so limited that it is unlikely that it will be able to pay in full for the damage done.[46] Our government has made some provision for the return of identifiable property, but it may well be that with respect to other types of claims the only equitable solution will be for those injured to share the resources available. This does not mean in the principal case that if the insurance proceeds are not considered identifiable, the Belgian corporation will necessarily be able to keep them. It might be required to turn them over to an Allied commission, but this would seem to be a matter to be settled by the Allied governments.

Moreover, even with respect to identifiable property in the United States it is arguable that to insure uniformity of treatment these claims, as well as all others, should be handled by a single agency.[47] Intricate questions as to the measure of damages and what constitutes duress will arise, and it might be that a court acting within Germany could best handle these problems.

At any rate, it seems clear that the problems are so complex that they should be left to the executive until such time as he permits the courts to take jurisdiction.

SHAREHOLDER DERIVATIVE SUIT AS CHECK ON CORPORATE ANTI-LABOR POLICIES

The fiduciary obligations of corporate directors may have been strikingly enlarged as a consequence of a recent New York decision which upheld the sufficiency of a stockholder complaint alleging that the Remington Rand Company had suffered monetary losses because of the anti-labor policy pursued by its board of directors during the period 1934–1937. The chief allegations were that the directors had ordered the dismantling and removal of corporate plants and the curtailment of production with a resulting loss to the corporation in excess of a million dollars, that these acts were not within the scope of reasonable business judgment but were designed solely to intimidate the corporation's employees, and that the directors permitted themselves to be dominated with respect to the corporation's labor policies by one who, it was asserted, was actuated by anti-labor bias and personal prejudices. The New York lower court dismissed the complaint and the Appellate Division affirmed on the ground that "stripped of its conclusionary statements" it "shows only a reasonable exercise of business judgment by the directors" and that "no facts are set forth which show that appellants [defendants] had interests adverse to the corporation or that they dealt with the corporation for their own benefit or that they were guilty of waste or fraud."[1] The New York Court of Appeals reversed, however, holding that if

[46] Goldschmidt, Legal Claims against Germany 161 (1945); Cole, Reparations and the Future of German Industry 17 (1945).

[47] Goldschmidt, Legal Claims against Germany 168 (1945).

[1] Abrams v. Allen, 271 App. Div. 326, 65 N.Y.S. 2d 421, 422 (1946).

the allegations of fact are proven at the trial they may constitute a cause of action for breaches of the fiduciary duties owed by the defendant directors to the corporation. *Abrams v. Allen.*[2]

The grounds on which equity has been willing to hold directors liable at the instance of stockholders suing on behalf of the corporation include mismanagement,[3] ultra vires acts,[4] fraudulent acts,[5] waste or squandering of corporate as-

[2] 74 N.E. 2d 305 (N.Y., 1947). Three judges dissented. The litigation was begun in 1938 and was the subject of numerous proceedings. There were two appeals to the Appellate Division involving the sufficiency of the other alleged causes of action. Abrams v. Allen, 266 App. Div. 835, 42 N.Y.S. 2d 641 (1943) and Leech v. Fuller, 259 App. Div. 816 (1940). As a result of dismissals ordered at Special Terms and affirmed by the Appellate Division, supra, all of the causes of action pleaded from time to time were dismissed, except the first, which was the subject of this appeal. The controversy underlying the litigation concerned six of Remington Rand's plants. A number of maintenance and equipment workers had by 1934 organized into one or more local unions. The locals were affiliated with general craft unions under the direction of the District Council of Office Equipment Workers, which the Metal Trades Department of the A. F. of L. chartered in March, 1934. The National Labor Relations Board found that this was an appropriate bargaining unit under Section 9(b) of the National Labor Relations Act, 29 U.S.C.A. § 159 (b) and entered an order in March, 1937 requiring Remington Rand to bargain collectively with the union, and to cease and desist from restraining or coercing its employees in their right to self-organization. The order was subsequently upheld by the Circuit Court of Appeals with modifications only as to what employees were to be reinstated. National Labor Relations Board v. Remington Rand, 94 F. 2d 862 (C.C.A. 2d, 1938). The controversy originated in the fall of 1935 with rumors and newspaper reports that the Company was going to set up a plant at Elmira, New York, and dismantle corresponding plants elsewhere. The Joint Protective Board, which had superseded the District Council, sought information concerning the rumors as well as a wage increase. No high official of the company was willing to meet with it. On May 10, 1936 a strike vote was called for by the Board and was taken throughout the locals, resulting in 3,768 votes, 3,200 for the strike. It then appeared that one of the defendants traveled throughout the plant dissuading the workers, after which he took a strike vote of his own, with the result that 670 workers did not vote and 28 were discharged. The strike was called on the 23rd and began on the 26th. The defendants made it known that they would no longer deal with the A. F. of L. Strikebreakers were employed and a back-to-work movement was initiated. The strike proved unsuccessful and ended before December. During the strike the Company had dismantled its Norwood plant, reduced production at Middletown and at Syracuse, but increased it at Ilian. The Elmira plant was put into production and by the end of September the aggregate number of employees at all plants was as great as on May 26. In its decision, from which these facts are taken, the Circuit Court said at p. 868: "There can be no doubt that the Joint Board had represented a majority of the employees in the original six plants, though exact figures are not obtainable."

[3] Kirrane v. Boone, 334 Mo. 558, 66 S.W. 2d 861 (1933); Kavanaugh v. Commonwealth Trust Co., 223 N.Y. 103, 119 N.E. 237 (1918) (lack of due care); General Rubber Co. v. Benedict, 215 N.Y. 18, 109 N.E. 96 (1915) (lack of due care); see Briggs v. Spaulding, 141 U.S. 132 (1891); Hun v. Carey, 82 N.Y. 65 (1880); Pepper v. Litton, 308 U.S. 295 (1939) (lack of good faith); Wheeler v. Abilene Nat. Bank Bldg. Co., 159 Fed. 391 (C.C.A. 8th, 1908) (lack of good faith); Bosworth v. Allen, 168 N.Y. 157, 61 N.E. 163 (1901).

[4] See Hawes v. Oakland, 104 U.S. 450 (1881); Leslie v. Lorillard, 110 N.Y. 519, 18 N.E. 363 (1888); Carson, Current Phases of Derivative Actions Against Directors, 40 Mich. L. Rev. 1125 (1942), asserting that no authority will be found for holding corporate directors liable for honest action on their part taken without negligence outside the corporate powers.

[5] James v. Steifer Mining Co., 35 Cal. App. 778, 171 Pac. 117 (1918); Smith v. Nevada Copper & Mining Co., 137 Wash. 317, 242 Pac. 367 (1926); Toebelman v. Missouri-Kansas Pipe Line Co., 41 F. Supp. 334 (Del., 1941). The attribution of fraud to directors is the main ingredient of minority stockholder actions, yet in very few such actions have plaintiffs succeeded in proving either actual or constructive fraud. Carson, op. cit. supra note 4, at 1132.

sets,[6] diversion of funds,[7] payment of unwarranted compensation to officers and directors,[8] and using the corporate property for the doing of an unlawful or immoral act.[9] Such derivative actions, however, have been much abused in recent years.[10] As a consequence, the courts have sought to discourage derivative actions by strict construction of pleadings[11] and by confining liability to only the most flagrant abuses of fiduciary duty.[12] Moreover, in several states, including

[6] Hazard v. Wright, 201 N.Y. 399, 94 N.E. 855 (1911); Greenwood v. Greenblatt, 173 Ga. 551, 161 S.E. 135 (1931); Liken v. Shaffer, 64 F. Supp. 432, (Iowa, 1946).

[7] Yates Ranch Oil & Royalties v. Jones, 100 F. 2d 419 (C.C.A. 5th, 1938); Backus v.Finkelstein, 23 F. 2d 531 (D.C. Minn., 1924); Tasler v. Peerless Tire Co., 144 Minn. 150, 174 N.W. 731 (1919); Orlando Orange Groves Co. v. Hale, 107 Fla. 304, 144 So. 674 (1932); Brinckerhoff v. Bostwick, 88 N.Y. 52 (1882); Quintal v. Kellner, 264 N.Y. 32, 189 N.E. 770 (1934); Bowers v. Male, 186 N.Y. 28, 78 N.E. 577 (1906).

[8] Wight v. Heublein, 238 Fed. 321 (C.C.A. 4th, 1916); Thauer v. Gaebler, 202 Wis. 296, 232 N.W. 561 (1930); Marony v. Applegate, 29 N.Y.S. 2d 421 (1941).

[9] Continental Securities Co. v. Belmont, 206 N.Y. 7 (1912) (illegal transfer of stocks and bonds); Van Schaik v. Carr, 170 N.Y. Misc. 539, 10 N.Y.S. 2d 569 (1939) (violation of the New York insurance laws); Corsica Nat. Bank v. Johnson, 251 U.S. 68 (1920) (illegal loan); Broderick v. Marcus, 152 N.Y. Misc. 413, 272 N.Y. Supp. 455 (1934) (violation of banking statute). But see Simon v. Socony-Vacuum Oil Co., 179 N.Y. Misc. 202, aff'd 267 App. Div. 890 (1944).

[10] Stockholders' suits for mismanagement "have been abused quite as much as the powers of the directors they have intended to restrain." Pound, Visitatorial Jurisdiction over Corporations in Equity, 49 Harv. L. Rev. 369, 395 (1936). Among the major abuses have been the "strike suit," brought on what may be a valid claim but for the real purpose of extorting a settlement. The most widely known "sue and settle man" was Clarence H. Venner, whose reported suits ran into the hundreds. 22 Time, No. 1, at 52 (July 3, 1933). The "collusive suit," brought by stockholders friendly to the defendants for purposes of making bona fide actions impossible or more difficult has also been used extensively. For a catalogue of abuses and the citation of authorities see Hornstein, Legal Controls for Intracorporate Abuse—Present and Future, 41 Col. L. Rev. 405, 406 (1941); Hornstein, Problems of Procedure in Derivative Suits, 42 Col. L. Rev. 574, 583 (1942); Carson, Further Phases of Derivative Actions Against Directors, 29 Corn. L. Q. 431 (1944). The private settlement and the stockholders' right to retain money which is paid to him in return for dismissing a derivative suit has been the main source of abuse. See Application of the Rule of Young v. Higbee Co. to Stockholder Derivative Suits, 13 Univ. Chi. L. Rev. 321, 323 (1946) for a complete discussion and the collection of authorities. Rule 23 of the Federal Rules of Civil Procedure, 28 U.S.C.A. foll. § 723c (1941) prohibits dismissal or compromise without approval of the court, but this does not remedy the situation where the striker is bought off before filing suit or where the plaintiff's attorney is the real instigator in the hope of receiving sizable attorney's fees in the event the court permits a compromise. The decision of the New York Court of Appeals in Clarke v. Greenberg, 71 N.E. 2d 443 (N.Y., 1947), noted in 14 Univ. Chi. L. Rev. 673 (1947), which held that the proceeds realized by a stockholder in a derivative suit by way of private settlement belong to the corporation upset the long-standing New York rule to the contrary, Beadleston v. Alley, 7 N.Y. Supp. 747 (Sup. Ct., 1889).

[11] In Price v. Standard Oil Co., 55 N.Y.S. 2d 890, 893 (1945) the court said: Undoubtedly the tendency of the courts of this state in recent years has been to insist more rigorously on the requirement that in a derivative stockholder's suit facts, rather than conclusory assertions, characterizations and charges, must be set forth in the complaint." Accord: Oshrin v. Celanese Corp., 291 N.Y. 170, 51 N.E. 2d 694 (1943); Weinberger v. Quinn, 290 N.Y. 635, 49 N.E. 2d 131 (1943); Lifshutz v. Adams, 290 N.Y. 707, 49 N.E. 2d 635 (1943); Kalmanash v. Smith, 291 N.Y. 142, 51 N.E. 2d 681 (1943).

[12] In Everett v. Phillips, 288 N.Y. 227, 232, 43 N.E. 2d 18, 19 (1942) the court said: "Yet, however high may be the standard of fidelity to duty which the court may exact, errors of

New York, the legislatures have passed "security for expenses" legislation[13] which has greatly narrowed the class of eligible plaintiffs.[14]

The Appellate Division had applied in the instant case the well known "business judgment rule."[15] The rule, in effect, means that the judgment of corporate directors is presumed to be formed in good faith and designed to promote the corporate interests, and that in the absence of clear and convincing evidence to the contrary equity will not interfere with the directors' formulation and execution of business policy.[16]

The courts have, nonetheless, used language that indicates the requirement of a high standard of loyalty and have usually insisted upon a disinterested performance of duty by directors as fiduciaries.[17] It has been said frequently that the relation of the directors to the stockholders is one of confidence and fidelity and is governed by principles similar to those found in trust and agency law.[18]

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judgment by directors do not alone suffice to demonstrate the lack of fidelity. That is true even though the errors may be so gross that they may demonstrate unfitness of the directors to manage the corporate affairs."

[13] The New York statute provides that a stockholder-plaintiff who owns less than 5 per cent of the outstanding stock of any class or less than $50,000 worth of stock of any class may be required by the corporation to post security for reasonable expenses, including attorney fees. N.Y. Cons. Laws (Thompson, 1944) c. 668 § 61-b. See N.J. Rev. Stat. (1945) tit. 14, c. 3, § 15; Md. Laws (1945) c. 989; Pa. Stat. Ann. (Purdon Supp., 1945) tit. 12, § 1322; Wis. Laws (1945) c. 462, § 180. 13. The New York legislation has been severely criticized as a design of the Chamber of Commerce unfairly to insulate directors from responsibility for abuses, and as premised on the theory that most stockholder suits are groundless. Hornstein, The Death Knell of Stockholders' Derivative Suits in New York, 32 Calif. L. Rev. 123 (1944); Hornstein, New Aspects of Stockholders' Derivative Suits, 47 Col. L. Rev. 1 (1947). See House, Stockholders' Suits and the Coudert-Mitchell Laws, 20 N.Y.U. L.Q. Rev. 377 (1945). But see Carson, Further Phases of Derivative Actions Against Directors, 39 Corn. L.Q. 431 (1944); Recent Changes Affecting Minority Stockholders' Suits, 8 Md. L. Rev. 241 (1944). The New York Legislature, in re-defining the period of the statute of limitations for suits in equity, has further narrowed the class of eligible plaintiffs. House, Early Exoneration for Delinquent Directors in New York, 46 Col. L. Rev. 377 (1946).

[14] The constitutionality of the New York legislation is still in doubt, since lower courts have divided. Cases are collected in Hornstein, New Aspects of Stockholders' Derivative Suits, 47 Col. L. Rev. 1, 5 (1947).

[15] See Gamble v. Queens County Water Co., 123 N.Y. 91, 98, 25 N.E. 201, 208 (1890). The courts have constantly reiterated that directors are not liable for mere errors of judgment. Davis v. Lowsville Gas & Electric Co., 16 Del. Ch. 157, 142 Atl. 654 (1928); Everett v. Phillips, 288 N.Y. 227, 43 N.E. 2d 18 (1942); Kalmanash v. Smith, 291 N.Y. 142, 51 N.E. 2d 681 (1943); Hornstein v. Paramount Pictures, 292 N.Y. 468, 55 N.E. 2d 740 (1944); Chelrob, Inc. v. Barrett, 293 N.Y. 442, 57 N.E. 2d 825 (1944).

[16] Davis v. Lowsville Gas & Electric Co., 16 Del. Ch. 157, 169, 142 Atl. 654, 659 (1928). See cases collected note 15 supra.

[17] See Twin-Lick Oil Co. v. Marbury, 91 U.S. 587 (1875); Blaustein v. Pan American Petroleum & Transport Co., 293 N.Y. 281, 56 N.E. 2d 705 (1944); Kavanaugh v. Kavanaugh Knitting Co., 226 N.Y. 185, 123 N.E. 148 (1919); Litwin v. Allen, 25 N.Y.S. 2d 667 (1940); Bayer v. Beran, 49 N.Y.S. 2d (1944) and cases cited therein; Rest., Restitution (1937) § 190, comment a.

[18] Kavanaugh v. Kavanaugh Knitting Co., 226 N.Y. 185, 123 N.E. 148 (1919); Litwin v. Allen, 25 N.Y.S. 2d 667 (1940); City Bank Farmers' Trust Co. v. Hewitt Realty Co.,

It thus appears that two conflicting policies have been reflected in the decisions, the one seeking to curtail the abuses of the stockholder derivative suit, and the other seeking to hold fiduciaries to the highest standards of loyalty and duty.

The complaint in the instant case did not charge that the defendant directors had interests adverse to the corporation, or that they dealt with it for their own benefit, or that they were guilty of fraud. The sole question seemed to be whether the allegations set forth any wrong to the corporation by the directors as a result of their handling of the labor dispute. The complaint went on the theory that the "business judgment rule" is merely a protective one and was never intended as a shield for acts which go beyond its minimum salutary requirements. The court's decision implicitly confirms this theory by imposing a greater limitation than the precedents require upon the wide latitude of discretion that directors have been permitted in their determination of business policies.

Although the decision runs counter to an unmistakable trend to greatly curtail the use of the derivative suit, clearly the court did not construct any new category of liability. A wanton, reckless, and imprudent spoliation and waste of corporate assets has always been sufficient ground to compel directors to account for the losses sustained by virtue of such improvident conduct.[19] In the instant case such an allegation was coupled with a charge of lack of good faith, which has likewise hitherto been a ground for imposing liability.[20] Moreover, the dismantling and removal of corporate plants for such purposes as were here asserted has been held to be against public policy.[21] However, inasmuch as the stockholders complained only of excesses in the execution of the directors' labor policy rather than of the policy itself,[22] the decision cannot be taken to mean that liability may be imposed upon directors solely because they pursued an anti-labor policy. Rather it would seem to mean only that the court has extended a number of existing grounds of liability to establish a new limitation on the directors' judgment in a labor dispute.

The Court of Appeals must have realized, however, that its decision was virtually an open invitation for similar and related actions to be brought. The decision is, therefore, suggestive of a range of possibilities of new developments in the realm of intracorporate struggles for control and in the realm of labor-management relations.

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257 N.Y. 62, 177 N.E. 309 (1931); Hornstein v. Paramount Pictures, 292 N.Y. 468, 55 N.E. 2d 740 (1944) and cases cited therein; see Stevens, Corporations § 138 (1936); Ballantine, Corporations § 114 (1947).

[19] Cases cited note 6 supra.

[20] Cases cited note 3 supra.

[21] National Labor Relations Board v. Cape County Milling Co., 140 F. 2d 543 (C.C.A. 8th, 1944); National Labor Relations Board v. Remington Rand, 94 F. 2d 862 (C.C.A. 2d, 1938).

[22] The National Labor Relations Act went into effect in July 1935 but was not upheld by the Supreme Court until April 1937. Jones & Laughlin Steel Corp. v. National Labor Relations Board, 301 U.S. 1 (1937). The stockholders did not allege that the defendant had no right to challenge the constitutionality of the Act.

Such allegations as were made in the instant case may be difficult to prove in a trial court; but nevertheless, if they are sufficient to constitute a cause of action, corporate directors may find themselves defending a host of damage suits or petitions for injunctions seeking to hold them answerable for their labor policies. The effect of such possible litigation as a check on a "get tough with labor" psychology is dependent upon several factors. In New York and a few other states where the existing "security for expenses" legislation confines the class of possible plaintiffs, it is not as likely that the labor policies of a corporation would be challenged from within as it is in other states where the holding of a certain designated large amount of stock or the posting of security is not a condition precedent to the filing of a stockholder suit. In these latter states the theory of the instant case might prepare the way for an assault on corporate anti-labor policies by stockholders who can show that their company would make, or would have made, more money in the long run by pursuing a more liberal labor policy. The value of such suits to stockholders would not necessarily depend on the possibility of winning injunctions or large recoveries. Even nominal damages would be a powerful weapon where a minority of stockholders is attempting to influence a recalcitrant management to adopt a progressive labor policy. Cyrus Eaton, writing in a recent issue of the *Review*,[23] described what he called "the classical example of managerial folly": a corporation head, who swore he would retire from business before he would let his plants be organized, spent twenty million dollars of his stockholders' money in a futile fight against a strike for union recognition with the result that his fellow industrialists placed their orders with concerns whose more dependable labor relations assured better delivery. The only tangible result, according to Mr. Eaton, was an occasional word of praise from Westbrook Pegler. A stockholder suit, however, under these circumstances, with the resulting publicity and the possibility of securing an injunction or large damages, might have had the more tangible result of bringing about a reversal of managerial policy.

Corporate development in our economy has long since reached a stage "in which the individual interest of the shareholder is definitely made subservient to the will of a controlling group of managers even though the capital of the enterprise is made up of the aggregated contribution of perhaps many thousands of individuals."[24] The stockholder, who in the early days of corporate development had somewhat the nature of a partner or joint-venturer, would now seem to have no property rights in the enterprise beyond that of having it conducted in the best interest of his pocketbook. The "business judgment rule" is equivalent to a definition of the stockholder's property rights, and as applied by the courts, relegates him to a virtually passive and forgotten status. As a consequence, the courts have never given any indication that it is within the purview of a stockholder suit to seek the solution of public problems.

[23] Eaton, A Capitalist Looks at Labor, 14 Univ. Chi. L. Rev. 332, 336 (1947).

[24] Berle and Means, The Modern Corporation and Private Property 277 (1934).

The question, however, of how public problems might possibly be fitted into the category of stockholders' monetary interests for the purpose of bringing a derivative suit is suggested by the instant case and by the leading case of *Dodge v. Ford Motor Company*.[25] There a program of expansion and price reduction for purposes of giving employment to more people, producing more cars, and bringing them within the reach of more people was held to be contrary to the financial advantage of the stockholders, and the company was forced to declare a dividend instead of implementing its program. If, however, stockholders can state a cause of action against directors for pursuing an imprudent and costly anti-labor policy, a cause of action might equally be made out where a corporation pursues a racially discriminatory and costly employment policy, or where it seeks to enforce restrictive covenants at the expense of community good will with consequent loss of revenues, or where it might, for example, require a political or religious test for employment, with the same result. In such instances the stockholders' monetary losses might be considerably more remote than in the case of directors selling goods to their corporation at a large personal profit, but they would be nonetheless real, and perhaps no more remote than in the *Ford* case. Although in the type of cases mentioned the defense under the "business judgment rule" might still prove insurmountable, the decision of the Court of Appeals in the instant case would seem to be encouragement enough for actions of this nature to be attempted. Should experience show that, although such suits were being brought in good faith, their chief value was harassment, and the number of recoveries was negligible, the flood of litigation might very well result in stricter construction of pleadings by the courts or in new legislation restricting the bringing of stockholder suits.

A final factor tending to govern the effect of such possible litigation is the incipient "economic planning" element that is present whenever courts interfere with the business conduct of enterprises. As yet, not even the most enthusiastic votaries of a planned economy have suggested that the courts are the appropriate agency for effectuating it. In view, however, of the extent of economic planning that already necessarily exists in our tightly interwoven social fabric, the courts may become more concerned with adjusting the established rights of individuals where corporate planning is not in the interests of the shareholders.

EXTENSION OF FIDUCIARY DUTIES IN SETTLEMENT OF DERIVATIVE SUITS: A FOOTNOTE TO *YOUNG V. HIGBEE*

In 1944, the Supreme Court, in *Young v. Higbee Co.*,[1] imposed a fiduciary duty upon two preferred shareholders who had contested a reorganization under the Bankruptcy Act and who had dropped the suit after a private settlement while an appeal was pending from an adverse decision. It was held that

[25] 204 Mich. 459, 170 N.W. 668 (1919).

[1] 324 U.S. 204 (1945).