

October 1970

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J. W. Montgomery III, *Constitutional Law - Jury Trial in a Derivative Action. Ross v. Bernhard*, 90 S. Ct. 733 (1970), 12 Wm. & Mary L. Rev. 125 (1970), <https://scholarship.law.wm.edu/wmlr/vol12/iss1/10>

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Constitutional Law—JURY TRIAL IN A DERIVATIVE ACTION. *Ross v. Bernhard*, 90 S. Ct. 733 (1970).

In a derivative action, stockholders of the Lehman Corporation charged the corporate directors and brokers with conversion of assets, gross negligence and breach of fiduciary duty. The plaintiffs' demand for a jury trial on the corporation's claims was granted by the district court,¹ but was reversed by the court of appeals on the ground that the derivative action was entirely equitable in nature.² On a writ of certiorari, the Supreme Court reversed and affirmed the district court's ruling.³ The Court held that the right to a jury trial attaches to those issues in a derivative action which would have been afforded a jury determination had the corporation been suing in its own right.⁴

The Seventh Amendment⁵ preserves the right of trial by jury for all issues which were "suits at common law."⁶ A corporation's suit to enforce a legal right was recognized, in classical procedure, as an action at law carrying the right of jury trial,⁷ although stockholders were denied the privilege of enforcing corporate rights at law.⁸ But a recognition of the possibilities of managerial abuse led the courts of equity to create relief for intra-corporate disputes between stockholders and directors on the basis of a trustee theory.⁹ Yet, when stockholders attempted to enforce corporate claims against outsiders doing business with the corporation, the trustee theory proved inadequate.¹⁰ The problem

1. *Ross v. Bernhard*, 275 F. Supp. 569 (S.D. N.Y. 1967).

2. *Ross v. Bernhard*, 403 F.2d 909 (2d Cir. 1968).

3. *Ross v. Bernhard*, 90 S. Ct. 733 (1970).

4. *Id.* at 735.

5. U.S. CONST. amend. VII provides, "In Suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved"

6. As opposed to suits in equity which were denied jury trial.

7. 1 W. BLACKSTONE, COMMENTARIES *475. Cf. *Bank of Kentucky v. Wister*, 27 U.S. (2 Pet.) 318 (1829).

8. See Prunty, *The Shareholders' Derivative Suit: Notes on Its Derivation*, 32 N.Y.U. L. REV. 980 (1957). In effect, this meant the shareholder was powerless to prevent managerial abuse through the courts.

9. *Robinson v. Smith*, 3 Paige Ch. 222 (N.Y. 1832); *Attorney General v. Utica Ins. Co.*, 2 Johns Ch. 371 (N.Y. 1817); *Foss v. Harbottle*, 67 Eng. Rep. 189 (Ch. 1843); *Charitable Corporation v. Sutton*, 26 Eng. Rep. 642 (Ch. 1742). These cases were all tried in chancery and hence without a jury.

10. Prunty, *supra* note 8, at 990. As there existed no fiduciary relationship between directors and outsiders, the shareholder-director relationship alone would not support a suit against outsiders.

was resolved in *Forbes v. Whitlock*¹¹ when the court postulated that a stockholder might, by joining the corporation as a party, exercise the corporate right in a secondary or derivative capacity.¹²

As the derivative suit was created in equity,¹³ the right of jury trial was denied at both the state¹⁴ and federal levels.¹⁵ But in *DePinto v. Provident Life Ins. Co.*,¹⁶ it was held for the first time that a constitutional right to jury trial extended to legal issues in a stockholders' derivative action.¹⁷ The Court noted that although a derivative suit was historically an invention of equity, the cause of action was ultimately that of the corporation, and if the corporation were the plaintiff, a jury trial would have been available. Since the stockholder sues in behalf of the corporation, the court reasoned that he also should be afforded a jury determination of any legal issues presented.¹⁸

11. 3 Ed. Ch. 446 (N.Y. 1841). The action was dismissed for failure to join the corporation. The court reasoned that the corporation's interests alone were at stake, and therefore must be asserted in the corporate name. Cf. *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1855), where it was held that while the corporation had the exclusive right to sue outsiders, a failure to prosecute even without fraudulent interest on the part of the directors amounted to a breach of trust.

12. Thus the dual nature of the derivative suit was cast. The crucial point is that the stockholders must show a breach of trust by the directors, and upon such a showing they are permitted to accede to any corporate claims and enforce them in a secondary or derivative capacity. The concept of the corporation as a separate, right-holding entity was, therefore, merged with the idea that the stockholder had an interest which required protection.

13. Because jury trials are available only for issues which gave rise to "suits at common law", the mode of trial is dependent upon historical classification of the action as legal or equitable. See James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963).

14. E.g., *Metcalf v. Shamel*, 166 Cal. App. 2d 789, 333 P.2d 857 (Dist. Ct. App. 1959). Cases on the state level are controlled by state constitutions and statutes; the right to jury trial under the Seventh Amendment of the United States Constitution has been held inapplicable to states. *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916).

15. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *Linken v. Shaffer*, 64 F. Supp. 432 (N.D. Iowa 1946).

A stockholders' derivative suit is an invention of the courts of equity and cannot be maintained at law Even if the claim, if sued by the corporation, would be an action at law, yet, if enforced by means of a stockholders' derivative suit, it is prosecuted by an action in equity.

64 F. Supp. at 441.

16. 323 F.2d 826 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964).

17. See *Ross v. Bernhard*, 90 S. Ct. 733, 737 (1970). The possibility that the merged federal practice might allow jury trial in a derivative suit was noted in dictum by Justice Clark in *Fanchon & Marco Inc. v. Paramount Pictures*, 202 F.2d 731, 735 (2d Cir. 1953).

18. *DePinto v. Provident Life Ins. Co.*, 323 F.2d 826, 836 (1963).

DePinto remained unsupported¹⁹ until *Ross v. Bernhard*²⁰ was decided in 1970. Both *DePinto* and *Ross* relied heavily on two Supreme Court decisions, *Beacon Theatres, Inc. v. Westover*²¹ and *Dairy Queen v. Wood*.²² In *Beacon*, an injunction was sought to prevent an antitrust action; the defendant counterclaimed for damages, and the Court ruled that there must be a trial by jury for any legal issues presented. In *Dairy Queen*, the plaintiffs sought an accounting and money damages. The Court found that the constitutional right to a jury trial could not be made to depend upon the pleadings;²³ if damages are sought the issue is unquestionably legal in nature.²⁴ The combined effect of *Beacon* and *Dairy Queen* was to insure a jury trial even where legal issues are merely incidental to equitable issues.²⁵ But, *Beacon* and *Dairy Queen* apply only to actions which involve a combination of historically separable suits in law and equity, and therefore, do not apply to stockholders' derivative actions which were *historically* not considered a combination of separable equitable and legal causes of action.²⁶

The *Ross* decision is based on the premise that the right to a jury trial should not be determined on the basis of the identity of the plaintiff who institutes the action;²⁷ but more specifically, that a jury trial should be available to the stockholders under the same circumstances as it is available to the corporation.²⁸ By elevating the importance of the conceptually dual nature of the derivative suit, that is, by permitting stockholders to exercise corporate rights secondarily upon a showing of a breach of trust by the directors,²⁹ *Ross* formulates a "nature of the issue test" in determining the right to a trial by jury. No longer will this right depend upon the superficial inquiry of the nature of the overall action.

19. DePinto has been criticized as an "unwarranted extension of the seventh amendment." Note, *The Right to A Jury Trial In A Stockholders' Derivative Action*, 74 YALE L.J. 725, 727 (1965).

20. 90 S. Ct. 733 (1970).

21. 359 U.S. 500 (1959).

22. 369 U.S. 469 (1962).

23. 369 U.S. at 473. Previously, a request for an accounting would have been controlling, but here the Court extracts the issue of money damages as historically legal, and therefore triable of right before a jury.

24. *Id.* at 476.

25. Note, *supra* note 19, at 736.

26. *Id.* at 734.

27. 90 S. Ct. at 735. See 49 CORNELL L. Q. 672 (1964).

28. 90 S. Ct. at 740. "We think the Seventh Amendment preserves to the parties in a stockholders' suit the same right to a jury which historically belonged to the corporation. . . ."

29. See note 12 *supra*.

The identity of the plaintiff will now be disregarded, and if the central issue was historically considered a basis for suit at common law within the meaning of the Seventh Amendment, the right to trial by jury will be granted.³⁰

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Constitutional Law—SPEEDY TRIAL. *Brooks v. Peyton*, 210 Va. 318, 171 S.E.2d 243 (1969).

Petitioner sought a writ of habeas corpus after being convicted of robbery on a reindictment.¹ His petition alleged a denial of a speedy trial in violation of the Sixth Amendment of the United States Constitution,² and section eight of the Virginia Constitution,³ and relied upon a Virginia statute barring prosecution of any person indicted for a felony who is not brought to trial within a specified period.⁴ Determining that the first indictment of the petitioner was defective, the Commonwealth had secured a second one, thereby delaying the trial seven months from

30. The dissent, written by Justice Stewart, expresses a fear that the majority's logic will lead to a virtual elimination of all equity jurisdiction, and thereby cause any traditionally equitable cause of action to be artificially broken down into legal issues. *Ross v. Bernhard*, 90 S. Ct. 733 (1970) (dissenting opinion). The majority of the Court, however, has not indulged in artificial dissection, but rather has given recognition to the dual origin of the derivative suit. See note 12 *supra*. The issue test deals only with truly legal issues which have been procedurally buried in equitable forms of action due to the identity of the plaintiff.

1. The reindictment was obtained as a consequence of the trial court holding that a similar indictment, issued against another suspect for the same crime, charged grand larceny and not robbery as contended by the Commonwealth. *Brooks v. Peyton*, 210 Va. 318, 171 S.E.2d 243 (1969).

2. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

3. VA. CONST. art 1, § 8:

That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty . . .

4. VA. CODE ANN. § 19.1-191 (Repl. Vol. 1960):

Every person against whom an indictment is found charging a felony and held in any court for trial, whether he be in custody or not, shall be forever discharged from prosecution for the offense, if there be three regular terms of the circuit or four of the corporation or hustings court in which the case is pending after he is so held without a trial . . .