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).

hold the proceeds of a settlement in trust for the corporation.[2] The effect of such a rule on so-called "strike suits" will probably be salutary.

Legislative attempts to curb the strike suitor have not proven satisfactory. Rule 23 of the Federal Rules of Civil Procedure[3] appears to be of limited effectiveness.[4] The attempt by the New York legislature to solve the problem through the adoption of the Coudert-Mitchell laws[5] has received widespread criticism[6] and its constitutionality remains in doubt.[7] Under the Supreme Court's decision in *Young v. Higbee*[8] the courts might succeed where the legislatures have failed. In that case two preferred stockholders objected to the participation awarded junior creditors in a reorganization under Chapter X of the Bankruptcy Act and appealed from the district court's confirmation of the plan. While the appeal was pending, the preferred stockholders "sold their stock and their appeal" to the junior creditors for an amount greatly in excess of the market value of the shares. Another preferred stockholder brought a class suit on behalf of all of the preferred stockholders and demanded that the stockholders who had originally brought the appeal be required to account to the corporation or to the preferred stockholders for the difference between the amount of the settlement and the fair value of the stock. In compelling the accounting the Supreme Court placed its decision on two grounds: the policy of the Bankruptcy Act to require a ratable distribution of the assets of the bankrupt estate; and the fiduciary duty which arose from the control which the preferred shareholders who instituted the appeal exercised over the interests of other members of their class.[9] *Young v. Higbee* purported to apply only to the distribution of

[2] The problem of the right to the proceeds of a settlement is distinct from, although related to, the question of who has the right to compromise or dismiss a derivative suit. California courts have held that the court and not the plaintiff stockholder has the right to compromise the corporate cause of action. Russell v. Weyand, 5 Cal. App. 2d 259, 42 P. 2d 381 (1935). But the majority of state courts, including those of New York, have taken the opposite position. Manufacturers Mutual Fire Ins. Co. v. Hopson, 176 Misc. 220, 25 N.Y.S. 2d 502 (1940).

[3] Federal Rules of Civil Procedure, Rule 23, 48 Stat. 1064 (1934), 28 U.S.C.A. foll. § 723c (1941). Part (b) of the rule requires the plaintiff in a derivative suit to have been a stockholder at the time of the acts complained of. Part (c) prohibits dismissal or compromise of a derivative suit without court approval and (if the court so requires) notice to other stockholders.

[4] By failing to apply Rule 23 to the "buying off" of a stockholder-plaintiff the federal courts have permitted derivative suits to be settled without court approval or notice to the other stockholders.

[5] N.Y. Cons. Laws (Thompson, 1945), c. 668, § 61-b. The act requires that a stockholder who brings a derivative suit must provide security for the payment of court costs and defendants' expenses (which are payable in case of judgment for the defendants) unless his stock exceeds 5 per cent of the outstanding shares *and* its market value exceeds $50,000.

[6] Zlinkoff, The American Investor and the Constitutionality of Section 61-b of the New York General Corporation Law, 54 Yale L. J. 352, 372 (1945); House, Stockholders' Suits and the Coudert-Mitchell Laws, 20 N.Y. U. L. Q. Rev. 377 (1945); Hornstein, Death Knell of Stockholders' Derivative Suits in New York, 32 Calif. L. Rev. 123 (1944).

[7] Shielcrawt v. Moffett, 294 N.Y. 180, 61 N.E. 2d 435 (1945).

[8] 324 U.S. 204 (1945).

[9] Ibid., at 210.

the proceeds of a bankrupt estate, but, as was suggested in the *Review*,[10] the rationale of the decision applied with equal force to the settlement of a stockholder derivative suit. Indeed the argument is even stronger in a derivative suit since the plaintiff in such a suit admittedly brings his action on behalf of others whereas the preferred stockholders in the *Young* case had appealed only as individuals.

In the instant case the New York Court of Appeals has applied the rule in *Young v. Higbee* to a stockholder derivative suit. The rule will serve to deter the strike suitor, whose principal objective is a lucrative personal settlement, and yet it will not decrease the incentive for bona fide derivative suits, since in the latter situation the plaintiff intends the corporation as a whole to recover the proceeds of the suit in excess of the costs of litigation. It has been suggested that the application of the rule will result in settlements in which the price paid for discontinuance takes the form of attorneys' fees rather than direct payments to the plaintiff.[11] A requirement of court approval would tend to insure the reasonableness of such fees. The related problem of settlement before a complaint is filed is more troublesome. In addition to the difficulty of obtaining proof, it may be argued that the instant case would not extend to such a situation since the imposition of the fiduciary duty here is based upon the plaintiffs' domination of the course of litigation. And yet by agreeing to a pre-litigation settlement for a sum in excess of his pro rata interest the plaintiff is necessarily acting in a representative capacity. In the words of the New York Court of Appeals, "a fundamental principle inherent in the representative relation"[12] should require him to account for his stewardship.[13]

Evidence—Authentication of Documents—Business Entry Rule—Unsigned Rent Order Not Admissible Solely on Authentication by OPA Attorney—[Nebraska].—The defendant landlord petitioned the regional Office of Price Administration in Omaha for an increase in maximum rent to compensate for improvements made on the premises. Subsequently, he increased the rent on the plaintiff tenant's apartment to $32.50 per month. The plaintiff, after paying that rent for four months, brought suit to recover penal damages for alleged rental overcharges. To prove that the rent could not be lawfully increased without an order of the regional rent director, the plaintiff offered in evidence a printed pamphlet containing the rent regulations of the OPA. To prove the

[10] Application of the Rule of Young v. Higbee Co. to Stockholder Derivative Suits, 13 Univ. Chi. L. Rev. 321 (1946).

[11] Ibid., at 331.

[12] Clarke v. Greenberg, 71 N.E. 2d 443, 445 (N.Y., 1947).

[13] The New York rule, permitting the plaintiff in a stockholder derivative suit to discontinue the suit at will so long as other stockholders have not intervened, note 2, supra, seems inconsistent with the trend indicated by the instant case. Legislative enactment of an effective version of Federal Rule 23 (c) seems necessary.