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.

amount of the rent ceiling for the apartment, he offered two other documents: a typewritten order on the official form purporting to increase the maximum rent to $30 per month and bearing the typewritten signature of the rent director, and the original registration certificate for the apartment, on which had been typed two endorsements showing that the maximum monthly rent had been twice changed by order of the rent director, first to $23, later to $30. The assistant rent attorney for the area attempted to authenticate all three documents, testifying that the latter two were prepared in the normal routine of the Omaha office. The trial court admitted the three documents in evidence, and the jury found for the plaintiff. On appeal, *held*, the admission of the order and the registration certificate without sufficient authentication is reversible error. *Powell v. Anderson.*[1]

Although the appellate court rejected the assistant rent attorney's authentication of the OPA rent regulations, it took judicial notice of them.[2] It was thus established that the landlord could not lawfully increase the rent until he had petitioned the OPA and received an order from the OPA rent director granting the increase.[3] Since the defendant had testified at the trial that he had increased the rent to $32.50 on the oral advice of a rent inspector and had denied having received an order from the rent director, he had admitted the absence of justification for the increase.[4] Accordingly, under the OPA rent regulations and the Emergency Price Control Act, the court could have held the defendant liable for at least $25 per overcharge, even if the plaintiff had offered no additional evidence.[5] The appellate court, however, ruled on the admissibility ques-

[1] 25 N.W. 2d 401 (Neb., 1946).

[2] It is well established that courts may take judicial notice of the regulations of federal agencies. Brown v. Lederer, 140 F. 2d 136 (C.C.A. 7th, 1944); Milk v. Mulcahey, 130 N.J.L. 325, 32 A. 2d 598 (1943); 222 East Chestnut Street Corp. v. Murphy, 325 Ill. App. 392, 60 N.E. 2d 450 (1945); Epstein v. Brook, 23 N.J. Misc. 267, 43 A. 2d 782 (1945); Weatherford v. Coffin, 187 S.W. 2d 406 (Tex. Civ. App., 1945); Kerr v. Congel, 46 N.Y.S. 2d 932, 181 Misc. 461 (1944).

[3] 10 Fed. Register 3436 (1945), especially Subsec. 2 (a) of § 1388.1181.

[4] That reliance on the unofficial statements of a rent inspector without having received a rent increase order is not a sufficient excuse for failure to follow the established procedure is well settled. Wells Lamont Corp. v. Bowles, 149 F. 2d 364 (Em. App., 1945); Bowles v. Sago, 65 F. Supp. 178 (Pa., 1946); Bowles v. Alexander, 65 F. Supp. 892 (Pa., 1946); Bowles v. Vance, 64 F. Supp. 647 (Pa., 1946); Bowles v. Hageal, 64 F. Supp. 294 (Pa., 1946).

[5] The Emergency Price Control Act of 1942 provides: "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for .... whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, ... as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however*, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practical precautions against the occurrence

tions as if the substantive law required that the plaintiff prove the amount of the overcharge in order to establish the defendant's liability.

In refusing to admit the maximum rent order and the registration certificate containing the endorsements, the appellate court declared the testimony of the assistant rent attorney incompetent and the documents incapable of proving themselves.[6] About the rent order the court said, "An unsigned and unauthenticated copy of an order, produced from the files of a governmental agency, is secondary evidence which, of itself, raises no presumption that the original was in fact executed. The original order in this case was not accounted for, nor was there any proof of its actual issuance or execution."[7] About the endorsements it added, "From the standpoint of establishing that the orders referred to therein were in fact made as recited, these endorsements have the same deficiencies [as the order] . . . . in that they are not authenticated or identified in any manner, other than the conclusion of the witness . . . . as to what the document contained, and his statement that the exhibit as a whole was a part of the official record. These endorsements are unsigned and unidentified and are not, of themselves, proof that the orders therein referred to were in fact issued by the rent director. . . . ."[8]

The rejection of the order increasing maximum rent lumps together two objections to the document; that it was a copy and therefore secondary evidence, and that it was unauthenticated. Because it is improbable that a carbon duplicate will suffer from the wilful or inadvertent errors in transcription to which a copy is subject, most courts have recognized a distinction between them. Carbon duplicates are necessarily exact transcriptions, and therefore, admissible as primary evidence.[9] In a few jurisdictions a distinction is drawn between signed and unsigned duplicates.[10] This distinction is significant where a signature is essential to the binding character of a document and is considered part of its contents, but when original documents are valid without a written signature it is apparent that the signature is added primarily for purposes of authentica-

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of the violation. . . . . the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, ... and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price." 56 Stat. 23 (1942), 50 U.S.C.A. App. § 925 (e) (1944).

[6] 25 N.W. 2d 401, 403–4 (Neb., 1946).

[7] Ibid.

[8] Ibid., at 404.

[9] Chanute Window Glass Co. v. Pierce, 87 Kan. 548, 125 Pac. 108 (1912); Humes v. Humes, 56 Cal. App. 2d 126, 133 P. 2d 39 (1942); United States v. Manton, 107 F. 2d 834 (C.C.A. 2d, 1938); Anglo-Texas Oil Co. v. Manatt, 125 Okla. 92, 256 Pac. 740 (1926); Massachusetts Bonding and Ins. Co. v. State, 84 Ind. App. 303, 149 N.E. 377 (1925); People v. Munday, 280 Ill. 32, 117 N.E. 286 (1917); Goodman v. Saperstein, 115 Md. 678, 81 Atl. 695 (1911); Wright v. Chicago, B. & Q. Ry. Co., 118 Mo. App. 392, 94 S.W. 555 (1906). Contra: Mauritz v. Schwind, 101 S.W. 2d 1085 (Tex. Civ. App., 1937); Wentworth v. Chapman, 141 Me. 35, 38 A. 2d 563 (1944); Lockwood v. L. & L. Freight Lines, Inc., 126 Fla. 474, 171 So. 236 (1936).

[10] Brenner v. Lesher, 332 Pa. 522, 2 A. 2d 731 (1938); R. D. Burnett Cigar Co. v. Art Wall Paper Co., 164 Ala. 547, 51 So. 263 (1909).

tion.[11] The duplicate maximum rent order in the instant case falls within the latter category, and consequently, although unsigned, should be considered not secondary, but primary evidence, admissible if sufficiently authenticated. The court's dictum, labeling the order a copy and thus secondary evidence, is therefore contrary to the decisions in analagous situations in most jurisdictions.

The holding of the court, on the other hand, that the order was improperly authenticated, is in accord with the great weight of authority at common law and reveals the appalling rigidity and inadequacy of common law precedents in dealing with routine business transactions. Both the rent order and the registration certificate were on official form documents, available only to qualified OPA officials. They were taken from the files of the Omaha office, and they were identified by a witness, who, in his daily work, was in continual and intimate contact with those files. The court's naked conclusion that neither document could be sufficiently authenticated by the assistant rent attorney, questioning as it does the reliability of an impartial administrative agency and its responsible representative, appears to reject authentication that common sense would accept. Only one other rental overcharge case has been found in which the reliability of a particular order was mentioned, and there the Emergency Court of Appeals took judicial notice of the order.[12] An interview with the chief rent attorney of the Chicago OPA office disclosed that that office customarily sends an assistant rent attorney into court with such documents, and has often sent only a stenographer. The same official explains that the procedure in the instant case in filing an unsigned order and sending a signed duplicate original to the landlord departed from the standard procedure prescribed for the OPA offices, which requires the signature on the office original of the rent director, or of a representative designated by him.

Probably defendant's counsel in the instant case was moved to attack the rent order, when it was offered in evidence, because it lacked a signature. However, the Chicago rent attorney stated that neither the signed orders nor the unsigned endorsements of that office had ever been questioned, whether authenticated by an assistant rent attorney or by a stenographer. Thus the decision in the instant case is hostile to an authentication which has been unquestioned in many cases; nevertheless, it is not in conflict with the decisions of most courts under the common law whenever objections have been raised to documents offered in evidence under similar circumstances.

At common law in analagous situations a writing may be proved by testimonial evidence, but the witness must have been present when the document was executed,[13] or must have personal knowledge of the handwriting or signa-

[11] See Notes: 23 Mich. L. Rev. 536 (1925); 11 Minn. L. Rev. 469 (1927); 19 Harv. L. Rev. 123 (1905).

[12] Safeway Stores, Inc., v. Brown, 138 F. 2d 278 (Em. App., 1943), cert. den. 320 U.S. 797 (1943).

[13] 7 Wigmore, Evidence § 2131 (1940).

ture of the writer.[14] Such documents are also admissible if they have been kept in official custody, but such custody is limited to that of a public officer whose primary task is to keep special documents and who can authenticate certified copies for the court.[15] Official documents may prove themselves, but only in limited cases and when under official seal.[16] The rent order in the instant case could not satisfy these rules of admissibility strictly applied.

The endorsements faced even greater obstacles. They were hearsay evidence of the rent order. At common law the endorsements might have been admissible under the exception to the hearsay rule for entries made in the regular course of business, but only if authenticated by the clerk or stenographer who made the entry.[17] To require for admission that each endorsement be followed by the signature of the rent director would involve an impossible sacrifice of administrative efficiency, since the numerous endorsements are entered by clerks in the office routine. That such narrow rules of admissibility for such entries are not necessary and are so unadaptable to the accounting and clerical systems of modern officies as to make authentication financially or administratively impracticable, has received widespread recognition.[18] Most experts agree that the failure of the common law in this field must be rectified by legislation, and several "model" statutes have been proposed.[19]

[14] 2 Jones, Evidence § 545 (1938).

[15] 7 Wigmore, Evidence §§ 2158–2159 (1940). [16] Ibid., §§ 2161–2169.

[17] Necessity has compelled acceptance of less complete authentication where the entrant has died, gone insane, or left the jurisdiction of the court. Morgan et. al., The Law of Evidence 53–54 (1927).

[18] Ibid., ch. 5. Massachusetts Bonding & Ins. Co. v. Norwich Pharmacal Co., 18 F. 2d 934, 937 (C.C.A. 2d, 1927); Borucki v. MacKenzie Bros. Co., Inc., 125 Conn. 92, 3 A. 2d 224 (1938); Palmer v. Hoffmann, 318 U.S. 109, 111–12 (1943); Johnson v. Lutz, 253 N.Y. 124, 126–29, 170 N.E. 517, 518 (1930); 5 Wigmore, Evidence, §§ 1518, 1520 (1940); Lehman, Technical Rules of Evidence, 26 Col. L. Rev. 509, 518 (1926); Business Entries before the Court, 32 Ill. L. Rev. 334 (1937). A few courts have substantially liberalized the rule by judicial decision. See the series of cases in the Second Circuit Court of Appeals: The Spica, 289 Fed. 436 (C.C.A. 2d, 1923); Straus v. Victor Talking Machine Co., 297 Fed. 791 (C.C.A. 2d, 1924); Massachusetts Bonding & Ins. Co. v. Norwich Pharmacal Co., 18 F. 2d 934 (C.C.A. 2d, 1927). It is probable that the documents in the instant case would have been admissible in that court. But despite Judge Hand's assertion in the last case, at 937, that "It is a matter .... where the intervention of the legislature, which must be by general rules, cannot be as satisfactory as a step by step progress of the courts, if they are willing to progress at all," the imperceptible progress of most courts has caused the Commonwealth Committee to conclude, ".... the process of reaching this proper end by judicial decision is altogether too slow and uncertain." Morgan, op. cit. supra note 17, at 63.

[19] Of these the "Uniform Act" of the Committee on Evidence of the National Conference of Commissioners on Uniform State Laws has been most widely adopted. It provides that "a record of an act, condition, or event shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." 9 U.L.A. 263 (1942). See Morgan, op. cit. supra note 17, at 63; Business Entries before the Court, 32 Ill. L. Rev. 334, 352 (1937).

Courts which have applied statutes based on these proposals for reform have admitted a wide range of writings on the strength of no more satisfactory authentication than was offered in the principal case. In *Harper v. U.S.*,[20] the prevailing flexible approach under the statutes was set forth. The court said of the federal statute,[21] "The purpose and effect of this statute is to make admissible *any writing* if made in the regular course of any business without the strict proof of authenticity which had theretofore been required."[22] In the *Harper* case the writings included invoices, analysis sheets, letters received and written by the company, and copies of checks it had issued. All were admitted when an officer of the company, who was the custodian of the documents, testified that they were writings executed in the regular course of business. Hospital records have been consistently admitted upon proof that they came from the hospital and were made in the regular course of business.[23] Reports of federal and state agencies,[24] and business records of every kind[25] are admitted under similar circumstances. The proof usually required is that a witness familiar with the routine of the office testify that the writings have come from a recognized business or agency, and that they were made and filed in the regular course of business. Under such a statute it would be difficult to object to the sufficiency of the authentication of the documents in the instant case; for they were official forms, they came from the files of the OPA office, they were executed in a routine procedure, and they were authenticated by a witness who was familiar with the office routine and the files.

The contrast which the case reveals between the common law and statutory requirements for admissibility of writings made in the regular course of business underlines the need for statutory reform in those states (the majority) where the common law requirements still prevail. To satisfy the Nebraska court it might have been necessary that the rent director authenticate the unsigned order, or that the stenographers who made the notations testify that they remembered entering the endorsements. While the Omaha office could

[20] 143 F. 2d 795 (C.C.A. 8th, 1944).

[21] 49 Stat. 1561 (1936), 28 U.S.C.A. § 695 (Supp., 1946).

[22] Harper v. United States, 143 F. 2d 795, 806 (C.C.A. 8th, 1944). Italics added.

[23] McDowd v. Pig'n Whistle Corp., 26 Cal. 2d 696, 160 P. 2d 797 (1945); Ulm v. Moore-McCormack Lines, Inc., 115 F. 2d 492 (C.C.A. 2d, 1940); 144 A.L.R. 731 (1943).

[24] E. K. Hardison Seed Co. v. Jones, 149 F. 2d 252 (C.C.A. 6th, 1945); Borucki v. MacKenzie Bros. Co., 125 Conn. 92, 3 A. 2d 224 (1938).

[25] E.g., Dias v. Farm Bureau Mut. Fire Ins. Co. of Columbus, Ohio, 155 F. 2d 788 (C.C.A. 4th, 1946) (Post Office forms); Landay v. United States, 108 F. 2d 698 (C.C.A. 6th, 1939) (books of corporations); People v. Richardson, 169 P. 2d 44 (Cal. App., 1946) (employee's time card); H. F. Shepherdson Co. v. Central Fire Ins. Co. of Baltimore, 220 Minn. 401, 19 N.W. 2d 772 (1945) (loose-leaf ledger sheets); Arques v. National Superior Co., 67 Cal. App. 2d 763, 155 P. 2d 643 (1945) (shipwright's book of entries); Doyle v. Chief Oil Co., 64 Cal. App. 2d 284, 148 P. 2d 915 (1944) (oil well reports, records, and invoices); Davidson v. John Hancock Mut. Life Ins. Co., 152 Pa. Super. 63, 31 A. 2d 585 (1943) (home office insurance record).

probably have avoided this difficulty by preserving the signed original order in the office files according to the procedure established for the OPA offices, the procedure it did follow was a common business practice. The standards imposed by the Nebraska court in this case will place formidable administrative burdens on the Omaha OPA office when it attempts to enforce either its own claims or those of aggrieved tenants arising out of OPA orders issued prior to the instant case. One might speculate that, even in the absence of a modern business records statute, an appellate court more sympathetic to the OPA might have found little difficulty in upholding the trial court in this case.

Evidence—Confessions—Coerced Confession May Be Suppressed before Indictment—[Federal].—Agents of the Federal Bureau of Investigation arrested the petitioners on the authority of a warrant issued on information and belief that the petitioners, jointly engaged in business, were knowingly in possession of goods stolen in foreign commerce. With the consent of one of the petitioners, who was the manager of the business, the agents searched the premises and seized certain documents. The petitioners were then taken to the United States Courthouse, where they were questioned individually by relays of federal agents. Continuous interrogation, ranging from six to eleven hours, elicited confessions from the petitioners. Before the grand jury took any action, a motion was made for the suppression of the documents and confessions on the ground that they had been obtained in violation of the Fourth and Fifth Amendments. The district judge refused to suppress the douments on the ground that consent had cured what was otherwise an illegal search and seizure;[1] he refused to consider the suppression of the confessions on the ground that precedent bars such relief before trial.[2] On appeal to the circuit court of appeals, *held*, a confession obtained in violation of constitutional rights may be suppressed before indictment. Order as to confessions reversed, one judge dissenting. *In re Fried*.[3]

Judge Augustus Hand, dissenting, stated that the desirability of preventing indictments based on incompetent confessions was outweighed by the necessity of not unduly burdening law enforcement officials with frequent pre-indictment and pre-trial determinations. Judge Frank, concurring in the holding, added that illegally obtained confessions should be suppressed before indictment re-

[1] A complaint based on information and belief will not support a lawful arrest. Go-Bart Co. v. United States, 282 U.S. 344 (1930); United States v. Pollack, 64 F. Supp. 554 (N.J., 1946); United States v. McCunn, 40 F. 2d 295 (N.Y., 1930); United States ex rel. King v. Gokey, 32 F. 2d 793 (N.Y., 1929).

[2] No prior case has been found concerning suppression of a confession before indictment. The holding of the district court was based on cases where suppression was unsuccessfully sought after indictment but before trial. United States v. Lydecker, 275 Fed. 976 (D.C. N.Y., 1921); Kokenes v. State, 213 Ind. 476, 13 N.E. 2d 524 (1938); People v. Nentarz, 142 Misc. 477, 254 N.Y. Supp. 574 (1931); People v. Reed, 333 Ill. 397, 164 N.E. 847 (1928).

[3] 161 F. 2d 453 (C.C.A. 2d, 1947).