

Section 61-B of the General Corporation Law of New York: Its Constitutionality and Applicability in the Federal Courts

Thomas A. Bolan

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live in honor and decency. They will not make the sacrifices necessary for the preservation of democratic ideals. They will decline into a worship of power. Fear will be their only motivation. The strong will vanquish the weak and democracy will perish.

Men must know God's law and they must learn it in the homes and in the schools. Secularization of the schools will produce monstrosities respectful of neither God nor man. Fear, hate and prejudice are the offspring of ignorance and if we are to keep our youth ignorant of God this nation will perish through fear, hate and prejudice.

Let us make religion a part of our school curricula, let us educate our citizens in the love of God and of country, and democracy will survive its enemies from without and from within.

JOHN P. O'BYRNE.

SECTION 61-B OF THE GENERAL CORPORATION LAW OF NEW YORK:
ITS CONSTITUTIONALITY AND APPLICABILITY IN THE
FEDERAL COURTS

On April 9, 1944, a disastrous blow was dealt minority stockholders seeking to institute derivative actions in the courts of New York State. On that day Governor Thomas E. Dewey signed the bill which was later known as Section 61-b of the General Corporation Law of New York.¹ Since that time a bitter battle has been raging as to (1) the constitutionality of the statute and (2) its applicability in the federal courts. Powerful and persuasive arguments are put forth both by those who uphold the statute and by those who seek to destroy it and the clash is one of exceptional interest.

¹ N. Y. GEN. CORP. LAW § 61-b: "In any action instituted or maintained in the right of any foreign or domestic corporation by the holder or holders of less than five per centum of the outstanding shares of any class of such corporation's stock or voting trust certificates, unless the shares or voting trust certificates held by such holder or holders have a market value in excess of fifty thousand dollars, the corporation in whose right such action is brought shall be entitled at any stage of the proceedings before final judgment to require the plaintiff or plaintiffs to give security for the reasonable expenses, including attorney's fees, which may be incurred by it in connection with such action and by the other parties defendant in connection therewith for which it may become subject pursuant to section sixty-four of this chapter, to which the corporation shall have recourse in such amount as the court having jurisdiction shall determine upon the termination of such action. The amount of such security may thereafter from time to time be increased or decreased in the discretion of the court having jurisdiction of such action upon showing that the security provided has or may become inadequate or is excessive."

I. Legislative History

To fully appreciate the significance of the present controversy, a knowledge of the background and origin of this statute is of prime importance. Section 61-b was made law for the express purpose of curtailing so-called "strike suits." A "strike suit" is an action, usually not founded on any meritorious claim, brought "on behalf" of a corporation by one of its stockholders. Its purpose is not primarily to attain benefit for the corporation but is rather the hope of forcing the corporation into a lucrative private settlement. A stockholder so inclined may arm himself with any slight irregularity remotely resembling a violation of fiduciary duty on the part of the corporate management and force the corporation to succumb to his groundless threats, rather than go through a time-consuming, expensive and often unpleasantly publicized litigation. In most cases his holdings comprise an infinitesimal percentage of the total corporate stock. Fees awarded to the stockholder's counsel in these suits are unduly large and thus there are more than a few attorneys who, with everything to gain and very little to lose, willingly bring suit even though their client's claim may be wholly lacking in merit.²

The obvious evil of the whole situation has been readily recognized by the courts³ and attention focused on it by many articles appearing in law school periodicals.⁴ In 1942 the Chamber of Commerce of New York instituted an extensive investigation and survey of stockholder derivative actions in New York and its conclusions pointed to the need for legislative reform.⁵ Thus, on April 9, 1944, Governor Thomas E. Dewey of New York, after stating that "a

² "These fees are among the largest possible for practitioners in any field of law. Any lawyer representing a stockholder, however small, in a corporation where a 'situation' is apparent has an opportunity to earn or share in these. His own professional qualifications are unimportant, for if the case appears to be colorably well founded, trial counsel of better standing and ability is available. If it is not, there is still some chance of a nuisance value settlement. With the wide range of financial transactions with which large corporations are concerned and some ingenuity in finding reasons to criticize them, it is not surprising that the flimsiest foundation of fact is not too weak for many attorneys to base a hope of rewards of these proportions." WOOD, SURVEY AND REPORT REGARDING STOCKHOLDERS' DERIVATIVE SUITS 82 (1944).

³ See *Gazan v. Vadsco Sales Corporation*, 6 F. Supp. 568 (E. D. N. Y. 1934); *Weinberger v. Quinn*, 264 App. Div. 405, 409, 35 N. Y. S. 2d 567, 572 (1st Dep't 1942), *aff'd*, 290 N. Y. 635, 49 N. E. 2d 131 (1943).

⁴ Note, *Extortionate Corporation Litigation: the Strike Suit*, 34 COL. L. REV. 1308 (1934); Comment, *Corporations—Right of Minority Stockholders to Interfere in Corporate Management*, 32 MICH. L. REV. 839 (1934); Berlack, *Stockholders' Suits: A Possible Substitute*, 35 MICH. L. REV. 597 (1937); Washington, *Stockholders' Derivative Suits*, 25 CORN. L. Q. 361 (1940).

⁵ WOOD, SURVEY AND REPORT REGARDING STOCKHOLDERS' DERIVATIVE SUITS (for Special Committee on Corporate Litigation, Chamber of Commerce of the State of New York, 1944). That this report was biased and its conclusions not substantiated by facts, see Zlinkoff, *The American Investor and the Constitutionality of Section 61-B of the New York General Corporation Law*, 54 YALE L. J. 352, 359-372 (1945).

veritable racket of baseless lawsuits accompanied by many unethical practices" had grown up in the field of stockholder suits, signed two bills designed to curb the "great abuse and malodorous scandal"⁶ connected with such actions. The first of these requires that the plaintiff be "a stockholder at the time of the transaction of which he complains or that his stock thereafter devolved upon him by operation of law"⁷ and the second, subsequently Section 61-b, gives the corporate defendant the right to require security for expenses, including counsel fees, whenever the plaintiff-stockholder does not own 5% of the outstanding corporate stock or stock having a market value of \$50,000. These expenses also include the expenses of the individual defendants for which the corporation may become liable.⁸ As is usually the case when legislation concerning corporations is enacted in New York, other states were not slow in adopting similar statutory provisions.⁹

II. Constitutionality

The effect of these statutes has been to drastically curtail minority stockholder actions in the state courts,¹⁰ and whether the legislatures have gone too far in bringing about such a result is an issue that has provoked much conflicting thought.¹¹

Until the recent decision of the Court of Appeals of New York in *Lapchak v. Baker*,¹² the lower courts of that state had not been in harmony regarding the constitutionality of Section 61-b.¹³ In that

⁶ PUBLIC PAPERS OF GOVERNOR DEWEY 255 (1944), and Governor's Memorandum, immediately following text of N. Y. GEN. CORP. LAW § 61-b.

⁷ Subsequently part of N. Y. GEN. CORP. LAW § 61. This provision corresponds to FED. R. CIV. P. 23(b)(1), long in force in the federal courts.

⁸ N. Y. GEN. CORP. LAW § 64 entitles the directors, officers or employees of a corporation to assess their reasonable expenses in these actions against the corporation, except where they have been adjudged liable for negligence or misconduct in the performance of their duties.

⁹ N. J. REV. STAT. § 14:3-15 (Cum. Supp. 1948); PA. STAT. ANN., tit. 12, § 1322 (Cum. Supp. 1948) (stockholder must own 5% of stock, with no alternative exemption for owning stock having a specified market value); MD. ANN. CODE GEN. LAWS Art. 16, § 195 (Cum. Supp. 1947) (stockholder required to own 5% of stock or stock having a value of \$25,000; excludes security for attorneys' fees).

¹⁰ Hornstein, *New Aspects of Stockholders' Derivative Suits*, 47 COL. L. REV. 1 (1947).

¹¹ Zlinkoff, *The American Investor and the Constitutionality of Section 61-B of the New York General Corporation Law*, 54 YALE L. J. 352 (1945); Hornstein, *The Death Knell of Stockholders' Derivative Suits in New York*, 32 CALIF. L. REV. 123 (1944); Carson, *Further Phases of Derivative Actions Against Directors*, 29 CORN. L. Q. 431 (1944); 58 HARV. L. REV. 135 (1944).

¹² 298 N. Y. 89, 80 N. E. 2d 751 (1948).

¹³ Constitutional: Matter of Baker v. Macfadden Publications, 270 App. Div. 440, 59 N. Y. S. 2d 841 (1st Dep't 1946), leave to appeal denied, 270 App. Div. 840, 61 N. Y. S. 2d 911 (1st Dep't 1946); Isensee v. Long Island Motion Picture Co., 184 Misc. 625, 54 N. Y. S. 2d 556 (Sup. Ct. 1945); Shielcraw v. Moffett, 49 N. Y. S. 2d 64 (Sup. Ct. 1944), *aff'd*, 268 App. Div. 352, 51

case the constitutionality of the statute was upheld by a unanimous decision. The opinion of the court was surprisingly brief and contained neither discussion nor refutation of the strong arguments submitted to show the unconstitutionality of the statute. The court was content with merely stating that it would not question the wisdom of the legislature in enacting the statute and that it was not so palpably arbitrary or unduly discriminatory as to warrant holding it unconstitutional. However, a conclusive judicial determination as to the constitutionality of Section 61-b and similar statutes in other states has not yet been reached. There is at present pending in the United States Supreme Court a case in which the constitutionality of a New Jersey statute¹⁴ almost identical to Section 61-b is one of the principal issues.¹⁵

Regarding its application to suits pending at the time it took effect, Section 61-b was interpreted as not applying to actions instituted before the date of its passage.¹⁶ The New Jersey statute above referred to is specifically retroactive. Doubt has arisen as to the validity of such a provision¹⁷ and that question is also before the United States Supreme Court in the case already adverted to.

The constitutionality of Section 61-b is attacked on several grounds. One argument adduced by those who hold that it is unconstitutional is that it violates the "due process" clause of the Fourteenth Amendment of the Federal Constitution in that the burden imposed upon the stockholder is so severe that, in effect, the courts are closed to him. Regarding this alleged burden, those who reject this viewpoint cite Governor Dewey's statement in approving the bill that "if his action has any merit at all, it should be easy enough to interest others who do hold at least 5%, or stock valued at \$50,000."¹⁸ However, practically speaking, to do this is not as "easy" as it sounds. It would seem that merely contacting 5% of the stockholders, apart from convincing them of the merits of one's cause, would involve considerable time, labor and expense. Furthermore, in many cases where small corporations or close corporations are involved it would be virtually impossible to interest 5% of the stockholders, since in these corporations the stock is ordinarily concentrated in the hands of a few individuals, which individuals are

N. Y. S. 2d 188 (1st Dep't 1944), *rev'd on other grounds*, 294 N. Y. 180, 61 N. E. 2d 435 (1945); *Wolf v. Atkinson*, 182 Misc. 675, 49 N. Y. S. 2d 703 (Sup. Ct. 1944). Unconstitutional: *Citron v. Mangel Stores Corporation*, 50 N. Y. S. 2d 416 (Sup. Ct. 1944).

¹⁴ N. J. REV. STAT. § 14:3-15 (Cum. Supp. 1948).

¹⁵ *Cohen v. Beneficial Industrial Loan Corp.*, 170 F. 2d 44 (C. A. 3d 1948), *cert. granted*, — U. S. —, 93 L. ed. 526 (1949).

¹⁶ *Shielcrawt v. Moffett*, 294 N. Y. 180, 61 N. E. 2d 435 (1945), *motion for reargument denied*, 294 N. Y. 840, 62 N. E. 2d 392 (1945).

¹⁷ See *Noel Associates v. Merrill*, 184 Misc. 646, 654, 53 N. Y. S. 2d 143, 151 (Sup. Ct. 1944).

¹⁸ Governor's Memorandum, immediately following text of N. Y. GEN. CORP. LAW § 61-b.

usually the ones who manage the corporation and against whom the minority stockholder contemplates suit.

There can be no doubt that in most cases the effect of this statute is to bar the minority stockholder from bringing suit, irrespective of what his motives may be. To hold otherwise would be to close one's eyes to the realities of the situation. Not only may lack of financial resources prevent the poorer stockholder from posting security, but it may also disable him from spreading his views to fellow stockholders. Assuming that a stockholder in a large corporation does not meet the statutory requirement of stock ownership but is financially able to hurdle the obstacle of submitting security, he is still under a statutory threat so pronounced that in most instances, no matter how valid his claim may be, he will shy away from suit. If he is successful in his anticipated suit the most he will recover is a few cents a share on his stock; but if he loses the suit he forfeits the security posted, which in some cases passes the \$100,000 mark. The scales are too unevenly weighted against him and the prudent stockholder will ordinarily not take the risk involved. When an individual has a right to enter court to protect his property, that right cannot be pushed to the point of disappearance by oppressive penalties.¹⁹ If the minority stockholder has such a right to protect his interest in a corporation by bringing a derivative suit, then in many cases Section 61-b renders such right a mere illusion, despite the absence of a literal liquidation in the statute.

However, the right of a minority stockholder to litigate a cause of action belonging to his corporation is far from being the right which the "due process" clause protects. It is not an absolute or unqualified right. It had its origin in equity and equitable considerations determine each case. To hold that merely because one owns stock in a corporation entitles him under the Constitution to bring suit on behalf of the corporation would be to fly in the teeth of federal enactments which heretofore have not been attacked as being invalid. Section 23(b)(1) of the Federal Rules of Civil Procedure requires the plaintiff-stockholder to own the stock at the time of the transaction of which he complains. If a stockholder has an inherent right to bring suit on behalf of the corporation in order to protect his own interest, how can such a rule be constitutionally sustained? Viewing the situation logically, a stockholder acquiring stock subsequent to a violation of fiduciary duty by the corporate management has just as much interest in seeing to it that the situation is rectified as has the stockholder who owned stock at the time of the violation.

¹⁹ *Wadley Southern Railway Co. v. State of Georgia*, 235 U. S. 651, 661, 59 L. ed. 405, 411 (1915), wherein it was stated that ". . . in whatever method enforced, the right to a judicial review must be substantial, adequate, and safely available; but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law."

If the subsequent stockholder is validly barred from bringing suit, it must be because he has no right which the "due process" clause protects. If the stockholder in that instance is not aided by the "due process" clause, it is difficult to see how he can avail of it in the situation in which he finds himself as a result of Section 61-b. Section 23(b)(1) was the result of a realistic approach to the same goal which Section 61-b seeks to attain, *viz.*, the curbing of abuse in derivative actions, and it would seem that the same recognition accorded Section 23(b)(1) should be given Section 61-b.

Another contention is that the statute denies equal protection of the laws, the claim being that it unduly discriminates against the small stockholder. Though legislatures have the power to make classification, such classification must bear a direct and reasonable relation to the object of the legislation.²⁰ In applying this principle, those who hold the classification to be constitutional reason that the legislature found the evil of extortionate "strike suits" to be the product merely of the small stockholders and not of the larger stockholders and that, therefore, the classification has a direct and reasonable relation to the legislative intent, for assuredly if only suits brought by small stockholders are obnoxious, then only such suits should be curtailed.²¹ Their reasoning is that a stockholder owning 5% of the corporate stock or stock having a market value of \$50,000 has more of a personal interest in the outcome of a derivative suit than has a stockholder not meeting the statutory minimum and that, therefore, a suit instigated by him is more apt to have a meritorious foundation. This may be true if we confine our analysis to one corporation. However, when we hypothetically compare the interest of a stockholder in one corporation with another's interest in a different corporation, a marked fallacy in this line of reasoning appears. For example, one can readily visualize that a stockholder owning but 3% of a corporation's stock may be in a position to gain much more by a derivative suit than a stockholder owning 5% of the stock of another corporation in a similar suit. This is so because taken alone neither the percentage of the stock one owns in a corporation nor the market value of that stock presents a sound criterion for estimating one's financial interest in the outcome of a litigation. Both the assets of the particular corporation and the amount at stake in suit are important considerations. The easily imagined possibility then is that stockholder *A*, who stands to gain \$1,000 by a successful derivative suit, is barred from bringing one because he owns but 3% of the corporate stock, whereas stockholder *B*, who stands to gain but \$500,

²⁰ *Asbury Hospital v. Cass County*, 326 U. S. 207, 214, 90 L. ed. 6, 13 (1945); *Frost v. Corporation Commission*, 278 U. S. 515, 522, 73 L. ed. 483, 488 (1929); *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 402, 72 L. ed. 927, 930 (1928).

²¹ *See Isensee v. Long Island Motion Picture Co.*, 184 Misc. 625, 629, 54 N. Y. S. 2d 556, 560 (Sup. Ct. 1945).

may bring suit because he owns 5% of the stock. Thus it would seem that the "personal interest" argument does not have much potency.

Those who believe the statute to be unconstitutional contend that the purpose of the legislature was simply to curtail *baseless* derivative actions and that by hindering all small stockholders desiring to bring suit, irrespective of the merit of their claims, the classification goes too far in achieving such purpose.²² They conclude that the object of the legislation is attained in an arbitrary and unreasonable manner, *i.e.*, *baseless* derivative actions are done away with by doing away with *all* derivative actions so far as stockholders unable to meet the statutory requirements are concerned. As one writer has aptly put it, Section 61-b and similar statutes "throw the baby out with the bath."²³ In addition, there is nothing to prevent a stockholder meeting the statutory requirements from bringing a groundless suit. It is also argued that the statute discriminates against the poorer stockholder. In many cases the test for bringing suit is not whether or not the stockholder's claim is meritorious, but rather the decisive question is does he have enough money to post the security demanded. Of course, any arbitrary distinction based on wealth and involving the right to judicial review has always met with severe condemnation²⁴ and if no other considerations were present, it would surely seem that Section 61-b is invalid.

However, the real test is whether the statutory classification is reasonable; if it is, the fact that the wealthier stockholder gains an incidental advantage is immaterial. To protect the public, legislatures may be forced to pass statutes which by their very nature work to the disadvantage of individuals with limited financial means.²⁵ That statutes or decisions may work a hardship on a few in particular instances for the sake of protecting the many is not an unfamiliar principle.

In New York many rights of stockholders are governed by statutory requirements of minimum ownership.²⁶ It has never been seriously contended that these statutes are constitutionally invalid. Such statutes were enacted not only to prevent abuse by the stockholder, but also so that corporate affairs might be run more smoothly and effectively, unhampered by multitudinous claims. It was such a prac-

²² Citron v. Mangel Stores Corp., 50 N. Y. S. 2d 416 (Sup. Ct. 1944).

²³ Wolfson, *Striking out "strike suits"*, Fortune, March, 1949, p. 138, col. 3.

²⁴ See Cotting v. Godard, 183 U. S. 79, 100, 101, 46 L. ed. 92, 105, 106 (1901).

²⁵ Gant v. Oklahoma City, 289 U. S. 98, 77 L. ed. 1058 (1933), wherein the court upheld the constitutionality of a municipal ordinance making the filing of a surety company bond in the sum of \$200,000 a condition of the right to drill a gas or oil well within the city limits.

²⁶ N. Y. STOCK CORP. LAW §§ 10, 113 limit the right of inspection of stock books to stockholders of record for at least six months or those holding or authorized by 5% of the outstanding shares. N. Y. STOCK CORP. LAW § 77 gives stockholders owning 3% of the shares of a corporation the right to request a statement of its affairs.

tical necessity that resulted in the passage of Section 61-b. Some limitation on stockholder suits was necessary and experience and careful observation dictated to the legislature what that limitation was to be and it is in this light that their determination may be justified.

It is true that a stockholder meeting the statutory requirements may bring a groundless suit. However, this in and of itself does not indicate that the statute is invalid. It is not necessary that a statute be without imperfection in striving to remedy a particular situation.²⁷ As previously stated, all that is required is that the statutory classification rest on some reasonable foundation.

Any question involving the constitutionality of a statute necessarily entails consideration of a great number of legal principles, and the foregoing represents nothing more than a preliminary approach to the core of the problem. The issue is indeed a controversial one and it is not easy to arrive, at least with any degree of certitude, at a conclusion as to which of the views above discussed are correct. It must be remembered that at present the derivative stockholder suit is the only civil remedy the minority stockholder has for corporate mismanagement.²⁸ Therefore, one should deliberate with much caution before approving any legislative action tending to curb or deny this remedy. On the other hand, there is undeniably a need for reform. That corporations are severely damaged financially and otherwise by baseless suits there can be no doubt. The fact that corporate directors and officers, harassed by these suits, are unable to devote proper time and effort to their duties is but one example of the many ways by which the corporation is injured. In a New York case the court allowed an amicable settlement and a substantial award of fees to plaintiffs' counsel, although stating that it was "reasonably certain that the plaintiffs would not be successful in the litigation."²⁹ Apart from the remote possibility that plaintiffs could recover, the court was persuaded in reaching its conclusion by a "consideration of the expenditure of time and money and the risks attendant upon a trial of issues."³⁰

Those opposed to the statute offer no adequate remedy for the conceded abuse that existed before its passage. Indeed the root of the whole problem under discussion may be traced to the fact that there seems to be no plan or remedy which will adequately distribute

²⁷ See *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 400, 81 L. ed. 703, 713 (1937).

²⁸ See *Bayer v. Beran*, 49 N. Y. S. 2d 2, 4 (Sup. Ct. 1944). "The stockholder's suit is, at present, the only practical way of permitting the small stockholder to question controlling stockholders and directors." Rosenman, J., lecture before the Practising Lawyers Institute, Jan. 28, 1942. "It [stockholder action] is the only existent means for bringing officers and directors of large corporations to account." Wolfson, *Striking out "strike suits"*, *Fortune*, March, 1949, p. 140, col. 2.

²⁹ *Diamond v. Davis*, 62 N. Y. S. 2d 181, 193 (Sup. Ct. 1945).

³⁰ *Ibid.*

justice to all concerned. The ramifications of a stockholder suit are so diverse that a perfect plan seems impossible. Unquestionably some statutory regulation is necessary and the scheme embodied in Section 61-b, though admittedly far from satisfactory, does seem the best available. In expressing an opinion that the provisions of 61-b are "mandatory and discriminatory" and "likely to do more harm than good," a federal judge³¹ suggested that as a substitute the states simply adopt the federal rule outlawing private settlements.³² In this connection, the Court of Appeals of New York has ruled that a plaintiff in a stockholder's derivative action shall be held accountable to the corporation for any money received by him in private settlement for the discontinuance of the action.³³ The effect of this, of course, is to greatly discourage any one who might bring suit in the hope of a private settlement, and to practically do away with the need for the statutory revision suggested. Unfortunately, however, doing away with private settlements represents only a partial solution of the problem. There still remains the shameful waste of time, expense and energy expended by corporations in fighting groundless claims. If Section 61-b should be declared unconstitutional, one result will stand out coldly and clearly: the minority stockholder and his attorney will be free once again to speculate at the expense of the corporation practically unhampered by any statutory restriction. On the other hand, the conclusion is inescapable that there will be instances in which the statute will work a severe hardship on a minority stockholder having a good cause of action. Ultimately the whole problem of constitutionality can be resolved into one question: Should innocent minority stockholders occasionally be made to suffer in order to eradicate an abuse affecting the interests of an innumerable number of persons? By its decision in *Lapchak v. Baker* the Court of Appeals of New York held Section 61-b not to be so arbitrary or discriminatory as to be violative of either the "due process" or "equal protection" clause of the Constitution. After some hesitation, we accede in this view.

III. *Applicability in the Federal Courts*

Assuming Section 61-b and like statutes in other states to be constitutional, a way still remains to substantially cripple their effectiveness. The contention is made by many that these statutes are procedural in nature and not substantive and, therefore, not enforceable by a federal court under the rule laid down in *Erie R. R. v. Tompkins*.³⁴ The importance of this issue is readily envisioned when

³¹ Judge Leibell in *Craftsman Finance & Mortgage Co. v. Brown*, 64 F. Supp. 168, 178 (S. D. N. Y. 1945).

³² FED. R. CIV. P. 23(c).

³³ *Clarke v. Greenberg*, 296 N. Y. 146, 71 N. E. 2d 443 (1947).

³⁴ 304 U. S. 64, 82 L. ed. 1188 (1938).

it is realized that in New York, for example, a great many of the corporations doing business there have been incorporated without the state and that it would not be too difficult for a minority stockholder residing in New York to gain entrance in the federal courts on the basis of diversity of citizenship.

Concededly, to ascertain whether a statute of this type is procedural or substantive is a difficult undertaking. In its report to the United States Supreme Court, the Advisory Committee on Rules for Civil Procedure, in considering whether a federal limitation on stockholder derivative actions³⁵ was substantive or procedural, decided that it could not answer the question with certainty and felt that rather than recommending any change in the rule it would be preferable to wait until the Supreme Court itself decided the matter in a litigation.³⁶

That the problem is a perplexing one is further borne out by the hopeless conflict found in the reported decisions on this issue. In the United States District Court for the Southern District of New York there is one case holding that the statute is procedural and therefore unenforceable in the federal courts³⁷ and two others wherein the court also declined to enforce the statute, holding that its applicability is discretionary with the court.³⁸ A decision of the District Court of the Eastern District of New York required the plaintiff to post security, agreeing with the Southern District cases which held that the statute's applicability is a matter of discretion, and on the further ground that where a statute reflects the public policy of a state it should be enforced in the federal courts.³⁹ A decision by the District Court of New Jersey holding that the statute was remedial in nature and therefore not enforceable was reversed by the United States Court of Appeals for the Third Circuit on the theory that federal courts should recognize and give force to the

³⁵ FED. R. CIV. P. 23(b)(1), which requires the plaintiff to aver that he "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. . . ."

³⁶ 5 F. R. D. 433, 449. The Committee discussed Section 61-b but did not reach a conclusion as to whether it was procedural or substantive.

³⁷ *Boyd v. Bell*, 64 F. Supp. 22 (S. D. N. Y. 1945). See also *Thompson v. Broadfoot*, 165 F. 2d 744 (C. C. A. 2d 1948) referring to an unreported Southern District decision involving the same parties which refused to enforce § 61-b on the ground that it was procedural.

³⁸ *Azarow v. Sherneth Corp.*, 8 F. R. D. 247 (S. D. N. Y. 1948), and *Craftsman Finance & Mortgage Co. v. Brown*, 64 F. Supp. 168 (S. D. N. Y. 1945).

³⁹ *Donovan v. Queensboro Corp.*, 75 F. Supp. 131 (E. D. N. Y. 1947). The court also held that even if § 61-b were to be considered procedural, since there was no equivalent federal rule, the court would be bound to recognize the same under a local rule of the court requiring it to accept state procedure in the absence of equivalent federal procedure. The United States Supreme Court denied plaintiff's petition for writ of certiorari in this case, — U. S. —, 93 L. ed. 26 (1948), but issues other than those under discussion were also before the court, a consideration of which quite possibly resulted in the denial.

public policy of a state.⁴⁰ For the view that the statute is procedural and unenforceable there is also the concurring opinion of Judge Frank in a case decided in the then Circuit Court of Appeals for the Second Circuit.⁴¹

Thus we see that on the question of the applicability of Section 61-b in the federal courts three irreconcilable views have been adopted, namely, (1) that it is not enforceable in the federal courts, (2) that it must be enforced in the federal courts, and (3) that its enforceability is discretionary with the federal court. In addition, the United States Court of Appeals for the Third Circuit and the United States Court of Appeals for the Second Circuit have reached exactly opposite conclusions with regard to the question of the appealability of a ruling by the district court on the issue under discussion. The second circuit, by a divided court, held a district court decision denying the right to have security not appealable, basing its conclusion on the ground that the defendant corporation could not be harmed by waiting until the merits of the case were decided.⁴² The court for the third circuit under like circumstances reasoned that the question of security was an issue entirely distinct from the main cause of action and therefore subject to review irrespective of the progress of the rest of the case.⁴³ It would seem that the third circuit view is the better one. Judge Frank, concurring in a subsequent second circuit decision,⁴⁴ pointed out the fallacy in the reasoning of the majority in the previous ruling by stating that the corporation could be harmed in that the minority stockholder might not appeal an adverse decision on the merits of the case and the corporation then would be in a precarious position as far as recovering its counsel fees and other expenses was concerned.

We disagree with the contention that Section 61-b and similar statutes should not be enforced in the federal courts. To begin with, there are many federal cases in which statutes providing for attorney's fees have been treated as being substantive.⁴⁵ No satisfactory

⁴⁰ *Cohen v. Beneficial Industrial Loan Corp.*, 170 F. 2d 44 (C. A. 3d 1948), *reversing* 7 F. R. D. 352 (D. N. J. 1947).

⁴¹ *Aspinook Corporation v. Bright*, 165 F. 2d 294 (C. C. A. 2d 1947), *cert. denied*, 333 U. S. 846, 92 L. ed. 579 (1948).

⁴² This is an unreported decision, but is referred to in *Aspinook Corporation v. Bright*, 165 F. 2d 294 (C. C. A. 2d 1947), which decided an issue arising out of the same litigation.

⁴³ *Cohen v. Beneficial Industrial Loan Corp.*, 170 F. 2d 44 (C. A. 3d 1948).

⁴⁴ *Aspinook Corporation v. Bright*, 165 F. 2d 294 (C. C. A. 2d 1947), *cert. denied*, 333 U. S. 846, 92 L. ed. 579 (1948).

⁴⁵ *Sioux County v. National Surety Co.*, 276 U. S. 238, 243, 72 L. ed. 547, 551 (1928), wherein the Court held that "Disregarding mere matters of form it is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts."; *Home Life Ins. Co. v. Fisher*, 188 U. S. 726, 47 L. ed. 667 (1903); *Iowa Life Insurance*

distinction can be found between those cases and cases involving the statutes here under consideration.

The cases holding that the federal judge has discretion as to whether or not Section 61-b should be enforced in the federal courts⁴⁶ are devoid of any convincing reason for such a conclusion and it would seem that no sound basis exists in their support.

The purpose of *Erie R. R. v. Tompkins* was "to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."⁴⁷ Since the *Erie* decision the United States Supreme Court has held that in diversity cases the federal courts must follow state law as to burden of proof,⁴⁸ as to conflict of laws,⁴⁹ and as to contributory negligence.⁵⁰

In *Guaranty Trust Company v. York*⁵¹ the United States Supreme Court held that whether or not a statute of limitations is considered substantive or procedural is immaterial and that the decisive question is "does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?"⁵² (Emphasis supplied.) Using this test, the late Judge Bright in *Boyd v. Bell*⁵³ held that Section 61-b did not "significantly affect" the merits of the controversy between the minority stockholder and the individual defendants and that, therefore, Section 61-b was unenforceable in the federal courts. It is true that the statute does not affect the merits of the issues between the plaintiff and the individual defendants, but it obviously affects the result of the litigation as between the plaintiff and the corporate defendant. For example, in one federal case⁵⁴ defendant corporation requested that security in the amount of \$125,000 be posted. If its request were denied and at the end of the litigation it were out that amount, could it be said

Co. v. Lewis, 187 U. S. 335, 47 L. ed. 204 (1902); Fidelity Mut. Life Assn. v. Mettler, 185 U. S. 308, 46 L. ed. 922 (1902); Associated Mfrs. Corp. v. De Jong, 64 F. 2d 64 (C. C. A. 8th 1933); Pond v. Goldstein, 41 F. 2d 76 (C. C. A. 9th 1930); Business Men's Assur. Co. v. Campbell, 18 F. 2d 223 (C. C. A. 8th 1927).

⁴⁶ *Azarow v. Sherneth Corporation*, 8 F. R. D. 247 (S. D. N. Y. 1948); *Craftsman Finance & Mortgage Co. v. Brown*, 64 F. Supp. 168 (S. D. N. Y. 1945); *Donovan v. Queensboro Corp.*, 75 F. Supp. 131 (E. D. N. Y. 1947), *cert. denied*, — U. S. —, 93 L. ed. 26 (1948).

⁴⁷ *Guaranty Trust Co. v. York*, 326 U. S. 99, 109, 89 L. ed. 2079, 2086 (1945).

⁴⁸ *Cities Service Oil Co. v. Dunlap*, 308 U. S. 208, 84 L. ed. 196 (1939).

⁴⁹ *Klaxon Co. v. Stentor Co.*, 313 U. S. 487, 85 L. ed. 1477 (1941).

⁵⁰ *Palmer v. Hoffman*, 318 U. S. 109, 87 L. ed. 645 (1943).

⁵¹ 326 U. S. 99, 89 L. ed. 2079 (1945).

⁵² *Id.* at 109, 89 L. ed. at 2086.

⁵³ 64 F. Supp. 22 (S. D. N. Y. 1945).

⁵⁴ *Cohen v. Beneficial Industrial Loan Corp.*, 170 F. 2d 44 (C. A. 3d 1948).

that the result was substantially the same as it would have been had effect been given to the statute?

In the *York* case the Court held that "since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State"⁵⁵ or, in other words, that a right without a remedy is no right at all for purposes of enforcement by a diversity suit in a federal court sitting in the state. This is rather compelling language for the view that Section 61-b should be enforced in the federal courts. However, a portion of the opinion stated that "State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts."⁵⁶ This latter language has been criticized by at least one federal court as being inconsistent with the conclusion arrived at in that case.⁵⁷ It would seem to be unnecessary to determine whether or not such criticism is well founded, for in the recent case of *Angel v. Bullington*⁵⁸ the Supreme Court clearly indicated that the Erie doctrine extends far beyond a mere application to state substantive law. In that case the Supreme Court of North Carolina held that a statute of that state barring a mortgagee from a deficiency judgment was valid because it was procedural in its nature, being a mere limitation of the jurisdiction of the state courts. The North Carolina Supreme Court denied plaintiff access to the state courts under the statute and the United States Supreme Court held that this denial barred plaintiff from bringing a new suit in the federal courts. In arriving at its conclusion, the Court held that diversity jurisdiction must follow state law and policy and that if North Carolina has prohibited deficiency judgments within its borders then a federal court in North Carolina must follow this policy. Section 61-b clearly represents a very important public policy of the State of New York and, under the rule just enunciated, if a minority stockholder is not able to have access to the New York courts then the federal courts should also be unavailable to him.

IV. *Section 61-b Should be Enforced in the Federal Courts*

From the foregoing it is clear that federal courts in diversity cases should not be concerned with precise differentiations between

⁵⁵ 326 U. S. 99, 108, 89 L. ed. 2079, 2086 (1945).

⁵⁶ *Id.* at 106, 89 L. ed. at 2084.

⁵⁷ *Houseware Sales Corporation v. Quaker Stretcher Co.*, 70 F. Supp. 747, 750 (E. D. Wis. 1947).

⁵⁸ 330 U. S. 183, 91 L. ed. 832 (1947). See Note, *Angel v. Bullington, State Limitation on Federal Jurisdiction*, 21 ST. JOHN'S L. REV. 184 (1947).

procedural and substantive law, but rather should seek to bring about substantially the same results as would obtain in a state court. By refusing to enforce Section 61-b a federal court may change the entire complexion of a case. On the one hand, if the court refuses to enforce the statute, the defendant corporation stands to lose a very substantial sum in counsel fees, and on the other hand, if the court does enforce it and plaintiff is unable to meet the statutory requirements, the case will be at an end. The result brought about by the ruling in *Boyd v. Bell* and the result that would have been brought about had the case been tried in a state court are strikingly at variance and assuredly the federal court there was far from being "another court of the state."

Adding emphasis to the rule that whether or not a statute is considered substantive or procedural is immaterial, the Supreme Court of the United States has held that a federal court in a diversity case should enforce the public policy of the state. The public policy of the State of New York will be completely ignored if *Boyd v. Bell* is to be followed.

The clash of authority both on the issue of applicability and on the issue of appealability makes it apparent that a decision by the United States Supreme Court will be required to decisively settle the controversy and it is hoped that such a decision will soon be forthcoming.⁵⁹

THOMAS A. BOLAN.

REHABILITATION OF WITNESSES

MAY AN IMPEACHED, CONTRADICTED OR DISCREDITED WITNESS BE REHABILITATED BY SHOWING THAT HE HAS MADE DECLARATIONS OUT OF COURT WHICH ARE CONSISTENT WITH HIS TESTIMONY?

I. *The General Rule*

In England and in this jurisdiction until the latter part of the 18th and early part of the 19th centuries, it had been the practice of the courts to allow the testimony of a witness to be corroborated or confirmed by permitting the introduction of declarations of the witness made out of court, whether under oath or not, of the same tenor as the testimony then being given.¹ This appears to have been done

⁵⁹ The Supreme Court has an opportunity to decide these questions in the pending case of *Cohen v. Beneficial Industrial Loan Corporation*.

¹ *People v. Vane*, 12 Wend. 78 (N. Y. 1834); *Jackson v. Etz*, 5 Cow. 314 (N. Y. 1826); *Knox's Trial*, 7 How. St. Tr. 763, 790 (1679); *Lutterell v. Reynell*, 1 Mod. 282, 86 Eng. Rep. 887 (1671).