1915), (where stockholder had acquired only the personal right to vote and had recovered no money nor property for the corporation or did not prevent ultra vires act, he was held not entitled to counsel fees).

106. Louisville Bridge Co. v. Dodd, 27 Ky. L. Rep. 454, 85 S.W. 683 (1905) held that while directors would be able to recover for expenses in a suit which they might bring in behalf of the corporation that did not result in benefit to the corporation, this did not apply to minority stockholders. The corporation must recover something from which the stockholder's attorney fees could be paid. The court stated that to hold otherwise would encourage foolish litigation. In a suit brought where the corporation was in receivership, it was held that in order to obtain attorney's fee plaintiffs must have substantially increased the assets of the insolvent corporation. Ham v. Norwood, 196 N.C. 762, 147 S.E. 291 (1929).

107. Marlin v. Marsh & Marsh, 189 Ark. 1157, 76 S.W.2d 965 (1934). Here a minority stockholder had declared void a contract for merger of building and loan associations, which contract had provided for liquidation of class of stock held by plaintiff. It was held that minority stockholder's attorney was entitled to a reasonable fee to be paid out of funds in the hands of the corporation's receiver. The Georgia Supreme Court has held that "Where, as a result of the prosecution of an action by minority stockholders, the majority have been prevented from fraudulently sacrificing corporate assets . . . the petitioners are entitled to an order of the court allowing payment from the common fund of the necessary expenses and counsel fees incurred by them." Georgia Veneer & Package Co. v. Florida Nat'l Bank, 198 Ga. 591, 32 S.E.2d 465, 478 (1944). Yet, in an earlier case, it was held that, where a minority stockholder had obtained an injunction against amending the corporate charter—which would have required consent of all stockholders—plaintiff's suit was that of an individual stockholder, not derivative. Thus since no trust fund was saved for the corporation, plaintiff was not entitled to attorney fees. Alexander v. Atlanta & West Point R.R., 113 Ga. 193, 38 S.E. 772 (1901). From the nature of the action and the remedy it would seem that the court could have found that the action was derivative. See also Grant v. Lookout Mountain Co., 93 Tenn. 691, 28 S.W. 90 (1894). In Uffelman v. Boillin, 19 Tenn. App. 1, 82 S.W.2d 545 (1935), attorney fees were allowed.

108. Rogers v. Hill, 34 F. Supp. 358, 370 (S.D.N.Y. 1940) (attorney's fees not allowed successful director); see 13 FLETCHER, PRIVATE CORPORATIONS § 6045 at 458-59 (perm. ed. rev. repl. 1943). However, for evidence of the recent trend in the law as indicated by statutes, note the 1957 supplement to this section. In Solimine v. Hollander, 129 N.J.Eq. 264, 19 A.2d 344, (Ch. 1941), 26 MINN. L. REV. 119 (1941), the successful director was allowed his attorney fees.

109. BALLANTINE, CORPORATIONS § 157, at 372 (rev. ed. 1946); Jervis, *Corporate Agreements to Pay Directors' Expenses in Stockholders' Suits*, 40

this is reasoned to be a needed protective device to encourage men of competence and ability to continue to accept the responsibilities implicit in corporate office. The question has been the subject of much recent legal discussion.[110]

One possible method of providing indemnity to the successful director is by enactment of a corporation by-law. There is always the possibility, of course, that such a by-law will fail of adoption, particularly in a corporation which contains divergent interests. Further, the provision can lead to opportunities for abuse by directors unless there is some regulation.[111] Several states have enacted statutes which make it possible for the successful director to be indemnified by the corporation. Two southern states—Kentucky[112] and North Carolina[113] include such a provision in their corporation statutes. The Kentucky statute also allows the director to compromise the suit with the approval of the board of directors. This has been criticized as allowing the board too much discretion, with the suggestion that it would be better to have settlements approved by the court.[114] The North Carolina statute leaves it to the discretion of the trial judge to determine whether the defendant-director is entitled to indemnity. Also, there is a provision that when suit is brought in another state which does not allow indemnification, the successful director may bring suit in North Carolina to recover his expenses. In view of the response to statutes providing indemnification of the successful directing, it is likely that other states will adopt such provisions.

COLUM. L. REV. 1192 (1940); Washington, *Litigation Expenses of Corporate Directors in Stockholders' Suits,* 40 COLUM. L. REV. 431 (1940). For a concise, accurate treatment of the arguments for and against allowing the director his expenses see STEVENS, CORPORATIONS § 174 (2d ed. 1949).

110. See, *e.g.,* Bishop, *Current Status of Corporate Directors' Right to Indemnification,* 69 HARV. L. REV. 1057 (1956); Hornstein, *New Aspects of Stockholders' Derivative Suits,* 47 COLUM. L. REV. 1, 8-11 (1947); Hornstein, *Director's Expenses in Stockholder's Suits,* 43 COLUM. L. REV. 301 (1943); Jervis, *Corporate Agreements to Pay Directors' Expenses in Stockholders' Suits,* 40 COLUM. L. REV. 1192 (1940); Washington, *Litigation Expenses of Corporate Directors in Stockholders' Suits,* 40 COLUM. L. REV. 431 (1940); Notes, 40 CALIF. L. REV. 104 (1952); 30 CALIF. L. REV. 667, 670-76 (1942); 27 KY. L.J. 102 (1938). See the cases on directors expenses in Annots., 152 A.L.R. 922 (1944) and 39 A.L.R. 2d 590 (1955).

111. It is very easy for such by-law provisions to be so broadly written and interpreted that the director is able to recover some expenses where he is not entirely successful, or even possibly where he is unsuccessful. See Bates & Zuckett, *Directors' Indemnity; Corporate Policy or Public Policy,* HARV. BUS. REV., Winter, 1954, p. 244 for an accurate analysis of the problem presented by these by-law provisions.

112. KY. REV. STAT. ANN. §271.375 (1955) provides that a director will be indemnified by the corporation for his expenses incurred in connection with litigation in which he was made a party. He must not be adjudged liable for negligence or misconduct.

113. N.C. GEN. STAT. § 55-21 (Supp. 1957).

114. Ballantine compares the Kentucky statute with the California statute and criticises the Kentucky statute for its looseness. See Ballantine, *California's 1943 Statute as to Directors' Litigation Expenses: An Exclusive Remedy for Indemnification of Directors, Officers and Employees,* 31 CALIF. L. REV. 515, 528-29 (1943).

CONCLUSION

Generally, the law of stockholders' derivative suits in these southern jurisdictions reflects the status of the orthodox view throughout the country. However, it must be recognized that there are few areas here in which it can be said that the law is well-settled.

The federal courts have widely participated in the litigation of the stockholder's derivative suit in the south. This has been largely due to the liberal discovery provisions allowed under the Federal Rules[115] and the various other reasons which prompt litigants to seek the federal courts. However, there is no sound reason why these proceedings could not be handled entirely by the state courts.[116]

Many suggestions for improvement of stockholders' derivative suits have been made and complete substitution of another remedy has sometimes been advocated.[117] Most of the suggested improvements are concerned with the enactment of up-to-date corporation statutes based on present needs for effective regulation of corporate activity. Many improvements are also possible where courts adopt a realistic approach to stockholders' derivative suits in the light of present corporate practices.

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115. *Supra* note 98.

116. A proposal to limit diversity jurisdiction in the federal courts which has been advanced at various times is to abolish the fiction that a corporation is a citizen for diversity purposes and thus eliminate federal jurisdiction where a corporation is a party to an action which does not involve a federal question. The effect would be that a corporation is a citizen anywhere it does business, thus it would be impossible to have diversity. Among the various proposals see McGovney, *A Supreme Court Fiction,* 56 HARV. L. REV. 853, 1090, 1225 (1943).

117. It has sometimes been advocated that the derivative suit could be substituted and replaced by an administrative agency which would bring the action in favor of the corporation. The agency would also regulate the relationship between majority and minority stockholders' interests. See, *e.g.,* Berlack, *Stockholders' Suits: A Possible Substitute,* 35 MICH. L. REV. 597 (1937).