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FEDERAL COURTS-FORUM NON CONVENIENS-DERIVATIVE SUITS

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FEDERAL COURTS—FORUM NON CONVENIENS—DERIVATIVE SUITS—Plaintiff, a resident of New York, and a policyholder in defendant Illinois corporation, brought a suit in the United States District Court in New York to

force one of defendant's directors and another corporation to account to defendant for alleged waste of its corporate assets. Defendant moved for dismissal on the grounds that the suit would involve interference with the internal affairs of a foreign corporation, and that the suit in New York would work great hardship, since the defendant would be required to transport many records and witnesses from Illinois to New York at great expense. The suit was dismissed by the district court on the ground of forum non conveniens.[1] The Second Circuit Court of Appeals affirmed.[2] On certiorari to the United States Supreme Court, *held*, affirmed, four justices dissenting. *Koster v. American Lumbermens Mutual Casualty Company*, (U.S. 1947) 67 S. Ct. 828.

As a result of the decision in the case at bar, it appears that the nominal plaintiff in a derivative suit must comply with a new condition precedent in addition to those laid down by Rule 23 (b) of the federal Rules of Civil Procedure,[3] even though venue in the case meets the requirements of section 51 of the Judicial Code.[4] It was held that the defendant by affadavits showing "vexation" made a prima facie showing of the inappropriateness of the forum, and the burden was on the plaintiff to make a showing of convenience to himself that would offset the hardship on the corporation defendant. The majority justified this requirement by taking notice of the peculiarities of derivative suits feeling that it was essential for the court to protect the interests of other stockholders, all of whom were "potential plaintiffs," by making certain that the suit would be maintained in a forum where the possibilities of collusive settlements and abuses would be minimized as much as possible. The majority concluded that there was no interference with the internal affairs of a foreign corporation which would justify dismissal under the "internal affairs rule" of *Rogers v. Guaranty Trust Company*,[5] but that the lower court's action could be justified under the

[1] (D.C. N.Y. 1945) 64 F. Supp. 595.

[2] (C.C.A. 2d, 1946) 153 F. (2d) 888.

[3] "Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort." 28 U.S.C. (1940) § 723 et seq.

[4] ". . . suit by a stockholder on behalf of a corporation may be brought in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have been brought by such corporation and process in such cases may be served upon such corporation in any district wherein such corporation resides or may be found." 49 Stat. L. 1213 at 1214 (1936), 28 U.S.C. (1940) § 112.

[5] 288 U.S. 123, 53 S. Ct. 295 (1933). The doctrine that a court should decline to take jurisdiction of a case involving the "internal affairs" of a foreign corporation has been widely applied in state courts, but has never been much accepted in the lower

doctrine set forth in *Williams v. Green Bay & W. R. Co.*[6] to the effect that forum non conveniens is an "instrument of justice" and could be invoked to prevent vexation and oppression of defendants in suits which, in fairness, should be tried in another court. The dissenting justices were willing to assume that the court has discretion to dismiss if the forum is "vexatiously inconvenient"[7] but they thought that the exercise of discretion was not warranted in this case. They were of the opinion that the plaintiff, under the Judicial Code,[8] started with a prima facie right to bring the suit at his residence; that clear proof by the defendant of vexation and oppression was essential before jurisdiction could be declined; that the hardship alleged by defendant overlooked the fact that the burden would be on the plaintiff, rather than the defendant, to get the records and witnesses to New York and make out his case; and that the court vitiated section 51 in concerning itself with the possibilities of a "strike suit" where nothing of the sort was alleged by defendant corporation. Since the quantum of vexation necessary to enable a court to decline to take jurisdiction is a matter of discretion, it is probably futile to predict what effect the present decision will have on derivative suits in the future. Certainly, if the court intends to put an actual burden on the nominal plaintiff to show real benefit to himself in the district of his residence, whenever the defendant alleges hardship, it would seem that the availability of derivative suits has been greatly limited.

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federal courts. For a comprehensive review of the development of the "internal affairs rule" see 46 COL. L. REV. 413 (1946.)

[6] 326 U.S. 549, 66 S. Ct. 284 (1946). Some writers have felt that the "internal affairs rule" of the Rogers case, supra, note 5, was, in effect, overruled by this decision. See 46 COL. L. REV. 413 (1946); 14 GEO. WASH. L. REV. 525 (1946); 59 HARV. L. REV. 621 (1946). Douglas, J., speaking for a unanimous court, said, at p. 553, that the Rogers case "is the only decision of this court holding that a federal court should decline to hear a case because it concerns the internal affairs of a corporation foreign to the State where the federal court sits."

[7] Reed, J., dissenting, in the principal case at 836.

[8] Supra, note 4.