as was expedient. The opinion implied that the plaintiffs were ungrateful in attempting to shorten the period of RFC control since they ". . . . having been saved from drowning, were not content to merely ride in the boat which had been so successully navigated by RFC but decided to take over and row it for themselves."[15] This attitude is in sharp contrast, not only with the duty which a private creditor in control of a corporation should owe to the stockowners, but with the criticisms of a recent Senate committee which urged that the RFC withdraw from reorganization proceedings as soon as possible.[16]

Soon after the decision in this case a settlement was reached whereby the entire $30,000,000 indebtedness of Maryland to the RFC was discharged through a sale of preferred stock to the public.[17] The plaintiff's committee had already announced its intention to appeal the decision. In the light of recent extensions of corporate fiduciary obligations,[18] it is possible that the Supreme Court would have imposed upon creditors, including government agencies, in control of corporate affairs a higher standard of fairness. The Supreme Court has said that a "dominant or controlling stockholder or group of stockholders" is a fiduciary, and "where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. . . . . The essence of the test is whether or not under the circumstances the transaction carries the earmarks of an arm's-length bargain."[19]

The transaction in the instant case might well be considered as not within the usual conception of "an arm's-length bargain."

Federal Courts—Relation to State Courts and Law—Effect of State Rules of Forum Non Conveniens under Erie v. Tompkins—[Federal].—The plaintiff, a Virginia corporation, brought an action in a federal district court in New York for damages arising from a tort allegedly committed in Virginia by a Pennsylvania corporation. The action was dismissed by the district court on the ground of forum non conveniens.[1] On appeal to the Circuit Court of Appeals for the Second Circuit, *held*, on the basis of the federal precedents, the doctrine of forum non conveniens cannot be invoked merely because a tort cause of action against a foreign corporation arises in another jurisdiction; and the defend-

[15] Todd v. Maryland Casualty Co., 155 F. 2d 29, 38 (C.C.A. 7th, 1946).

[16] S. Rep. 925, 79th Cong. 2d Sess. 33 (1946).

[17] Moody's Investors Service, Banks & Finance 1749, 1795 (Aug. 7, July 17, 1946).

[18] Young v. Higbee, 324 U.S. 204 (1945); Consolidated Rock Products Co. v. DuBois, 312 U.S. 510 (1941); Pepper v. Litton, 308 U.S. 295 (1939); Taylor v. Standard Gas & Electric Co., 306 U.S. 307 (1939).

[19] Pepper v. Litton, 308 U.S. 295, 306–7 (1939).

[1] Gilbert v. Gulf Oil Corp., 62 F. Supp. 291 (N.Y., 1945).

ant made no sufficient showing of vexation or oppression in the plaintiff's choice of the forum for the suit to warrant dismissal. Judgment reversed, one judge dissenting. *Gilbert v. Gulf Oil Corp.*[2]

Including the instant case, the Circuit Court of Appeals for the Second Circuit has had before it in the past two years four cases involving the problem of the applicability of forum non conveniens,[3] each of which at least by implication presented the question of whether state law should control this issue under the rule in *Erie R. Co. v. Tompkins.*[4] In the earliest of these, *Weiss v. Routh,*[5] the court upon its own motion raised the question and unanimously decided that the state rule as to forum non conveniens must control. Although this case has not been expressly overruled, in the subsequent cases the same court has decided the question of forum non conveniens independently of the state precedents. This result has been reached either on the assumption that state and federal law were the same,[6] or on the ground that the problem might more aptly be characterized as one of "procedure,"[7] or on the ground that the question was one of the jurisdiction of federal courts.[8] One of these cases, *Williams v. Green Bay & Western R. Co.*,[9] has been before the Supreme Court for review, but in that case the Court specifically reserved the question of the applicability of the *Erie* doctrine. Since there are significant differences in approach in both state and federal courts to the question of forum non conveniens in general[10] and since it

[2] 153 F. 2d 883 (C.C.A. 2nd, 1946), cert. granted 66 S. Ct. 1123 (1946).

[3] Gilbert v. Gulf Oil Corp., 153 F. 2d 883 (C.C.A. 2nd, 1946); Koster v. Lumbermens Mutual Casualty Co., 153 F. 2d 888 (C.C.A. 2nd, 1946), cert. granted 67 S. Ct. 61 (1946); Williams v. Green Bay & Western R. Co., 147 F. 2d 777 (C.C.A. 2nd, 1945), rev'd 326 U.S. 549 (1946); Weiss v. Routh, 149 F. 2d 193 (C.C.A. 2nd, 1945).

[4] 304 U.S. 64 (1938).

[5] 149 F. 2d 193 (C.C.A. 2nd, 1945).

[6] Gilbert v. Gulf Oil Corp., 153 F. 2d 883 (C.C.A. 2nd, 1946); Williams v. Green Bay & Western R. Co., 147 F. 2d 777 (C.C.A. 2nd, 1945), rev'd on other grounds 326 U.S. 549 (1946); cf. Overfield v. Pennroad Corp., 113 F. 2nd 6 (C.C.A. 3rd, 1940).

[7] Gilbert v. Gulf Oil Corp., 153 F. 2d 883, 885 (C.C.A. 2nd, 1946).

[8] Koster v. Lumbermens Mutual Casualty Co., 153 F. 2d 888 (C.C.A. 2nd, 1946).

[9] 326 U.S. 549 (1946).

[10] The doctrine may be briefly outlined in the terms of the three considerations which have generally caused it to be invoked in both state and federal courts: (a) vexation and oppression to the defendant, Canada Malting Co., Ltd. v. Paterson Steamship, Ltd., 285 U.S. 413 (1932); Universal Adjustment Corp. v. Midland Bank, Ltd., 281 Mass. 303, 184 N.E. 152 (1933); Thurman v. Chicago M. & St. P. Ry., 254 Mass. 569, 151 N.E. 63 (1926); (b) inconvenience and expense to the dismissing court, State ex rel. Goldwyn Distributing Corp. v. Gehrz, 181 Wis. 238, 194 N.W. 418 (1923); Collard v. Beach, 93 App. Div. 339, 87 N.Y. Supp. 884 (1904); (c) desirability of having the internal affairs of a corporation adjudicated in the forum of its incorporation, Williams v. Green Bay & Western R. Co., 326 U.S. 549 (1946); Rogers v. Guaranty Trust Co. of New York, 288 U.S. 123 (1933); Wojtczak v. American United Life Ins. Co., 293 Mich. 449, 292 N.W. 364 (1940). See Rest., Conflict of Laws §§ 192-202 (1934); The Development of the "Internal Affairs" Rule in the Federal Courts, and Its Future under Erie v. Tompkins, 46 Col. L. Rev. 413 (1946). For comprehensive treatments of the subject of forum non conveniens, see Gibbs, International Law of Jurisdiction (1926); Blair, The Doctrine of Forum Non Con-

seems that distinct federal rules on the subject are being developed, it is evident that a clearer and more consistent statement of the status of state doctrines of forum non conveniens in the federal courts is needed.

The instant case, as the only tort action of the four cases previously alluded to,[11] possibly brings into sharper focus the cleavage between state and federal doctrines of forum non conveniens and the need for deciding whether the *Erie* principle has any force in this area. Some state courts have developed a policy of refusing jurisdiction of foreign tort actions wherein neither party is a resident of the state of the forum.[12] It is significant that New York, the state of forum in the instant case, has long been a leader in the development of this policy;[13] yet the possibility of difference between state and federal rules was ignored in the assumption by the circuit court that the doctrine of forum non conveniens as applied by state and federal courts was indistinguishable.[14] A further instance of the difference of approach in state and federal courts may arise from the recent modification of the Supreme Court's position as to the jurisdiction of federal courts over the internal affairs of a foreign corporation. The general rule announced in *Rogers v. Guaranty Trust Co. of New York*[15] that a federal court would not accept jurisdiction of a suit involving the internal affairs of a foreign corporation, although much criticized[16] and often given bare lip-service by lower courts,[17] probably represented the position of the state

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veniens in Anglo-American Law, 29 Col. L. Rev. 1 (1929); Dainow, The Inappropriate Forum, 29 Ill. L. Rev. 867 (1935); Foster, Place of Trial in Civil Action, 43 Harv. L. Rev. 1217, 44 Harv. L. Rev. 41 (1930); 32 A.L.R. 6 (1924).

[11] Note 3 supra.

[12] State ex rel. Goldwyn Distributing Corp. v. Gehrz, 181 Wis. 238, 194 N.W. 418 (1923); Disconto Gesellschaft v. Umbreit, 127 Wis. 651, 106 N.W. 821 (1906), aff'd 208 U.S. 570 (1908); Mexican Nat'l R. Co. v. Jackson, 89 Tex. 107, 33 S.W. 857 (1896); Cofrode v. Gartner, 79 Mich. 332, 44 N.W. 623 (1890). See Blair, op. cit. supra note 10, at 25–27, 34; 32 A.L.R. 6 (1924).

[13] Pietraroia v. New Jersey & Hudson R. & F. Co., 197 N.Y. 434, 91 N.E. 120 (1910); Hoes v. New York, N.H. & H.R. Co., 173 N.Y. 435, 66 N.E. 119 (1903); Collard v. Beach, 93 App. Div. 339, 87 N.Y. Supp. 884 (1904). Although New York courts are granted jurisdiction over foreign tort actions involving foreign corporations doing business in the state, N.Y. Gen. Corp. Law. (McKinney, 1943) c. 23, §§ 223–25, this provision has been interpreted as being permissive only, and jurisdiction has often been declined. Gregonis v. Philadelphia & Reading Coal & Iron Co., 235 N.Y. 152, 139 N.E. 223 (1923); cf. Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377 (1929); Murnam v. Wabash R. Co., 246 N.Y. 244, 158 N.E. 508 (1927). See Blair, op. cit. supra note 10, at 34.

[14] Gilbert v. Gulf Oil Corp., 153 F. 2d 883, 884, 885 (C.C.A. 2nd, 1946).

[15] 288 U.S. 123 (1933).

[16] The Development of the "Internal Affairs" Rule in the Federal Courts, and Its Future under Erie v. Tompkins, 46 Col. L. Rev. 413 (1946); Jurisdiction of a Court to Interfere with the Internal Affairs of a Foreign Corporation, 18 Minn. L. Rev. 192 (1934); Interference with the Internal Affairs of a Foreign Corporation, 31 Mich. L. Rev. 682 (1933).

[17] Harr v. Pioneer Mechanical Corp., 65 F. 2d 332 (C.C.A. 2nd, 1933); Balch v. Investors Royalty Co., 7 F. Supp. 420 (Okla., 1934); National Lock Co. v. Hogland, 101 F. 2d 576

courts fairly closely. The recent restriction of the *Rogers* case in *Williams v. Green Bay & Western R. Co.* has perhaps widened the differences between state and federal rules[18] and thus made more acute the question of the applicability of the *Erie* doctrine.

At least two approaches might be followed in considering whether the *Erie* doctrine should be extended to matters of forum non conveniens. In the case of *Weiss v. Routh*,[19] the position was taken by the court that the conformity of results with state courts required by the *Erie* doctrine necessitated the application of the state rule of forum non conveniens. This is in effect the same method of solution found in the numerous cases under the *Erie* doctrine in which the issue is stated in terms of whether the matter is substantive or procedural.[20] It involves the assumption that the matter is one of sufficient significance that state law must control and that no other considerations apply; yet in similar cases the same distinction has been used to produce a precisely contrary result.[21] The substance-procedure distinction in the conflict of laws has long been recognized as being far from automatic in its application, and often the mere statement of a conclusion,[22] and the recent case of *Guaranty Trust Co. of New York v. York*[23] indicates that the line of demarcation between substance and procedure is even more indefinite under the *Erie* doctrine. It is submitted that a more fundamental approach to the problem of forum non conveniens in federal

(C.C.A. 7th, 1938). The courts to avoid the Rogers rule have distinguished it away by finding the affairs to be not truly "internal" or by finding the defendant guilty of fraud or breach of trust. The Development of the "Internal Affairs" Rule in the Federal Courts, and Its Future under Erie v. Tompkins, 46 Col. L. Rev. 413, 421 (1946).

[18] The Williams case restricts a federal court's discretion to dismiss to those situations where the remedies and supervision of the courts of the corporation's domicile are required or are more appropriate, or where substantial oppression to the defendant exists. In contrast, in a number of cases state courts have refused jurisdiction with far less restriction limiting their discretion. Langfelder v. Universal Laboratories, 293 N.Y. 200, 56 N.E. 2d 550 (1944); Farmers' Educational and Cooperative Union of America, Minnesota Division v. Farmers' Educational and Cooperative Union of America, 207 Minn. 80, 283 N.W. 884 (1940); Wojtczak v. American United Life Ins. Co., 293 Mich. 449, 292 N.W. 364 (1940); Arizona Commercial Mining Co. v. Iron Cap Copper Co., 236 Mass. 185, 128 N.E. 4 (1920).

[19] 149 F. 2d 193 (C.C.A. 2nd, 1945).

[20] Palmer v. Hoffman, 318 U.S. 109 (1943); Klaxon Co. v. Stentor Co., 313 U.S. 487 (1941); Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939); Sampson v. Channell, 110 F. 2d 754 (C.C.A. 1st, 1940).

[21] Note 7 supra; cf. Angel v. Bullington, 150 F. 2d 679 (C.C.A. 4th, 1945), cert. granted 66 S. Ct. 231 (1945), reargument ordered 66 S. Ct. 1358 (1946), noted in 13 Univ. Chi. L. Rev. 195 (1946).

[22] Davis v. Mills, 194 U.S. 451 (1904); Fitzpatrick v. Internat'l R. Co., 252 N.Y. 127, 199 N.E. 112 (1929). See Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L.J. 333 (1933); Ailes, Substance and Procedure in the Conflict of Laws, 39 Mich. L. Rev. 392 (1941); 9 Univ. Chi. L. Rev. 723 (1941), noting Maki v. George R. Cooke Co., 124 F. 2d 663 (C.C.A. 6th, 1942).

[23] 326 U.S. 99 (1945); cf. Palmer v. Hoffman, 318 U.S. 109 (1943); Klaxon Co. v. Stentor Co., 313 U.S. 487 (1941); Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939).

courts is found in *Koster v. Lumbermens Mutual Casualty Co.*,[24] decided on the same day as the instant case, in which the question was discussed as involving the jurisdiction of the federal courts. While forum non conveniens does not involve the question of jurisdiction in the strictest sense, it nevertheless involves the question, preliminary to any suit, of whether or not jurisdiction shall be exercised and a decision on the merits undertaken.[25] Although the courts of a given state may feel that they are too busy to undertake to hear certain foreign causes of action,[26] a federal court must consider that there will be no net saving in the work of the federal courts as a whole by refusing jurisdiction.

A refusal of jurisdiction under forum non conveniens involves no decision on the merits, and the substantial rights of the parties remain unaffected; thus the need for conformity with state courts is by no means as obvious as it is in the usual *Erie* problem, even if the state court would have heard the case in the particular instance. State laws can not restrict the jurisdiction of the federal courts,[27] and recent cases have indicated that federal judges must be very careful in relinquishing that jurisdiction.[28] If it is recognized that forum non conveniens is essentially a jurisdictional question[29] and that it lies in the discretion of each system of courts to determine how far it shall extend, it remains for the federal courts to work out their own rules upon considerations of oppression and vexation to defendants, availability of more appropriate remedies elsewhere, and the national character of the federal courts. The fact that in the majority of recent cases the federal courts have managed, by one route or another, to decide the forum non conveniens question under federal precedents[30] is indicative

[24] 153 F. 2d 888 (C.C.A. 2nd, 1946).

[25] "The doctrine . . . . involves nothing more than an appeal to the inherent powers possessed by every court of justice—powers, that is to say, which are incontestably necessary to the effective performance of judicial functions." Blair, op. cit. supra note 10, at 1; see also Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377 (1929).

[26] Notes 10 and 12 supra.

[27] Stephenson v. Grand Trunk Western R. Co., 110 F. 2d 401 (C.C.A. 7th, 1940); Martineau v. Eastern Air Lines, 64 F. Supp. 235 (Ill., 1946); cf. Miles v. Illinois Central R. Co., 315 U.S. 698 (1942); Baltimore & Ohio R. Co. v. Kepner, 314 U.S. 44 (1941); Developments in the Doctrine of Erie Railroad Co. v. Tompkins I, 9 Univ. Chi. L. Rev. 109, 116–17 (1941). See also the dissenting opinion of Mr. Justice Rutledge in Guaranty Trust Co. of New York v. York, 326 U.S. 99, 112 (1945).

[28] Markham v. Allen, 326 U.S. 490 (1946); Meredith v. Winter Haven, 320 U.S. 228 (1943). But cf. A.F. of L. v. Watson, 66 S. Ct. 761 (1946); Chicago v. Fieldcrest Dairies, 316 U.S. 168 (1942); Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941); Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940).

[29] Note 25 supra.

[30] Williams v. Green Bay & Western R. Co., 326 U.S. 549 (1946); Gilbert v. Gulf Oil Corp., 153 F. 2d 883 (C.C.A. 2nd, 1946); Koster v. Lumbermens Mutual Casualty Co., 153 F. 2d 888 (C.C.A. 2nd, 1946); Kelley v. American Sugar Refining Co., 139 F. 2d 76 (C.C.A. 1st, 1943), cert. den. 321 U.S. 791; Overfield v. Pennroad Corp., 113 F. 2d 6 (C.C.A. 3rd, 1940); Grismer v. Merger Mines Corp., 43 F. Supp. 990 (Wash., 1942), aff'd sub nom. Merger Mines Corp. v. Grismer, 137 F. 2d 335 (C.C.A. 9th, 1943); Hirshhorn v. Mine Safety Appliances Co., 54 F. Supp. 588 (Pa., 1944); Healey v. R. J. Reynolds Tobacco Co., 48 F. Supp. 207 (N.C., 1942). Contra: Weiss v. Routh, 149 F. 2d 193 (C.C.A. 2nd, 1945).

that the doctrine involves considerations which the federal courts must decide for themselves and, further, that the *Erie* doctrine does not foreclose all possibility of independence on the part of federal courts.[31] It might even be suggested that, since federal courts must now follow the conflict of laws rules of the state in which they sit[32] and since this at times leads to undesirable results,[33] especially where nation-wide service of process is available under the Interpleader Act,[34] the federal courts might use an independently developed forum non conveniens doctrine to relegate suits to a forum where a more appropriate law is available. It must be recognized, however, that this would be contrary to the present tendency to apply forum non conveniens less restrictively in the federal courts.[35]

Insurance—Cooperation Clause—Conflict of Interest between Insured and Insurer as Excuse from Compliance—[California].—Following an intersection collision between the automobiles of both insured parties, each of whom carried identical policies of liability insurance with the same insurers,[1] a negligence complaint was filed to which a cross-complaint was filed. The personal attorneys for the cross-complainant notified the insurer that they would also conduct the defense in the action. The insurer advised the defendant and cross-complainant in the negligence action that it was relieved of any liability under the policy because the defendant had violated the cooperation clause of the policy by not permitting the insurer to conduct the defense in the negligence action.[2] The plaintiff in the present suit (defendant and cross-complainant in the negligence action) instituted this declaratory judgment proceeding, naming the plaintiff in the negligence action and the insurer as defendants, to determine the rights of the parties under the policies. The trial court held that since the plaintiff in the instant case had violated the cooperation clause, the insurer was relieved of li-

[31] Clark, State Law in the Federal Courts; The Brooding Omnipresence of Erie v. Tompkins, 55 Yale L. J. 267 (1945); Exceptions to Erie v. Tompkins: The Survival of Federal Common Law, 59 Harv. L. Rev. 966 (1946).

[32] Klaxon Co. v. Stentor Co., 313 U.S. 487 (1941); Griffin v. McCoach, 313 U.S. 498 (1941).

[33] Griffin v. McCoach, 313 U.S. 498 (1941), noted in 9 Univ. Chi. L. Rev. 141 (1941).

[34] 49 Stat. 1096 (1936) as amended, 28 U.S.C.A. § 41 (26) (Supp., 1945).

[35] Compare Williams v. Green Bay & Western R. Co., 326 U.S. 549 (1946), with Rogers v. Guaranty Trust Co. of New York, 288 U.S. 123 (1933); see note 18 supra.

[1] Under complementary policies both were insured by Firemen's Insurance Company and the Metropolitan Casualty Insurance Company. The two companies are referred to hereafter as the insurer.

[2] The policy provided that the insurer "shall defend in his name and behalf any suit against the insured . . . . ; but the Company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the Company. . . . . [The insured] shall cooperate with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses, and in the conduct of suit. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical or surgical relief to others as shall be imperative at the time of the accident." O'Morrow v. Borad, 167 P. 2d 483, 485 (Cal., 1946).