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Corporation--Stockholder's Derivative Suits--Verification Requirement of Federal Rule 23(b)

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the *Driver* case best illustrates the truth of this statement. The number of times Driver was convicted indicates the futility of his prison terms. Neither deterred nor rehabilitated, he and others like him are daily released again into society. In attempting to solve this problem, the *Driver* court upholds civil commitment while refusing to allow criminal conviction. Given the fact that the criminal law should not punish an illness and that the chronic alcoholic is ill, the court's reasoning becomes persuasive. Although problems are necessarily associated with this type of decision, *Driver* represents a more realistic approach to this ancient problem of the criminal law[21] and manifests potential uses of the eighth amendment in other areas.

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CORPORATION — STOCKHOLDER'S DERIVATIVE SUITS — VERIFICATION REQUIREMENT OF FEDERAL RULE 23(b).—Plaintiff shareholder, a Polish immigrant with a limited knowledge of English, received from the management an offer to purchase her stock. Not understanding the import of the offer, she sought the advice of her son-in-law, an investment counselor who had originally procured the stock for her. The son-in-law immediately had misgivings about the offer, and he undertook a comprehensive investigation of the management's operations. He concluded that the directors were engaged in an illegal scheme to defraud the corporation of millions of dollars and decided that the best course for the plaintiff to follow would be to bring a derivative suit. This she did, following the instructions of her son-in-law and an attorney who had been hired by him. She made the affirmations in the complaint required by Rule 23(b) of the Federal Rules[1] and verified the complaint pursuant to the same rule. A deposition of the plaintiff taken by the defendants revealed that she was totally ignorant

[21] The influence of the *Driver* case is already being felt. See Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966).

[1] FED. R. CIV. P. 23(b) "Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. 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 action or the reasons for not making such effort."

of the substance of the complaint. The defendants moved to dismiss the action, arguing that the affidavit of verification was "sham." Affidavits filed by the son-in-law and attorney explained the plaintiff's ignorance of the action and detailed the history of the charges, showing a substantial basis in fact for them. In spite of these affidavits, the district court dismissed the action "with prejudice." The Court of Appeals affirmed,[2] and the Supreme Court granted certiorari. *Held*: Reversed and remanded. Rule 23(b) does not require the dismissal of an action in which a plaintiff, qualified in all respects under the rule to bring a stockholder's suit, lacks the requisite knowledge to comprehend the complaint she has verified. *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363 (1966).

The federal rule permitting a stockholder to sue in behalf of the corporation to vindicate rights the assertion of which the management has refused is a synthesis of diverse policy considerations. While affording the shareholder a means of protecting his investment from mismanagement, the rule also protects the courts from collusive suits and insures the corporations against spurious litigation.

The rule had its origin in an 1855 decision[3] which recognized the equitable right of a shareholder to institute a secondary action in the federal courts on a diversity of citizenship basis. This decision, rendered at a time when federal courts were not bound by substantive state law, led to the institution of many collusive suits in these tribunals. A corporation, to gain federal jurisdiction over a question which, if brought in a state court, would lead to an unfavorable decision, would place shares in the hands of a non-resident and have him institute a derivative suit in the federal courts.[4]

The growth in the number of corporate enterprises after the Civil War, in addition to the conferment on the national tribunals in 1875 of "federal law" questions, had the effect of threatening the federal courts with an inundation of lawsuits if the privilege of instituting the derivative action was not curtailed.[5] Thus, the Supreme Court, in *Hawes v. Oakland*,[6] promulgated guidelines for the future institution of such suits. These directives, which were eventually embodied in Rule 23(b), required the allegation of stock ownership at the time of the alleged transgression for which the complaint is brought, the denial of collusion to attain federal jurisdiction, and the affirmation that all means

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[2] Surowitz v. Hilton Hotels Corp., 342 F.2d 596 (7th Cir. 1965).
[3] Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1855).
[4] 2 MOORE, FEDERAL PRACTICE § 23.05, at 2249 (1st ed. 1938).
[5] *Id.* at 2250.
[6] 104 U.S. 450 (1881).

of rectifying the grievance within the organization itself had been exhausted. *Hawes* also directed that the complaint be verified.[7] These requirements were necessitated by, and directed at alleviating, the burden placed on the federal courts caused by the abuses of the stockholder's suit on the part of the corporation.[8]

But in their effect, these directives have served the equally valuable function of preventing abuses by the stockholder and of protecting corporations and their officers from so-called "strike suits." Such actions, based on untenable charges, are brought by stockholders in the hope of gaining an out-of-court settlement with the management, which usually would rather reach such an agreement than face the expense and damaging effects of litigation. By requiring verification of the complaint, the federal rules discourage such suits by subjecting the verifier to the threat of perjury prosecution.[9]

In light of these functions of Rule 23(b), it is apparent that the decision of the Court in the instant case was correct. As the Court stated, "Rule 23(b) was not written to bar derivative suits."[10] It was designed for, and has served the purpose of, permitting a stockholder with a genuine grievance to protect his investment, whether that stockholder be erudite or naïve. The record of the case, especially the supporting affidavits, showed that there was evidence with which to prove the irregularities charged in the complaint. The motives of the plaintiff and her advisors were unimpeachable. Further, as the case presented an alleged violation of federal law, the question of collusion was not in issue. Thus it would not have been within the spirit of the rule to affirm the ruling of the lower court. Such a ruling would have denied to the poor in learning the same remedy at law that is afforded our more educated citizens.

It is unfortunate, though, that the Court did not build its decision on firmer ground. The holding of the Court leaves the corporately naïve plaintiff, who brings an action under 23(b), in the anomalous position of swearing to the veracity of a set of averments the truth of which he could not possibly know. In a sense, such an affidavit undermines the verification requirement by depriving it of the attendant penalty for false swearing. Perjury, the willful swearing to the truth

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[7] *Id.* at 461.

[8] 2 MOORE, *op. cit. supra* note 4, at 2251.

[9] Several states whose courts were bothered by this nuisance litigation enacted legislation requiring a plaintiff holding less than a specified interest in the corporation to give security for the litigation expenses of the corporation should the suit prove to be unsuccessful. *E.g.*, N.Y. GEN. CORP. LAW § 61(b) (McKinney Supp. 1965).

[10] 383 U.S. 363, 371.

of matters known to be false,[11] would not lie against a verifier who did not know that the facts alleged were not true.

The danger in such a situation comes not so much from the stockholder, who would probably not be so shrewd as to institute a "strike suit," but rather from one who would capitalize on the stockholder's ignorance in the hope of himself deriving a gain. In most cases, as experience in several state jurisdictions has shown, this opportunist would be the plaintiff's attorney.[12] The ill-advised plaintiff verifier, immune from perjury, would suffer no ill effects; moreover, if a settlement were reached, the unscrupulous barrister would harvest a handsome profit.

In a case such as the instant one, the sounder interpretation of the rule would require verification by one not a party to the record who is qualified to make a valid judgment on the truth of the allegations. As Justice Harlan observed in the concurring opinion, "Rule 23(b) directs that in a derivative suit 'the complaint shall be verified by oath' but nothing dictates that the verification be that of the plaintiff shareholder."[13] When a statute does not specifically state who shall make the verification, the general practice allows it to be made by one other than the plaintiff, "if he has sufficient knowledge of the facts."[14] In such instances, "a satisfactory reason should be stated for the failure of the party to verify."[15]

If vicarious verification for the uneducated stockholder is required, fulfillment of the verification requirement becomes more than a mere formality; the threat of perjury charges is again imminent. Because the verifier in such cases, presumably the plaintiff's attorney, would be disinclined to perjure himself, the deterrent function of the verification requirement would be preserved.

Granted, the issue decided in this case was verification by the naïve stockholder and not by another. But, as Justice Harlan suggested, the Court could have accepted the sworn affidavit of the plaintiff's

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[11] 18 U.S.C. § 1621 (1964).

[12] See WOOD, SURVEY AND REPORT REGARDING STOCKHOLDER'S DERIVATIVE SUITS 11 (1944). Wood points out that the only person to profit substantially in a stockholder's suit is the plaintiff's attorney, who may take twenty to forty per cent of any recovery, the balance being distributed among the shareholders. Wood goes on to say that such fees may be among the largest in any field of law, and the possibility of earning them is an inevitable inducement to find a shareholder plaintiff by any means and to seize upon any colorable basis for a suit. Since the lawyer's interest is paramount and the usual stockholder's interest is virtually negligible, the real interests of the corporation and its stockholders are unmistakably made subordinate to any advantage that can be gained by the attorney, so that the usual controls of the plantiff's interest are entirely lacking.

[13] 383 U.S. 363, 374.

[14] 71 C.J.S. *Pleading* § 355 (1951).

[15] *Ibid.*

attorney in lieu of her verification to permit a furtherance of this action.[16] At the same time, it could have stated that in the future verification should be by one versed in the facts.

Richard O. Stevenson

CRIMINAL LAW—ASSAULT AND BATTERY—RESISTING ILLEGAL ARREST.—The defendant, Kurt Koonce, was a bartender in New Jersey in May of 1964 when police attempted to arrest him on the charge that he had sold liquor to a minor. The bartender resisted and his mother helped him in his brief struggle with the police, but they were rather quickly subdued and Koonce was jailed. When he appeared in court, however, the charge of selling liquor to a minor was dismissed on the grounds that a peace officer in New Jersey may not arrest without a warrant for a misdemeanor which is not committed in his presence. Still, Koonce drew a 90-day sentence on another charge of assault and battery upon a peace officer. His mother was fined $50 for having come to her son's assistance. *Held*: Judgment reversed as to the defendants, but hereafter it shall not be lawful in New Jersey to resist a police officer undertaking an arrest, notwithstanding the illegality of the arrest. *State v. Koonce*, 89 N.J. Super. 169, 214 A.2d 428 (1965).

The doctrine of man's inalienable right to resist with all necessary force an unlawful attempt to arrest dates so far back as to defy pinpointing. Historically, the Englishman has never minimized the unpleasant circumstances attendant upon even a short confinement in prison, and English common law early found that resistance to false arrest is a natural extension of the right of self-defense.[1] The doctrine has been so completely accepted in American criminal law that, until now, it has needed no qualification.[2]

> A private person has the right to resist an illegal arrest. He can repel force with force. t does not have to be pat-a-cake force; the one making the illegal arrest is in the wrong and may be repelled. In the end, the arrestee may take the life of the arrester in such a case if it becomes necessary to do so in self-defense.[3]

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[16] 383 U.S. 363, 374.

[1] 5 AM. JUR. 2d *Arrest* § 94 (1962); 6 AM. JUR. 2d *Assault & Battery* § 79 (1962); 6 C.J.S. *Arrest* § 13 (1937); Annot., 48 A.L.R. 746 (1927) (elements of resisting officer).

[2] MORELAND, MODERN CRIMINAL PROCEDURE (1959); ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 27 (1947); 6 C.J.S. *Arrest* § 92(d) (1937); see State v. Robinson, 145 Me. 77, 72 A.2d 260 (1950); People v. Cherry, 307 N.Y. 308, 121 N.E.2d 238 (1954); Robison v. U.S., 4 Okla. Crim. 336, 111 Pac. 984 (1910); State v. Rousseau, 40 Wash. 2d 92, 241 P.2d 447 (1954).

[3] MORELAND, *op. cit. supra* note 2, at 44.