or the situs of the contract shall govern.[27] These obstacles to a systematic solution or determination of the law co-exist with the construction to be given to the recording statutes in force in the several states.[28]

Corporations—Shareholders' Suits—Allegation of Prior Ownership—Procedural or Substantive—An application for settlement of the claim was turned down by the court and petitioners applied for permission to intervene on the grounds that the original complainant would not properly safeguard the petitioners' interests. *Held,* petition denied because of the petitioners' failure to allege that they were shareholders of the Sperry Corporation at the time of the transaction of which they complain, or that their shares devolved on them by operation of the law. *Piccard v. Sperry Corporation et al.* 36 F. Supp. 1006, (S.D. N. Y. 1941).

Several states including New York[1] permit a stockholder to sue as a representative of his corporation where it refuses to sue on its own behalf, regardless of whether the stockholder purchased his stock before or after the occurrence of the transaction complained of. The rule

---

Co. v. Higbee, *supra* note 3; General Motors Acceptance Corp. v. Boudreaux, *supra* note 25.

27. Lane v. J. E. Roaches Banda Mexicana, *supra* note 9; Baldwin Piano Co. v. Thompson, *supra* note 2; Amer. Slicing Mach. Co. v. Rothschild & Lyons, *supra* note 25; Weinstein v. Freyer, *supra* note 2; *In re* Legg, *supra* note 3; Summers v. Carbondale Mach. Co., *supra* note 6; Kennedy v. Nat. Cash Reg. Co., *supra* note 6; Eli Bridge Co. v. Lochman, *supra* note 6; Corbet v. Riddle, *supra* note 5; Clyde Iron Works v. Fredericks, *supra* note 23; Barrett v. Kelley, *supra* note 3.

28. Dorntee Casket Co. v. Gunnison, 69 N.H. 297, 45 A. 318 (1898); Davis v. Osgood, 69 N.H. 427, 44 A. 432 (1899); Baldwin v. Hill, *supra* note 4; Drew v. Smith, *supra* note 4; Fry Bros. v. Theobold, *supra* note 4; Ky. Stat. sec. 496; Southern Hard. Co. v. Clark, *supra* note 6; Ala. Code. 1907, sec. 3394; Cleveland Mach. Works v. Lang, *supra* note 4; N.H. Laws 1885, c. 30; Willys-Overland Co. of Cal. v. Chapman, 206 S.W. 978 (Texas 1919); Vernon's Sayles Ann. Civ. St. 1914, Arts. 5654, 5655.

1. Pollitz v. Gould, 202 N.Y. 11, 94 N.E. 1088, 38 L.R.A. (N.S.) 988, Ann. Cas. 1912D. 1089 (1911).

in the federal courts has been that only those stockholders who acquired their stock before the cause of action arose could maintain such an action. There have been many articles written discussing the merits of the two views and it is not the purpose of this discussion to go further into the advantages of either theory. The problem which is to be studied here is whether or not the position taken by the courts in those cases is substantive or procedural and thus whether, under the doctrine of *Erie R. R. v. Tompkins*,[2] the federal courts will be required to discard its present rule and follow the state law on the subject.

It is well known that *Erie R. R. v. Tompkins*[2] overruled the century old doctrine of *Swift v. Tyson*,[3] and it is well known that the Erie R. R. case held that the federal courts had to dispense with their own theories of "general law" and follow state law including rules of decision as well as statutes. But few, if any, know how far that doctrine is to be extended: few, if any, know just where the fine line of distinction between procedural and substantive should be drawn. Generally speaking, procedure goes to the way a cause should be proven and substantive goes to what you have to prove in order to succeed, but very frequently a single problem will have both procedural and substantive aspects.

No one can question the fact that form of pleading is procedural, yet the contents of a complaint depend in a large part on the substantive rights of the parties. For example let us look at the case of *Francis v. Humphrey*.[4] A plaintiff in her complaint failed to allege contributory negligence. Under Illinois law (the state in which the federal court was sitting) such a defect would be fatal as a plaintiff was required to allege and prove his freedom from contributory negligence. The right to have plaintiff allege and prove freedom from contributory negligence was, we believe, properly held to be a substantive right. Thus we have the procedural question of what constitutes a sufficient complaint tied up with and dependent upon a substantive right. Similarly, in *Cities Service Oil Co. v. Dunlap*,[5] the question of whether the federal courts sitting in Texas had to follow the Texas rule that one attacking the

2. Erie R.R. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).
3. Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865 (1842).
4. Francis v. Humphrey, 25 F. Supp. 1 (E.D. Ill. 1938).
5. Cities Service Oil Co. v. Dunlap, 101 F. (2d) 314 (C.C.A. 5th 1939).

legal title had to bear the burden of proof on the question of the bona fides of the purchaser and on the question of knowledge and value arose. Mr. Justice McReynolds speaking for the United States Supreme Court held that the federal courts had to follow the state law. He thereby reversed the Circuit Court of Appeals' holding that it was purely a question of procedure.

With these cases in mind we can now turn to our problem. Certainly the federal rule which requires that the complaint contain a statement, that the stock was held at the time that the cause arose or devolved on the complainant and that the suit is not collusive, under oath[6] is a rule governing procedure exclusively. But it provides for a procedure which, if followed, will result in the prevention of a person from prosecuting an action which he can prosecute in the state courts. The New York courts permit a person to sue even though he has acquired the stock after the cause arose.[7] This brings us squarely to the problem of whether the right to sue is a substantive right. It would seem that if the question of what one has to prove to succeed in an action were substantive, the right to sue itself should be substantive too. There is a close analogy between these cases. In a sense our problem is merely one of what plaintiff has to prove. Under New York law he does not have to prove that he held the stock before the cause arose, and proof of the fact that he did not hold it at the time the cause of action arose would not defeat him. In other words the basis of his right under New York law is his present ownership of the stock. Why should not that be sufficient in the federal courts which are bound by the substantive law of New York.

Further proof of the fact that the problem involves substantive rather than procedural rights can be found in the fact that several states permit only those who held the stock at the time the cause arose[8] and they are not bothered by the procedural question. They place it squarely on the basis of whether or not it is equitable to permit the action by one who purchased the stock subsequently to sue. Again, the Supreme

---

6. Rule 23(b) Rules of Civil Procedure for the District Courts of the United States.

7. Pollitz v. Gould, *supra*, note 1.

8. Albers v. Merchants' Exchange of St. Louis, 45 Mo. App. 206.

Court of Nebraska in commenting on the question said, "The federal equity rule, while designed in part to prevent collusive proceedings in fraud of jurisdiction of those courts, goes far beyond the requirements of such a purpose. If that were the sole purpose of the rule, it should go on further than to prevent such suits where the vendor of the stock was a citizen of the same state as the corporation. If the vendor and purchaser were citizens of the same state, and the vendor an original stockholder, had never had the same citizenship as the corporation, no fraud on the jurisdiction of the court would be possible, and in such case, if recovery were proper and the purchaser's cause were meritorious, it would be highly unjust for the court to abrogate its jurisdiction. This consideration alone dispenses of the criticism. The rule has its foundation in a sound wholesome principle of equity."[9]

For the foregoing reasons we submit that the right to sue is substantive and suggest that the Court should have permitted the petitioners to intervene.

Personal Services Contract—Specific Performance—Mutuality of Remedy—One Kasdin, through the Kasdin Realty Company, a corporation owned and controlled by him, contracted to purchase stock in a theater corporation. He agreed with the complainant to advance the entire purchase price, less the complainant's commission as broker in negotiating the sale, and also to transfer to his name five of the ten shares purchased in consideration of successful management of the theater by him. These five shares were to be held in escrow, and transferred to complainant's name when the defendant would receive his total amount of investment in the form of profits from the enterprise. Defendant refused to transfer the shares and terminated complainant's employment. *Held,* that the shares be transferred in complainant's name as per contract. *Steinberg v. Kasdin,* 128 N.J.Eq. 503, 17 A. 2d 284 (E.&A. 1941).

While the contract in the instant case specifically stated that the complainant was to render services in consideration for the shares, the

9. Home Fire Ins. Co. v. Barber, 67 Neb. 644, 93 N.W. 1024 (1903).