EXTRATERRITORIAL ENFORCEMENT OF REVENUE LAWS

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Anglo-American judges and textwriters have with such consistency stated that one state will not enforce the revenue or the penal laws of another that the rule has become familiar learning.[1] The non-inforcement of foreign revenue and penal laws, for the particular fugitives concerned, constitutes sanctuary between the great mass of enforceable transitory causes of action on the one side and the extradition and interstate rendition of criminals on the other.[2] Whether this judge-made paradise for those seeking to avoid an obligation to the state (be it payment of a tax or making restitution for a criminal offense) is socially desirable and logically sound has in recent years become an important problem.[3] Evidence of this importance is the increasing number of attempts by one state or subdivision thereof to collect taxes from an individual who is residing in another state,[4] and the ease with which offenders against penal statutes can cross state lines.

A penal law, in the international sense, is one whose purpose is to mete out punishment in favor of the state, rather than to redress a private wrong.[5] Although penal and revenue laws are of the same genus in so far as each is a claim existing in favor of government, yet they are not of the same species, since the latter are devoid of retributive qualities. It is the purpose of this paper to examine the extraterritorial enforcement of revenue laws with respect to (A) original actions to enforce such laws in another state, and (B) suits upon tax judgments brought in the courts of another state.

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1. The Antelope (1825) 10 Wheat. 123, 6 L. ed. 268. Mr. Chief Justice Marshall said: "The courts of no country execute the penal laws of another." Dicey, *Conflict of Laws* (3d ed. 1922) 230; Wharton, *Conflict of Laws* (3d ed. 1925) 14, 18; Minor, *Conflict of Laws* (1901) 21; Story, *Conflict of Laws* (8th ed. 1883) 840.

2. Leflar, Extrastate Enforcement of Penal and Governmental Claims (1932) 46 Harv. L. Rev. 193.

3. Ibid.

4. These cases will be discussed in this article.

5. Huntington v. Attrill (1892) 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123.

(A) SUIT ON ORIGINAL CAUSE OF ACTION

I. English Cases

In order to appraise the validity of the rule that no state will enforce the revenue laws of another state, it is necessary to examine the foundations which were laid in a few early cases, beginning with *Boucher v. Lawson.*[6] There the plaintiff shipped gold from Portugal to England in a vessel owned by the defendant. The export of gold was prohibited by the laws of the former country. The master of the vessel refused to deliver the cargo in London, and the plaintiff brought action against the owner. One of the defenses was that since it was illegal to export gold under the laws of Portugal, the parties were *participes criminis,* and the law should not give a remedy. Lord Hardwick, in denying this defense, said that if it were allowed it would cut off all benefit of such trade from England, where such trade was not only lawful but greatly encouraged.

Some forty years later *Holman v. Johnson*[7] was decided. Plaintiff, a resident of Scotland, sold and delivered a quantity of tea to defendant. Although he knew it was to be smuggled into England, plaintiff had no concern in the smuggling scheme itself. To plaintiff's action for the price in England, the defense was that the contract for the sale of the tea was founded upon an intention to make illicit use of it, and that therefore plaintiff was not entitled to the assistance of an English court to recover the price. Plaintiff was allowed recovery. Since the contract and the delivery were made in Scotland, plaintiff had plainly offended no law of England. In a pure dictum Lord Mansfield took occasion to say, "For no country ever takes notice of the revenue laws of another."[8]

Shortly afterward Lord Mansfield decided *Planche v. Fletcher.*[9] Plaintiffs, London merchants, insured goods in a vessel sailing from London for France. The ship was, however, cleared for Ostend, Belgium. Because of war between France and England the cargo was captured. Plaintiffs sued the underwriter on the policy. The defense was fraud on defendant in clearing the ship for Ostend when she was never intended to go there. The court

6. (1734) Cases temp. Hardwicke 85, 89, 198, 95 Eng. Rep. 53, 55, 127.
7. (1775) 1 Cowp. 341, 98 Eng. Rep. 1120.
8. Id. at p. 343.
9. (1779) 1 Doug. 251, 99 Eng. Rep. 164.

held with plaintiff on the ground that this false clearance was proved to be the constant course of the trade and well known to everyone connected therewith. Lord Mansfield, having decided this, then went on to say that it did not appear why it was the custom to clear for Ostend, but that possibly duties were lower there. In any event the motive did not matter, he said, because "one nation does not take notice of the revenue laws of another."[10] This of course was obiter dictum and not necessary to the decision.

Another ancestor of the rule against non-enforceability was *Sharp v. Taylor*.[11] There two British subjects purchased an American-built ship on a joint speculation for the purpose of employing her in trade between the two countries until they could resell her to advantage. With this in view, they procured her to be registered in the name of C, a citizen of the United States, upon the false declaration that she was *bona fide* the property of C. After the ship had made several voyages Englishman B, who had the management of the ship, refused to share the profits with Englishman A. The latter brought suit, to which B interposed the defense that since the false registration was a fraud upon the American law, no action could be maintained. The court disposed of the defense by saying that the courts of England will not refuse to decide the rights of joint importers simply because in the production or exportation of the particular commodity some fiscal law of a foreign country has been violated.[12]

The common element in these early cases is the apprehension of the judges that "to take notice" of the foreign revenue law would have hampered international trade. This sentiment was well expressed in *The Emperor of Austria v. Day*[13] where the court said

> Although from the comity of nations, the rule has been to pay respect to the laws of foreign countries, yet for the

10. Id. at p. 253.
11. (1848) 2 Phill. 801, 41 Eng. Rep. 1153.
12. See 2 Phill. at 816, where the court said: "During the French war the greater part of the foreign trade of this country was carried on in despite of the fiscal regulations of other countries, some of which were not at war with this country; and there are still instances existing of the same kind; but the parties to such transactions have not, upon that ground, been denied the ordinary administration of justice in matters growing out of such transactions."
13. (1861) 3 De. G. F. and J. 216, 45 Eng. Rep. 861.

> general benefit of free trade, "revenue laws" have always been the exception; and this may be an example of an exception proving the rule.[14]

Although the non-enforceability of revenue laws was thus evolved from a desire to promote commercial conveniences, it came to be applied in a type of case where no such interest could possibly be promoted by its application.

Such a case was *Municipal Council of Sydney v. Bull.*[15] The legislature of New South Wales passed an act authorizing the Municipal Council of Sydney to improve a certain street in that city, and imposed upon the property owners within the improvement area the burden of contributing toward the cost. The council was empowered to distrain the goods of these owners, and in addition to recover by personal action the amounts due and payable.[16] When distraint did not yield the amount of contribution assessed against a certain owner within the area, the council brought action in England against Bull, who had covenanted with the owner to save him harmless against the claim in this action. It was held for defendant. The court said

> the action is in the nature of an action for a penality or to recover a tax; it is analogous to an action brought in one country to enforce the revenue laws of another. In such cases it has *always* been held that an action will not lie outside the confines of the last-mentioned state.[17]

This language is interesting, particularly the use of the word "always," because the *Bull* case represents one of the first attempts of one government to recover a tax by means of action in the courts of another. Moreover, no authority is cited for this sweeping condemnation of foreign revenue laws.

What then did the court have in mind? There was no commercial convenience to promote in this case. In answer to plaintiff's contention that the action was in nature transitory, the court said: "I do not think it is. Some limit must be placed upon the available means of enforcing the sumptuary laws enacted by

14. Id. at p. 242.
15. (1909) 1 K. B. 7.
16. The power to create personal liability for local improvements does not prevail everywhere. Many American jurisdictions limit the assessment to a charge upon the land. Such is the rule in Missouri. See St. Louis v. Allen (1873) 53 Mo. 44, 35 L. R. A. 58; Comment (1909) 22 Harv. L. Rev. 292.
17. (1909) 1 K. B. 7, 12 (Italics supplied).

foreign States for their own municipal purposes."[18] The tone of the opinion impels the conclusion that the court felt there was something penal about a foreign tax law. In some manner the judicial spark jumped the gap from refusal to recognize foreign revenue laws in the interest of commercial convenience where the suit was *between private parties* to the proposition that *one state cannot maintain an action* to enforce its revenue laws in the courts of another.[19]

The next effort at extraterritorial collection of taxes in England arose in *H. M. The Queen of Holland v. Drukker*.[20] One Visser had died domiciled in Holland, leaving personalty in England. The Dutch sovereign brought an action in England under the Succession Act, a Dutch statute, claiming that the succession duty on the estate constituted a debt owing to her. In dismissing the action the court followed the *Bull* case. Plaintiff's counsel attempted to distinguish that case on the ground that there a municipal corporation was suing, but that here an independent sovereign was suing. It seems that there is validity in this attempted distinction. In the former case the Moore Street Improvement Act, which formed the basis of the action, did not authorize the municipal corporation to bring suit in the courts of a foreign country. The sole object of the legislation appeared to be "to provide that within that area where the claim was recoverable it might be recovered by an action."[21] But in the *Drukker* case the Dutch sovereign brought the action, and there is no doubt as to her power to sue in a foreign forum, provided it is the kind of case which the court will hear.

The brief of counsel for plaintiff also argued vigorously that there was no actual decision in England for the proposition that one state will not enforce the revenue laws of another, but that such statements were obiter dicta. The rather naive reply in the opinion was that "the absence of authority may indicate that the proposition is not well founded in principle, but it may also merely indicate that it is so well recognized that it has never been put to the test."[22] Counsel further urged that the

18. Ibid.
19. A second basis for the decision in the Bull case was that an action to recover a charge on the land by enforcing a personal liability is a mixed action, and that a mixed action, like a real action, should be determined in the forum *rei sitae*.
20. (1928) 1 Ch. 877.
21. Municipal Council v. Bull (1909) 1 K. B. 7, 12.
22. H. M. The Queen of Holland v. Drukker (1928) 1 Ch. 877, 882.

older cases were decided on the principle that if the revenue laws of another country were recognized it would interfere with freedom of trade to the detriment of England. Note how that argument was met:

> My own opinion is that there is a well recognized rule, which has been enforced for at least two hundred years or thereabouts, under which these Courts will not collect the taxes of foreign States; and this is one of those actions which these courts will not entertain.[23]

There seems little doubt that the court simply turned a deaf ear to reason and paid obeisance to what it thought the rule of law to be. Nevertheless, the *Drukker* case crystallizes in England the rule that one country will not enforce the revenue laws of another, anomalous though its development has been.

II. American Cases

In view of the English heritage possessed by our early American courts, it is not surprising to find foreign revenue laws receiving treatment here similar to that accorded them in the mother country. Probably the earliest American case in point is *Ludlow v. Van Rensselaer*.[24] That was a suit upon a promissory note executed by defendant in France, made payable in New York. Under the law of France the note was void there unless it was stamped in accordance with the revenue laws of that country. The note in question was not stamped, and defendant contended that since it was void there, no recovery should be allowed on it in New York. It was held to be immaterial whether or not the note was stamped according to French law, on the ground that New York courts do not sit to enforce the revenue laws of other countries. The court added that even if they had to notice the French revenue law, it could well be said that the parties never contemplated payment there, and this would "form a sufficient excuse" for not following French law. Since the note was valid by the law of the place of performance, the correct result was reached here. There is no indication that the New York court was influenced by the policy favoring freedom of trade found in the English cases; the doctrine of non-enforce-

23. Id. at p. 884.

24. (N. Y. 1806) 1 Johns. 93; cf. Indian and General Investment Trust v. Borax Consolidated (1920) 1 K. B. 539; Beadall v. Moore (1922) 199 App. Div. 531, 191 N. Y. S. 826.

ability was simply accepted without any supporting reasoning whatever.

So also in *Henry v. Sargeant*,[25] a leading American case, was the dictum repeated. That was an action in New Hampshire for damages resulting from the imprisonment of plaintiff in Vermont until he paid a tax assessed by a town in that state. The New Hampshire court took jurisdiction on the ground that this was an ordinary transitory cause of action. In dismissing the defense that the courts of one state will not notice the revenue laws of another state for the purpose of reviewing proceedings had under them, the court said

> There is no attempt to enforce the penal or revenue laws of Vermont by this action. If there were, it would be held that this was not to be done through the instrumentality of the courts of another state; *as, for instance, if the attempt was to collect a tax assessed in Vermont by suit here.*[26]

No reasons nor authority were given for this statement.

The first time an American court was actually called upon to collect a tax for a sister state was in *J. A. Holshauser Co. v. Gold Hill Copper Co.*[27] A New Jersey statute provided that every corporation chartered by that state should pay an annual franchise tax of a certain percentage of its capital stock. The statute further provided that such tax should be a debt due the state for which an action at law could be maintained after the same had been in arrears one month, and that such tax should be a preferred debt in case of insolvency. The Copper Company, a New Jersey corporation, owed the state $12,000 for three years' back franchise taxes. When creditors of the company brought proceedings in North Carolina to have a receiver appointed, the State of New Jersey presented the back tax claim. The decision of the trial court, that New Jersey was entitled to file its claim, but that it was entitled to no preference, was affirmed on appeal. New Jersey was allowed to come in as a creditor, but the statutory provision as to preference was held to have no extraterritorial force on the ground that it would prejudice local creditors. It has been suggested that the court simply overlooked the fact that it was helping another state to collect her taxes.[28] Whatever

25. (1843) 13 N. H. 321.
26. Id. at p. 332 (Italics mine).
27. (1905) 138 N. C. 248, 50 S. E. 650.
28. Comment (1936) 4 George Washington L. Rev. 281.

the explanation of the result here, the case has never been followed, and it is the lone instance of recovery by one state, on a tax claim not reduced to judgment, in the courts of another state.

A dissimilar result was reached in *Maryland v. Turner*.[29] There two actions were brought, one by the State of Maryland and one by the mayor of the City of Baltimore, against defendant to recover from him a sum of money equal to the amount of taxes assessed against him upon personal property while he was a resident of that state and city. A demurrer for failure to state facts sufficient to constitute a cause of action was sustained. Plaintiffs had contended that the highest courts of Maryland, in interpreting its tax laws, had held that by the assessment of a tax a legal duty and obligation was created under and by which defendant impliedly agreed to pay said tax; that in effect it was a contractual obligation. But the court decided that whether a foreign tax was a penal law or a contractual obligation is to be determined by the law of the forum. Since by the law of New York the imposition of a tax raised not a contractual liability, but rather an impost operating *in invitum*, it was held that plaintiffs could not maintain the action. By the generally accepted rule of the conflict of laws, matters connected with the substantive part of a transaction are determined by the law of the forum where the transaction arose, while matters of procedure are determined by the law of the forum where suit is brought.[30] Applying this rule to the *Turner* case, it would seem that the New York court should have applied the Maryland doctrine, namely, that such a tax was a contractual liability. Having taken this position, the court would then decide the controversy as in the case of any other foreign contract action.

It is implicit in the opinion in the *Turner* case that the foreign taxes were of a *penal* nature in the New York court, even though they were considered contractual in Maryland. It was stated at the outset that the extraterritorial enforcement of foreign revenue laws was severable from that of the extraterritorial enforcement of penal laws. For purposes of convenience this is true, since there is a great mass of case law on the subject of penal laws. Nevertheless, this classification has not always been clearly made in the cases, as is witnessed by the *Turner* case. It has

29. (1911) 75 Misc. Rep. 9, 132 N. Y. S. 173.
30. Goodrich, *Conflict of Laws* (1927) 228.

been demonstrated that the non-enforceability of foreign revenue laws resulted from a desire to foster trade. The non-enforceability of penal laws was based upon a similar provinciality—the notion that one sovereign would not recognize a claim running in favor of another. Witness the test of penality laid down in the famous case of *Huntington v. Attrill*[31]:

> The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act.

If it is the former the law is penal; if the latter, it is not. Therefore since a tax obligation does run in favor of the state and not of an individual, it is not strange that the concept of penality has crept into the tax cases. So Professor Beale has said, with respect to the dicta in the early freedom of trade cases, that "the courts have repeated the rule [against non-enforcement of foreign revenue laws] without careful consideration and merely as a literary corollary to the proposition that no state will enforce the penal laws of another state."[32]

The case which is probably most cited for the rule that one state will not enforce the revenue laws of another is *Colorado v. Harbeck*.[33] There the State of Colorado brought an action to recover an inheritance or transfer tax upon the estate of Harbeck. The latter was a resident of Colorado who died in New York. His will was admitted to probate in New York, and letters testamentary were issued to his widow. The estate consisted of $3,000,000 worth of stocks and bonds, none of which were present in Colorado at decedent's death nor thereafter. The decision that the New York court would not take jurisdiction was placed upon two grounds. Under the due process clause of the Fourteenth Amendment, where delinquent taxpayers are non-residents of the taxing state and outside the jurisdiction, no personal liability may be established against them; and where the property is without the taxing state, and no *res* exists upon which the

31. (1892) 146 U. S. 657, 673, 13 S. Ct. 224, 36 L. ed. 1123.
32. 3 Beale, *Conflict of Laws* (1935) 1638.
33. 179 N. Y. S., reversed (1921) 232 N. Y. 71, 133 N. E. 357.

taxing state may impose a lien, the state cannot collect the tax in its own courts nor in those of a sister state.[34] It would seem that since there was no jurisdiction to levy a valid tax in Colorado, the decision might have been placed upon this ground alone. Nevertheless the court went on to say

> * * * the attempt to give such a statutory provision extraterritorial effect would conflict with another well settled principle of private international law which precludes one state from acting as a collector of taxes for a sister state and from enforcing its penal or revenue laws as such. The rule is universally recognized that the revenue laws of one state have no force in another.[35]

The rule in *Colorado v. Harbeck,* whether or not it was necessary to the decision, represents the attitude which New York takes toward the enforcement of foreign revenue laws. Although nearly all of the cognate cases have been decided in that state, it is probable that the rule would be followed in other states should the problem arise.

III. The Federal Courts

The position of the Federal Courts on the enforcement of the revenue laws of states other than the one in which they are sitting is not so clear cut as that of the state courts. In *New York Trust Co. v. Island Oil and Transport Corp.*[36] creditors of the latter company, a Virginia corporation, brought suit in the

34. Brown, Multiple Taxation by the States—What is Left of It? (1935) 48 Harv. L. Rev. 407.

35. Colorado v. Harbeck (1921) 232 N. Y. 71, 85, 133 N. E. 357. Accord: In re Bliss' Estate (1923) 121 Misc. Rep. 773, 202 N. Y. S. 185. (Application by Vermont tax commissioner to New York Surrogate Court for payment of Vermont inheritance tax dismissed on ground that Vermont had no jurisdiction to levy a valid tax, and that New York should not be the tax collector for its sister states); but cf. In re Hollins (1913) 79 Misc. Rep. 220, 139 N. Y. S. 713. (It was held that American executors of an English testatrix were justified in remitting to the English executors a sum sufficient to discharge the legacy duty imposed by the laws of England on the annuity to a legatee resident in Austria. The court strove to reach a fair result and said, l. c. 717: "While it is doubtless true that this court will not aid a foreign country in the enforcement of its revenue laws, it will not refuse to direct a just and equitable administration of that part of an estate within its jurisdiction merely because such direction would result in the enforcement of such revenue laws." In re Martin's Will (1931) 255 N. Y. 359, 174 N. E. 753, expressly leaves open the question whether the return of assets of a decedent's estate to the state of domicile for the purpose of allowing the latter to levy a tax is the enforcement of a foreign revenue law within the rule of Colorado v. Harbeck.

36. (C. C. A. 2, 1926) 11 F. (2d) 698.

District Court for the Southern District of New York, and a receiver was appointed. The State of Virginia sought to recover an annual franchise tax placed upon all corporations created by it. Counsel for Virginia appeared by permission of court, and the receivers petitioned the court for instructions whether to pay the tax. The Circuit Court of Appeals, reversing the District Court, held that there was no legal duty to pay the tax, and that it would be inexpedient to pay as a matter of comity since the money equitably belonged to the creditors. The opinion indicates that had this been a receivership in a federal court in Virginia, with assets in that state, a preferential payment of the tax would have been due, had the Virginia law so held.[37] But it is further stated that had Virginia appeared and demanded payment in the District Court in New York (Virginia was not a party to this suit, and counsel appeared by permission), it could not have been recovered on the ground that "neither its sovereignty nor its statutes has any extraterritorial vigor."[38] Although this language is obiter, this court would probably follow the rule as laid down in *Colorado v. Harbeck.*

There is, however, no authoritative decision by the United States Supreme Court as to the position which the lower federal courts must take when they are confronted with the problem under consideration, and that the question is still open is evinced by the case of *Moore v. Mitchell.*[39] That was a suit by the treasurer of Grant County, Indiana, to recover taxes which arose while decedent was resident there, brought against his executors in the District Court for the Southern District of New York. The suit was dismissed in the District Court on the ground that this kind of claim will not be enforced in the New York courts under the decision in *Colorado v. Harbeck,* and that therefore if the executors paid the tax, the payment might not be allowed in the state court which appointed them. A companion ground for dismissal was that since decedent was not in the state at the time the tax accrued and since he had no property there, the State of Indiana had no jurisdiction to impose the tax. The Cir-

37. See Marshall v. New York (1920) 254 U. S. 380, 385, 41 S. Ct. 143, 66 L. ed. 315.

38. New York Trust Co. v. Island Oil Corp. (C. C. A. 2, 1926) 11 F. (2d) 698, 699.

39. (D. C. S. D. N. Y. 1928) 28 F. (2d) 997; (C. C. A. 2, 1929) 30 F. (2d) 600; (1930) 281 U. S. 18, 50 S. Ct. 175, 74 L. ed. 673.

cuit Court of Appeals adopted the latter ground as the basis for their decision, and affirmed the judgment below.

Judge Learned Hand, in a concurring opinion in the Circuit Court of Appeals, took the position that a valid tax was levied, imposing a personal liability upon decedent, because he was living at the time of the assessment, and the fact that the securities were out of the jurisdiction did not affect its validity.[40] Therefore he was squarely presented with the issue whether a lawfully imposed tax of a foreign state can be collected by suit in a federal court sitting in another state. He decided that the court should not enforce the tax on the ground that it might be embarrassing for one state to pass upon a matter involving the relation of a sister state to its citizen. That is, he said, the forum will ordinarily determine whether a foreign cause of action is contra to the public policy of the forum, but when this inquiry concerns the provisions of public order of another state, the forum might find itself embarrassed in holding the action to be against its own public policy; therefore it is best not to take jurisdiction at all. This theory Judge Hand admittedly made out of whole cloth.

The Supreme Court of the United States, on appeal, expressly refused to decide whether a federal court in one state will enforce the revenue laws of another state. Rather the decision was placed upon a ground different from any of those in the courts below, namely, that the tax collector had no capacity to sue outside the State of Indiana.[41] He was, it was said, an arm of the state, with no better standing to sue outside of Indiana than an Indiana executor or chancery receiver, and the Federal Courts have always declined to take jurisdiction of suits by such persons appointed in another state. The Supreme Court has yet to decide, therefore, whether a suit by a party with capacity to sue, a state for example, for the purpose of enforcing its revenue law, will be entertained by a federal court sitting in a different state. At present the dictum in the *Island Oil* case[42] and the concurring opinion of Judge Hand in *Moore v. Mitchell*[43] indicate that under such circumstances a federal court will decline jurisdiction.

40. (C. C. A. 2, 1929) 30 F. (2d) 600.
41. (1930) 281 U. S. 18, 50 S. Ct. 175, 74 L. ed. 673.
42. Supra, note 38.
43. Supra, note 40.

IV. Remedies

In order to meet the problem of tax evasion which the courts have left unsolved the legislatures in a number of states have adopted reciprocal legislation with a view to the collection of domiciliary death taxes. These statutes provide in substance

> that where there is an administration of a nonresident estate in the foreign state the legal representative will reserve and transmit to the domiciliary state a sufficient amount of the estate funds to cover domiciliary taxes, providing the laws of the domiciliary state afford like protection in the collection of such taxes.[44]

This solution can only partially ameliorate the difficulty, however, since it applies only to death taxes.

If the historical reason for the non-enforcement of foreign revenue laws, namely, the desire to foster free trade, has no validity in our federal system, and it is patent that it has none, it is necessary to see what reasons there are, if any, for such non-enforcement.

First, there is the question of public policy. The forum may refuse to grant relief because it disapproves of the foreign cause of action.[45] But surely in our federal system it is not likely that the public policy of one state would be offended by the taxes of another.[46] The application of the defense of public policy should be limited. Professor Beale has said

> This is especially true as between the states of the United States, for not only is there little or no variation in the fundamental policies of their respective laws, but here, even more than elsewhere, a uniform enforcement of right is greatly desirable.[47]

Therefore the argument that the forum might be embarrassed in dealing with the relations between a sister state and its citizen —the contention of Judge Hand in *Moore v. Mitchell*—does not particularly commend itself. It would seem that greater embarrassment and bad feeling would arise from the complete refusal to take jurisdiction.

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44. Kidder, *State Inheritance Taxation and Taxability of Trusts* (1934) 308.

45. Union Trust Co. v. Grosman (1917) 245 U. S. 412, 38 S. Ct. 147, 62 L. ed. 368.

46. Cf. Milwaukee County v. M. E. White Co. (1935) 296 U. S. 268, 56 S. Ct. 229, 80 L. ed. 220.

47. 3 Beale, *Conflict of Laws* (1935) 1651.

Secondly, there is the fear expressed in *Colorado v. Harbeck* that one state would be acting as the tax collector for another. Nearly all of the attempts at extrastate collection of taxes have been made in the state and federal courts of New York. It is conceded that if New York were to allow other states to collect their taxes in its courts the latter might be burdened, although the provision for reciprocal remission of estate funds to cover domiciliary death taxes would alleviate such a condition to a degree.[48] This difficulty presumably would affect only the State of New York, and it may be discounted so far as the other jurisdictions are concerned.

The third conceivable objection, perhaps rather tenuous, to the uniform extrastate enforcement of revenue laws is that the absence of a fair remedy in the forum might make it inconvenient for the forum to enforce the taxes of a sister state. If, for example, the tax was such that the forum would experience great difficulty in administering it, it might be desirable to decline jurisdiction.[49]

In some cases taxes have been regarded as contractual in nature. Such was the holding in *People of New York v. Coe Manufacturing Co.*,[50] where the consent of a corporation to pay a franchise tax was implied. If the liability is thus bottomed upon contract, it would seem that the forum could not object to giving a remedy upon the contract. But in most taxes it is difficult to spell out the consent since they generally operate *in invitum*. Moreover, in *Maryland v. Turner*[51] a New York court refused to enforce a Maryland tax even though Maryland considered the tax contractual. It seems that whether the liability is consensual or not is irrelevant, and that the logical solution to the problem is to annex suits for taxes to the great body of enforceable transitory causes of action.[52]

48. Leflar, Extrastate Enforcement of Penal and Governmental Claims (1932) 46 Harv. L. Rev. 193, 221.

49. Cf. Slater v. Mexican National Ry. Co. (1904) 194 U. S. 120, 24 S. Ct. 581, 48 L. ed. 900. (Suit in district court in Texas against Colorado corporation for damages under Mexican wrongful death statute dismissed. The court could not effectuate the remedy provided by the Mexican statute, namely, periodic payments to surviving wife and children until former remarried or latter came of age). See also Marshall v. Sherman (1895) 148 N. Y. 9, 42 N. E. 419. (Refusal to take jurisdiction apparently placed upon ground that the court could not give a fair remedy).

50. (1934) 112 N. J. L. 536, 172 Atl. 198.

51. (1911) 75 Misc. Rep. 9, 132 N. Y. S. 173.

52. Supra, note 48.

(B) SUIT ON TAX JUDGMENT

It has been seen so far that the courts have almost universally held that a state cannot bring an original cause of action for taxes in the courts of another state. Suppose, however, that State A, having acquired jurisdiction over taxpayer C, brings suit against him in one of its own courts and recovers judgment. Before execution taxpayer C removes his person and property to State B. Can State A enforce its judgment in the courts of State B? Does the "full faith and credit" clause of the Federal Constitution make such enforcement mandatory? What effect has the merger of the tax into judgment upon the extrastate enforcement of the former? These problems remain for consideration.

Article IV, section 1, of the Federal Constitution provides that "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."[53] This clause has been much litigated, but the net result has been "to leave extrastate protection of rights, *except such as have ripened into a definite judicial judgment*, exactly where the Constitution found it, that is to say on a basis of comity, and so at the mercy of the adverse local policy of the forum state."[54] The present status of a judgment of another state is that it is conclusive evidence of the proceedings in the sister state, and suit must be brought upon such judgment by an action of debt.[55]

There are, however, certain limitations even upon the enforcement of judgments under the "full faith and credit" clause—situations in which a judgment is not conclusive. Among these is want of jurisdiction. It is clear that unless a court has jurisdiction over the defendant, any judgment which it may render

53. In pursuance thereof Congress passed Act of May 26, 1790, ch. 11, 1 Stat. 122, and Act of March 27, 1804, ch. 56, sec. 2, 2 Stat. 299, which are today Revised Statutes, secs. 905-906, (1928) 28 U. S. C. A. secs. 687-688. Section 905 provides for the authentication of the legislative acts of states and territories and of their records and judicial proceedings. It further provides that "the said records and judicial proceedings authenticated as aforesaid shall be given such faith and credit in every court of the United States as they have by the law and usage in the courts of the state from whence the said records are or shall be taken." Section 906 makes similar provision for records "not appertaining to a court."

54. Corwin, The "Full Faith and Credit" Clause (1933) 81 U. of Pa. L. Rev. 371 (Italics mine).

55. McElmoyle v. Cohen (1839) 13 Pet. 312, 10 L. ed. 177.

is void under the Fourteenth Amendment, not only in the state where rendered,[56] but also in any other state.[57] And courts of other states are not required to give such a judgment full faith and credit.[58] Jurisdiction then may be defined as that function which a state exercises "through its courts over a person by creating through the judgment or decree of its courts, rights against the person which under the principles of the common law will be recognized as valid in other states."[59]

Assuming then that a judgment is based upon proper jurisdiction, are there other factors which may prevent it from receiving full faith and credit? It is settled that even though a judgment violates the public policy of the forum, it must nevertheless be accorded recognition.[60] Moreover, a judgment based upon an error of law, if conclusive in the state where rendered, must be given equal effect in other states.[61] But a judgment procured by fraud is not entitled to full faith and credit if the fraud could be attacked in equity in the forum where the judgment was rendered.[62] Neither is a judgment based upon a penal claim entitled to full faith and credit. That was decided in *Wisconsin v. Pelican Insurance Co.*[63]

In that case the state brought an original action of debt in the

56. 1 Beale, *Conflict of Laws* (1935) 326.

57. Pennoyer v. Neff (1877) 95 U. S. 714, 24 L. ed. 565; Thompson v. Whitman (1873) 18 Wall. 457, 21 L. ed. 897.

58. 1 Beale, *Conflict of Laws* (1935) 326.

59. Omitted.

60. Fauntleroy v. Lum (1908) 210 U. S. 230, 28 S. Ct. 641, 52 L. ed. 1039 (Missouri judgment given full faith and credit in Mississippi although the judgment was based upon a futures contract which was by statute unenforceable in Mississippi), Kenney v. Supreme Lodge (1920) 252 U. S. 411, 40 S. Ct. 371, 64 L. ed. 638; Corwin, The "Full Faith and Credit" Clause (1933) 81 U. of Pa. L. Rev. 371, 377-378.

61. Roche v. McDonald (1927) 275 U. S. 449, 48 S. Ct. 142, 72 L. ed. 365. (Plaintiff recovered judgment in Washington and sued on the judgment in Oregon. The Oregon court awarded a judgment against defendant, more than six years after rendition of the Washington judgment. Plaintiff then brought suit on the Oregon judgment in Washington. In the last suit the defense was that under a Washington statute a judgment expired after six years and no suit should be had extending its duration. *Held*, that although the Oregon court made an error of law in allowing suit on the judgment, nevertheless it had jurisdiction of the parties and the subject matter, and its judgment was entitled to full faith and credit).

62. Levin v. Gladstein (1906) 142 N. C. 482, 55 S. E. 371, 32 L. R. A. (N. S.) 905. (To suit in North Carolina on a Maryland judgment, the defense was fraud in the procurement. Since the judgment could have been attacked in equity in Maryland, a similar defense was good in North Carolina); cf. Christmas v. Russell (1866) 5 Wall. 290, 18 L. ed. 475.

63. (1887) 127 U. S. 265, 8 S. Ct. 1370, 32 L. ed. 239.

Supreme Court of the United States against a Louisiana corporation upon a judgment recovered by Wisconsin in one of its own courts. A Wisconsin statute provided that each fire insurance company doing business in the state should file an annual financial statement with the commissioner of insurance, providing monetary penalties for failure to do so. The defendant demurred on the ground that the Supreme Court has original jurisdiction of a suit between a state and citizens of another state only where the controversy is of a civil nature, and not where it is sought to enforce a penal law. The language of the Court in sustaining the demurrer was quite broad

> The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its *revenue*, or other municipal laws, and to all judgments for such penalties. If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment.[64]

Although the *Pelican* case only decides that a judgment based upon a penal law is not entitled to full faith and credit, it was thought until recently that the dictum just quoted, that judgments based upon revenue laws are also not entitled to full faith and credit, could fairly be stated as the rule in such cases.[65] The result in *Milwaukee County v. M. E. White Co.*[66] was therefore not easily predicted. Milwaukee County, a citizen of Wisconsin, brought suit in the District Court for Northern Illinois against defendant corporation, a citizen of Illinois, to recover on a judgment for income taxes duly recovered in a Wisconsin state court. The District Court dismissed the cause as a suit in substance to enforce the revenue laws of Wisconsin. The question whether a United States District Court in Illinois should entertain an action on a judgment predicated upon an income tax due from defendant to the State of Wisconsin was certified to the

64. See 127 U. S. at 290 (Italics mine).

65. Restatement, Conflicts (1934) sec. 443: "A valid foreign judgment for the payment of money which has been obtained in favor of a state, a state agency, or a private person, on a cause of action created by the law of the foreign state as a method of furthering its own governmental interests will not be enforced."

66. (1935) 296 U. S. 268, 56 S. Ct. 229, 80 L. ed. 220.

Supreme Court. The question was answered in the affirmative.[67] A judgment ordering the payment of money, it was said, is in the nature of a debt, regardless of the nature of the right which gave rise to the judgment.

In considering the implications of this opinion it should be noted first that the case need not have decided that the Wisconsin judgment was entitled to full faith and credit, but rather the decision could have been rested upon comity. A federal court sitting in a state "is bound equally with courts of the State to observe the command of the full faith and credit clause, where applicable,"[68] but since no previous Illinois decision had given full faith and credit to extrastate tax judgments, the Illinois District Court was not bound to do so in this case.[69] Nevertheless, the language of the opinion is such that it is tantamount to a decision that the court was bound to give full faith and credit to the Wisconsin judgment.[70]

It is also of moment that this case removes the last vestige of penality from revenue laws. Under the rule in *Wisconsin v. Pelican Insurance Co.*[71] a judgment based upon a penal law is not entitled to full faith and credit. Therefore the decision in the *Milwaukee County* case that a judgment based upon a revenue law will be enforced in another state *a fortiori* removes revenue laws from the realm of penality.

Finally, not the least significant point in the case is the statement that the Court would not commit itself on the question it left open in *Moore v. Mitchell,*[72] namely, whether a court in one state must take jurisdiction of an original suit for taxes brought in one of its courts by another state.

(C) CONCLUSION

In recapitulation of the treatment which the courts have accorded extrastate revenue laws, the following conclusions are probably the most significant:

(1) Historically foreign revenue laws were not enforced because of the desire to foster trade.

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67. Mr. Justice McReynolds and Mr. Justice Butler answered "No."
68. Bradford Electric Co. v. Clapper (1932) 286 U. S. 145, 155, 52 S. Ct. 571, 76 L. ed. 1026.
69. Comment (1936) 49 Harv. L. Rev. 490.
70. Cf. Comment (1936) 84 U. of Pa. L. Rev. 526.
71. (1887) 127 U. S. 265, 8 S. Ct. 1370, 32 L. ed. 239.
72. (1930) 281 U. S. 18, 50 S. Ct. 175, 74 L. ed. 673.

(2) Although the reason for this policy has no validity where the suit is to collect a tax, particularly in our federal system, both state and federal courts have clung to this anachronistic rule.

(3) Subject to the qualifications that a fair remedy might be lacking in the forum and the possibility that the New York courts might be overburdened, the extrastate collection of taxes by original cause of action should be allowed.

(4) Whether such enforcement may at some time be required was expressly left undecided in *Milwaukee County v. M. E. White Co.*,[73] although almost uniformly the courts have so far refused it.

(5) When a revenue law has been reduced to judgment it may be enforced in another state on the principle of comity. Such a judgment, under the broad language of the *Milwaukee County* case, may possibly be entitled to full faith and credit. That case may well be said to offer new hope to the apostles of uniform vested rights.

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73. (1935) 296 U. S. 268, 56 S. Ct. 229, 80 L. ed. 220.