try a case involving title to land situated in another state may be motivated by reasons of convenience to itself, or may rest upon inconvenience to the defendant or a desire not to invade the sovereignty of another state. The *Erie* rule of uniformity in diversity cases would seem applicable when the latter reasons motivate the state's policy of not hearing such cases. It may also be argued that the purpose of the *Erie* doctrine is to prevent the accident of citizenship from determining the outcome of litigation.[20] The only necessary limit to this policy is the impossibility of a federal court's changing its constitution or practice from case to case. But since the readiness or refusal to try a case does not necessitate any such change, no reason exists why the state rule should not be followed.

In the principal case, if the court had felt itself bound to follow the law of New Jersey, the state in which it was sitting, the result might well have been different.[21] In *Karr v. New York Jewell Filtration Co.*[22] it was decided by a New Jersey court that an action for damages to real property in the District of Columbia, due to excavation on adjoining property, could not be heard in a New Jersey court. While the court in the instant case might have been able to distinguish the *Karr* case, the court should at least have considered it and other New Jersey cases. Moreover, the circumstances may be reversed, and the state rule may allow the courts of the state in which the federal court is sitting to hear cases which the federal court would be bound to dismiss as local actions under federal precedents.[23] In any case it would seem that the determination is "substantive" and, therefore, it is inappropriate for a federal court to grant to a plaintiff that access to court which is refused him by the state court, even though such conformity may result in a complete denial of justice. Perhaps the frequent injustice of the doctrine of local actions would thus be highlighted with the result of inducing the states to bring about the necessary change.

Constitutional Law—Exports and Imports Clause—State Sales Tax on Goods Sold for Foreign Shipment Unconstitutional—[Federal].—The plaintiff, a producer and vender of oil in California, made a contract for the sale of oil with the New Zealand government, the terms of which provided that the price was to be f.o.b. Los Angeles, payment in London, delivery into the vendee's carrier at the Los Angeles harbor. California assessed a retail sales tax[1] against

[20] See Weiss v. Routh, 149 F. 2d 193, 195 (C.C.A. 2d, 1945): ". . . . we are to remember the purpose of conformity in "diversity cases." It is that the accident of citizenship shall not change the outcome: a purpose which extends as much to determining whether the court shall act at all, as to how it shall decide, if it does."

[21] Karr v. New York Jewell Filtration Co., 78 N.J.L. 198, 73 Atl. 132 (1909); Van Ommen v. Hageman, 100 N.J.L. 224, 126 Atl. 468 (1924); cf. Hill v. Nelson, 70 N.J.L. 376, 57 Atl. 411 (1904); Doherty v. Catskill Cement Co., 72 N.J.L. 315, 65 Atl. 608 (1905).

[22] 78 N.J.L. 198, 73 Atl. 132 (1909).

[23] Notes 9, 10, and 12 supra.

[1] The tax statute provides that "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2½ per cent of the gross receipts of

the plantiff measured by the gross receipts of the transaction, which the plaintiff paid under protest. It then brought suit for refund of the state tax. The California Supreme Court at first allowed the claim, but upon rehearing reversed its position and held the tax constitutional. Upon appeal to the United States Supreme Court, *held*, the tax was unconstitutional since it constituted an impost upon an export within the meaning of Article I, Section 10, Clause 2 of the United States Constitution. Judgment reversed, one justice dissenting. *Richfield Oil Corporation v. State Board of Equalization.*[2]

This case, though seeming to limit the power of the states to interfere with foreign commerce through their taxing power, may actually produce the opposite result. Although the constitutional limitations on the power of the states to tax foreign and interstate commerce both had as their purpose the avoidance of interstate conflict and the preservation of federal supremacy in those areas, the instant case demonstrates that the two limitations are not co-extensive. In line with the prohibitions against taxes on exports imposed by the Constitution,[3] a stamp tax upon bills of lading for gold and silver which were exported was held to be a tax on exports,[4] as were a tax upon the gross receipts of a steamship company engaged in foreign commerce,[5] a federal stamp tax on foreign bills of lading,[6] a federal tax on charter parties for the carriage of cargoes to foreign ports,[7] that portion of a license tax measured by the gross receipts from foreign commerce,[8] and a federal tax upon baseball equipment when applied to foreign shipments.[9] On the other hand, the court has held that a federal stamp can be affixed to tobacco designated for export,[10] and has sustained the application of

any retailer from the sale of all tangible personal property sold at retail in this State on or after August 1, 1933, and to an including June 30, 1935, and at the rate of 3 per cent thereafter. .... The tax hereby imposed shall be collected by the retailer from the consumer in so far as it can be done." Cal. Rev. and Tax. Code (Deering, 1944) §§ 6051, 6052.

[2] 67 S.Ct. 156 (1946).

[3] "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress." U.S. Const. Art. 1, § 10; "No tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. 1, § 9.

[4] Almy v. People of the State of California, 24 How. (U.S.) 169 (1860). This decision was subsequently held to have been erroneously decided on the facts, but the case was upheld under the interstate commerce clause. Woodruff v. Parham, 8 Wall. (U.S.) 123, 137–38 (1868).

[5] Philadelphia and Southern Steamship Co. v. Pennsylvania, 122 U.S. 326 (1887).

[6] Fairbank v. United States, 181 U.S. 283 (1901).

[7] United States v. Hvoslef, 237 U.S. 1 (1915).

[8] Crew Levick Co. v. Commonwealth of Pennsylvania, 245 U.S. 292 (1917).

[9] Spalding & Bros. v. Edwards, 262 U.S. 66 (1923).

[10] Turpin v. Burgess, 117 U.S. 504 (1886); Pace v. Burgess, 92 U.S. 372 (1875). Both of these cases were brought to recover payments made under the same federal act imposing an excise tax on tobacco. Tobacco intended for export was exempted from the tax, and the act

the net income tax to income derived from the export business.[11] Similarly, it has been emphasized that a tax upon goods manufactured for foreign markets before they begin to move in foreign commerce is not a tax upon exports.[12]

The cases present a different picture of the power of a state to tax sales in the larger and very closely related field of interstate commerce.[13] Coal purchased from out-of-city mine operators under contracts made locally with a sales office has been held subject to the New York City sales tax,[14] as have sales of merchandise similarly solicited by local agents of outside concerns when the merchandise was shipped directly to the vendees from another state.[15] Likewise, a gross income tax based upon receipts from sales has been upheld in the case of: sales by out-of-state branches of a local concern to dealers and users within the taxing state where delivery was made;[16] sales to out-of-state buyers who came into the taxing state, took delivery there, and then carried the goods to their home state;[17] sales within the taxing state to local buyers even though the goods were shipped from out of the state to the local buyers.[18] A state may levy a use tax upon merchandise sold by agents of an out-of-state corporation which has not qualified for intrastate business where the goods are shipped directly to the consumers from outside the state into the taxing state.[19] In each of these cases the courts emphasized the fact that the tax did not discriminate against interstate commerce or place it at a disadvantage relative to intrastate commerce. Although the provisions of the Constitution relating to foreign and domestic commerce are both part of a larger plan to eliminate jealousy and discrimination, a state may, with due regard to form, impose a sales or use tax at both ends of an interstate commerce transaction,[20] but under the instant case it may not do so

provided for separately identifying such tobacco by affixing a special stamp for which a charge was made. In the Pace case the Court held that the payment for the stamp did not constitute a tax but was only a fee charged for inspection to prevent fraud. In the Turpin case the Court made a similar finding based on the earlier case but went on to say by way of dictum that a general tax laid on all property alike and not levied by reason of the goods being exports is not prohibited by the Constitution.

[11] Peck & Co. v. Lowe, 247 U.S. 165 (1918).

[12] In Spalding & Bros. v. Edwards, 262 U.S. 66 (1923), the Court stated while the goods were in the process of manufacture, they were none the less subject to taxation if they were intended for export and made with specific reference to foreign wants. Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922); Cornell v. Coyne, 192 U.S. 418 (1904); Brown v. Houston, 114 U.S. 622 (1885). Probably the leading case on this point, although its holding related to movements in interstate commerce, is Coe v. Errol, 116 U.S. 517 (1886). Miller, Lectures on the Constitution of the United States 592 (1891).

[13] See Maxwell, The Fiscal Impact of Federalism 298 (1946).

[14] McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940).

[15] McGoldrick v. Felt and Tarrant Mfg. Co., 309 U.S. 70 (1940).

[16] International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944).

[17] Ibid.

[18] Ibid.

[19] Felt & Tarrant Manufacturing Co. v. Gallagher, 306 U.S. 62 (1939).

[20] See 14 Univ. Chi. L. Rev. 503 (1947), noting Freeman v. Hewit, 67 S.Ct. 274 (1946).

if the item is exported. The result is that foreign commerce is favored relative to domestic commerce, and those states in which foreign commerce plays a substantial part are at a disadvantage as regards the use of the sales tax.

When the Constitution was framed, the clause in question[21] represented a compromise—between those advocating local and national sovereignty—that formed part of a larger scheme to do away with the strife that had characterized the Confederation.[22] Southern states feared they would bear the brunt of imposts on imports and that these would be particularly obnoxious to them if left in the hands of the individual states.[23] Exporting states felt that they would be placed at a trading disadvantage if other states could tax their products flowing through these other states on the way to foreign markets.[24] Congress itself was placed under a disability to tax exports[25] for fear of the same discrimination and possible deleterious effects on trade.[26] Even though a federal export tax would have to be geographically uniform, it might nevertheless discriminate against sections of the country by discriminating against products. Congress, however, was permitted to levy taxes on imports because that source of revenue was too substantial to be discarded,[27] and it was felt that the fairest administration would be that of the central government. Congress was given the power to regulate both interstate and foreign commerce[28] and the supremacy of the states in this area was limited.[29] But the power of taxing exports was taken from the states to prevent coastal states from taxing goods produced further inland and sold abroad. In the instant case, however, California was *both* the coastal state and the state of production. A solution more consistent with the theme of the regulation of commerce by the central government would be that this California tax is exactly what it says it is, a tax on the privilege of selling tangible property at retail, that it is a general tax and is in no way laid upon exports but is measured by the gross of all retail sales however made, that it is not a burden on foreign commerce, and that it is merely part of the formula whereby all members of society bear their just portion of its costs.

In *Hooven & Allison Co. v. Evatt*,[30] the Court, in dealing with the same clause of the Constitution involved in the main case, but as it related to an import problem, flatly stated that it made no difference when the title vested. That position seems irreconcilable with the conclusion in the principal case that be-

[21] U.S. Const. Art. 1, § 10.

[22] The Federalist, No. 42.

[23] 3 Elliot's Debates 252–53 (1836).

[24] Ibid., at 483.

[25] U.S. Const. Art. 1, § 9.

[26] Answer to Mason by James Iredell in Scott, The Federalist and Other Constitutional Papers 885 (1894); 5 Elliot's Debates 454 (1865).

[27] 2 Elliot's Debates 192 (1836).

[28] As to one view of the purpose of this delegation of the commerce power, see the argument of James Madison in The Federalist, No. 42.

[29] Story, Commentaries on the Constitution of the United States § 1016 (1851).

[30] 324 U.S. 652 (1945).

cause the taxable event, the sale, coincided with delivery to the tanker there was an unquestioned linkage between the tax and the exportation. As Mr. Justice Black pointed out in dissent in the instant case, this is a decision from which it will be difficult to retreat. In the case of interstate commerce, Congress can change the application of a decision and license a state to impose a particular restriction; but since Congress is itself prohibited from taxing exports, the determination in the particular case must stand until overruled by the Court. Furthermore, the advantage given to exporters and producers for foreign trade hardly seems justifiable. The modern theory of international economics is based primarily on price,[31] and it does not seem rational for a country with a staggering export balance further to subsidize its export trade by such haphazard price reductions. California, which derives about one-third of its revenues from the sales tax,[32] will not be able to apportion its tax freely among all who carry on business under protection of California laws. The tax will be shifted to others who will bear the tax burden in different proportions than previously. Thus an exporting state with a general income tax may provide an incentive for exportation by substituting a sales tax from which exporters are exempt; conversely, the export trade may be discouraged by the replacement of a sales tax with a general income tax. Viewed in this light, the decision in the instant case amounts to a partial return to the states of the power to control foreign commerce.

Corporations—Derivative Suits—Plaintiff Required To Account to Corporation for Proceeds of Settlement—[New York].—In a prior action the defendant brought a derivative suit against the directors of a corporation of which he was a stockholder, alleging mismanagement of the corporate affairs. Before trial an out-of-court settlement was reached between the directors of the corporation and the stockholder by which the stockholder executed releases and sold his stock to the directors in return for a sum of money greatly in excess of the market value of his stock. The present action was brought by the trustee of the corporation to impress upon the proceeds of the settlement a trust in favor of the corporation to the extent of the difference between the amount of the settlement and the fair value of the stock. On appeal to the New York Court of Appeals, *held*, the proceeds realized by a stockholder in a derivative suit by way of private settlement belong to the corporation and not to the individual stockholder-plantiff. *Clarke v. Greenberg.*[1]

This decision requires a plaintiff in a derivative suit to remain truly representative even if he settles the suit out of court. By assuming to act for the corporation the stockholder has created a fiduciary duty which requires him to

[31] Ellsworth, International Economics C. 5 (1938).

[32] In 1945 California's total revenues from taxation amounted to $566,219,000. Of this, $242,757,000 was derived from its sales and use taxes. 2 State Finances: 1945, Dept. of Commerce Bureau of the Census 6 (No. 2, Prelim., 1945).

[1] 71 N.E. 2d 443 (N.Y., 1947).