NOTES

EXTRASTATE ENFORCEMENT OF REVENUE CLAIMS — Constant judicial reiteration of the rule that one state will not enforce the revenue laws of another, bred of a reason that is non-existent between free trade states, has been an insuperable barrier for a state to collect a tax validly imposed upon one within its borders who has physically removed himself and his attachable property therefrom, either with or without the motive of evading the tax. Although a state is empowered to impose a franchise tax upon a foreign corporation for the privilege of conducting its business within its confines,[1] and has been given the exclusive right to levy an inheritance tax upon intangible personalty, such as securities, located outside of the state and owned by a locally domiciled decedent,[2] these powers to tax are but futile gestures of the remnant of so-called state sovereignty so long as they are unaccompanied with the correllated power to collect. When a state pursues its just claims into a sister state, the courts of the latter repel the charge with the magic shield, "One state will not enforce the revenue laws of another". Sound reasons are never attributed. The rule suffices.

Historically, the rule finds its origin in the refusal of England to treat as illegal contracts to smuggle goods into and out of foreign states without paying an import tax, since to do so would tend to check the flow of British commerce.[3] Out of this disregard of foreign revenue laws with the aid of unfortunate *dicta*[4] appeared our present rule that the revenue laws of one state will not be enforced by the courts of another. As a consequence, in modern private international law, the rule persists.[5] The arbitrary doctrine received its first application in

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[1] Bergen Aqueduct v. State Board of Taxes & Assessments, 95 N.J.L. 486, 112 Atl. 881 (E. & A. 1921); Home Insurance Co. v. New York, 134 U.S. 594, 34 L. ed. 1025 (1890).

[2] Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 74 L. ed. 371 (1930). But when intangibles of a non-resident are taxed at their business situs the problem is the same as though the property were tangible. New Orleans v. Stempel, 175 U.S. 309, 44 L. ed. 174 (1899). See Note (1931) 44 HARV. L. REV. 1265.

[3] DICEY, CONFLICT OF LAWS (5th ed. 1932); Boucher v. Lawson, Cas. Temp. Hardwicke 85 (1735) wherein it was stated, "But if it should be laid down, that because goods are prohibited to be exported by the laws of any foreign country from whence they are brought, therefore, the parties should have no remedy or action here, it would cut all the benefit of such trade from this kingdom, which would be of very bad consequence to the principal and most beneficial branches of our trade." (1929) 29 COL. L. REV. 782.

[4] Holman v. Johnson, 1 Cowp. 341, 343 (1775); James v. Catherwood, 3 Dowl. & Ry. 190, 191 (1823); Ludlow v. Van Renssalaer, 1 Johns. Sup. Rep. 93 (1806); Henry v. Sargeant, 13 N.H. 321, 332 (1843).

[5] Queen of Holland v. Drukker, [1928] 1 Ch. Div. 877. Holland brought an action in England for inheritance taxes due from a decedent domiciled in Holland who died in England. The claim was refused.

interstate, as distinguished from international relations, in 1911[6] when the State of Maryland sought to collect a tax levied upon personalty while the defendant was a resident of that state by means of a common law action in New York. Placing a tax in the same category as a penalty,[7] the court refused to entertain the action.

Should a tax be classified with a penal law? In support of the affrmative of this proposition, a *dictum* in *Wisconsin v. Pelican Ins. Co.*[8] is oft times erroneously cited;[9] which *dictum* merely says:

> "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."

Needless to say a tax cannot be considered as falling within this definition. A penalty is punitive in its nature while a tax is a civic obligation, resting upon services rendered by the state. The only similiarity is that in both instances the state is the interested party. Some states[10] in an effort to enforce their revenue laws extraterritorially have based their claims upon the ground that a tax is contractual and therefore belongs in the category of a transitory action. This technical argument has been rejected[11] despite the fact that a tax appears to be more similar to a debt than a penalty.

Since the original reason for the refusal to enforce another state's revenue laws has no application among our free trade states, it might be well to review the objections that exist today. It has been suggested[12] that to enforce revenue laws might run counter to the settled public policy of the state in which such claims are attempted to be enforced. This contention fails to take into consideration that the principal bases for taxation, including corporate franchise and inheritance taxes, are well standardized among the American states and it will be seldom that a constitutionally imposed tax will be met with abhorrence in a sister state. If a state adopts the policy of permitting

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[6] State of Maryland v. Turner, 75 Misc. 9, 132 N.Y.S. 173 (1911).

[7] It is universal that "the courts of no country execute the penal laws of another," The Antelope, 10 Wheat. 66, 123, 6 L. ed. 268 (1825); Derrickson v. Smith, 27 N.J.L. 166 (Sup. Ct. 1858); but the reason for classifying a tax with a penalty is questioned in this discussion.

[8] 127 U.S. 265, 32 L. ed. 239 (1888).

[9] State of Maryland v. Turner, *supra* note 6; Moore v. Mitchell, 30 Fed. (2d) 600 (C.C.A. 2d 1929), *aff.* on other grounds, 281 U.S. 18 (1930).

[10] State of Maryland v. Turner, *supra* note 6; Colorado v. Harbeck, 232 N.Y. 71, 133 N.E. 357 (1921).

[11] It is true a tax is not a contract (see *infra* note 35) but statutory obligations have been deemed transitory. Loucks v. Standard Oil Co., 224 N.Y. 99, 110, 120 N.E. 198, 201 (1918). See (1929) 29 COL. L. REV. 786.

[12] L. Hand, J. concurring opinion. Moore v. Mitchell, *supra*, note 9. *Cf.* Foley, S, in Matter of Martin's Estate, 136 Misc. 51, 54, 240 N.Y.S. 393, 396 (1930), *aff.* 255 N.Y. 359, 174 N.E. 753 (1931).

suits on foreign tax claims, would this open the door to actions based on exorbitant tax measures of sister states? Such a consequence would not necessarily follow. In an extreme example suppose that the State of New York acting within its constitutional rights exacts from every non-resident automobilist a twenty-five dollar license fee for the privilege of using its highways and that the operation of a car on its roads shall be deemed equivalent to an appointment of the Secretary of State to be the non-resident's lawful attorney upon whom may be served process[18] in any action for the tax collection. New York brings suit on a thousand claims against non-residents in New Jersey courts, or judgments are first secured in New York upon which actions are brought in New Jersey. Such an occurrence is a possibility, but it is far from the realm of probability. Retaliation by New Jersey would soon bring a halt to such a tax measure. Furthermore, it would be economically unsound from New York's standpoint since the net result would be an avoidance of New York highways. Such attempts in the past to place unjust taxes on non-residents have been settled by reciprocal legislation[14] which can always be invoked when a sister state enacts radical revenue laws. Foreign tax actions have also been refused on the ground that the tax statute made no provision for such foreign suits.[15] In another case[16] despite the fact that a tax law authorized the county treasurer to bring suit outside the state it was held that he had no authority as a private citizen to collect taxes in a foreign state. These difficulties, however, can be readily obviated by statutory adjustment. It may be advanced that if revenue claims of a sister state are to be accorded recognition, it would be only consistent to permit foreign nations to prosecute their enforcement in this country. For instance, should we allow Abyssinia, Turkey, and others to bring suit on their heterogeneous tax statutes in the State of New Jersey?[17] Such a case would, no doubt, be a rarity, but it is

[18] Hess v. Pawloski, 274 U.S. 352, 71 L. ed. 1091 (1927).

[14] In 1932 Pennsylvania enacted a law (Act 47, 1932 Special Sessions) which withdrew all reciprocal privileges from vehicles transporting goods or passengers for hire on a regular schedule, and which limited to fifteen days the operation of all other commercial vehicles transporting persons or property for compensation. Up to this time New Jersey had given complete reciprocity for the entire year for all non-resident vehicles. P.L. 1921 Ch. 208, Sec. 10(4); P.L. 1932 Ch. 66, Sec. 10(4). New Jersey retaliated by withdrawing all reciprocity from Pennsylvania trucks. P.L. 1933 Ch. 8. Another act (P.L. 1933 Ch. 39) empowered the Commissioner to suspend the free operating privilege of all, a class, or a part of any class of motor vehicles registered in another state at any time that state prohibits the free operation therein of a class of motor vehicles belonging to the residents of the State of New Jersey. The net result of the "truck warfare" was an amiable settlement and compromise. OFFICE FILES OF THE COMMISSIONER OF MOTOR VEHICLES OF NEW JERSEY. This merely illustrates the practical working of reciprocal legislation. Radical tax measures if enacted on non-residents could be controlled in a similar method.

[15] Colorado v. Harbeck, *supra*, note 10.

[16] Moore v. Mitchell, 281 U.S. 18, 74 L. ed. 673 (1930).

[17] Delicate situations which could not possibly arise as between American

a matter that could be easily regulated by reciprocal treaties as in extradition for criminal offenses. State taxes, as distinguished from tax measures of foreign nations, are very similar, and therefore the courts of the sister states would not be burdened with the interpretation of strange and intricate tax laws. It would seem that the simplest ideas of comity would compel interstate recognition of a validly imposed tax of a sister state. Corners are being chipped off every day from the "firm foundation of legal precedent" to formulate more intelligent laws applicable to interstate economic and social relations.[18] No sound reason prevents the adoption of an exception to this stubborn rule of the law of conflicts. A tax is only equitable when it is fairly distributed. A rule which permits complete evasion of taxes necessarily shifts the burden on others. "An attitude which fosters and preserves this inequality is indefensible."[19] It is encouraging to note, however, that North Carolina permitted New Jersey to file a claim for a franchise tax with a receiver of its court appointed to liquidate corporate assets.[20]

Whatever reasons of doubtful merit exist for the refusal to entertain an action on a foreign tax statute, will they be eradicated when the tax claim is reduced to a judgment upon which suit is brought in a sister state? Are states bound to give full faith and credit to such a judgment? Until 1888, the United States Supreme Court in a virtually unbroken line of decisions had held that the obligation of the full faith and credit clause required judgments of a sister state to be enforced without question except, of course, where jurisdiction had not been acquired.[21] In 1888, another exception was engrafted upon the mandate of the full faith and credit clause, by a *dictum* in *Wisconsin v. Pelican Ins. Co.*[22] to the effect that judgments for penalties need not be enforced for, "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."[23] This judicial utter-

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states might conceivably develop between nations. See DICEY, CONFLICT OF LAWS (4th ed. 1927) 226.

[18] New York has enacted a reciprocal statute applicable to death taxes owed to other states and providing for their collection in New York. This act becomes operative as to domiciliaries of any state only if the law of such domiciliary state permits similar collection therein of New York taxes. N. Y. Laws c. 333, amendment enacted Mar. 21, 1932.

[19] Leflar, *Extrastate Enforcement of Penal and Governmental Claims* (1932) 46 HARV. L. REV. 193, 216.

[20] Holshouser Co. v. Gold Hill Copper Co., 138 N.C. 248, 50 S.E. 650 (1905).

[21] Christmas v. Russell, 72 U.S. 290, 18 L. ed. 475 (1866); Thompson v. Whitman, 85 U.S. 457, 21 L. ed. 897 (1873); Knowles v. Logansport Gas, Light & Coke Co., 86 U.S. 58, 22 L. ed. 70 (1873); Hanley v. Donaghue, 116 U.S. 1, 29 L. ed. 535 (1885); Renaud v. Abbott, 116 U.S. 277, 29 L. ed. 629 (1886).

[22] *Supra,* note 8.

[23] It is unfortunate that the RESTATEMENT OF THE CONFLICT OF LAWS No. 13 (American Law Institute) Proposed Final Draft No. 2 (1931), provides, "No action can be maintained on a foreign judgment which has been obtained

ance was supported by negative implication four years later in *Huntington v. Attrill.*[24] However, the definition of a penalty as laid down in both cases cannot be said to have included a tax.[25] In 1905 Justice Holmes in *Fauntleroy v. Lum*[26] dismissed the *Pelican dicta* as such and ruled that notions of public policy hostile to the original cause of action could not be set up as against a sister state judgment. Although no direct adjudication has been given on the question by the Supreme Court, some state courts have given full faith and credit to judgments recovered on penal statutes.[27] In view of the fact that the highest court has yet to place a tax into the category of a penalty[82] and considering the strict policy of recognition as evinced by *Fauntleroy v. Lum*[29] it is quite probable that the Supreme Court will hold that a revenue judgment must be given full faith and credit.

In the recent case of *New York v. Coe Manufacturing Co.*[30] New York State brought suit in New York against a New Jersey corporation for the collection of a franchise tax. Jurisdiction was obtained and judgment rendered for the State. Subsequently, the

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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 governmental interests."

[24] 146 U.S. 657, 36 L. ed. 1123 (1902). The test laid down as to what is a penalty in this case which involved the liability of a director of a corporation for false affidavit, was "whether it appears, to the tribunal which is called upon to enforce it, to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person." The court ruled that if the judgment is not for a penalty, it must be given effect in another state. This would seem, inferentially to say if the judgment was given for a penalty, enforcement was not required.

[25] *Supra,* notes 8 and 24.

[26] 210 U.S. 230, 52 L. ed. 1039 (1904), wherein the court stated, "that a judgment of a state court should have the same credit, validity, and effect in every other court in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court of the United States." As to the *Pelican dicta,* "However, the whole passage was only a *dictum* and it is not worth while to spend much time upon it."

[27] Schuler v. Schuler, 209 Ill. 522, 71 N.E. 16 (1904); State of Indiana v. Helmer, 21 Iowa 370 (1866); Healy v. Root, 28 Mass. 389 (1831); Spencer v. Brockway, 1 Ohio 259 (1824). *Contra*: Arkansas v. Bowen, 3 App. D.C. 537 (1894).

[28] The Supreme Court in Moore v. Mitchell, *supra,* note 16, refused to pass upon the question whether a federal court in one state should enforce the state revenue laws of another.

[29] *Supra,* note 26. This view is strengthened by Bradford Electric Light Co. v. Clapper, 286 U.S. 145, 76 L. ed. 1026 (1932); *cf.* Atchison, Topeka & Santa Fe Ry. Co. v. Nichols, 264 U.S. 348, 68 L. ed. 720 (1924); James-Dickinson Co. v. Harry, 273 U.S. 119, 71 L. ed. 569 (1927); Roche v. McDonald, 275 U.S. 449, 72 L. ed. 365 (1928). Moreover, it has been held that an original suit on a cause of action arising in a foreign jurisdiction would not be maintainable in local tribunals is no justification for a refusal to give full faith and credit to a suit brought on the claim after it had been reduced to a judgment. Kenney v. Loyal Order of Moose, 252 U.S. 411, 64 L. ed. 638 (1920).

[30] 112 N.J.L. 536, 172 Atl. 198 (E. & A. 1934).

State instituted suit in New Jersey to recover on the judgment. The lower court, while admitting that if this were an original suit the action could not be entertained, ruled that since the tax claim had been merged in a judgment, it was entitled to full faith and credit.[31] Impliedly the court placed a tax in the class of a penalty, but since its status was altered by the rendition of the judgment, it was accorded recognition. The *dicta* in the *Pelican* case[32] which stated that judgments for penalties need not be enforced received no explanation. The case experienced even a more graceful evasion of the fundamental question involved when presented before the Court of Errors and Appeals.[33] In affirming the lower court, the appellate body found it unnecessary to pass upon the question whether a penal judgment must be given full faith and credit, since the franchise tax was impliedly contractual in its nature and therefore not a penalty.[34] Despite the unanimity of authority[35] that a tax is not a contract nor a debt, the appellate tribunal's argument is to the effect that in return for the privilege of conducting its business in New York, the New Jersey corporation had obligated itself to pay the tax imposed. A similar

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[31] 10 N.J. Misc. 116, 162 Atl. 872 (Circ. Ct. 1932). After stating that an original action could not have been maintained, citing Colorado v. Harbeck (*supra* note 10) the court said at p. 873, "As I view this matter, the suit in this court is not for the collection of taxes, but for the collection of a judgment which is based on a tax claim, and the original character of the claim has been merged in the judgment. In so holding I am not unmindful of *Huntington v. Attrill*, 146 U.S. 657, 13 Sup. Ct. 224, nor *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 8 Sup. Ct. 1370, 32 L. ed. 239." See comment, (1933) 42 YALE L. JOUR. 1131; (1933) 18 CORNELL L. Q. 581.

[32] *Supra*, note 22.

[33] *Supra*, note 30.

[34] Justice Lloyd on p. 538 said, "In *Huntington v. Attrill, supra*, it is said that, 'Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state. The test whether a law is penal is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual.' The wrong in this case is to the state as an individual and not to the public as an injured party." This sophistical distinction, however, interesting, fails to consider the fact that assuming a state can be wronged as an individual it is in effect a wrong against the public. A state is a mere political corporation through which the public acts. A failure to pay state taxes necessarily shifts the burden on the public and the latter are thereby wronged. It is inconceivable of an instance whereby a wrong against the state "as an individual" is not in effect a wrong against the public.

[35] Baker v. East Orange, 95 N.J.L. 365, 111 Atl. 681 (Sup. Ct. 1920), *aff.* 96 N.J.L. 267, 114 Atl. 926 (E. & A. 1921) wherein the court stated, "A tax is an impost levied by authority of government. Taxes are, in legal contemplation, neither debts nor contractual obligations, but are in the strictest sense of the word, exactions." In City of Camden v. Allen, 26 N.J.L. 398 (Sup. Ct. 1857) it was said, "It (a tax) is not founded on contract or agreement. It operates *in invitum*." See Schradin v. Bealer Co., 114 N.J.Eq. 470, 168 Atl. 855 (Ch. 1933); Freeholders of Atlantic County v. Weymouth, 68 N.J.L. 652, 54 Atl. 458 (E. & A. 1903); Colorado v. Harbeck, *supra*, note 10; Meriwether v. Garrett, 102 U.S. 472, 513, 26 L. ed. 197; COOLEY, TAXATION (1924 ed.) vol. 1, §22. See cases in 41 L.R.A. (N.S.) 730, 734 (1913).

contention has been advanced in regard to inheritance taxes.[36] Ingenuity might carry this argument to any form of a tax, but the fact remains that it is mere fiction, created by the realization of the urgent need for extrastate enforcement of revenue claims. However tenuous the court's rationale may appear it is apparent that the motivating reason is to reserve the right to pass upon the merits of each tax claim in the future, instead of committing itself to a broad rule which would compel it to recognize all tax measures of a sister state however radical some may be. Although the Court of Errors and Appeals arrived at a desirable result, the *ratio decidendi* is legally most unsatisfactory and opens the door to many complications when applied to various types of taxes. To make the enforcibility of a foreign tax dependent upon whether it is contractual or not is evasive of the whole problem. The need is for the recognition of all legitimate tax liabilities, and aid should be given a sister state "unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal,"[37] regardless of the fact whether a judgment has been first rendered in the taxing state or not. Undoubtedly the only concrete solution seems to lie in the enactment of reciprocal state legislation.[38] Definite rights can then be established without the need of awaiting for an uncertain judicial pronouncement based upon fictions[39] created to justify the desired result.

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[36] Colorado v. Harbeck, *supra* note 10. In this case Colorado sought to collect an inheritance tax by an action against the legatees in New York. The deceased was domiciled in Colorado, but all his property was in New York. Colorado's contention was to the effect that the privilege of taking property of a decedent by will or descent is a creature of law, and can be conditioned as the law pleases, so that one who accepts such a privilege from the law must assent to all the conditions, including the payment of whatever taxes the sovereign has chosen to impose. To this the court said, "It is urged that the legatee becomes liable to pay the tax upon an implied contract when he accepts the legacy under the will of a resident of Colorado, and that he may be sued in the courts of another state wherever jurisdiction of the person may be obtained. But taxes are not debts or contracts. No contractual or quasi contractual obligation to pay arises out of the assessment of a tax."

[37] Loucks v. Standard Oil Co., *supra* note 11, wherein Cardozo, C. J. says, "A foreign statute is not law in this state, but if it gives rise to an obligation, which if transtory, follows the person and may be enforced wherever the person may be found! * * * it is a principle of every civilized law that vested rights shall be protected. A right of action is property. If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. Similarity of legislation has indeed this importance; its presence shows beyond question that the foreign statute does not offend local policy. But its absence does not prove the contrary * * * The courts are not free to enforce a foreign right at the pleasure of the judges to suit the individual notion of expediency or fairness."

[38] *Supra* note 18, Reciprocal death tax of New York.

[39] Besides the "contractual phase" of the case, it is of interest to note the court's language concerning the penalties for the failure to pay the tax when due. "It is true the statute imposed certain penalties for the failure to comply with