courtesy. Hence, the vendee would have no occasion to see a tell-tale foreign certificate, should one exist.

The foreign secured party fares better elsewhere than in a Code state in this situation. In *Bank of Atlanta v. Fretz*,[19] the same trio appear: an innocent foreign mortgagee with an interest perfected in the state of origin, a dealer who has wrongfully removed and wrongfully sold the automobile, and an unsuspecting purchaser. The court held that the mortgagee should prevail since he had taken all reasonable steps. In short, mere possession by the dealer is not enough.[20] The owner must be charged with some oversight or imprudence for the purchaser to prevail. Estoppel can operate only against a party in whom there is some legal fault. Most courts have been willing to cut off the security interest if, in addition to possession by the dealer, other circumstances converge to justify the penalty, such as the leaving of documents, indicia of ownership, in improper hands. The Code makes short work of these distinctions: all interests created by the dealer are cut off by a good faith purchase.[21]

PAUL G. DELANEY

Corporations—Derivative Suits—Security for Expenses under Rule X-10b-5 of the Securities Exchange Commission.—*McClure v. Borne Chemical Co.*[1]—Plaintiffs, stockholders in Borne Chemical Co., brought a

19 148 Tex. 551, 226 S.W.2d 843 (1950). The case is cited with approval by the court in the principal case, but with no comment upon the fact that resale was by a dealer.

20 The mortgagee who has left encumbered goods with the mortgagor engaged in the sale of such goods may well be deprived of his rights as against an innocent purchaser on theories of agency, waiver, or estoppel. But the law chose not to make this an absolute proposition. Possession alone is inconclusive. "The law takes into account not simply the deception of the subsequent buyer by the appearance of title in the possessor of the goods, but also whether this appearance of title was created by the original owner for a purpose so essential and proper that the original title must be protected irrespective of the injury to the subsequent buyer." 2 Williston, Sales § 312 (rev. ed. 1948).

Mori v. Chicago National Bank, 3 Ill. App.2d 49, 120 N.E.2d 567 (1954); Rand's Discount Co. v. Universal C.I.T. Corp., 10 App. Div.2d 240, 198 N.Y.S.2d 341 (1960). The classic case of the watch left for repairs with a jeweler typifies this principle. Zendman v. Harry Winston, Inc., 305 N.Y. 180, 111 N.E.2d 871 (1953). The rule is no less applicable to automobile cases. Budget Plan Inc. v. Savoy, 336 Mass. 322, 145 N.E.2d 710 (1957).

See also the Uniform Sales Act, 1 U.L.A. § 23(1); Uniform Conditional Sales Act, 2 U.L.A. § 9 (Supp. 1960); Uniform Trust Receipts Act, 9A U.L.A. § 9 (1951). These laws all manifest particular concern for the innocent purchaser. Yet all accept the premise that mere possession by the dealer is not enough. On the other hand, case law has been said to have eroded the common law principle through a particular finding of negligence by the mortgagee. First National Bank v. Hermann, 275 App. Div. 415, 90 N.Y.S.2d 249 (1949).

21 In a somewhat similar situation the Code again completely abrogates the old principle. Section 2-403(2) states: "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business."

The voidable title doctrine, as codified in § 2-403(1), has not yet been extended to conditional sales. See, generally, 49 Ky. L.J. 437 (1961).

1 292 F.2d 824 (3d Cir. 1961).

derivative suit against Borne, a New Jersey corporation, and CEM Securities Corp., a Delaware corporation, for allegedly unlawful dealings between the two corporations. Plaintiffs stipulated in the United States District Court for the Eastern District of Pennsylvania that all allegations were restricted to violations of Rule X-10b-5 of the Securities Exchange Commission passed pursuant to Section 10(b) of the Securities Exchange Act of 1934.[2] The defendants asked the court to require the plaintiffs to post security for expenses, which request was denied. On appeal the defendants asserted three grounds for reversal. First, that New Jersey and/or Pennsylvania security for expenses statutes[3] were applicable; second, that defendants were entitled to security under "general federal equity law"; and third, that a security for expenses requirement should be implied from section 10(b) by analogy to other provisions of the law. The Court of Appeals affirmed. HELD: In a shareholders' derivative suit brought in a federal district court under Rule X-10b-5 of the Securities Exchange Commission, security for expenses may not be required.

The court in its opinion, prior to the discussion of defendants' contentions, gave a brief summary of the policy reasons behind security for expenses requirements. The court felt that they are primarily intended to prevent so-called "strike" suits. These are suits brought by minority stockholders for individual gain by way of secret settlement. Security for expenses legislation reduces the number of derivative suits and does to some extent eliminate the "strike" suit.

The court separately discussed and disposed of each of defendants' claims. It had no difficulty holding the Pennsylvania statute non-applicable as the law of the forum since jurisdiction was not predicated on diversity. The court, however, had more difficulty with the New Jersey statute, apparently bothered by the problem of whether state requirements for bringing a derivative suit must be met in whatever court suit is brought if the corporation is incorporated in New Jersey. In rejecting this argument the court stressed the federal nature of the right sought to be enforced and concluded that: "We think that the stockholders' right to maintain a derivative action on a corporate right federal in nature is federally conferred."[4] This being so, state security for expenses requirements have no application.

Defendants' second contention was dismissed rather summarily. Unable to find any "general federal equity law" supporting security for expenses, the court characterized this contention as erroneous.[5]

Finally, the court faced defendants' third, and what seemed to be their most cogent argument. Defendants contended that if a private right of action is to be implied either from the statute or from general principles of tort law,[6] then a security for expenses requirement should be implied by analogy to other sections of the statute. The court felt that there is no clear general policy under the statute as some sections require security and others do not. Therefore, where Congress is silent in a particular section

[2] 48 Stat. 891 (1934), 15 U.S.C. § 78j(b) (1958).
[3] N.J. Stat. Ann. § 14.3-15 (Supp. 1961); Pa. Stat. Ann. tit. 12 § 1322 (1953).
[4] Supra note 1, at 832.
[5] Supra note 1, at 835.
[6] See, e.g., Kardon v. National Gypsum, 69 F. Supp. 512 (E.D. Pa. 1946).

such a requirement cannot be implied. The court did not discuss this argument in very great detail and it is not clear whether such a discussion might not elicit a more definite congressional intent one way or the other

It would seem that in discussing federal "strike" suit prevention the court should have discussed Rule 23 of the Federal Rules of Civil Procedure. This rule prohibits the settlement of derivative suits without the permission of the court, thereby apparently eliminating the cause of "strike" suits. The decision of the court on these particular facts seems to be correct. However, if the court were going to preface the decision with a policy discussion, it might have given a more complete treatment by including a discussion of Rule 23. If Rule 23 can be interpreted to prevent the "strike" suit, then federal security for expenses requirements must be justified on other grounds or they should be eliminated. Security for expenses legislation has had a long and controversial history in both state and federal courts. Perhaps the utilization of Rule 23 could satisfy both sides. It would, on the one hand, prevent the "strike" suit and, on the other hand, would relieve the minority shareholder of the security for expenses burden.

Of course, the elimination of security for expenses requirements from federal laws is a legislative rather than a judicial function. However, if Federal Rule 23 does eliminate the need for security for expenses perhaps the courts could aid Congress by pointing this out. If in judicial discussion of this problem the courts showed agreement on the impact of Rule 23 on security for expenses requirements, then the legislature would be better able to act. The courts cannot disregard existing laws but they can show that certain provisions have become unnecessary due to subsequent enactments thereby giving the legislature cause to reexamine their original position.

JAMES M. QUINN

Fair Trade Laws—Non-Signer Clauses—Constitutionality.—***Hudson Distribs., Inc. v. Upjohn Co.; Hudson Distribs., Inc. v. Eli Lilly & Co.***[1]—The plaintiff is the operator of retail stores which sell pharmaceutical products. The defendants are the manufacturers of pharmaceuticals which they distribute to retailers either directly or through wholesalers. The defendants independently entered into a number of written contracts with retail stores in Ohio for the purpose of determining the retail price of their commodities, and served notice of these contracts on the plaintiff. The plaintiff purchased the defendants' trade-marked products in interstate commerce from a third party, with notice of the established retail price in Ohio. He then proceeded to sell these articles at prices below those fixed by the defendants. The defendants individually sought to enjoin the plaintiff from selling their products for less than the established prices. In so doing, they claimed the protection of the Ohio Fair Trade Act, which makes the purchase of a trade-marked or trade named commodity for resale, with knowledge of the existence of fair trade contract prices, an implied contract to comply with these prices, even

[1] 176 N.E.2d 236, Trade Reg. Rep. (1961 Trade Cas.) ¶ 70,065 (Ohio Ct. App. 1961).