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It is to be hoped that these indications are true ones and that the North Carolina Supreme Court will, in fact, persist in its refusal to follow the federal example.

ROBERT PERRY, JR.

Federal Jurisdiction—Diversity of Citizenship—Realignment of Parties in Corporate Derivative Suits

A New York stockholder in a New York corporation brought a derivative suit against a citizen of Kentucky. The corporation was joined as a defendant in accordance with the practice in derivative suits. The complaint alleged that the officers in control of the New York Corporation had wrongfully transferred shares to the Kentucky defendant in exchange for some worthless property. The Kentucky defendant sought dismissal for lack of diversity of citizenship between the plaintiff stockholder, a citizen of New York, and his New York corporation. The plaintiff conceded the apparent absence of diversity but contended that the court should sustain diversity jurisdiction by realigning the New York corporation as a complainant, since the action was on behalf of that corporation.

The court refused to realign on the ground that the complaint showed that managing powers of the New York corporation had fraudulently conspired with the other defendant, therefore the corporation was a rightful and necessary party defendant and could not be regarded otherwise.¹

The problem of realignment is of particular significance in corporate derivative suits, in view of the facts that jurisdiction in such cases is usually based on diversity of citizenship,² the right sought to be enforced is a corporate right,³ and the corporation is an indispensable party.⁴ Logically, it would seem that the corporation should be aligned

¹ *Smallen v. Louisville Fire & Marine Ins. Co.*, 80 F. Supp. 279 (W. D. Ky. 1948).

² *See Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U. S. 518, 522 (1947) ("With possible rare exceptions, these actions involve only issues of state law and . . . can get into federal courts only by reason of diversity of citizenship of the parties.").

³ *Koster v. (American) Lumbermens Mutual Casualty Co.*, *supra* note 2 at 522 ("The cause of action which such a plaintiff brings before the court is not his own but the corporations's."); *Greenberg v. Giannini*, 140 F. 2d 550, 554 (C. C. A. 2d 1944); *STEVENS, CORPORATIONS* §163 (1936) ("the mere fact that the shareholder appears as plaintiff . . . does not change the substantial nature of the right to be enforced or the judgment to be collected. Both the right and the judgment belong to the . . . corporation.").

⁴ *Davenport v. Dows*, 18 Wall. 626 (U. S. 1873); *Hobbs v. Mitchell*, 80 F. 2d 172 (C. C. A. 10th 1935) (held that it was collusive to leave out the corporation). *See Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U. S. 518, 522 (1947).

as a complainant for purposes of testing diversity,⁵ but the cases have not followed that course.

One of the earliest federal decisions recognizing a stockholder's suit to enforce a corporate right was *Dodge v. Woolsey*⁶ in which the Supreme Court affirmed the grant of injunctive relief to a Connecticut stockholder in his suit to prevent Ohio taxing officials from collecting a tax from the Ohio corporation. Clearly there would have been no diversity if the corporation had brought the suit. The taxing officials labeled the case a contrivance to give jurisdiction, but the Supreme Court held that the right of a citizen of Connecticut to sue a citizen of Ohio in federal court could not be questioned.

The *Dodge* case was decided before the federal courts had statutory authority to dismiss for collusion in manufacturing diversity of citizenship by getting a non-resident stockholder to bring a derivative suit, and before the doctrine of realignment was recognized. It was not until 1880 that the Supreme Court abandoned the practice of testing diversity by means of the position of the parties in the pleadings and construed the Judiciary Act of March 3, 1875,⁷ as empowering the federal courts to realign the parties.⁸ Since that time it has become well settled that, for purposes of testing the jurisdiction of a federal court on the basis of diversity of citizenship, it is immaterial how the parties are arranged in the pleadings. It is the duty of the court to align them according to their real interest in the controversy;⁹ that is, on the basis of their actual legal interests and the apparent result to them if the object sought is successful.¹⁰

*Doctor v. Harrington*¹¹ is probably the leading Supreme Court decision on the issue of realignment in stockholders' derivative suits. In that case, as in the *Dodge* case, there would not have been the necessary complete diversity if the corporation had been realigned. The court recognized that the right was one which could properly be asserted by the corporation but concluded that since "the corporation is *controlled by interests antagonistic to complainant*¹² . . . the defendant corporation is not to be classed on the same side of the controversy as complainant

⁵ 1 STREET, FEDERAL EQUITY PRACTICE 562 (1909) ("In as much as these suits are always technically based on a right of action primarily vested in the corporation itself, it has been suggested that . . . the corporation ought always to be treated as being in the same right with the actual plaintiff stockholder.").

⁶ 18 How. 331 (U. S. 1856).

⁷ 18 STAT. 470 (1875). See Pub. L. No. 773, 80th Cong., 2d Sess. §§1332, 1441, 1447 (June 25, 1948).

⁸ Removal Cases, 100 U. S. 457 (1879); *Pacific Railroad v. Ketchum*, 101 U. S. 289 (1880).

⁹ *Indianapolis v. Chase Nat. Bank*, 314 U. S. 63 (1941); *Thomson v. Butler*, 136 F. 2d 644 (C. C. A. 8th 1943), cert. denied, 320 U. S. 761 (1943).

¹⁰ See *Thomson v. Butler*, supra note 9 at 647.

¹¹ 196 U. S. 579 (1905).

¹² Italics supplied.

stockholder for the purpose of determining the diversity of citizenship on which the jurisdiction of the Circuit Court must rest."

Inconsistent language used in some of the subsequent decisions certainly justifies an observation that the cases are conflicting, particularly if an attempt is made to state the rule applied in terms of the results reached.¹³ However, the decisions have substantially adhered to the reasoning and the theory of *Doctor v. Harrington*.¹⁴ As in that case, the federal courts have frequently refused to realign the corporate defendant to *defeat*¹⁵ diversity jurisdiction, while in others, like the instant case, the courts have refused to realign the corporate defendant to *sustain*¹⁶ diversity jurisdiction. There have also been cases in which the court did realign to defeat diversity,¹⁷ and in one case the corporate defendant was realigned to sustain diversity jurisdiction, when its answer in effect joined in the complaint.¹⁸ However, the cases are in agreement in that the presence or absence of an antagonistic attitude in the persons controlling the corporation determined the question of realignment in each case.

¹³ See BREWSTER, FEDERAL PROCEDURE §382 (1940) ("The decisions on this point are in sharp conflict, some holding that defendant shall be deemed for all jurisdictional purposes a real party plaintiff, and others refusing to conform to this doctrine. . ."); MONTGOMERY, MANUAL OF FEDERAL JURISDICTION AND PROCEDURE §67 (4th ed. 1942) ("the rule [of realignment] is not applied in the case of stockholder's bills—for, otherwise, it would be impossible for a non-resident stockholder to bring suit in the federal court. This being the situation, the corporation will not be realigned. . ."); 2 MOORE, FEDERAL PRACTICE §23.21 (2d ed. 1948) ("The majority of the federal courts have refused to do this [realign], when to do so would defeat their jurisdiction."). But see ROSE, JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS §338 (2d ed. 1922); 1 STREET, FEDERAL EQUITY PRACTICE §562 (1909).

¹⁴ *E.g.*, *Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U. S. 518 (1947); *Venner v. Great Northern Ry. Co.*, 209 U. S. 24 (1908); *Hutchinson Box Board & Paper Co. v. Van Horn*, 299 Fed. 424 (C. C. A. 8th 1924); *Laughner v. Schell*, 260 Fed. 396 (C. C. A. 3d 1919); *Cutting v. Woodward*, 255 Fed. 633 (C. C. A. 9th 1918); *Lindauer v. Compania Palomas*, 247 Fed. 428 (C. C. A. 8th 1918), *cert. denied*, 246 U. S. 670 (1918); *Hyams v. Calumet & Hecla Mining Co.*, 221 Fed. 529 (C. C. A. 6th 1915); *Ashley v. Keith Oil Co.*, 73 F. Supp. 37 (D. Mass. 1947); *Richardson v. Blue Grass Mining Co.*, 29 F. Supp. 658 (E. D. Ky. 1939), *aff'd*, 127 F. 2d 291 (C. C. A. 6th 1942), *cert. denied*, 317 U. S. 639 (1942); *Nagle v. Wyoga Gas & Oil Corp.*, 10 F. Supp. 905 (M. D. Pa. 1935); *Harris v. Brown*, 6 F. 2d 922 (W. D. Ky. 1925); *Whitaker v. Whitaker Iron Co.*, 238 Fed. 980 (N. D. W. Va. 1916), *aff'd*, 249 Fed. 531 (C. C. A. 4th 1917), *cert. denied*, 248 U. S. 564 (1918); *Baillie v. Backus*, 230 Fed. 711 (D. Or. 1916); *Crawford v. Seattle R. & S. Ry. Co.*, 198 Fed. 920 (W. D. Wash. 1912); *Howard v. Nat. Tel. Co.*, 182 Fed. 215 (C. C. N. D. W. Va. 1910); *Kelly v. Miss. River Coal-ing Co.*, 175 Fed. 482 (C. C. W. D. Pa. 1909); *Gage v. Riverside Trust Co.*, 156 Fed. 1002 (C. C. S. D. Cal. 1906); *Lucas v. Milliken*, 139 Fed. 816 (C. C. D. S. C. 1905).

¹⁵ *Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U. S. 518 (1947); *Venner v. Great Northern Ry. Co.*, 209 U. S. 24 (1908).

¹⁶ *Nagle v. Wyoga Gas & Oil Corp.*, 10 F. Supp. 905 (M. D. Pa. 1935); *Crawford v. Seattle R. & S. Ry. Co.*, 198 Fed. 920 (W. D. Wash. 1912).

¹⁷ *Laughner v. Schell*, 260 Fed. 396 (C. C. A. 3d 1919); *Gage v. Riverside Trust Co.*, 156 Fed. 1002 (C. C. S. D. Cal. 1906); *accord*, *Lindauer v. Compania Palomas*, 247 Fed. 428 (C. C. A. 8th 1918).

¹⁸ *Lucas v. Milliken*, 139 Fed. 816 (C. C. D. S. C. 1905).

The practice of collusively obtaining federal diversity jurisdiction by means of the corporate derivative suit, which developed soon after the decision in the *Dodge* case, led the Supreme Court, in *Hawes v. Oakland*,¹⁹ to restrict the doctrine of the *Dodge* case by placing the burden on the plaintiff stockholder to show that he had a proper case for a derivative suit and that there was no collusion with the corporation to manufacture federal diversity jurisdiction.²⁰ The doctrine of that case was subsequently codified²¹ and now is substantially embodied in federal rule 23 (b).²²

The purpose of the requirements set out in rule 23 (b) was to determine the question of the authority of the plaintiff to maintain a derivative suit and not to raise questions of realignment and diversity jurisdiction,²³ but compliance with 23 (b) indirectly affects these questions by showing that the persons in control of the corporation are antagonistic to the stockholder's interests.²⁴ By the application of general equitable principles, upon which rule 23 (b) is based, a stockholder has no authority to institute a derivative suit unless the persons in control of the corporation have wrongfully refused to bring the suit.²⁵ Thus, whenever a stockholder has the proper standing to bring a derivative suit, the corporation is controlled by interests antagonistic to the stockholder, and the federal court will not realign the corporate defendant either to sustain or defeat diversity jurisdiction.²⁶ Of course,

¹⁹ 104 U. S. 450 (1882).

²⁰ *Hawes v. Oakland*, *supra* note 19 at 461, 462.

²¹ Equity Rule 94, 104 U. S. IX (1882).

²² FED. R. CIV. P., 23(b) (In a derivative suit, the complaint must aver "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").

²³ See *Venner v. Great Northern Ry. Co.*, 209 U. S. 24, 34 (1908); 13 CYCLOPEDIA OF FEDERAL PROCEDURE §6876 (2d ed. 1944).

²⁴ *Gage v. Riverside Trust Co.*, 156 Fed. 1002, 1007 (C. C. S. D. Cal. 1906) ("... the failure to comply with equity rule 94 not only affects the merits, but determines the proper alignment of the parties and thus indirectly goes to the question of federal jurisdiction."); *Groel v. United Electric Co.*, 132 Fed. 252 (C. C. D. N. J. 1904).

²⁵ STEVENS, CORPORATIONS §162 (1936) ("The minority shareholder has no standing to institute an action in the right of the corporate group, overriding a decision honestly arrived at by the directors or majority stockholders"). When the persons controlling the corporation are shown to be antagonistic to the stockholder's interests, and yet rule 23(b) has *not* been complied with, the court will not realign. Though such action may sustain diversity jurisdiction, the complaint is subject to demurrer for failure to show a right in equity to sue. *Venner v. Great Northern Ry. Co.*, 153 Fed. 408 (C. C. S. D. N. Y. 1907), *aff'd*, 209 U. S. 24 (1908).

²⁶ When the court refuses to realign the corporation, it would seem that diversity jurisdiction would always be defeated by the conclusive presumption that a corporation is composed of citizens of the state of incorporation. *Marshall v. Baltimore & Ohio R. R.*, 16 How. 314 (U. S. 1853). That possibility was re-

if the corporation is not controlled by antagonistic interests, the corporation may be realigned to sustain or defeat diversity jurisdiction,²⁷ but even if jurisdiction is sustained by the realignment, the stockholder has no standing to maintain the suit.

The courts have sought to bring the rule applied in derivative suits within the doctrine of realignment by stating it in terms of the antagonistic control of the corporation; however, the ultimate result amounts to a variation in the realignment doctrine which not only violates the basic theory of derivative suits²⁸ but cannot be reconciled with the practice of treating the corporation as a plaintiff for other jurisdictional purposes²⁹ and for the purpose of determining the district in which the suit may be brought.³⁰

LIVINGSTON VERNON.

Labor Law—Unfair Labor Practice—Discriminatory Denial of Use of Company Hall for Union Organization

An employer, motivated by anti-union bias, refused to allow union organizers to hold a meeting of employees in an employer-owned hall, not connected with the plant, in a North Carolina mill village. The hall had been used for other community activities in the past without objection. The only other public buildings in the mill village were also owned or controlled by the employer and unavailable to the organizers. Because of these circumstances the National Labor Relations Board found that the employer had discriminated against the union in violation of Section 8(1) of the National Labor Relations Act,¹ and ordered that

jected in *Doctor v. Harrington*, 196 U. S. 579 (1905), when Justice McKenna explained that the fiction was created to give federal courts diversity jurisdiction over corporations and could not be extended. See generally McGovney, *A Supreme Court Fiction, Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts*, 56 HARV. L. REV. 853 (1943).

²⁷ *Laughner v. Schell*, 260 Fed. 396 (C. C. A. 3d 1919) (Requirements of rule 23(b) were not complied with. The court realigned to defeat jurisdiction and dismissed the bill for failure to comply with the rule.).

²⁸ See note 3 *supra*.

²⁹ See *Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U. S. 518, 523 (1947); *Hutchinson Box Board & Paper Co. v. Van Horn*, 299 Fed. 424, 428 (C. C. A. 8th 1924) ("The amount in controversy is the value of the corporate right sought to be enforced and not the value of . . . [stockholder's] interest").

³⁰ 28 U. S. C. §1401 (Supp. 1948) ("Any civil action by a stockholder on behalf of his corporation may be prosecuted in any judicial district where the corporation might have sued the same defendants.").

¹ 49 STAT. 452 (1935), 29 U. S. C. §158(1) (1946), subsequently amended by National Labor Management Relations Act, 61 STAT. —, 29 U. S. C. §158(a) (1) (Supp. 1947): "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Section 7 provides, "Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and