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STOCKHOLDERS' DERIVATIVE SUITS: THE COMPANY'S ROLE, AND A SUGGESTION

GEORGE T. WASHINGTON*

When a stockholder brings a derivative action to redress some real or alleged abuse in the conduct of his corporation's affairs, he is, at least in theory, merely acting in the place and stead of the company. The corporation itself, supposedly the true plaintiff, is in an anomalous position. As a "legal entity" it should be interested in the protection of its rights, and, whether the stockholder's suit is aimed against directors, officers, or third parties, it should welcome any addition to its funds or property which the litigation is able to produce. From the practical point of view, of course, the acts of the corporation are those of its management, and the very conditions under which a stockholder's suit is brought usually indicate complete lack of sympathy on the part of the management with the alleged cause of action. The executives are generally of the firm opinion that the stockholder's suit is "against the best interests of the corporation," and that active steps should be taken on behalf of the company to prevent any further damage from being done. The protesting stockholder has the equally firm belief that if the corporation does anything at all it should be in aid of the prosecution of the action; nothing makes him more indignant than to see the defense supported by corporate power and corporate funds. Shortly after the commencement of the action, counsel for the corporation will probably be asked whether the company may assist the individual defendants. Similarly, one of the first tasks confronting complainant's counsel is very often that of resisting procedural steps taken in the company's name. After reviewing the part which the corporation may play in stockholders' actions, with particular reference to efforts by the management to suppress suits which are regarded as malevolent or harmful, the writer would like to discuss a possible means by which corporate funds and power may be put to a somewhat different use in dealing with stockholders' grievances.

I. The Corporation as a Party Litigant in Stockholders' Suits

The accepted theory upon which stockholders' derivative actions are based does not of itself provide a complete answer to our inquiry as to the company's role. It is commonly said that since the stockholder has no remedy at law, equity permits him to maintain suit in behalf of the corporation, joining the latter as a defendant to protect the real defendants from a subsequent suit by the corporation, and to make sure that the corporation receives the funds

*For valuable criticisms of the manuscript of this paper, the writer is indebted to his colleagues, Dean Robert S. Stevens, Professor Arthur J. Keeffe, and Herbert R. Baer, Esq.

recovered.¹ Occasionally, it is stated that the stockholder's action is of a dual nature, in that the stockholder must first show that the body corporate (acting through its constituted authorities) has been guilty of a breach of duty to the stockholders by failing to sue, and, secondly, must show a cause of action in behalf of the corporation against the actual defendants.² Thus, it may be argued that the corporation is a defendant as to the first cause of action and a plaintiff as to the second. If this theory were adopted, the corporation could assist the plaintiff, or could actively defend on the ground, and only on the ground, that the corporation was justified in its failure to bring suit. However, this would seem to be too narrow an approach, in view of some of the cases to be discussed below.

The corporation must be named and served as a party defendant,³ a requirement which, as we shall see, may work great hardship upon the complaining stockholder. However, the courts commonly speak of the company as a "nominal defendant," and indicate plainly that in their view it should take a very limited part in the litigation, at least if it desires to aid the individual defendants.⁴ In the usual case, it need not answer or take any other step in the proceedings.⁵ Ideally, the company should be impartial, or perhaps aid the plaintiff if it finds his cause to be just. And, in fact, the management sometimes honestly wishes to take a neutral position. After the Pecora

¹Davenport v. Dows, 18 Wall. 626, 21 L. ed. 938 (1874); Willoughby v. Chicago Junction Railways & Union Stockyards Co., 50 N. J. Eq. 656, 25 Atl. 277 (1892). In Kelly v. Thomas, 234 Pa. 419, 83 Atl. 307 (1912), the court gives the additional reason that the company is entitled to notice "in order that its interests and the rights of its creditors might be protected." See also Hanrahan v. Andersen, 108 Mont. 218, 90 P. (2d) 494 (1939).

²Koral v. Savory, Inc., 276 N. Y. 215, 218, 11 N. E. (2d) 883 (1937); BALLANTINE, CORPORATIONS (1927) 611-612; 13 FLETCHER, CORPORATIONS (1931) § 5946. Cf. McLaughlin, *The Mystery of the Representative Suit* (1938) 26 GEO. L. J. 878, 898, where the author rejects the theory that the stockholder has a personal grievance against the corporation because of its failure to bring suit, pointing out that the plaintiff in a derivative suit never asks damages for himself but always for the corporation. On the necessity of prior demand by complainant on directors or stockholders that suit be brought by the corporation, see *infra* notes 58 and 59.

³On the necessity of joinder of the corporation in stockholders' representative suits, see note, (1935) 44 YALE L. J. 1091; STEVENS, CORPORATIONS (1936) 671. On joinder of a dissolved corporation, see 13 FLETCHER, CORPORATIONS (1931) § 5997; of a corporation which has been consolidated with another, see *Arnstein v. Bethlehem Steel Corp.*, 18 F. Supp. 916 (E. D. N. Y. 1937). On service of process, see *infra* note 12.

⁴See *Chabot & Richard Co. v. Chabot*, 109 Me. 403, 84 Atl. 892 (1912); *Meyers v. Smith*, 190 Minn. 157, 251 N. W. 20 (1933), noted, (1934) 43 YALE L. J. 661; *Apfel v. Auditors*, 223 App. Div. 457, 228 N. Y. Supp. 489 (1st Dep't 1928), *aff'd w.o.op.*, 250 N. Y. 600, 166 N. E. 339 (1929); *Young v. Equitable Life Assur. Soc.*, 112 App. Div. 760, 762, 98 N. Y. Supp. 1052 (3d Dep't 1906). Cf. cases cited *infra* notes 18 and 19.

⁵Failure to answer ordinarily cannot harm the corporation, since no relief is asked against it in the complaint and no judgment by default can be taken. See *Young v. Equitable Life Assur. Soc.*, *supra* note 4, at 762. Sometimes, of course, a receivership is asked, in which event the corporation's right to defend itself is clear. See *infra* note 18. See also *Weiland v. N. W. Distilleries, Inc.*, 203 Minn. 600, 281 N. W. 364 (1938), on the necessity of giving the corporation notice of appeal from a judgment in its favor.

investigation had brought to light a number of unfortunate episodes in the history of a large bank in New York City, several stockholders brought derivative actions (later consolidated) against the directors who had authorized the transactions in question. The board, which at the time the suits were brought had partly changed in membership, instructed a committee of directors to investigate, through independent counsel, the allegations made.⁶ The bank, which had been joined as a party defendant in the action, served a short answer, submitting its rights to the court.⁷ Doubtless many instances could be found in which the company's management has sought to take an impartial attitude.

Occasionally, also, the corporation may offer active aid to the plaintiff—perhaps because a new management has come into control of the business. In such a situation, according to the recent case of *General Investment Corp. v. Addinsell*, the company cannot formally assume the status of co-plaintiff, even with the consent of the complaining shareholder.⁸ Yet it seems clear that the company can informally assist the plaintiff, and take an active part in the prosecution, at any stage in the proceedings.⁹ The practical question then arises as to whether the stockholder or the corporation should control the action, especially with reference to the selection of trial counsel. The *General Investment* case would indicate that the shareholder, as sole plaintiff,

⁶See N. Y. Times, Jan. 4, 1934, p. 36, col. 3; *ibid.*, Jan. 10, 1934, p. 1, col. 3.

⁷The answer took the following form, as shown by the record in *Bookbinder v. Chase National Bank of New York*, 244 App. Div. 650, 280 N. Y. Supp. 393 (1st Dep't 1935): "The defendant, The Chase National Bank of the City of New York, for its answer to the amended complaint, submits its rights to the Court and asks the Court to make such judgment and decree herein with respect to the defendant bank as may be just and proper." (Record, p. 586.) Technically, of course, this is not an "answer" at all, since it does not comply with the requirements of local practice (N. Y. Civ. Prac. Act §§ 241, 261). But it seems clear that the corporation need not answer or plead; see *supra* note 5. The suit mentioned above was ultimately settled. See N. Y. Times, Dec. 28, 1938, p. 11, col. 2.

⁸255 App. Div. 319, 7 N. Y. S. (2d) 377, 255 App. Div. 962, 8 N. Y. S. (2d) 671 (1st Dep't 1938), corporation's motion for joinder as coplaintiff denied; individual defendants resisted motion. The opinion of the court is not persuasive; there seems no real reason for refusing to permit the corporation to join as coplaintiff, unless perhaps the defendants have raised defenses based on the complaining stockholder's personal lack of capacity to sue, and there is thought to be some compelling policy in favor of protecting them in these defenses. From *Bachrach v. General Investment Corp.*, 29 F. Supp. 966, 967 (S. D. N. Y. 1939), it appears that the Investment Corporation later began a separate suit in the state courts. See also *Weiss v. Addinsell*, 103 N. Y. L. J. 1096, col. 6 (Sup. Ct., N. Y. County, March 9, 1940); *O'Brien v. King*, — App. Div. —, 17 N. Y. S. (2d) 44 (1st Dep't 1940). Cf. *Loeb v. Berman*, 217 Cal. 716, 20 P. (2d) 685 (1933), where the corporation filed a cross-complaint against the individual defendants; the corporation's receiver later took over the action, and the original plaintiffs were considered super-numerary parties. See also *Russell v. Weyand*, 5 Cal. App. (2d) 259, 42 P. (2d) 381 (1935).

⁹See *Sheridan v. Sheridan Electric Light Co.*, 38 Hun 396 (N. Y. Sup. Ct., General Term, 1st Dep't 1886), where the corporation filed no answer to the suit; it later aided the plaintiff, being permitted to take an appeal from a judgment for the defendants; *Block (Noma Electric Corp.) v. Block*, 102 N. Y. L. J. 1142, col. 6 (Sup. Ct., N. Y. County, Oct. 16, 1939).

should have the deciding voice, but in the event of a serious disagreement the trial court would doubtless have authority to settle the dispute, at the instance of either the company or the stockholder.¹⁰ The complaining stockholder, rather than the corporation, is of course entitled normally to control the conduct of the litigation.¹¹

Suppose the company's management says, "We simply want to protect the corporation's interests." That is a safe and sound attitude, but one which in practice seems to operate to the advantage of the individual defendants and to the detriment of the complainant. For instance, the corporation may appear specially to object to lack of proper service of process upon it.¹² It is said that the company is entitled to insist that it be treated as an ordinary defendant in determining what service is to be deemed sufficient. Suppose, then, that the complaining stockholder and all the directors are in New York, while the corporation is incorporated in and doing business in New Jersey. If suit is started in New York and the company is not doing business there, it can appear specially and have the attempted service on it set aside. The suit then fails for lack of a necessary party. If the plaintiff starts suit in New Jersey, he will hardly get very far, because sufficient service cannot be obtained there against the individual defendants. Under these circumstances, the stockholder's opportunity for redress is very seriously curtailed.¹³ It would

¹⁰In *Dresdner v. Goldman Sachs Trading Corp.*, 240 App. Div. 242, 269 N. Y. Supp. 360 (2d Dep't 1934), *rev'g* 148 Misc. 541, 265 N. Y. Supp. 913 (1933), the court indicated that where two stockholders were attempting to maintain separate derivative suits on the same cause of action, the trial court should reserve control, with power in its discretion to dismiss the second action brought, to consolidate both actions, or to allow both to continue. Similarly, in *Wile v. Burns Bros.*, 239 App. Div. 59, 265 N. Y. Supp. 461 (1st Dep't 1933), *s.c.*, 239 App. Div. 67, 265 N. Y. Supp. 469, where an action by a corporation against its directors to recover property allegedly misappropriated was being controlled in the interests of the defendants and not being prosecuted in good faith, the court held that a stockholder could maintain a separate suit on the same cause of action, and granted an injunction against the prosecution of the first suit. See note (1934) 19 CORNELL L. Q. 300; STEVENS, CORPORATIONS (1936) 676, 678.

¹¹*Planten v. National Nassau Bank*, 174 App. Div. 254, 259, 160 N. Y. Supp. 297 (1st Dep't 1916), *aff'd w.o.op.*, 220 N. Y. 677, 116 N. E. 1070 (1917). See also STEVENS, CORPORATIONS (1936) 675-678, and cases cited *supra* notes 8, 9, and 10.

¹²*Goldberg v. Emanuel*, 254 App. Div. 556, 2 N. Y. S. (2d) 946 (1st Dep't 1938), *rev'g* 166 Misc. 610, 2 N. Y. S. (2d) 943 (1938); *Freeman v. Bean*, 243 App. Div. 503, 276 N. Y. Supp. 310 (1st Dep't 1934), one judge dissenting, *aff'd w.o.op.*, 266 N. Y. 657, 195 N. E. 368 (1935); *Grant v. Cobre Grande Copper Co.*, 126 App. Div. 750, 111 N. Y. Supp. 386 (1st Dep't 1908), two judges dissenting, *rev'd on other grounds*, 193 N. Y. 306, 86 N. E. 34 (1908).

¹³See dissenting opinion of Finch, P. J., in *Freeman v. Bean*, *supra* note 12, at 503; Black, J., in *Phillips v. Morgan*, 100 N. Y. L. J. 2175, col. 5 (Sup. Ct., N. Y. County, Dec. 16, 1938). Cf. *Holmes v. Camp*, 219 N. Y. 359, 373, 114 N. E. 841 (1916); *Guggenheimer v. Beaver Board Companies*, 136 Misc. 511, 240 N. Y. Supp. 15 (1930), *aff'd w.o.op.*, 229 App. Div. 717, 241 N. Y. Supp. 877 (1st Dep't 1930). Possible remedies for the situation are suggested in notes, (1935) 44 YALE L. J. 1091, and (1935) 35 COL. L. REV. 793. See also Winer, *Jurisdiction over the Beneficiary Corporation in Stockholders' Suits* (1935) 22 VA. L. REV. 153. If the facts enable the stockholder to sue in the federal courts, he may take advantage of 28 U. S. Code § 112, as amended April 16, 1936, establish-

appear also that the corporation may move for a change of venue,¹⁴ or to correct a misjoinder of causes of action, as where the stockholder has improperly attempted to join an individual cause of action with one in behalf of the corporation.¹⁵ As to the foregoing matters, which may perhaps be considered as legitimate endeavors by the corporation to see that its rights are adjudicated in a proper court and on proper pleadings, the company seems to be considered a true party defendant.¹⁶ In another respect, however, it must be considered a true plaintiff; it should not ordinarily be allowed to set up a counterclaim against the complaining stockholder.¹⁷

ing a more liberal rule regarding service on the corporation. However, if the unfortunate decision in *Rogers v. Guaranty Trust Co.*, 288 U. S. 123, 53 Sup. Ct. 295, 77 L. ed. 652 (1933), is followed, under which a federal court may in certain situations refuse to take jurisdiction over a stockholder's action, the advantage gained by § 112 may frequently be nullified. Moreover, many stockholders' suits are excluded from the federal courts by Rule 23 (b), Federal Rules of Civil Procedure (formerly Equity Rule 27). As to the effect on Rule 23 (b) of the decision in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188, 114 A. L. R. 1487 (1938), see *Summers v. Hearst*, 23 F. Supp. 986 (S. D. N. Y. 1938), noted, (1939) 37 MICH. L. REV. 654.

¹⁴*McHarg v. Commonwealth Finance Corp.*, 44 S. D. 144, 182 N. W. 705 (1921).

¹⁵*Brock v. Poor*, 216 N. Y. 387, 111 N. E. 229 (1915), corporation joined in demurrer based on misjoinder; demurrer sustained. Cf. *Brinckerhoff v. Bostwick*, 88 N. Y. 52 (1882), corporation demurred, with other defendants, for want of jurisdiction, improper joinder of parties, and other defects in the complaint; judgment was rendered for the plaintiff on the demurrer, without discussion of the propriety of the corporation's activity in the case. On the question of whether the corporation can by motion or answer raise the objection that the complainant made no demand on the board of directors that suit be brought, see *Herrick v. Dempster*, 73 N. J. Eq. 145, 75 Atl. 810 (1907); *Marr v. Marr*, 73 N. J. Eq. 643, 70 Atl. 375 (1907). Instances can be found in which the corporation defended on this ground and no comment was made regarding the propriety of such action on its part. See, for example, *Flynn v. Brooklyn City R. R.*, 158 N. Y. 493, 53 N. E. 520 (1899); *Boaz v. Sterlingworth Railway Supply Co.*, 68 App. Div. 1, 73 N. Y. Supp. 1039 (1st Dep't 1902). On the related question of whether a corporation can raise by plea or answer the contention that a demand to sue was rightly refused by the board, see *Groel v. United Electric Co. of N. J.*, *infra* notes 27 and 28, and connected text. Cf. *Spiegel v. Beacon Participations, Inc.*, 8 N. E. (2d) 895 (Mass. 1937).

¹⁶The corporation has also been said to be a true party defendant in determining the question of diversity of citizenship for purposes of federal jurisdiction. *Doctor v. Harrington*, 196 U. S. 579, 25 Sup. Ct. 355, 49 L. ed. 606 (1905). However, the result reached in *Doctor v. Harrington* would seemingly have been the same had the corporation been considered purely a neutral party. Cf. 2 MOORE'S FEDERAL PRACTICE (1938) 2270 *et seq.* That the rule in *Doctor v. Harrington* has not been affected by the decision in *Erie Railroad Co. v. Tompkins*, *supra* note 13, see *J. R. A. Corporation v. Boylan*, 30 F. Supp. 393 (S. D. N. Y. 1939), noted, (1940) 38 MICH. L. REV. 724. Cf. *Johnson v. Ingersoll*, 63 F. (2d) 86 (C. C. A. 7th 1933), corporation's interest, and not complainant stockholder's interest, determines amount involved for purposes of federal jurisdiction; *State ex rel. St. Louis Amusement Co. v. Roskopf*, 330 Mo. 1078, 52 S. W. (2d) 178 (1932), interests of corporation and individual defendants are conflicting, and not similar, on question of supplying appeal bond.

¹⁷*Vas Nunes v. Schwab*, 129 Misc. 404, 221 N. Y. Supp. 339 (Sup. Ct., N. Y. County, 1927), counterclaim alleging stockholder was in debt to corporation on account of an unpaid stock subscription must be stricken out, since the corporation "is in reality the plaintiff in the action." *But see Lloyd, Jr. v. Beardsley, Sr.*, 102 N. Y. L. J. 2077, col. 6 (Sup. Ct., N. Y. County, Dec. 11, 1939), noted, (1940) 53 HARV. L. REV. 689, where the company was permitted to interpose a counterclaim asking an injunction to compel the complainant to return a list of the company's customers. See also *Miller v. Friedman*, 103 N. Y. L. J. 1027, col. 5 (App. Div., 2d Dep't March 5, 1940). Representative actions

There is another field in which "protection of the company's interests" may incidentally provide substantial aid to the individual defendants. The clearest case is where the complaining stockholder seeks to sequester the assets of the corporation and interrupt its normal business. It is now well settled that the company can actively resist an application to place it in receivership, and can pay counsel for so doing.¹⁸ This resistance can be very helpful to the defendant directors in the conduct of their own case. Similarly, it has been held that the corporation may actively defend against a suit seeking to set aside a voluntary reorganization of the corporation's affairs, the court having found that the reorganization was beneficial to the corporation and that successful maintenance of the suit would have threatened "the impairment of the corporation's assets."¹⁹

Often, of course, the corporation will endeavor to provide direct aid to the defendant officers or directors. As has been indicated above, the management and majority stockholders will in many instances—perhaps in most instances—be sympathetic with the defendant directors, or perhaps find themselves joined as defendants. Even though they are not so joined, the members of the present management will in all probability regard the suit as a reflection on themselves, "on the administration." Under these circumstances, the temptation is very great to cause the corporation to aid the defendants in every way possible. At the very least, the defendants will

should not as a general rule be impeded by counterclaims against the initiator of the suit in his individual capacity. CLARK, CODE PLEADING (1928) 466. However, justice may sometimes require that all controversies between the parties be settled in the same suit. This was true in the *Lloyd* case, *supra*, where there were only three stockholders, all of whom were parties to the action. Under New York practice, the court has power to refuse the individual defendants permission to set up counterclaims against the corporation. *Ritter v. Mountain Camp Holding Corp.*, 252 App. Div. 602, 299 N. Y. Supp. 876 (1st Dep't 1937); *Burgess v. Stevens*, 148 Misc. 450, 266 N. Y. Supp. 79 (Sup. Ct., Broome County, 1933) (action under N. Y. GEN. CORP. L. §§ 60, 61). *Cf. Vas Nunes v. Schwab, supra*; *Noeller v. Duffy*, 126 Misc. 799, 214 N. Y. Supp. 304 (Sup. Ct., Niagara County, 1926).

¹⁸*Godley v. Crandall & Godley Co.*, 181 App. Div. 75, 78, 168 N. Y. Supp. 251 (1st Dep't 1917), *aff'd w.o.op.*, 227 N. Y. 656, 126 N. E. 908 (1920). This decision should be read in the light of the connected case of *Godley v. Crandall & Godley Co.*, 153 App. Div. 697, 139 N. Y. Supp. 236 (1st Dep't 1912), *mod.*, 212 N. Y. 121, 105 N. E. 818 (1914). Other receivership cases include *Esposito v. Riverside Sand & Gravel Co.*, 287 Mass. 185, 191 N. E. 363 (1934); *Atwater v. Elkhorn Valley Coal-Land Co.*, 184 App. Div. 253, 171 N. Y. Supp. 552 (1st Dep't 1918), *aff'd w.o.op.*, 227 N. Y. 611, 125 N. E. 912 (1919). *And see Barnes v. Newcomb*, 89 N. Y. 108 (1882)—not, however, a derivative action, apparently. *Contra*, where appointment of receiver was for best interests of corporation, *Brock v. Automobile Livery & Sales Co.*, 137 La. 9, 68 So. 195 (1915). *See also Wither- spoon v. Hornbein*, 70 Colo. 1, 196 Pac. 865 (1921).

¹⁹*Corey v. Independent Ice Co.*, 226 Mass. 391, 115 N. E. 488 (1917), suit by minority stockholder, but apparently not a derivative action; corporation and certain individuals active in the reorganization were made defendants. *See also Esposito v. Riverside Sand & Gravel Co.*, *supra* note 18. Apparently, a corporation can resist an application for an injunction to restrain payment of interest to bondholders. *Continental Securities Co. v. New York Central R. R.*, 179 App. Div. 355, 166 N. Y. Supp. 491 (2d Dep't 1917), *aff'd w.o.op.*, 222 N. Y. 650, 119 N. E. 1036 (1918).

ordinarily have ready access to the company's books and papers. Often the attorneys customarily retained by the corporation will represent the defendant directors, thus giving the latter the benefit of special knowledge of the company's affairs. The full resources of the corporation, financial and otherwise, are very commonly made available to the individual defendants.²⁰ This does not necessarily mean a conspiracy to defeat justice, as the stockholder and his attorney are likely to feel—though sometimes it amounts to exactly that. The company's activity is due partly to the management's worry about the situation from the standpoint of damage to the company's reputation and their desire to "do something" about it, partly to the fact that if the corporation is an active litigant, the individual defendants' legal bills may be correspondingly reduced.

Any financial aid by the corporation to the individual defendants to assist them in resisting the stockholder's suit must be regarded as improper; the defendants have not yet successfully defended themselves on the merits, and the corporation should not use its funds to protect them from attack.²¹ Similarly, it is improper for the company to set up defenses affirmatively

²⁰See Berlack, *Stockholders' Suits: A Possible Substitute* (1937) 35 MICH. L. REV. 597, 601-602, where the author states: "The corporation is a party defendant and must be represented; and while the rule is that the expenses of the individual defendants cannot be charged to the corporation, it is usually these very defendants who are in control of the corporate treasury, and do not hesitate to call upon it, at least for the initial disbursement. How much may be recovered from them later is conjectural. The cost of defense is quite as great as the cost of prosecution, and often greater; attorneys for large and vulnerable corporations do not work for pittance. But from the point of view of the defense, there is the saving fact that the corporate treasury usually is supplied with enough cash to meet the exigencies of the situation." The point made by Mr. Berlack is doubtless well taken in a very large number of instances. In *Dresdner v. Goldman Sachs Trading Corp.*, *supra* note 10, Davis, J., said (p. 245): "Stockholders are widely scattered and have no definite method of contact with each other. They usually know that the evidence is almost exclusively in the control of those who are charged with delinquency; that those same individuals are likewise in control of the funds of the corporation and may apply them in defense of their acts, whether those acts are innocent or wrongful; that in seeking a remedy the stockholder will be met with every obstacle and procedural delay that the ingenuity of skilled counsel can devise, as is illustrated in the present case; and that the litigation must entail on their part a great expense with the eventual result in doubt."

²¹*McCourt v. Singers-Bigger*, 145 Fed. 103 (C. C. A. 8th 1906); *Wickersham v. Crittenden*, 106 Cal. 329, 39 Pac. 603 (1895); *McConnell v. Combination M. & M. Co.*, 31 Mont. 563, 79 Pac. 248 (1905); *Chabot & Richard Co. v. Chabot*, *supra* note 4; *General Mortgage & Loan Corp. v. Guarantee Mortgage & Sec. Corp.*, 264 Mass. 253, 162 N. E. 319 (1928); *Hooker, Corser & Mitchell Co. v. Hooker*, 88 Vt. 335, 92 Atl. 443 (1914). See also *Percy v. Millaudon*, 8 Mart. N. S. 68 (La. Sup. Ct. 1829); *s.c.*, on subsequent appeal, 3 La. Sup. Ct. O. S. 568 (1832). In none of the cases cited were the directors found innocent of the charges made by the complaining stockholders. Even if they had been, it seems clear that the corporation should not aid them prior to a court determination of their lack of wrongdoing. See Washington, *Litigation Expenses of Corporate Directors in Stockholders' Suits* (1940) 40 Col. L. Rev. 431, where the writer discusses the problem of granting reimbursement from corporate funds to directors who have successfully defended themselves on the merits of the suit. It may also be noted that the corporation may protect its own interests (see cases cited *supra* notes 12-19), and this, as was pointed out above, may incidentally aid the defendants.

supporting the questioned activities of the individual defendants,²² unless perhaps it appears that such defense is necessary to protect the interests of the corporation.²³ This last exception is a narrow one. It may be argued that the attack on the directors is an attack on the "business reputation" of the corporation itself, indicating that it lacks good management, and that, therefore, the corporation, particularly if it is a financial institution seeking the confidence of the public, should be allowed to make an active defense of the challenged acts. However appealing this contention may be from a business standpoint, it is not likely to be recognized by the courts. One case has said that the argument at all events loses its force as soon as the stockholder's complaint has been served, as it is then no longer possible to avoid any damaging publicity which may result from the pendency of the suit.²⁴ The courts would also in all probability say that if the stockholder's suit is eventually shown to be groundless, the directors' reputation will have been vindicated, whereas if the suit proves successful, the corporation cannot complain of indirect harms due to unfavorable publicity. The whole tenor of the cases is that the stockholder is entitled to a fair trial on the merits, without having the power of the corporation turned against him. It must be noted, however, that corporations have frequently interposed affirmative defenses and actively supported them without the complaining stockholder or the court itself having raised the point of whether the corporation was technically entitled to do so.²⁵

²²*Meyers v. Smith*, *supra* note 4: corporation pleaded affirmative defenses in behalf of directors charged with wrongful expenditures; defenses stricken out on stockholder's motion; individual defendants were in control of corporation. The court said: "The corporation is a nominal party only. It was properly joined as a party for the protection of the defendants. . . . But that does not vest in the corporation the right to here step in and, by answer, attempt to defeat what is practically its own suit and causes of action. Nor have the two individual defendants, in control thereof, any right to use the corporation for any such purpose or to impose on the corporation the burden of fighting their battle." See also *Levinson v. Rosoff*, 98 N. Y. L. J. 1927 (Sup. Ct., Kings County, Dec. 1, 1937) (suit against directors under N. Y. Gen. Corp. L. § 60; corporation's defenses, supporting directors, stricken out on motion); *Harris v. State Bank of Williamson*, 177 N. Y. Supp. 545, 548 (Sup. Ct., Wayne County, 1919); *Harris v. Pearsall*, 116 Misc. 366, 375, 190 N. Y. Supp. 61 (Sup. Ct., Wayne County, 1921), corporation interposed an answer denying the complainant's personal capacity to bring suit; court in effect condemns this procedure; *Kaiser v. Niemeyer*, 198 Wis. 581, 225 N. W. 188 (1929). Cf. *Davis v. Sirotowitz*, *infra* note 23.

²³See *Davis v. Sirotowitz*, 99 N. Y. L. J. 1195, col. 1 (Sup. Ct., Kings County, March 10, 1938), motion to strike out corporation's answer denied (inspection of record shows that complaint asked that defendant directors, though a majority, be enjoined from acting as such and that corporation be compelled to perform certain agreements which would break a contract between the corporation and a third party; in effect, therefore, the corporation was resisting relief unfavorable to itself). See also cases cited *supra* notes 18 and 19.

²⁴*Harris v. Pearsall*, *supra* note 22.

²⁵See *Brown v. De Young*, 167 Ill. 549, 47 N. E. 863 (1897); *Katz v. New England Fuel Oil Co.*, 135 Me. 452, 199 Atl. 274 (1938); *Pollitz v. Wabash R. R. Co.*, 207 N. Y. 113, 100 N. E. 721 (1912); *Brock v. Poor*, *supra* note 15; *Frank v. American Commercial Alcohol Corp.*, 152 Misc. 123, 273 N. Y. Supp. 622 (Sup. Ct., N. Y. County, 1934);

At this point, it will be asked, "Are there not certain instances in which the corporation is entitled to resist a stockholder's suit by every means in its power? Strike suits, for example?" Definitions of "strike suits" are likely to vary according to one's outlook. Directors would generally concede that actions which attack actual physical theft of corporate assets are justified; most other actions would probably be regarded as "strike suits," even though there was solid legal basis for recovery. Suits to hold directors liable for declaring dividends out of capital, or for violating some similar statutory restriction, are thought of as being based on "technicalities," and stockholders who attempt to take advantage of the plain words of the statute must necessarily be "strickers." Such an attitude, of course, is unfair, and one can hardly seek to justify the use of corporate funds to resist an action seeking to impose a liability clearly intended by the legislature. A "strike suit" is perhaps better defined as an action brought purely for its nuisance value, with the purpose of obtaining a settlement for the complainant's sole benefit—the amount of the proposed settlement being far greater than any possible injury suffered by the complainant.²⁶ Even a suit brought for this reason—to induce the defendants to pay off the complainant—may be based on a good cause of action. Are we to allow the corporation to seek to defeat a sound legal claim, merely because the plaintiff has an unworthy motive?

Another difficult situation is presented when the complaint on its face states a cause of action and the plaintiff is clearly acting in good faith, but the suit is likely to do more harm than good to the corporation and its stockholders. Take, for example, the following situation—which, though hypothetical, can probably be duplicated in a dozen lines of business. X Corporation has recently reconstituted its directorate, after several years of financial difficulty. The executive who was formerly general manager is now chairman of the board at a reduced salary. The employees are loyal to him, and his long experience is regarded as being of great value. A stockholder now brings a derivative suit against this individual, alleging that he mismanaged the corporation and that the compensation he received as general manager was excessive and should in large part be returned to the corporation. The present members of the board of directors are joined as defendants, the complaint

Runcie v. Bankers Trust Co., 6 N. Y. S. (2d) 623 (Sup. Ct., Nassau County, 1938); Robins v. Brooklyn Trust Co., 6 N. Y. S. (2d) 626 (Sup. Ct., Nassau County, 1938); Wolf v. American Tel. & Tel. Co., 103 N. Y. L. J. 416, col. 1 (Sup. Ct., N. Y. County, Jan. 26, 1940).

²⁶See note (1934) 34 Col. L. Rev. 1308. Cf. Davis, J., in *Dresdner v. Goldman Sachs Trading Corp.*, *supra* note 10, at 248: "Stockholders' actions (not collusive) may be brought for three distinct purposes: *one*, for the genuine purpose of benefit to all stockholders with a determination to pursue the suit to judgment, with all stockholders invited in good faith to join in labor and expense; *two*, for the purpose of individual benefit by private settlement, with the fact of the bringing of the suit kept secret; *three*, a suit brought purely for 'strike' purposes."

alleging that they have been negligent in failing to enforce the corporation's cause of action against the principal defendant, and that they are accordingly secondarily liable. What should the directorate do under such circumstances? It would be easy to cause the principal defendant to sever his connection with the business, and to cause the corporation to prosecute with vigor the alleged claims against him. Such a course is probably the one best designed to save the personal skins and pocketbooks of the directors. But let us assume that the directors are honestly convinced that the individual in question is of such great value to the corporation in his present post that any possible recovery of past compensation—assuming it to have been excessive—would be small in comparison. The trial would of necessity be long and involved; the corporation's policies and inner history for the last few years would be displayed before the public in a partisan, perhaps even a sensational, form; the loyalty and enthusiasm of the employees would undoubtedly suffer; the corporation would receive much adverse publicity; competitors might gain information which could be used to the prejudice of the company. And all for what? The complainant may lose the suit; if he wins, the corporation will recover an amount which will be reduced by an allowance to the attorney for the protesting stockholder, and probably be more than counterbalanced by the amount of time which would be spent by officers and employees in compiling financial data, searching records, attending examinations before trial and serving as witnesses at the trial itself. Under such circumstances a completely unprejudiced stockholder or director must regard the litigation with dismay, if not with indignation, for even its successful maintenance will produce more harm than good to the persons having a real financial stake in the company.

It is easy to say that the attitude just described is shortsighted, and that in the long run investors will benefit by the higher standards of official conduct which the threat of such litigation will enforce. But even granting the social desirability of the frequent maintenance of stockholders' suits, one can still understand the legitimate hostility which can be aroused on the part of management and majority stockholders against the maintenance of certain types of such suits. We can go further and agree that the law should provide some means of effectively discouraging the wrong kind of stockholder's suit.

We are not considering here the remedies available to the individual defendants; it is true that they are able to put the facts of the case before the court as completely as could the corporation itself,²⁷ but it is not at all clear that their remedies against strike suits are adequate. And certainly they cannot defend on the ground that the suit will do the corporation more harm than good. That is a defense peculiar to the corporation—if it is to be considered a defense at all. Can the corporation set up such a defense if the

²⁷See *Groel v. United Electric Co. of N. J.*, 70 N. J. Eq. 616, 61 Atl. 1061 (1905).

management has concluded that the suit will be harmful to the company? No case has been found directly on the point. The decision most nearly relevant seems to be that of the New Jersey Chancery Court in *Groel v. United Electric Co. of New Jersey*.²⁸ The corporation there entered a plea in bar to the effect that the plaintiff's demand that the company bring suit on the alleged cause of action had been rightly refused by the board of directors. Garrison, V. C., in overruling the plea, said:²⁹

"The formal defendant should have the right to object to and to question the power of the complainant to bring a suit in its behalf, but I do not think that the form in which it should raise this objection should be by plea or answer or demurrer. . . . If we should adopt a practice by which the formal defendant should raise its objection by a petition setting forth such facts as it thought relevant and giving the reasons why it thought the complaining stockholder should not be permitted to prosecute a suit in its behalf, the court could, upon such an issue, properly determine the only question that ever should be permitted to be litigated between the formal defendant and the complainant without in any way interfering with the real, meritorious issue against the actual defendant."

This suggestion does not seem to have been adopted in any subsequent case. The difficulty, of course, is that we cannot always trust the management to decide whether the suit is groundless or whether it will in fact produce no beneficial result. If the management is itself being sued, it certainly cannot be counted upon to see the situation in an impartial light, and this is almost as true when the defendants are former officers or directors. Can we say that if the defendants constitute only a minority on the board, the remaining directors may, if they believe the suit to be groundless, cause the corporation to take an active part in the defense of the minority? Plausible as this argument is, it has the practical disadvantage that the majority of the board would be strongly tempted to maintain friendly and harmonious relations with the minority, and would, therefore, be inclined to take part in the defense of the minority if such a course seemed to have any justification at all. Further, any such view would encourage stockholders' attorneys to join all of the directors as defendants from the start.³⁰ Where the suit is only against third parties, the directors can reasonably be expected to act in the interest of the company, and it is here that we find the courts most strictly enforcing the requirement that the board must be given an opportunity to pass on the alleged cause of action before suit is brought.³¹ If, however, the demand

²⁸Cited *supra* note 27. As to findings by the management that suit would be "inexpedient," see *infra* note 57 and cases cited.

²⁹70 N. J. Eq. 616, 626, 61 Atl. 1061, 1064 (1905).

³⁰See *Glickenhau v. Anderson*, *infra* note 39.

³¹See *Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 827 (1881); *Huntington v. Palmer*,

requirement has been satisfied and the suit relates to matters on which the management will probably not be impartial, we are brought squarely back to our problem.

Is the solution to call a meeting of stockholders to pass upon the question of what attitude should be taken by the corporation towards the pending suit? Where action taken pursuant to a majority vote of stockholders forms the very grievance of which the plaintiff complains, going to the stockholders a second time might not prove very fruitful. Under other circumstances, we will frequently find the management or the individual defendants calling a stockholders' meeting to consider a pending suit. Sometimes this is purportedly done merely to "report" to the stockholders and to obtain an expression of an "opinion." Occasionally, the individual defendants frankly state that they wish to obtain resolutions ratifying their challenged conduct, which they may use in defending themselves. In either case, the realities of the situation are the same—if the defendants control a majority of the stock, they will seek to use that control as powerfully as they possibly can in an attempt to bar the alleged cause of action or to limit the quantum of recovery. From a strictly technical point of view, of course, any ratifying action taken at a stockholders' meeting may be of limited effectiveness.³² From the practical point of view, however, purported ratification may have an important effect. It may gain favorable publicity for the corporation and the defendants; it permits the raising of an additional defense, weak as it may be; and it may well have a definite psychological effect on the court. Further, the defendants will probably make the argument—tenuous though it may be—that there has been a "waiver" of rights by certain of the stockholders and that, therefore, the measure of damages should be correspondingly reduced, even though the cause of action may not have been wiped out by ratification.³³ Accordingly, if it is evident that there will not be sufficient disclosure of the facts and that any action taken could not fairly represent the stockholders' views, the complainant may be entitled to an injunction restraining the taking of a vote at

104 U. S. 482, 26 L. ed. 833 (1881); *Latimer v. Richmond, etc.*, R. R., 39 S. C. 44, 17 S. E. 258 (1892). On the demand question generally, see *infra* notes 58 and 59.

³²Extended treatment of the subject of ratification lies beyond the scope of this article. It may be pointed out, however, that most stockholders' suits involve charges of misappropriation of funds and similar acts, which a majority vote could not originally have authorized; such acts, it is generally said, cannot be ratified by less than a unanimous vote. *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 18, 99 N. E. 138 (1912); *Pollitz v. Wabash R. R. Co.*, *supra* note 25. Cf. *Putnam v. Juvenile Shoe Corp.*, 307 Mo. 74, 269 S. W. 593 (1925), and cases there cited, where the act sought to be ratified was deemed merely voidable. *And see* note (1937) 4 U. OF CHI. L. REV. 495.

³³*See Eshleman v. Keenan*, 194 Atl. 40, 41-42 (Del. Ch. 1937), *aff'd*, 2 A. (2d) 904, 909-910, 120 A. L. R. 227 (Del. 1938), noted below (1937) 35 MICH. L. REV. 493; *Harris v. Waters*, 112 Misc. 640, 183 N. Y. Supp. 721 (Sup. Ct., Wayne County, 1920); note, 120 A. L. R. 238. Cf. *Proctor v. Farrar*, *Alexander v. Quality Leather Goods Corp.*, and *Sale v. Ambler*, all cited *infra* note 40.

the meeting.³⁴ On the other hand, there are disadvantages to the individual defendants in approaching the stockholders, even in a case where ratification by majority vote might have legal effect.³⁵ There is the difficulty of presenting sufficient information to the stockholders to make their vote binding;³⁶ there is the fact that going to the stockholders may indicate weakness in the defendants' case; and there is the question of whether the defendants' votes should be counted when the ballot is cast.³⁷ There is also the fact that if stockholders are numerous, it will be difficult to arouse interest and obtain a fair expression of their views.

These difficulties militate seriously against the submission to the stockholders of the question whether the pending suit should be resisted by the corporation as being groundless, malevolent, or non-beneficial. Nor can the problem be solved by having a majority of the stockholders vote to ratify the directors' decision not to bring suit in the name of the corporation, if under the circumstances a majority vote could not effectively ratify the challenged transactions. As Judge Pitney said in a well-known New Jersey case, ratification cannot be "accomplished indirectly under the guise of a refusal to bring an action."³⁸

On the whole, therefore, no adequate remedy is available to a corporation against a strike or non-beneficial suit. Attempts have recently been made to attack stockholders' suits by motions for summary judgment, but it is probable that this relief will be granted only in exceptional circumstances.³⁹

³⁴*Berendt v. Bethlehem Steel Corp.*, 108 N. J. Eq. 148, 154 Atl. 321 (1931). *See also* *Scott v. P. Lorillard Co.*, 108 N. J. Eq. 153, 154 Atl. 515, *aff'd*, 109 N. J. Eq. 417, 157 Atl. 388 (1931).

³⁵*See supra* note 32.

³⁶*See Berendt v. Bethlehem Steel Corp.*, *supra* note 34; *Bliss v. Linden Cemetery Ass'n*, 83 N. J. Eq. 494, 91 Atl. 304 (1914), *mod.*, 85 N. J. Eq. 501, 96 Atl. 1001 (1916).

³⁷On this point, *see United States Lines, Inc. v. United States Lines Co.*, 96 F. (2d) 148 (C. C. A. 2d 1938); *Russell v. Henry C. Patterson Co.*, 232 Pa. 113, 81 Atl. 136 (1911); *Lattin, The Minority Stockholder and Intra-Corporate Conflict* (1932) 17 *Iowa L. Rev.* 313, 332; note (1929) 28 *MICH. L. REV.* 181.

³⁸*Siegmán v. Electric Vehicle Co.*, 72 N. J. Eq. 403, 409, 65 Atl. 910, 912 (1907), declaration of dividends from capital. *Contra, Foster v. Quintal*, 101 N. Y. L. J. 2434, col. 5 (Sup. Ct., N. Y. County, May 26, 1939, Shientag, J.); majority of stockholders voted to ratify directors' decision not to bring suit for misapplication of funds; court grants motion (apparently by corporation) for summary judgment dismissing the derivative action. The holding in the *Foster* case seems unsound, as it would permit the majority stockholders to do indirectly what they could not do directly. *See Continental Securities Co. v. Belmont*, *supra* note 32; *Eshleman v. Keenan*, *supra* note 33. Refusal to sue may no doubt be effectively ratified by the majority in a case where it could ratify the challenged acts.

³⁹In *Levine v. Behn*, 282 N. Y. 120, 25 N. E. (2d) 871 (1940), the New York Court of Appeals reversed a summary judgment dismissing a stockholder's derivative suit. While nothing in the court's opinion indicates that summary judgment of dismissal is never to be allowed in such actions, evidently it will seldom be permitted. In fact, defendants in such suits will rarely be able to make as effective an attempt to comply with Rule 113, N. Y. Rules of Civil Practice, as was made in the *Levine* case; yet the Court of Appeals held the effort there to be insufficient. For the opinions below, *see* 169 *Misc.* 601, 8 N. Y. S. (2d) 58 (Sup. Ct., N. Y. County, 1938, Shientag, J.) *aff'd*, 257 *App. Div.* 156, 12 N. Y. S. (2d) 190 (1st Dep't 1939). The motion for summary judgment in the

The usual means of fighting strike suits—and, all too often, legitimate suits as well—has been to tire the plaintiff out with motions, expensive excursions to take testimony, and the like. If the plaintiff refuses to tire, he finally gains the privilege of going through a long and costly trial, perhaps to meet defeat, perhaps to obtain a judgment in favor of the corporation.⁴⁰ Sometimes, of course, a settlement is made—frequently one which produces little or no benefit to the corporation.⁴¹

The situation pictured in the preceding pages is obviously unsatisfactory to the complaining stockholder, who finds the corporation able to do a good deal to hinder him in the exercise of his principal remedy. It is unsatisfactory also to the other stockholders—as well as to the management—in that the courts will do little or nothing to put a complete stop to a suit which has some technical basis but which will in fact do more harm than good to the company.

One difficulty—arising from the desire to have the corporation take an active part in the proceedings in order to lessen the individual defendants' legal bills—can be partly remedied by a fair and reasonable policy as to reimbursing from corporate funds directors who have incurred expense in defending groundless suits. The writer has elsewhere examined the conditions under which such a policy might be put into effect.⁴²

The other problem—that of allowing the management and majority stockholders some means of ending a suit which they reasonably deem to be contrary to the best interests of the company—is, of course, part of the larger problem of achieving adequate protection for the minority stockholder without

Levine case was made by certain of the individual defendants. Cf. *Foster v. Quintal*, *supra* note 38; *Glickenhau v. Anderson*, 99 N. Y. L. J. 1925, col. 6 (Sup. Ct., N. Y. County, April 21, 1938), *s.c.*, 99 N. Y. L. J. 2221, col. 2 (May 7, 1938), *s.c.*, 100 N. Y. L. J. 1562, col. 6 (Nov. 10, 1938), *s.c.*, 101 N. Y. L. J. 1495, col. 1 (April 1, 1939). Apparently in the *Glickenhau* case the corporation joined in the motion for summary judgment.

⁴⁰Judgment is ordinarily entered in favor of the corporation, rather than the complaining stockholder. 13 FLETCHER, CORPORATIONS (1931) § 5953; BALLANTINE, CORPORATIONS (1927) 632. The complainant, however, should be intrusted with the collection of a judgment in favor of the company. *Earl v. Brewer*, 248 App. Div. 314, 289 N. Y. Supp. 150 (4th Dep't 1936), *aff'd w.o.op.*, 273 N. Y. 669, 8 N. E. (2d) 339 (1937), noted, (1936) 22 CORNELL L. Q. 105, (1937) 21 MINN. L. REV. 210. See also *Proctor v. Farrar*, 213 S. W. 469 (Mo. 1919); *Alexander v. Quality Leather Goods Corp.*, 150 Misc. 577, 269 N. Y. Supp. 499 (Sup. Ct. 1934); *Sale v. Ambler*, 6 A. (2d) 519 (Pa. 1939).

⁴¹See *McLaughlin, Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit* (1937) 46 YALE L. J. 421, 427-431, where cases are discussed in which the courts have given weight to the corporation's approval or disapproval of a proposed settlement; the writer of the article reaches the conclusion that the corporation's attitude should be regarded as immaterial. See also *Standard Home & Savings Ass'n Co. v. Jones*, 64 Ohio St. 147, 59 N. E. 885 (1901); *United States Lines, Inc. v. United States Lines Co.*, *supra* note 37; with which compare *Cutter v. Arlington Casket Co.*, 255 Mass. 52, 151 N. E. 167 (1926). On the question of whether approval by stockholders and court of the proposed settlement should be required, see note (1935) 44 YALE L. J. 534; *McLAUGHLIN, loc. cit. supra* at 432-435; Rule 23(c), Federal Rules of Civil Procedure.

⁴²See *Washington, supra* note 21.

at the same time unduly hampering business. What is said in the following pages is not offered as a complete solution of the problem of the stockholder's suit, or even of the particular problems discussed above. It is not put forward as a cure, but as a palliative which may occasionally prove useful.

II. *Another Possible Use for Corporate Funds—Providing a New Remedy for Stockholders*

How is adequate protection for minority stockholders to be obtained, without destructive interference with legitimate business? We have seen some of the reasons why derivative suits do not provide such protection; they are expensive, hazardous and clumsy.⁴³ Dean Pound has well said that "these suits have been rendered relatively ineffective by the limitations necessary to prevent abuse of them."⁴⁴ It seems clear that the passage of new and more severe restrictive laws will not be of much help; we need observance and enforcement of existing standards rather than new ones. Along this line, it has been suggested that investors throughout the country should unite to form an agency to investigate and prosecute charges of wrongdoing by management.⁴⁵ A government bureau with similar functions has also been advocated.⁴⁶ Again, it has been pointed out that courts of equity possess a visitatorial power over corporations, which may perhaps be invoked through information by the attorney-general—a procedure offering certain advantages over the stockholder's suit.⁴⁷ It has even been urged that sentence of death, through judicial winding-up proceedings, should be more frequently used as a penalty against corporations which have dealt unfairly with a minority.⁴⁸

None of these suggestions is a complete answer to the problem. An investors' protective group has very recently been formed,⁴⁹ as yet, it has had little opportunity to prove itself. In any event, the activities of such an agency would doubtless be directed chiefly towards corporations in which its members had investments. As for a government bureau to investigate and prosecute charges of management wrongdoing, no state or federal legislation to this end seems so far to have been passed.⁵⁰ The establishment of such a bureau

⁴³For a good discussion of the defects of the stockholder's derivative suit, see Berlack, *supra* note 20, at 600-607.

⁴⁴Pound, *Visitatorial Jurisdiction over Corporations in Equity* (1936) 49 HARV. L. REV. 369, 395.

⁴⁵See Douglas, *Directors Who Do Not Direct* (1934) 47 HARV. L. REV. 1305; REIS, *FALSE SECURITY* (1937) 267-272.

⁴⁶See Berlack, *supra* note 20, at 611-614.

⁴⁷See Pound, *loc. cit. supra* note 44.

⁴⁸See Hornstein, *A Remedy for Corporate Abuse—Judicial Power to Wind Up a Corporation at the Suit of a Minority Stockholder* (1940) 40 COL. L. REV. 220.

⁴⁹American Investors Union, Inc., New York City. Other agencies, unknown to the writer, may also be functioning.

⁵⁰The Securities and Exchange Commission, of course, is concerned primarily with compelling disclosure of material facts regarding securities; wide as are the Commission's

would in itself hardly guarantee the active enforcement of high standards. The history of the Federal Trade Commission, and of the Sherman and Clayton Acts, shows us that it is the energy and ability of the enforcing agency upon which we must rely—and shows also how greatly the quantity and quality of enforcement can vary from administration to administration.⁵¹ It is hardly unfair to say that if a governmental investigating body is lazy, it is useless; if it is active, it can very easily play havoc with the operation of vital units in the country's economic structure. Anyone who is familiar with the Pecora and Sabath investigations can testify as to the energy and enthusiasm of the investigators; he can also testify to the resulting disruption of business, the inconvenience to employees and managers, and the cost. Inquisitions of that type may be justified once or twice in a generation, to provide the basis for new legislation, but they certainly should not be initiated at the request of every dissatisfied stockholder. If government can establish an agency which is efficient and at the same time is able to investigate a business without throwing it into chaos, by all means let us have it.⁵² The possibility seems rather remote, however. Similarly, experience in New York would indicate that not a great deal of hope should be placed on the possibility of appealing to the visitatorial power of equity through informations by the attorney-general; the New York statute providing for such relief, which has been in force for generations, is seldom used.⁵³ Nor can the idea of corporate death for the erring company be accorded a very warm welcome, except in extreme cases. The average dissatisfied stockholder does not want to liquidate the corporation—he can probably sell his stock on the market for more than he would derive from a forced break-up of the company. In the usual case, "corporate death" might produce real harm to the community, particularly to the company's employees, without substantially benefiting the minority stockholder.

On the other hand, all of the suggestions just discussed have elements of value. Differences in the type of business involved and in the evil which is

powers, it can hardly be described as an agency for the protection of minority stockholders. For comments on certain activities of the Commission which do have a semi-supervisory character, see Dean, *Non-Compliance with Proxy Regulations: Effect on Ability of Corporation to Hold Valid Meeting* (1939) 24 CORNELL L. Q. 483.

⁵¹See HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST (1936) 115-138.

⁵²Continuous supervision of business by government agencies, which is another possible approach to certain aspects of our problem, is not without its drawbacks. See Berlack, *supra* note 20, at 607-611; Pound, *supra* note 44, at 395. See also Patterson, *Wanted: Directors Who Direct* N. Y. Times Magazine, Jan. 21, 1940, p. 6, where it is said at p. 18: "There are some who propose to improve the situation by having the government place one or two public directors on the boards of companies. This, I am convinced, would be disastrous for industry. The government might serve helpfully; there are industries in which certain government approvals are necessary to the good of the industry and the public. But there is no justification for government to start telling each company how to manage its own affairs. If that happens, free private enterprise is on its way out."

⁵³N. Y. GEN. CORP. L. §§ 60, 61, 134. See Pound, *supra* note 44, at 395; Berlack, *supra* note 20, at 611-612; Hornstein, *supra* note 48, at 243.

sought to be eradicated will call for widely varying remedies. With full recognition of this fact, the writer would like to call attention to still another possible means of adjusting disputes between stockholder and management. That possibility is simply this: to offer to the stockholder a remedy in addition to the derivative suit—a remedy within the corporation, through the creation of what might be called a “judicial” department.

“The judicial branch of General Motors Corporation”—the words do not seem to make sense. Our corporate government has a highly developed executive branch, and a rather rudimentary legislative one. The judicial department hardly seems to exist at all. Yet already in many businesses we find active shop committees, passing on the rights and privileges of the manual worker, and exercising a power closely akin to the judicial. Outside the business world, we find lodges and labor unions with actively functioning councils and committee which wield the power of admission to and expulsion from membership—power that may mean the loss of livelihood, not to mention loss of pension rights, insurance, and the like. The regularly constituted courts accord a high degree of recognition to these minor tribunals.⁵⁴ It is not a tremendous jump from these groups to a committee, functioning within the corporation and designed to deal with claims of stockholders against the management.

What form could such a committee take, postponing for the moment questions as to its usefulness? In the first place, it would seem that there should be no attempt to oust the courts of jurisdiction; there must be few indeed who would like to see the rights of stockholders—or of the management for that matter—placed beyond the protection of law. Nor is it likely that such a committee would have any desire to deal with legal questions. Determining the extent of corporate power would certainly be beyond its scope. What, then, is left? The realm of fact—which can be sufficiently vast—and of negotiation. In other words, a Committee of Investigation and Mediation. Why is not such a committee a perfectly legal creation? Improvement of relations with stockholders, and the avoidance of unnecessary litigation, is certainly a proper corporate purpose.⁵⁵

What would be the membership of such a committee? If we try to obtain representation of various interests, we run into some difficult practical problems. If the group is to consist entirely of directors, it is open to the objection

⁵⁴See, for example, *Capra v. Local Lodge No. 273 of B. of L., F. & E.*, 102 Colo. 63, 76 P. (2d) 738 (1938); *Agrippino v. Perrotti*, 270 Mass. 55, 169 N. E. 793 (1930); *Carrigan v. Plainfield Patrolmen's Benev. Ass'n*, 121 N. J. L. 559, 3 A. (2d) 587 (1939); *West v. Pennsylvania R. R.*, 328 Pa. 156, 194 Atl. 912 (1937).

⁵⁵Expenditures for increasing the good will of customers and employees are clearly for proper corporate purposes. *STEVENS, CORPORATIONS* (1936) 218, 220. So, of course, are expenditures for advertising. *State v. Long-Bell Lumber Co.*, 321 Mo. 461, 12 S. W. (2d) 64 (1928).

that it is likely to be biased in favor of the management. Similarly, if it is not composed of directors, but is elected by the stockholders, the group is still likely to be of management selection. Proportional representation through cumulative voting might meet the difficulty, but even here we still have the question of what interests are in fact being represented. Certain stockholders may see eye to eye with the management on some matters but not on others. "Minorities" on one question may be part of the "majority" on others. One approach might be to rely on the standards set by the legal and accounting professions, and choose for our committee lawyers and accountants well and favorably known in their professions. Such a committee might be composed of a director, a lawyer, and an accountant, to be chosen annually by the stockholders. Professional standards, after all, constitute one of the ultimate bases of reliance when we select judges for our regular courts. In any event, a corporation desiring to establish such a committee would doubtless have many individual problems, requiring individual solution. One of these problems is, of course, that of compensation to the committee members, which, it would seem, should be from corporate funds.⁵⁶

Suppose we do establish a committee of this type. What good would it do? It seems to the writer that at worst it would do very little harm, and might occasionally do a great deal of good. A stockholder who wishes to attack a proposed issue of stock to the officers will not be able to profit from the existence of the committee—he will no doubt seek immediate injunctive relief. On the other hand, take the case of a stockholder who suspects that the directors were negligent and wasteful in purchasing a certain tract of land. If he applies to the committee for a statement of the facts, nothing the committee can do in the matter will jeopardize his rights.⁵⁷ If the committee renders a report white-washing the transaction, the stockholder at least gets an idea of what the defense will be. If the committee reports that there is a cause of action, the stockholder's bargaining position is greatly improved, and there is likely to be a prompt settlement. If the committee delays in making its investigation, or if the Statute of Limitations is about to bar the action, the stockholder can at any time start suit. Further, the fact that the committee is in existence will tend to make the executives toe the mark. Such a group could have a very healthy influence on the management.

From the other side, what benefit does the management get out of the

⁵⁶A fair basis of compensation could doubtless be worked out. Ordinarily, payment based on hours served would seem to be more appropriate than a fixed salary.

⁵⁷A finding by the board of directors, or by a committee of directors, that a proposed suit would be "inexpedient," is not in itself sufficient to bar a stockholder's derivative suit on the same cause of action. *Groel v. United Electric Co. of N. J.*, *supra* note 27; *Siegman v. Electric Vehicle Co.*, *supra* note 38; *Goodbody v. Delaney*, 82 N. J. Eq. 140, 91 Atl. 724 (1913). See also *United States Lines, Inc. v. United States Lines Co.*, *supra* note 37.

arrangement? First of all, by the very fact of its having created such a committee, the management may gain considerable stockholder good will. Secondly, there are many situations that cannot adequately be defended in court, for various reasons, but can be explained to the satisfaction of a reasonable inquirer. A certain contract, for example, may have been clearly improvident, but may subsequently have led to a profitable business arrangement; this new arrangement might well be lost if the whole transaction were aired in court. Explanations of this sort often meet with disbelief when made by the management, even though there is nothing sinister about the transaction. A similar explanation by a disinterested group might meet with readier acceptance. In any case, a stockholder who does decide to sue after receiving and rejecting the committee's report is likely to be more restrained in the language of his complaint than he would be otherwise. It is difficult even for a hardened strike-suiter to call the executives defrauders and criminals after they have listened to a grievance with courtesy and caused an investigation to be made by a committee consisting largely of outsiders. A moderate complaint means less newspaper comment and less damage to good will.

And, finally, there is the possibility that the courts might welcome the establishment of such committees. To quote:

" . . . before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes." *Hawes v. Oakland*, 104 U. S. 450, 460, 26 L. ed. 827 (1881), *per* Mr. Justice Miller.

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"A stockholder, before he can proceed in his own name but in behalf of the corporation for the redress of wrongs done to it, must establish that he has exhausted all available means to obtain relief through the corporation itself, unless the circumstances excuse him from so doing. That is a condition precedent. . . . It is an implied condition of becoming a stockholder in a corporation that its general policy shall be determined by the holders of a majority of the stock and that disagreements as to its dominating policy and as to the details of its management shall be settled by the stockholders, and that recourse cannot be had to the courts to adjust difficulties of this sort. It is only from actual necessity, in order to prevent a failure of justice, that a suit in equity for the benefit of the corporation can be maintained by a stockholder." *Bartlett v. New York, New Haven & Hartford R. R.*, 221 Mass. 530, 532, 109 N. E. 452 (1915), *per* Rugg, C. J.

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"In addition, it is the spirit of the rule as repeatedly interpreted in federal decisions that stockholders bringing derivative action shall exhaust every remedy within the corporation before suing. . . ." *Long v. Stites*, 88 F. (2d) 554, 556 (C. C. A. 6th 1937), *per* Allen, Cir. J.

These statements were dicta, made in the course of opinions dealing with the necessity of demand on the board of directors, or perhaps on the stockholders,⁵⁸ before suit is brought. The courts were restating the rule that demand must be made, unless excused,⁵⁹ and were emphasizing the point that the plaintiff must exhaust the "internal remedies" provided by the corporation. If the corporation provides a better internal remedy than mere recourse to the board of directors—by offering the services of a disinterested committee accustomed to deal with similar problems and perhaps selected through a process in which the complainant has some voice—is it not reasonable to suppose that the courts would require the complainant to exhaust the possibilities of relief offered by the committee before appealing to equity?⁶⁰ The board of directors, it is true, has power to bring suit in the corporation's name to enforce the alleged cause of action, whereas the committee would have power only to investigate the facts and attempt to produce harmony by mediation. But the committee's services are still valuable—it is offering a useful remedy, even though not a complete one. The board of directors itself does not offer a complete remedy: it cannot enter a judgment against the wrongdoers, but can merely prosecute a suit against them.

It will be objected that the strike-suitor will simply allege that the committee is corrupt, that it is part of a conspiracy to defraud the plaintiff, and that, hence, it would be "useless" for him to deal with the committee, just as it is "useless" to make a demand on the board of directors. Possibly so.

⁵⁸It is generally said that the aggrieved stockholder must make a demand on the board of directors that the corporation bring suit on account of the alleged wrong; if the board refuses, and the matter is one within the control of the stockholders, he must make demand on the stockholders as a body that they sue the directors or take other action to remedy the wrong; if the stockholders take no action, his own suit may follow. See STEVENS, CORPORATIONS (1936) 668-671; 13 FLETCHER, CORPORATIONS (1931) §§ 5963-5970; 72 A. L. R. 628; note (1939) 6 U. OF CHI. L. REV. 269; note (1932) 15 MINN. L. REV. 453. See also Federal Rules of Civil Procedure, Rule 23(b), discussed *supra* note 13. As to circumstances excusing such demands, see *infra* note 59.

⁵⁹Allegations that the wrongdoers "control" the board of directors are generally held sufficient to excuse a demand on the board; if the wrong is one which the stockholders could not ratify, or adequately redress, a demand on the stockholders is generally excused. See authorities cited *supra* note 58.

⁶⁰It may be noted that if the corporation is in receivership the stockholder must ordinarily seek redress through the receiver before being permitted to maintain a derivative action. *Isaac v. Marcus*, 258 N. Y. 257, 179 N. E. 487 (1932); *Koral v. Savory, Inc.*, *supra* note 2. Reference may also be made to the decision of Judge Cotillo in *Busch Jewelry Co., Inc. v. United Retail Employees Union Local 830*, 169 Misc. 854, 9 N. Y. S. (2d) 167, 169, 172 (Sup. Ct. 1939), where an employer sought an injunction against picketing. The court said: ". . . in these labor disputes there are too often less legal problems to be solved than social, economic and even political ones. . . . By virtue of this conviction, I have decided that this dispute can and should be settled by conciliation and arbitration. . . . I therefore appoint three men of learning, ability and experience [as a Committee to hear and report]." The subsequent history of the case is traced in MARIANO, *THE BUSCH JEWELRY LABOR INJUNCTION* (1940) 132 *et seq.* See also *Hechler v. Emery*, 133 Misc. 689, 234 N. Y. Supp. 46 (Sup. Ct., N. Y. County, 1928, *Levy, J.*), a stockholder's action in which the trial judge requested the board of directors to meet with him to discuss the grievances alleged.

But would the courts accept these allegations at face value? Suppose we have a committee composed of a non-executive director, a leading accountant, and a well-known lawyer—perhaps a retired judge. Unsupported statements that all three of these individuals were corrupt and prejudiced would have short shrift at the hands of a good many courts. The experienced judge generally knows a striker when he sees one, and will be only too glad to tell him that he must bring his grievance to the committee before going to the courts. There will, as has been indicated, be many instances in which the complainant will be entitled to go directly to the courts, as where injunctive relief is asked, or the Statute of Limitations is about to bar the action.⁶¹

Is there any body of experience which would help us to estimate the probable usefulness of such a committee? As far as the writer knows, there is none. Boards of directors frequently name committees of their own members, or of stockholders, to investigate charges of misappropriation and the like; these committees often do very useful work.⁶² Sometimes such committees are named after a stockholder's action has started. But the writer knows of no committee which has been formed as a permanent or quasi-permanent body, with predominantly a disinterested membership. The Du Pont Company has recently named three non-executive directors as an Audit Committee, empowered to supervise the auditing of the company's accounts.⁶³ It is not a far cry from such a committee to a group of the kind here under discussion, and perhaps the functions of the two might be combined.

As has been said above, the possibility which is here being discussed is not offered as a complete solution for the problem of the stockholder's suit. But it is a step which an individual corporation can take on its own responsibility, without amending its charter, without new legislation, and without submitting to a new form of government control. Such a plan may have only a limited usefulness. It may be appropriate only for a few large companies. Yet, under proper conditions, it may offer an opportunity for business to take a more constructive role in the adjustment of intracorporate difficulties.

⁶¹A striker might be tempted to make sham allegations along these lines, to avoid going to the committee, presenting a situation with which a court might have some difficulty in dealing, unless it were willing to cut the Gordian knot by taking jurisdiction over matters allegedly calling for immediate court action, and requiring the stockholder to submit all other matters to the committee.

⁶²For a discussion of the valuable work done by the Stockholders Investigating Committee of the Texas Corporation, see Douglas, *supra* note 45, at 1308-1314. This committee was formed to investigate an extended conflict between two factions on the Corporation's board. The committee's chairman was an individual acceptable to both groups; the chairman then selected two other stockholders to act with him. Rules of procedure were adopted; hearings were held; and a report was issued.

⁶³See Annual Report (1939), E. I. duPont de Nemours & Company, p. 21.