

**ON THE ORIGINS AND EVOLUTION OF
THE REVENUE RULE:
THE QUEST FOR CERTAINTY**

DECLARATION

I, **NIALL O'HANLON**, declare that this thesis has not been submitted as an exercise for a degree at this or any other university and it is entirely my own work.

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NIALL O'HANLON

29th September 2016

To Alex the Father, Alex the Son, and Alex the Guiding Spirit
And
To Karen, who, though She may not Remember, is not Forgotten
And Who Will Always Be Loved

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TABLE OF CONTENTS

PART I – INTRODUCTION

Chapter 1 – The Revenue Rule	12
Introduction.....	12
The Historical Context.....	12
The Issues Arising.....	13
The Thesis.....	15
The Situs of the Revenue Rule within the Corpus Juris.....	17
Methodology.....	18
Structure of the Thesis.....	20

PART II – THE EXISTING LAW RELATING TO THE REVENUE RULE

Chapter 2 – The Orthodox Statement of the Revenue Rule.....	22
Introduction.....	22
The Orthodox Statement of the Revenue Rule in Dicey.....	22
Restriction of the Revenue Rule by International and European Union Measures	24
OECD Model Convention.....	24
OECD/Council of Europe Multilateral Convention.....	24
European Union Measures.....	24
The Revenue Rule and Extradition.....	27
Assistance with Regard to Evidence or Information.....	27
OECD Model Convention.....	28
OECD/Council of Europe Multilateral Convention.....	28
European Union Measures.....	28
Domestic Measures.....	29
Conclusion.....	29
Chapter 3 – The Nature and Extent of the State’s Jurisdiction to Tax.....	30
Introduction.....	30
The External Perspective.....	30
The Internal Perspective.....	35
Imposition of Taxation by Executive Order.....	35
Acts jure imperii and Acts jure gestionis.....	37
Characterisation of Actions.....	38

Commercial Characterisation.....	38
Governmental Characterisation.....	41
Conclusion.....	41
Chapter 4 – Questions of Classification.....	42
Introduction.....	42
What Constitutes a Revenue Law?.....	43
Classification of the Proceedings – Applicable Criteria.....	44
Classification of the Law – Applicable Criteria.....	45
The Approach of the Courts in Specific Instances	47
Municipal Improvement Rate.....	47
Employers’ Contributions to State Health Insurance and Family Benefits Scheme.....	47
Compulsory Hospital Insurance Scheme.....	48
Order for Costs in favour of Foreign Legal Aid Body.....	50
Order for Costs in favour of Foreign State.....	50
Order for Cost of Measures undertaken by Foreign State Agency.....	51
Levy to Finance Airport Security.....	51
Franchise Taxes.....	52
Theft of Treasury Funds.....	53
Foreign Exchange Legislation.....	54
The Appropriate Classification of Criminal Sanctions in Taxation Legislation.....	57
What Constitutes a Penal Law?.....	57
The Canadian Proceedings.....	57
The United States Proceedings.....	58
The Subsequent Case Law.....	59
Conclusion.....	64
PART III – THE REVENUE RULE: ORIGINS, EVOLUTION, TAXONOMY AND RATIONALE	
Chapter 5 – The Origins and Evolution of the Revenue Rule.....	66
Introduction.....	66
Background.....	67
Litigation between Private Parties.....	70
Simple Contracts.....	70

A Forum Contract which breaches Forum Tax Law.....	71
A Foreign Contract which breaches Forum Tax Law.....	72
A Forum Contract which breaches Foreign Tax Law.....	75
A Foreign Contract which breaches Foreign Tax Law.....	79
Contracts by Deed.....	79
The Modern Position.....	90
Transactions Violating the Revenue Law of a Foreign and Friendly State.....	95
Litigation involving a Foreign State.....	99
Impact of the Penal Law Restriction on the Development of the Revenue Rule.....	99
Direct Enforcement.....	103
Indirect Enforcement.....	112
Conclusion.....	114
Chapter 6 – The Taxonomy of the Revenue Rule.....	117
Introduction.....	117
Act of State, Revenue Rule and Sovereign or State Immunity.....	117
The Taxonomy of the Revenue Rule.....	124
Foreign Legislative Overreach.....	124
Cases in the First Category.....	125
Cases in the Second Category.....	128
Foreign Executive Overreach by Direct Action.....	133
Foreign Executive Overreach by Institution of Proceedings in the Forum Courts.....	135
Lacuna in Mann’s Framework.....	136
Commonality and Confluence of Public and Private International Law	137
Conflation of Questions of Jurisdiction and Enforcement.....	137
The Confluence of Public and Private International Law.....	139
Conclusion.....	141
Chapter 7 – The Relationship between the Revenue Rule and Sovereignty.....	143
Introduction.....	143
The United States.....	145
The Revenue Rule as between Sister States.....	146
Pre-Milwaukee.....	147
First Application of the Revenue Rule to a Sister State Tax Claim.....	147

First Application of the Revenue Rule by a Court of Last Resort.....	148
Application of the Revenue Rule at Federal Level to Sister State Tax Claims.....	149
Impact of Statutory Reciprocity Provisions.....	150
Sister State Taxes Not Entitled to Priority.....	151
Pre-Milwaukee Rejection of the Revenue Rule.....	151
The Milwaukee Decision.....	152
The Background to the Case.....	153
The Question Arising.....	153
Purpose of the Full Faith and Credit Clause.....	153
Full Faith and Credit not required for Enforcement of Sister State Tax Judgments.....	154
Post Milwaukee.....	154
The Expansive View.....	155
The Narrow View.....	158
The Culmination of Milwaukee?.....	161
Canada.....	161
The Commonwealth of Australia.....	162
The British Empire.....	165
Category (a) - A less dominant jurisdiction and the predominant state.....	167
Category (c) - The predominant state and a less dominant jurisdiction	167
The Commonwealth of Nations.....	168
The European Union.....	169
Conclusion.....	172
Chapter 8 – Rationale for the Revenue Rule.....	174
Introduction.....	174
Criticism of the Rule.....	175
The Nature of the Proceedings.....	178
The Absence of an Explicit Human Rights Rationale.....	179
Promotion of Trade – A Precursor to the Free Movement of Goods?.....	180
Revenue Laws analogous to Penal Laws.....	182
Sovereignty.....	188
Difficulties with the Sovereignty Rationale.....	190
Separation of Powers and the Jurisdiction of the Courts.....	196

Enforcement a Matter for the Legislature.....	196
Necessary Public Policy Analysis would lead the Courts into the Political Domain.....	198
Reducing Public Policy Review.....	200
Eliminating Public Policy Review.....	201
Difficulties with Separation of Powers Rationale.....	202
International Relations.....	202
Key Issues.....	204
Likelihood of a finding that Foreign Tax is contrary to Public Policy.....	204
Likelihood that Selective Refusal will Offend.....	206
The Question of State Immunity and the Converse of the Revenue Rule.....	209
The Judgment of Richardson J.....	209
The Judgment of Thomas J.....	211
Respect for the Sovereignty of the Foreign State.....	214
Public Policy.....	215
Forum Non Conveniens – Procedural or Administrative Difficulties.....	217
Refusal to Further Foreign Governmental Interests.....	222
Promotion of Reciprocity.....	224
Conclusion.....	224
PART IV – THE CONTEMPORARY OPERATION OF THE REVENUE RULE	
Chapter 9 – Functional Enforcement.....	229
Introduction.....	229
First Circuit – Criminal Proceedings – Boots.....	230
Second Circuit – Criminal Proceedings – Trapilo.....	232
Second Circuit – Civil Proceedings – R.J. Reynolds.....	232
The Dissent.....	237
Eleventh Circuit – Civil Proceedings – Philip Morris.....	239
The Supreme Court – Criminal Proceedings – Pasquantino.....	241
The Majority View.....	242
The Dissent.....	246
Commentary.....	247
Second Circuit – Civil Proceedings post Pasquantino – RJR Nabisco.....	249
New York – Civil Proceedings – Acts Jure Gestionis – Diageo.....	251

Direct Enforcement.....	252
Indirect Enforcement.....	253
International Application of RICO – Bank of New York.....	254
The Trans-Atlantic Divide – When is a Tax Claim not a Tax Claim.....	255
Conclusion.....	258
Chapter 10 – Avoidance of the Revenue Rule.....	260
Introduction.....	260
In Personam.....	269
What Provision is there for Extradition by the Forum?.....	261
What Provision is made for Extradition in respect of Revenue Offences?.....	262
Extradition arrangements silent as respects Revenue Offences.....	263
Extradition for Revenue Offences Prohibited.....	266
The Statutory Definition of a Revenue Offence.....	266
Monetary Compensation Amounts Not Taxes for Purposes of the 1965 Act.....	267
Offences in Connection with Taxes Distinguished from Offences with a Tax Connection	268
In Rem.....	270
Ad Informandum.....	278
Conclusion.....	281
Chapter 11 – The Revenue Rule: Probate and Trusts.....	283
Introduction.....	283
Testamentary Intention.....	284
Court will not require “Export” of Assets Solely to Pay Foreign Taxes.....	288
Foreign Procedures Designed to Ensure Tax Collection will not be Upheld.....	291
Foreign Tax Law and Forum Trust Law.....	293
The Revenue Rule: Beneficiaries and Fiduciaries.....	294
Conclusion.....	310
Chapter 12 – The Revenue Rule and Transnational Insolvencies.....	311
Introduction.....	311
Transnational Insolvencies – The Issues Arising.....	312
Council Regulation 1346/2000 on Insolvency Proceedings.....	314
Re Cedarlease.....	314
The UNICTRAL Model Law on Cross-Border Insolvency.....	315

Territorialism.....	316
Moving Beyond Territorialism.....	318
The Sefel Case.....	318
The Oygevault Case.....	323
The Matol Case.....	325
Personal Insolvencies.....	327
Conclusion.....	329
PART V – CONCLUSION	
Chapter 13 – The Future of the Revenue Rule.....	330
Glossary.....	332
Bibliography.....	333
Table of Cases.....	335
Table of Constitutional Provisions.....	345
Table of Legislation.....	346
Table of Delegated Legislation.....	349
Table of European Union Measures.....	350
Table of International Conventions.....	351

PART I – INTRODUCTION

Chapter 1 – The Revenue Rule

Introduction

- 1.1** The rationale underlying the prohibition on the enforcement, by the forum, of foreign tax claims or judgments, otherwise known as the Revenue Rule,¹ and the uncertainties pertaining to its origins, taxonomy and scope are the subjects of this thesis. Whilst the Rule has been subject to modification by international agreement, supra-national measures and domestic legislation, it displays a continuing vitality which is consistent with the on-going use of taxation policy by states as a means of securing advantages over their neighbours. Thus, far from being an obscure legal doctrine of interest only from the perspective of a black letter analysis it raises matters that go to the heart of international relations.
- 1.2** This Chapter sets out the historical context in which the Revenue Rule emerged, issues arising in relation to the Rule, the thesis advanced, the relationship of the Revenue Rule to the Law generally, the methodology utilised in the conduct of research and the structure of the thesis.

The Historical Context

- 1.3** The 1770's were a pivotal period in relation to taxation. The decade marked a turning point in a long running dispute pertaining to attempts by Britain to impose taxation upon her American colonists. In 1775 the first shots were fired in what was to become the American Revolutionary War followed, in 1776, by the signing of the Declaration of Independence.

¹ The District Court in *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson* 433 F.Supp. 410 (D. Or. 1977), *aff'd*, 597 F.2d 1161 (9th Cir. 1979) coined the term “revenue rule” *per* Farnam, *Racketeering, RICO and the Revenue Rule in Attorney General of Canada v. R.J. Reynolds: Civil RICO Claims for Foreign Tax Law Violations*, 77 Washington Law Review, 843, at 851, fn. 81, (2002). More recently the term was adopted by the English High Court in *Commissioners for Her Majesty's Revenue and Customs v. Ben Nevis (Holdings) Ltd.* [2012] EWHC 1807 (Ch), at paragraph 16.

- 1.4 However, there are other reasons why these two years are significant from a taxation perspective. 1776 saw the publication of *The Wealth of Nations*² in which Adam Smith set out his four canons of taxation,³ namely equality, convenience of payment, economy of collection and certainty; in 1775 fellow Scot Lord Mansfield, held, in *Holman v. Johnson*,⁴ that “no country ever takes notice of the revenue laws of another.”
- 1.5 Lord Mansfield’s dicta evolved into a prohibition on the enforcement, by the forum, of foreign tax claims or judgments and is a long-standing feature of common⁵ and civil⁶ law systems. The Rule forms part of a broader prohibition on the enforcement of penal and other public laws.⁷

The Issues Arising

- 1.6 The rationale for the Rule is frequently said to be rooted in considerations of sovereignty and the assertion that the enforcement of a foreign tax claim is contrary to all concepts of independent sovereignties. This, in turn, raises questions relating to the nature and extent of a (foreign) state’s power to impose taxation and how it can be said that the act of a foreign state submitting to the jurisdiction of the forum’s courts constitutes an encroachment upon the sovereignty of the forum.
- 1.7 The advancement of sovereignty as a rationale for the Rule also invites a consideration of the extent to which the Rule applies in the context of federal states and supra-national regional organisations, in particular the European Union. Arguably it follows that if the sovereignty rationale does possess explanatory power a diminution in the importance of

² *An Inquiry into the Nature and Causes of the Wealth of Nations*. Edited by Edwin Cannan. Chicago: University of Chicago Press, 1976. Available online at: <http://www.econlib.org/library/Smith/smMS.html>.

³ Book V, Chapter II, Part II.

⁴ (1775) 1 Cowp. 341, 98 E.R. 1120.

⁵ Ireland, *Buchanan v. McVey* [1954] I.R. 89; England, *Government of India v. Taylor* [1955] AC 491; Canada, *United States of America v. Harden* 41 D.L.R. (2d) 721; Australia, *Permanent Trustee Company (Canberra) Ltd. v. Finlayson* (1967) 9 FLR 424; New Zealand, *Connor v. Connor* [1974] 1 NZLR 632; South Africa, *Commissioner of Taxes, Federation of Rhodesia v. McFarland* 27 SATC 15, 1965 (1) SA 470 (W); Hong Kong, *Her Majesty’s Revenue & Customs v. Shahdadpuri* [2012] 1 HKLRD 223; Singapore, *Relfo Ltd. (in liquidation) v. Varsani* (2008) 11 ITLR 783; India, *Viswanathan v. Wajid* 1963 AIR 1, 1963 SCR (3) 22; United States of America, *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson* (1979) 597 F. 2d 1161.

⁶ Scotland, *Metal Industries (Salvage) Limited v. Owners of the S.T. “Harle”* 1962 S.L.T. 114; Louisiana, *Kohn v. Renaissance* (1850) 5 La. Ann. 25, 1850 WL 3925 (La.), 52 Am. Dec. 577; France, the authorities referred to in *Government of India v. Taylor* [1955] AC 491 and *QRS 1 ApS v. Fransden* [1999] 1 W.L.R. 2169.

⁷ Dicey, Morris & Collins, *The Conflict of Laws* (14th ed.), Vol. 1, Rule 3, para. 5R-019, p. 100.

the Rule will be apparent in circumstances where there has been a pooling of sovereignty.

- 1.8** Considerations of sovereignty also give rise to questions of taxonomy; although the Rule is generally to be found in expositions of private international law it has been argued that it actually forms part of public international law. That being said, the significance of the taxonomy of the Rule is open to question in light of the increasing convergence, in the view of some commentators, of public and private international law. The relationship of the Revenue Rule to the doctrine of sovereign immunity and the act of state doctrine is also considered.
- 1.9** Inevitably, as with any legal proposition, questions of classification arise; in particular, what constitutes a revenue law⁸ for the purposes of the Rule and the extent to which the common law answer to that question has been impacted upon by statutory developments. Further, the Rule sits within a broader prohibition that encompasses penal laws; however, the distinction between revenue and penal laws is marked less by a sharp boundary and more by a grey penumbra.
- 1.10** The origins of the Revenue Rule are also subject to uncertainty. Although *Holman v. Johnson* is frequently cited as the starting point for the Rule, an examination of the jurisprudence and the literature reveals that the claims made on its behalf are not uncontested.
- 1.11** Further, whilst the evolution of the Revenue Rule across a range of common law jurisdictions is broadly consistent, it is, unsurprisingly, not free from contradictions. What can be said is that the Rule has a broad sweep in that it is apparent that the courts, in prohibiting both direct and indirect enforcement, have adopted a *substance over form* approach. That is not to say, *Holman v. Johnson* notwithstanding, that the recognition of a foreign revenue law is prohibited but this in turn gives rise to difficulties in satisfactorily distinguishing between recognition and indirect enforcement.

⁸ In this thesis the terms revenue law, tax law and tax (or taxation) legislation are taken to have the same meaning and are used interchangeably.

- 1.12** Notwithstanding its antiquity, and the extent to which it has been modified by international agreements, supra-national measures and domestic legislation, the Revenue Rule enjoys continued vitality, most especially at federal level in the United States, where the Courts have extended the prohibition from *direct* and *indirect* enforcement to encompass what they have defined to be *functional* enforcement.
- 1.13** Whilst the Revenue Rule operates broadly in terms of prohibiting *in rem* remedies, further clarification on the extent of the Rule has come from cases in which there have been attempts to secure *in personam* remedies, in particular extradition, and remedies securing the co-operation of the forum courts in obtaining evidence for the purpose of legal proceedings in the foreign state.
- 1.14** As noted earlier, the distinction between recognition and enforcement is doctrinally problematic, however the reason for the persistence of this distinction becomes apparent when the Revenue Rule is considered in the context of probate, trusts, contracts and transnational insolvencies and lies in the unwillingness of the Courts to allow the application of the Rule to adversely affect the interests of private parties. Developments in the area of transnational insolvencies in particular offer both a further challenge to the sovereignty rationale for the Revenue Rule and a way to address the concerns that lie at its core.

The Thesis

- 1.15** The thesis of this work is that the orthodox statement⁹ of the Revenue Rule, namely that whilst forum courts may recognise a foreign tax law, they will not enforce it, does not meet the criterion of certainty advanced by Adam Smith in his canons of taxation. Uncertainties arise in relation to; the origins, taxonomy and extent of the Rule; what the courts will regard as constituting a revenue law; the distinction between revenue and penal laws; the purported distinction between recognition and enforcement of foreign revenue law, and; what constitutes the rationale for the Rule.

⁹ As to which see **Chapter 2**.

1.16 This work, with a view to reducing the aforementioned uncertainties, examines the origins, evolution¹⁰ and taxonomy¹¹ of, and the rationale¹² for, the Revenue Rule and, in light of that examination, advances a revised statement of the Rule, specifically that:

A forum court will not, absent evidence of reciprocity on the part of the courts of a foreign state,¹³ enforce a revenue claim¹⁴ of that state, except where not to do so would adversely affect the interests of private parties,¹⁵ even when, as a consequence of so doing, such enforcement advances the interests of that foreign state: Further, whilst a forum court will not impose sanctions for the breach of foreign revenue law, except where forum legislation makes provision for penalties for such act or omission,¹⁶ neither will it sanction such breach.¹⁷

1.17 In seeking to bring clarity to the various aspects of the Revenue Rule, it is necessary to directly address the core issue of rationale and the contention that the best explanation of the theoretical basis for the Rule lies in considerations of sovereignty. In particular, it will be argued that whilst the power of a state to impose taxation is recognised to be an attribute of sovereignty,¹⁸ it does not follow that the enforcement, by the forum, of a foreign revenue law, is contrary to all concepts of independent sovereignties. Further, the assertion that sovereignty is the basis for the Revenue Rule provides a testable (and tested) hypothesis, in that the importance of the Rule should be diminished in circumstances where states have pooled their sovereignty.

1.18 The thesis will advance an alternative conceptual framework which will not only provide a more compelling account of the rationale for the Revenue Rule but will also address

¹⁰ **Chapter 5.**

¹¹ **Chapter 6.**

¹² **Chapters 7 and 8.**

¹³ *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson* (1979) 597 F. 2d 1161, see **Chapter 5.**

¹⁴ A tax claim may be either adjudicated, that is, reduced to judgement in the courts of the foreign state, or unadjudicated.

¹⁵ *Buchanan v. McVey* [1954] I.R. 89, see **Chapter 5.**

¹⁶ *Pasquantino v. United States* 336 F.3d 321 (4th Cir. 2003), 544 U.S. 349, 125 S.Ct. 1766 (2004), see **Chapter 9.**

¹⁷ *Reggazzoni v. K C Sethia (1944) Ltd* [1956] 2 Q.B. 490, [1958] AC 30, see **Chapter 5.**

¹⁸ Beale, *Jurisdiction to Tax*, 32 Harvard Law Review, 587, (1918-1919); *George Cook (US) v. United Mexican States* UN Rep Vol IV 593, at 595 (1930) cited in O'Connell, *International Law*, (2nd ed. 1970), Vol. 2, page 715.

some of the doctrinal difficulties attendant upon current explanations of its operation and suggest the circumstances in which the Rule ought not be applied by the Courts.

The Situs of the Revenue Rule within the Corpus Juris

- 1.19** The formulation of the Revenue Rule advanced in this thesis represents a break from orthodoxy in part because it discards what will be seen to be the problematic distinction between recognition and enforcement.¹⁹ However, the thesis does not challenge orthodoxy insofar as the Revenue Rule (to the extent that it may be said to form part of private international law)²⁰ is located alongside the categories of penal and other public laws nor does it examine the recognition/enforcement distinction as it applies to those other categories; these are tasks for another day.
- 1.20** Further, although the term, the Revenue Rule, suggests a connection with tax law, there are important differences arising between the Rule and the law pertaining to taxation, including the fact that; tax law is concerned with forum taxation as opposed to foreign taxes, and; tax law is a creature of statute whereas the Rule has its origins in court decisions.
- 1.21** Although there are *dicta* to the effect that the courts do not have jurisdiction, by reference to the doctrine of the separation of powers,²¹ (thus suggesting that there is a constitutional law underpinning to the Revenue Rule) to enforce foreign tax claims, the formulation of the Rule advanced herein implicitly contradicts such an assertion by recognising that there are circumstances in which a foreign tax claim may be enforced by a forum court. Authority for this formulation comes from clear statements, both from the United States Supreme Court and from the House of Lords, that the Rule does not go to jurisdiction.²²
- 1.22** A question that arises is how the formulation of the Revenue Rule, advanced herein, fits within the orthodox framework of private international law, in terms of (i) rules

¹⁹ As to which see **Chapter 5**.

²⁰ As to which see **Chapter 6**.

²¹ See the discussion in **Chapter 8**.

²² See the discussion in **Chapter 8, para. 8.165**.

concerning the jurisdiction (competence) of forum courts, (ii) rules concerning the law applicable to a claim or issue before a forum court, and (iii) rules concerning the recognition and enforcement of foreign judgments. As will become apparent from the examination conducted in Chapter 5, the courts adopt a form over substance approach in applying the Revenue Rule and for these purposes they do not distinguish between adjudicated and unadjudicated tax claims; the reduction to judgment of a foreign tax claim in a foreign court, prior to the institution of enforcement proceedings in the forum, does not circumvent the operation of the Rule. Accordingly, the recognition and enforcement of judgments follows the treatment of unadjudicated tax claims. As discussed in the preceding paragraph, the Revenue Rule does not go to the jurisdiction of the forum court. Accordingly, the view taken in this thesis is that the Rule, as formulated herein, comes within the category of choice of law. The suggestion of Briggs that the prohibition on enforcement ought to re-formulated as providing that revenue claims are governed by the *lex fori* are considered but ultimately rejected for reasons which Briggs himself advances.²³

- 1.23** The relationship of the Rule the concepts of state immunity and foreign act of state is considered at length in Chapter 6 wherein it is concluded that there is a public international law dimension to the Rule.

Methodology

- 1.24** Following identification of the thesis to be advanced and defended, research was carried out in *four* distinct stages.
- 1.25** The *first stage* consisted, where there was sufficient material, of parallel historical examinations, dating from 1729 in the earliest case, of the jurisprudence relating to the Revenue Rule in a range of common law jurisdictions, namely Ireland, England, the United States, Canada, Australia, New Zealand and South Africa. Individual cases from Hong Kong, Singapore and India were also examined. In addition, the Scottish jurisprudence and an early case from the State of Louisiana was examined.

²³ See Chapter 9, para. 9.66 and 9.67.

- 1.26** The *second stage* consisted of a comprehensive review of the jurisprudence gathered from each of the aforementioned jurisdictions and a re-organisation of the material from an historical and geographical to a thematic basis. The themes thus identified determined the chapter structure of the thesis. The thematic examination of the materials considered the extent to which the evidence supported the thesis that; *firstly*, the Revenue Rule is characterised by uncertainty in relation to its origins and extent; *secondly*, there are uncertainties in relation to the distinction between revenue and penal laws and in relation to what constitutes a revenue law, and; *thirdly*, there are doctrinal uncertainties arising from the *recognition/enforcement dichotomy*.
- 1.27** The *third stage* comprised the literature review and it included extensive materials, dating from 1919 onwards, from the United States. It also included materials from the United Kingdom and other common law jurisdictions. The results of the literature review were incorporated across the work but were of especial importance in the consideration of the rationale for the Revenue Rule given the paucity of discussion of this topic in the jurisprudence. Again, this examination was conducted with a view to ascertaining to what extent the evidence could be said to support the thesis that the rationale for the Revenue Rule was characterised by uncertainty.
- 1.28** The *fourth stage* involved the testing of two hypotheses, *firstly*, that the Revenue Rule forms part of public international law, not private international law, and, *secondly*, that there is a direct relationship between the Rule and sovereignty, and; the writing up of the results of the research undertaken. This stage examined the evidence in support of the thesis that the taxonomy of the Revenue Rule is characterised by uncertainty and also the evidence in support of the proposition advanced by some courts and commentators, that the best explanation for the Rule is sovereignty.
- 1.29** The *fifth stage* involved the writing up of the research undertaken in the four research stages and included a consideration of emerging trends in the jurisprudence relating to the Revenue Rule, with particular reference to the area of transnational insolvencies.

Structure of the Thesis

- 1.30** Apart from the introductory remarks contained in this Chapter, the thesis comprises four parts. **Part II**, which is primarily descriptive, *reviews the existing law* in relation to the Revenue Rule and comprises **Chapter 2**, which sets out the orthodox statement of the Rule and the extent to which it has been modified by supra-national agreements and legislation; **Chapter 3** which considers the *nature* of the State's jurisdiction to impose taxation and the uncertainties that have arisen, in both the jurisprudence and the literature, in relation to the *extent* of this jurisdiction, and; **Chapter 4** which considers *problems of classification*, in particular what constitutes a revenue law, and the approach of the courts to the question of the appropriate classification of criminal provisions in taxation legislation.
- 1.31** **Part III** *critically analyses*; in **Chapter 5**, the *evolution* of the Revenue Rule across a range of common law jurisdictions, the question of what case or cases can be said to constitute the *origin* of the Rule and the problems associated with the *recognition/enforcement dichotomy*; in **Chapter 6**, the *taxonomy* of the Rule; specifically, whether it forms part of public international law or private international law; in **Chapter 7**, whether the *relationship* between sovereignty and the Revenue Rule is *one-sided*, and whether, whilst it has been argued that a departure from the Rule would constitute a derogation from sovereignty, derogations from sovereignty result in a diminution of the Rule, and; in **Chapter 8**, the *rationale* for the Revenue Rule.
- 1.32** **Part IV** *examines* the operation of the Revenue Rule in light of the analysis conducted in **Part III**. In particular, **Chapter 9** considers the *functional enforcement test*, developed by federal courts in the United States, and notes what appears to a trans-Atlantic divide on this issue; **Chapter 10** considers the extent to which *avoidance* of the operation of the Revenue Rule is possible through the pursuit of alternative remedies and proposes a new term *ad informandum*,²⁴ to stand alongside the terminology of *in personam* and *in rem*; **Chapter 11** examines the judge-made *exceptions* to the operation of the Revenue Rule in the context of trusts and probate, and; **Chapter 12** examines

²⁴ *Ad informandum* – for information.

developments in the law relating to transnational insolvencies and how such developments further call into question the sovereignty rationale for the Rule.

1.33 **Part V** comprises a single chapter and offers some *concluding observations*.

PART II THE EXISTING LAW RELATING TO THE REVENUE RULE

Chapter 2 – The Orthodox Statement of the Revenue Rule

Introduction

- 2.1** This thesis entails an examination of the development of the common law, insofar as it relates to the Revenue Rule. Such examination does not, by definition, culminate in an exposition of the current state of the Rule, insofar as change has been brought about by treaty or legislation. Instead, the orthodox statement of the Revenue Rule – with particular reference to the position in Ireland – is set out in this Chapter, taking into account the impact of treaties, European Union measures and legislation, enacted, either to give domestic effect to the State’s obligations in international law, or to transpose EU measures into national law. The review of international and EU measures is not confined to those designed to facilitate co-operation amongst states in relation to tax collection *per se*, it also includes a consideration of measures pertaining to extradition and the exchange of information.
- 2.2** The orthodox statement of the Revenue Rule is set out, not only for the sake of completeness, but also to illustrate the relationship between legislative changes and common law refinements of the Rule. In the succeeding chapters will be seen the extent to which the courts have been willing to move away from the Revenue Rule in light of legislative developments,²⁵ the degree to which they have adhered to the Rule notwithstanding such changes²⁶ and the circumstances in which legislative intervention appears to have been unnecessary in the first instance.²⁷

The Orthodox Statement of the Revenue Rule in Dicey

- 2.3** The Revenue Rule, insofar as it concerns what is commonly referred to as enforcement, operates in circumstances where a foreign State seeks, by means of court proceedings in the forum, directly or indirectly, to collect tax from an individual whose assets are within

²⁵ See **Chapter 12, paragraph 12.9** *et seq.*

²⁶ See **Chapter 9** which discusses the concept of *functional enforcement*.

²⁷ See **Chapter 10, paragraph 10.55** *et seq.*

the jurisdiction of the forum. It is frequently, though not invariably,²⁸ the case that the individual is not amenable to the jurisdiction of the foreign State.²⁹

- 2.4** The orthodox statement of the Revenue Rule is set out in *Dicey*,³⁰ within a broader proposition relating to the exclusion of foreign law:

“English courts have no jurisdiction to entertain an action:

- (1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state; or*
- (2) founded upon an act of state.”*

- 2.5** The prohibition, *per Dicey*,³¹ extends to foreign tax claims that have been reduced to judgment:

“... a foreign judgment in personam ... may be enforced ... if the judgment is

- (a) for a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); ...”*

- 2.6** The Rule, which does not distinguish between extraterritorial *imposition* of tax and extraterritorial *collection* or *enforcement* of same,³² is concerned with *substance over form* in that it prohibits the enforcement, direct or indirect,³³ of foreign tax claims or judgments. The prohibition on indirect enforcement has been extended by recent United States jurisprudence to encompass the concept of *functional enforcement*.³⁴

²⁸ In *Bullen v. Her Majesty's Government of the United Kingdom* 553 So. 2d 1344 (Fla. App. 1989) the foreign sovereign successfully sought receiving orders against the appellants, who had been convicted and imprisoned in the United Kingdom, in respect of property situated in Florida.

²⁹ Cases in this area frequently involve parties who are either deceased or who have removed themselves from the jurisdiction of the taxing State.

³⁰ Dicey, Morris & Collins, *The Conflict of Laws* (14th ed.), Vol. 1, Rule 3, para. 5R-019, p. 100.

³¹ Dicey, Morris & Collins, *The Conflict of Laws* (14th ed.), Vol. 1, Rule 35 (1), para. 14R-018, p. 574.

³² *Moore v. Mitchell* (1929) F.2d. 600, at 602.

³³ *Buchanan v. McVey* [1954] IR 89, in which the Scottish Revenue attempted to indirectly enforce a tax claim through the appointment of a liquidator who thereafter sought the assistance of the Irish High Court.

³⁴ See **Chapter 9**.

2.7 However, the Revenue Rule does not prohibit, the recognition,³⁵ in certain circumstances, of foreign revenue law nor does it sanction the breach of the revenue laws of a friendly foreign state.³⁶

Restriction of the Revenue Rule by International and European Union Measures

2.8 A variety of international and regional measures restrict the operation of the Revenue Rule.

OECD Model Convention

2.9 Article 27 of the Organisation for Economic Co-Operation and Development Model Convention with respect to Taxes on Income and Capital³⁷ provides that Contracting States shall lend assistance to each other in the collection of revenue claims. A revenue claim means an amount owed in respect of taxes, of every kind and description, imposed on behalf of the Contracting States, as well as interest, administrative penalties and costs of collection or conservancy related to such amount. Article 27 also provides that proceedings with respect to the existence, validity or the amount of a revenue claim of a Contracting State shall not be brought before the courts or administrative bodies of the other Contracting State.

OECD/Council of Europe Multilateral Convention

2.10 The OECD and Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters³⁸ provides for assistance in recovery of taxes. It also deals with the service of documents and it can facilitate joint audits.

European Union Measures

2.11 European Union measures³⁹ provide for mutual assistance in the field of recovery of tax claims.⁴⁰ The necessity for such specific measures is illustrated by *QRS I ApS v.*

³⁵ *Buchanan v. McVey* [1954] IR 89, at 99. See **Chapter 5**.

³⁶ *Reggazzoni v K C Sethia (1944) Ltd* [1958] AC 301.

³⁷ Model Tax Convention (Condensed Version) OECD 2014. Hereafter the O.E.C.D. Model Convention.

³⁸ OECD and Council of Europe (2011), *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol*, OECD Publishing. <http://dx.doi.org/10.1787/9789264115606-en>.

³⁹ European Union and other measures which modify the operation of the Revenue Rule in the context of transnational insolvencies are considered separately in **Chapter 12**.

⁴⁰ Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures OJ L 84, 31.3.2010, p.1, transposed into Irish law by Statutory Instrument No. 643 of 2011 European Union (Mutual Assistance for the Recovery of Claims relating to Taxes,

Fransden,⁴¹ where the Court of Appeal was required to consider, *inter alia*, whether the authorities on indirect enforcement survived the United Kingdom's implementation of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

- 2.12** The first paragraph of article 1 of the Convention provides: “*This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.*” The first issue arising was whether the claim which the plaintiffs sought to advance was a revenue matter within the meaning of article 1.
- 2.13** In answering that question in the affirmative Simon Brown L.J. noted⁴² that there was no definition of “revenue matters” in the Convention and no decision of the European Court of Justice bearing on the point. The Court posed the question as to what would the original member states regard as revenue matters for this purpose.
- 2.14** It was argued that indirect claims were not excluded. The difficulty with this argument was that it implied that *Buchanan v. McVey*⁴³ was wrongly decided and that the courts of other member states, unlike the House of Lords, would so regard it. The Court stated that nothing in the foreign jurisprudence or commentaries supported such a view.
- 2.15** The Court noted⁴⁴ that in *Bemburg v. Fisc de la province de Buenos Aires*⁴⁵ the French court had refused letters rogatory⁴⁶ and, commenting approvingly on the decision Professor Mazeaud had observed:

Duties and Other Measures) Regulations 2011, and Commission Implementing Regulation (EU) No 1189/2011 of 18 November 2011 laying down detailed rules in relation to certain provisions of Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures OJ L 302, 19.11.2011, p.16.

⁴¹ [1999] 1 W.L.R. 2169.

⁴² *Ibid*, at 2174.

⁴³ [1954] IR 89.

⁴⁴ *Ibid*, at 2175.

⁴⁵ 24th February, 1949; Tribunal de la Seine, Semaine Juridique, 1949, II, 4816.

⁴⁶ Documents making a request through a foreign court to obtain information or evidence from a specified person within the jurisdiction of that court.

“It is a rule now well established of our law and of international custom that besides treaties, in tax matters everyone is master in his own state and the authority of each individual state does not go beyond its own frontiers. This applies to all areas of tax such as the amount that will be taxed, the recovery of taxes, the levying of individual taxes, and fines ... It may be considered that this line of thinking is obsolete, but it still remains anchored within us that we will not permit the presence in our country of foreign tax men, even if represented by intermediaries; we do not tolerate that any help may be given to them.”

2.16 The Court observed that the same approach was reflected in Professor Batiffol’s *Droit International Privé*,⁴⁷ which included⁴⁸ a footnoted reference to *Héritiers Vogt v. Feltn*,⁴⁹ a decision going significantly further than *Buchanan* in the prohibition of indirect enforcement. The court there refused to allow the plaintiff, whose shares had been seized and sold by the German government in Alsace in 1918 to discharge a tax liability, to recoup from the defendant his share of the original debt. The Court stated that whether, as the note to the report suggested, the *Vogt* decision went perhaps too far, did not matter for present purposes. There was no reason to doubt that the rule in France was just as fundamental and far reaching as in England and that it was rightly described in both jurisdictions as a rule of international application. The Court added that it had been shown no contrary jurisprudence from any other member state.

2.17 It had been suggested⁵⁰ that the Revenue Rule, insofar as it related to indirect enforcement, was a product of its times and no longer to be regarded as sound, least of all in a Community law context. The Court stated that there was nothing to this argument; that unsurprisingly counsel had been unable to formulate satisfactory limits to the Rule’s application, whether temporal or territorial. The Court concluded⁵¹ that the claims in this case plainly fell within the compass of revenue matters as that expression would be understood by all member states for the purposes of article 1 of the Convention.

⁴⁷ 7th ed. (1981).

⁴⁸ *Ibid*, at p. 295.

⁴⁹ 3 July, 1926, Cour de Cassation de France.

⁵⁰ *Ibid*, at 2176.

⁵¹ *Ibid*, at 2177.

The Revenue Rule and Extradition

- 2.18** It would appear to be the case at common law that extradition in respect of revenue offences is not permitted. In an Irish context, Kingsmill Moore J., speaking in relation to extradition proceedings, stated⁵² that it was undoubted law at that time, and it was also the law before 1922, that the courts of England and Ireland would not lend their aid to the enforcement of the fiscal laws of another country, either directly or indirectly.
- 2.19** The Extradition Act 1965⁵³ gave statutory force to this prohibition and, in doing so, defined what constituted a revenue offence in very wide-ranging terms.⁵⁴ However, the prohibition was modified by the Extradition (European Union Conventions) Act 2001⁵⁵ and the Criminal Justice (Theft and Fraud) Offences Act 2001.⁵⁶ In addition, section 38 of the European Arrest Warrant Act 2003⁵⁷ deals with revenue offences and restricts the circumstances in which the surrender of a person shall be refused. Further, the Criminal Justice (Mutual Assistance) Act 2008⁵⁸ provides for the giving of assistance to designated states in relation to a variety of offences, including revenue offences.

Assistance with Regard to Evidence or Information

- 2.20** The House of Lords has held⁵⁹ that the Revenue Rule does not preclude the courts of the forum state giving assistance in procuring evidence for the purpose of enforcing foreign revenue law in a foreign jurisdiction. In addition, a variety of measures exist to facilitate co-operation in this area.

⁵² *The State (Hully) v. Hynes* (1961) 100 I.L.T.R. 145, at 166.

⁵³ No. 17 of 1965. Section 13 thereof provided that extradition would not be granted for revenue offences.

⁵⁴ Section 3(1) of the Act provides that, “*revenue offence*”, in relation to any country or place outside the State, means an offence in connection with taxes, duties or exchange control but does not include an offence involving the use or threat of force or perjury or the forging of a document issued under statutory authority or an offence alleged to have been committed by an officer of the revenue of that country or place in his capacity as such officer.

⁵⁵ No. 49 of 2001. Section 13 thereof provides that extradition shall not be granted for revenue offences unless the relevant extradition provisions otherwise provide.

⁵⁶ No. 50 of 2001. Section 47 thereof provides for extradition in respect of certain offences against the European Communities or money laundering notwithstanding section 13 of the 1965 Act.

⁵⁷ No. 45 of 2003.

⁵⁸ No. 7 of 2008.

⁵⁹ *In re Norway’s Application (Nos. 1 & 2)* [1990] 1 A.C. 723. See **Chapter 10** for a discussion of the case.

OECD Model Convention

- 2.21** Article 26 of the O.E.C.D Model Convention⁶⁰ provides that the competent authorities⁶¹ of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of the Convention or to the administration or enforcement of the domestic laws concerning taxes, of every kind and description, imposed on behalf of the Contracting States.

OECD/Council of Europe Multilateral Convention

- 2.22** The OECD and Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters⁶² provides for the exchange of information on request, spontaneously and automatically.

European Union Measures

- 2.23** Perhaps the single most significant European Union measure is the Savings Directive.⁶³ In addition, European Union measures⁶⁴ provide for administrative cooperation in the field of value added tax,⁶⁵ excise⁶⁶ and direct taxation.⁶⁷

⁶⁰ Model Tax Convention (Condensed Version) OECD 2014.

⁶¹ Article 3 (f) makes provision for the definition of what constitutes a competent authority. This will generally be the revenue authority of a Contracting State.

⁶² OECD and Council of Europe (2011), *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol*, OECD Publishing. <http://dx.doi.org/10.1787/9789264115606-en>.

⁶³ Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments OJ L 157, 26.6.2003, p.38.

⁶⁴ European Union and other measures which modify the operation of the Revenue Rule in the context of transnational insolvencies are considered separately in **Chapter 12**.

⁶⁵ Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combatting fraud in the field of value added tax (recast) OJ L268, 12.10.2010, p. 1.

⁶⁶ Council Regulation (EC) No 2073/2004 of 16 November 2004 on administrative cooperation in the field of excise duties OJ L359, 4.12.2004, p. 1, and Council Directive 2004/106/EC of 16 November 2004 amending Directives 77/779/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, certain excise duties and taxation of insurance premiums and 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products OJ L359, 4.12.2004, p. 30.

⁶⁷ Council Directive 2014/107/EU of 9 December 2014 OJ L 359, 16.12.2014, p.1, (transposed into Irish law by Statutory Instrument No. 609 of 2015 Mandatory Automatic Exchange of Information in the Field of Taxation Regulations 2015) amending Council Directive 2011/16/EU of 15 February 2011 as regards mandatory automatic exchange of information in the field of taxation which latter Directive repealed Directive 77/799/EEC OJ L 64, 11.3.2011 p.1, and which was transposed into Irish law by Statutory Instrument No. 549 of 2012 European Union (Administrative Cooperation in the Field of Taxation) Regulations 2012.

Domestic Measures

- 2.24** On the 21st of December, 2012, Ireland signed an intergovernmental agreement with the United States in relation to the implementation of the Foreign Account Tax Compliance Act (FATCA) in Ireland. FATCA aims to combat tax evasion by improving exchange of information between tax authorities. The Statutory Instrument implementing the intergovernmental agreement (S.I. No. 33 of 2013) is included in Part 3 of Schedule 24 of the Taxes Consolidation Act, 1997. This Statutory Instrument, along with S.I. No. 292 of 2014 (as amended by S.I. No. 501 of 2015) and section 891E of the Taxes Consolidation Act gives legislative effect to the agreement.

Conclusion

- 2.25** Notwithstanding the aforementioned international agreements, European Union measures and domestic legislation, the Revenue Rule, as the succeeding chapters shall demonstrate, enjoys continued vitality going into the 21st century.

Chapter 3 – The Nature and Extent of the State’s Jurisdiction to Tax

Introduction

- 3.1** From a forum perspective, a logically prior question arising in Revenue Rule cases is whether a foreign state has *jurisdiction* to impose the tax in the first instance. Accordingly, this Chapter considers, from both an external or public international law perspective and an internal or municipal (Irish) law perspective, the *nature* and *extent* of a State’s jurisdiction to impose taxation.
- 3.2** The Chapter also considers the question of whether all acts that may be performed by a state, directly or indirectly, in connection with the exercise of its taxing powers, fall to be treated as acts *jure imperii*.⁶⁸ Finally, the Chapter sets out the background for the examination of the uncertainties relating to the taxonomy of the Revenue Rule.⁶⁹

The External Perspective

- 3.3** As regards the *nature* of the power to tax, Beale⁷⁰ asserts that it is one of the attributes of sovereignty; his view was subsequently echoed in *George Cook (US) v. United Mexican States*⁷¹ where the United States-Mexican Claims Commission held that the right of the State to levy taxes constituted an inherent part of its sovereignty; it was a function necessary to its very existence.
- 3.4** Beale,⁷² in considering the *extent* of a State’s jurisdiction to tax asserts:

“The power to tax is one of the attributes of sovereignty; and the jurisdiction to exercise the power is coterminous with the bounds of the sovereign’s jurisdiction.

- 3.5** In advancing this position he cites the decision of Marshall C.J. in *M’Culloch v. Maryland*:⁷³

⁶⁸ Act of government.

⁶⁹ See **Chapter 6**.

⁷⁰ Beale, *Jurisdiction to Tax*, 32 Harvard Law Review, 587, (1918-1919).

⁷¹ UN Rep Vol IV 593, at 595 (1930) cited in O’Connell, *International Law*, (2nd ed. 1970), Vol. 2, page 715.

⁷² Beale, *Jurisdiction to Tax*, 32 Harvard Law Review, 587, (1918-1919).

⁷³ 4 Wheat. (U.S.) 316, 429, 431 (1819).

It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation ... The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission ... The power to tax involves the power to destroy.”

- 3.6** Beale goes on to cite the *dicta* of Field J. in *State Tax on Foreign Held Bonds*, which set out the power of the State in positive terms:⁷⁴

“The power of taxation, however vast its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business.”

- 3.7** He also refers to the remarks of Emery J. in *Augusta v. Kimball*,⁷⁵ which deals with the matter in converse terms:

“The taxing power of the state ... cannot reach over into any other jurisdiction to seize upon persons or property for purposes of taxation. No officer, however armed by statute or court process of this state, can seize upon [such property] for taxes.”

- 3.8** Beale concludes by stating:⁷⁶

“A personal tax may be laid upon persons subject to the jurisdiction of the sovereign; a property tax upon all property situated in his territory; an excise or license tax upon all acts done within his boundaries.”

⁷⁴ 15 Wall. (U.S.) 300 (1872).

⁷⁵ 91 Me. 605, 40 Alt. 666 (1898).

⁷⁶ Beale, *Jurisdiction to Tax*, 32 Harvard Law Review, 587, (1918-1919).

3.9 Moving onto the issue of the *extent* of the power to tax *Commissioner of Taxes, Federation of Rhodesia v. McFarland*,⁷⁷ cited *verbatim* and with approval the decision of the Permanent Court of International Justice in the *Lotus* case.⁷⁸

“The first and foremost restriction imposed by international law upon a State is that, failing the existence of a permissive rule to the contrary, it may not exercise its powers in any form in the territory of another State. In this sense jurisdiction is territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or a convention.”

3.10 However, Dodge⁷⁹ suggests that a different conclusion may be drawn from the *Lotus* case,⁸⁰ namely that public international law does *not* restrict a nation’s jurisdiction to its own territory.⁸¹ In support of this proposition he cites the following from *Lotus*:⁸²

“Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principle which it regards as best and most suitable.”

3.11 However, the practical effect of such an interpretation is constrained to the extent that a taxing state is dependent upon the courts of the forum state enforcing its tax claims or judgments; it may seek to claim whatever jurisdiction it wishes but, absent direct action by the executive of the taxing state, the recognition and enforcement of such jurisdiction will continue to rest with the forum.

⁷⁷ 27 SATC 15, 1965 (1) SA 470 (W), accessed from Lexis Nexis.

⁷⁸ *SS ‘Lotus’ (France v. Turkey)* (1927) PCIJ Ser A, No. 10 253.

⁷⁹ Dodge, *Breaking the Public Law Taboo*, (2002) *Harvard International Law Journal*, 164.

⁸⁰ *SS ‘Lotus’ (France v. Turkey)* (1927) PCIJ Ser A, No. 10.

⁸¹ Dodge, *Breaking the Public Law Taboo*, (2002) *Harvard International Law Journal*, 164, at 217.

⁸² *SS ‘Lotus’ (France v. Turkey)* (1927) PCIJ Ser A, No. 10, at 19. However, Brownlie, *Principles of Public International Law*, (7th ed.), Oxford University Press, at p. 303, notes that the passage, of which this forms part, has been criticised by a substantial number of authorities (see fn. 24 therein in that regard) and that its emphasis on state discretion has been subsequently contradicted by the views of the International Court of Justice.

- 3.12** As regards the *extent* of the power to tax Norr⁸³ asserts that no rules of international law exist to limit the extent of any country's jurisdiction to tax. However, the better view is expressed by Akehurst⁸⁴ who notes that customary international law permits a state to levy taxes only if there is a genuine connection between the state and the taxpayer or between the state and the transaction or property in respect of which the tax is levied. In support of this proposition Akehurst refers to *Imperial Tobacco Co. of India v. Commissioners of Income Tax*⁸⁵ in which the Supreme Court of Pakistan held that international law prevented Pakistan from taxing an Indian company, resident in India, in respect of its profits in India.
- 3.13** Further, there are also municipal law inhibitions against such legislative overreach which find expression in the presumption, in statutory interpretation, against extraterritoriality and, in the Irish context, the restrictions imposed by Article 29.3 of the Constitution.⁸⁶
- 3.14** The question of the *extent* of a State's jurisdiction to impose tax has been the subject of a number of decisions at federal and state level in the United States.
- 3.15** In *Shaffer v. Carter*,⁸⁷ the appellant, a resident of Illinois who had operated in the oil business in Oklahoma, sought to restrain the enforcement of a tax assessed against him pursuant to income tax legislation of the latter state. The appellant argued, *inter alia*, that Oklahoma was without jurisdiction to levy a tax upon the income of non-residents. In dealing with this proposition, Mr Justice Pitney, who delivered the opinion of the Supreme Court, stated:⁸⁸

“This radical contention is easily answered by reference to fundamental principles. In our system of government the states have general dominion, and,

⁸³ Norr, *Jurisdiction to Tax and International Income*, 17 Tax Law Review, 431 (1961 – 1962).

⁸⁴ Akehurst, *Jurisdiction in International Law*, (1974) 46 Brit. Y.B. Int'l L. 145, at 179 to 180.

⁸⁵ (1958) I.L.R., vol. 27. P. 103.

⁸⁶ Article 29.3 provides; “*Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States.*”

⁸⁷ (1920) 252 U.S. 37, 40 S. Ct. 221.

⁸⁸ 252 U.S. 37, at 50 to 51.

saving as restricted by particular provisions of the federal Constitution, complete dominion over all persons, property, and business transactions within their borders; they assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence, have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray the governmental expenses. Certainly they are not restricted to property taxation, nor to any particular form of excises. ... That the state, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement. That it may tax the land but not the crop, the tree but not the fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible.”

3.16 The Court concluded:⁸⁹

“And we deem it clear, upon principle as well as authority, that just as a state may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to nonresidents from their property or business within the state, or their occupations carried on therein, enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders.”

3.17 A similar conclusion was reached in the Australian case of *Broken Hill South Ltd. v. Commissioner of Taxation (N.S.W.)*⁹⁰ where it was held that if the State could tax property located within its territory, then the constitutional authority of the State was not transcended because it taxed the owners, legal or equitable, of that property, whether domiciled or resident within the State or not – the *situs* of the property attracted the

⁸⁹ 252 U.S. 37, at 52.

⁹⁰ (1937) 56 C.L.R. 337, at 366.

constitutional authority of the State to tax it and thus enabled it to cast the burden upon the owners of the property.

- 3.18** However, whilst the taxation of the income of non-residents is not objectionable *per se*, there is authority for the proposition that it is not permissible for a state to attempt to impose personal liability, in respect of taxation, on non-residents.

The Internal Perspective

- 3.19** The view, as regards the *nature* of the power to tax, that it is an inherent part of sovereignty is consistent with the provisions contained in the articles of Bunreacht na hÉireann⁹¹ in respect of Money Bills. Article 22 defines a Money Bill as including a Bill containing provisions dealing with the imposition, repeal, remission, alteration or regulation of taxation.

- 3.20** The Constitution makes clear that the power to impose taxation resides with the legislature and in doing so it emphasises the primacy of Dáil Éireann.⁹² Article 17 sets out the financial functions of the Dáil; Article 21 provides that Money Bills shall be initiated only in the Dáil, and; Article 22 sets out the procedures to be followed in the event of a dispute arising between the Dáil and the Seanad⁹³ as to whether a Bill is a Money Bill.

Imposition of Taxation by Executive Order

- 3.21** There is limited legislative provision for the imposition of taxation by executive order.⁹⁴ Taxation in the form of customs duty, stamp duty or excise duty can be imposed, without prior resort to the Dáil, under the Imposition of Duties Act 1957, although doubts have been expressed as to whether this Act is compatible either with Article 15.2 (which provides that the sole and exclusive power of making laws for the State is vested in the Oireachtas)⁹⁵ or with Articles 17, 21 or 22 of the Constitution.⁹⁶

⁹¹ Constitution of Ireland.

⁹² The lower house of the Irish legislature.

⁹³ The upper house of the Irish legislature.

⁹⁴ See generally, Hogan and Whyte, *The Irish Constitution*, (3rd ed.), p.172.

⁹⁵ The term Oireachtas is generally used to collectively refer to the two houses of the Irish legislature.

⁹⁶ Hogan and Whyte, *The Irish Constitution*, (3rd ed.), p. 110 to 111 and p. 173.

- 3.22** There is also provision for raising taxation, in circumstances of extreme urgency,⁹⁷ in the Taxes and Duties (Special Circumstances) Act 1942. Under this Act, whenever enemy action prevents the Dáil, or both Houses, from meeting to consider resolutions or Bills to impose taxation, or the Taoiseach from presenting such a Bill for the President's signature, such taxation may be imposed by declaration of the Taoiseach or any person for the time being authorised by law to perform the functions of the Taoiseach.
- 3.23** So far as the *extent* of the power to tax is concerned, section 18 (1) of the Taxes Consolidation Act 1997, at paragraph 1 (b) of Schedule D, provides that tax under the Schedule shall be charged in respect of all interest of money, annuities and other annual profits or gains not charged under Schedule C or Schedule E, and not specifically exempt from tax.
- 3.24** In dealing with the equivalent provision in the United Kingdom legislation, section 122 (1) (b) of the Income Tax Act 1952, Lord Hailsham, in *National Bank of Greece v. Westminster Bank*⁹⁸ stated:

“Read out of context these words would appear to be wide enough to charge income even of residents outside the United Kingdom even from property outside the United Kingdom. But it is clear that they cannot be so read, since such charge would be wholly outside the scope of the Income Tax Acts altogether including the scope of Schedule D.

This appears from the well-known statement of Lord Herschell in the leading case of Colquhoun v. Brooks (1889) 14 App. Cas. 493, 504. Lord Herschell said:

“The Income Tax Acts ... themselves impose a territorial limit, either that from which the income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there.”

⁹⁷ Hogan and Whyte, *The Irish Constitution*, (3rd ed.), p.172.

⁹⁸ [1971] A.C. 945, at 953 to 954.

3.25 However, in *Nichols v. Gibson*⁹⁹ Morritt LJ, having referred to the above passage, went on to state that it was not disputed that the principle of territoriality was one of presumption and that it was not absolute in that it was open to Parliament to legislate extra-territorially to a greater or lesser extent if it saw fit to do so.

3.26 Accordingly, notwithstanding the provisions of Article 29.3 of the Constitution, which provides that Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States, the possibility of the Oireachtas legislating extra-territorially, in respect of taxation, cannot be precluded; it has previously legislated extra-territorially with the enactment of the Criminal Law (Jurisdiction) Act 1976 which extends the criminal law of the State to certain acts done in Northern Ireland.

Acts jure imperii and Acts jure gestionis

3.27 Whilst the exercise by a state of its taxing jurisdiction clearly constitutes an act of state, not all acts carried out in connection with a country's tax system will be regarded as acts *jure imperii*.

3.28 *Controller and Auditor-General v. Davison*,¹⁰⁰ which was part of a series of related cases¹⁰¹ arising out of the *Winebox Inquiry*,¹⁰² involved a claim that certain tax related activities of the Cook Islands government constituted an act of state in respect of which there was an entitlement to state immunity.¹⁰³

3.29 In the *Winebox Inquiry* some 60 sets of transactions were identified which were narrowed down into various categories. One particular arrangement, the Magnum transaction, followed a structure proposed to the Cook Islands Government by certain

⁹⁹ [1996] S.T.C. 1008, at 1014.

¹⁰⁰ [1996] 2 NZLR 278.

¹⁰¹ *KPMG Peat Marwick & Ors. v. Davison* [1996] 2 NZLR 278 and *Brannigan & Ors. v. Davison* [1996] 2 NZLR 278.

¹⁰² So called because documents evidencing certain transactions were given to a member of the New Zealand parliament in a winebox.

¹⁰³ The members of the Court in the *Davison Case* appear to have used the terms sovereign immunity and state immunity interchangeably. For all other purposes the term "sovereign immunity" shall refer to the proposition that a sovereign is not amenable to suit in its own courts whilst the term "state immunity" shall refer to the proposition that a state is not amenable to suit in the courts of another state.

corporate interests, the European Pacific group of companies. Withholding tax paid to the Cook Islands Government and evidenced by a tax credit certificate for \$881,582 was in reality repaid (except for the sum of \$50,000) through the medium of contemporaneous dealing in a promissory note carried out by the Cook Islands Government Property Corporation. The corporation, a statutory body, comprised all members of the Cabinet of Ministers of the Cook Islands.

3.30 As a result of the dealing, the corporation, which had wide commercial powers, retained the sum of \$50,000 by way of profit. Subsequently, a similar transaction was carried out, the amount of tax involved being \$1,169,609, the whole of which was effectively repaid. The net result was that at the end of these transactions European Pacific was better off by \$2,001,191, the Cook Islands Government was better off by \$50,000 and the New Zealand Government was worse off by \$2,051,191.

3.31 A commission of inquiry was established in New Zealand to investigate the transactions. An issue arose as to whether the Commission had the authority to order the Controller and Auditor General of New Zealand, who was also, at the relevant time, the government auditor of the Cook Islands, to produce to the Commission, information or documents that had come into his possession in his latter role.

Characterisation of Actions

3.32 The Court of Appeal was split on the question of whether the actions of the Cook Islands Government were to be characterised as governmental or commercial.

Commercial Characterisation

3.33 The majority took the view that the actions of the Cook Islands Government fell to be characterised as commercial. Cooke P. stated¹⁰⁴ that, seen in isolation, the issuing of a tax credit was an act that could be performed only by a state. At least on the surface, it would, by itself attract sovereign immunity. However, the affidavit of the Commissioner and the evidence already before him showed, *prima facie*, that the Cook Islands government, in the buying and selling of promissory notes, was integrally involved in

¹⁰⁴ [1996] 2 NZLR 278, at 289.

the tax credit transactions. Dealing in promissory notes was an activity which any private citizen could perform. Cooke P. characterised the transactions as the sale of tax credits and concluded that a government which descended to this extent into the market place could not fairly expect total immunity. Its auditors and financial advisers could be in no better position.

3.34 Henry J. stated¹⁰⁵ that although the imposition and collection of tax was undoubtedly a function of government and not a commercial activity, as was the issue of a tax credit certificate, to allow those factors to be determinative was to ignore the reality of the transactions being investigated. He went on to state¹⁰⁶ that the context in which the act of the Cook Islands Government in issuing the tax credit was to be considered, must include the directly associated promissory note dealing, involving the state corporation. That dealing could not be divorced from the associated collection of “revenue” and lent the transaction as a whole a commercial character, with the element of tax collection becoming largely illusory. The use of a revenue gathering power, although necessary to the implementation of the whole transaction, was but a part of it. There was a strong commercial flavour, with the government and its instrument, the corporation, being directly and significantly involved. It was difficult to see how it could be said that that the acts of the corporation were other than commercial and of a private law character. They could not be the subject of immunity. The issuing of the tax credit gave rise to and formed an integral part of that commercial activity and must also have the same character.

3.35 Thomas J. stated¹⁰⁷ that he was concerned with the principal restriction to sovereign immunity, the exception of activity engaged in by the foreign state otherwise than in the exercise of sovereign authority, acts *jure gestionis*¹⁰⁸ as distinct from acts *jure imperii*. The problem however, as many international law commentators had pointed out, was that a precise distinction between these concepts was difficult to discern and define.

¹⁰⁵ [1996] 2 NZLR 278, at 308.

¹⁰⁶ [1996] 2 NZLR 278, at 308 to 309.

¹⁰⁷ [1996] 2 NZLR 278, at 311.

¹⁰⁸ A commercial or trading act.

- 3.36** Thomas J. went on to state that just as non-governmental or commercial activity of a foreign state, which was contrary to New Zealand's laws, was unacceptable when undertaken within the jurisdiction, so too it was unacceptable for New Zealand to be subject to the detrimental impact of such activity when it occurred beyond its borders. He further stated¹⁰⁹ that it could not be gainsaid that the involvement of the Cook Islands Government in transactions described by the Commissioner had, or were likely to have had, a direct effect on the tax base of New Zealand. The impact of the sale of tax credit certificates on the tax base was no less than it would have been if, by some device, the Cook Islands Government had been able to sell the tax credit certificates within New Zealand.
- 3.37** Thomas J. stated¹¹⁰ that if the activity of the Cook Islands Government was regarded as essentially one of implementing taxation measures, then it was likely that it would be viewed as a proper governmental activity or function; if the nature of the transaction (entering into the arrangement involving the contemporaneous exchange of the promissory notes), the nature of the act complained of (selling tax credit certificates), and the purpose of the activity (to secure revenue for the Cook Islands other than tax on income earned) was examined, the activity was likely to be classified as non-governmental.
- 3.38** Thomas J. joined with Cooke P. and Henry J. in classifying the activities of the Cook Islands Government as being within the exception contemplated by the restricted theory of sovereign immunity. Imposing taxes, collecting taxes and issuing tax credit certificates in respect of taxes that were otherwise due, were certainly functions of a sovereign state. A government could establish a taxation regime of, in all probability, immense complexity, to that end. However, the Cook Islands Government did far more than engage in a tax regime of this kind. Thomas J. concurred with the characterisation of the transactions by Cooke P. as the sale of tax credits. Thomas J. concluded that the Cook Islands Government could not properly claim to be outside the scope of the commercial or non-governmental exception to the doctrine of sovereign immunity.

¹⁰⁹ [1996] 2 NZLR 278, at 312.

¹¹⁰ [1996] 2 NZLR 278, at 312 to 313.

Governmental Characterisation

- 3.39** In expressing the minority view that the actions fell to be characterised as governmental, Richardson J. observed¹¹¹ that the imposition of taxes was an exercise of sovereign power and that the operation of a tax system was a quintessential example of governmental activity that should ordinarily be immune from intrusive scrutiny by the agencies of another state. He stated that the exercise of a taxing power was a governmental activity that was not exercisable by private persons. The exercise of the tax function could constitute an abuse of power but that did not change the character of the power that was exercised.
- 3.40** Richardson J. held that it was a matter of looking at what had been done in order to determine whether the questioned activity was a private act of the state or whether it involved necessary participation in a public act of the state. He held that whatever the motivation, and whatever the overall result, the Magnum transaction involved the application of the tax legislation of the Cook Islands by the Cook Islands. The issue of a tax certificate for tax stated to have been paid was an integral feature. It was a public act of the state. The issue of the receipt or certificate of payment of Cook Islands tax must be characterised as an exercise of governmental power.
- 3.41** Referring to the *dicta* of Learned Hand J. in *Moore v. Mitchell*,¹¹² Richardson J. noted¹¹³ that revenue laws and their administration were an extension of the sovereign power that imposed the taxes and that any local inquiry which involved an assessment of their operation encroached on that sovereign power.

Conclusion

- 3.42** Whilst the power to tax is an attribute of sovereignty not all acts in connection with the exercise of that power fall to be regarded as an act *jure imperii*. Further, regardless of whether states choose to legislate extra-territorially, the successful cross-border enforcement of their tax claims will, absent international treaty or domestic legislative measures, be dependent upon the co-operation of forum court

¹¹¹ [1996] 2 NZLR 278, at 301.

¹¹² 30 F 2d 600, at 604 (1929).

¹¹³ [1996] 2 NZLR 278, at 302.

Chapter 4 – Questions of Classification

Introduction

- 4.1** This Chapter considers questions of classification. Specifically, it examines the degree to which, on a review of the jurisprudence in relation to what constitutes a revenue law, uncertainty can be said to arise. This examination commences with a consideration of the difficulties identified by Carter¹¹⁴ and sets out the solution to these difficulties advanced by Briggs.¹¹⁵ It goes on to consider fourteen cases, from across a range of common law jurisdictions, to illustrate both the consistencies, and the conflicts, in the conclusions reached by the courts in relation to this issue. Clearly, uncertainty, in relation to how a court will classify a given law, leads to ambiguities in relation to the precise reach of the Revenue Rule.
- 4.2** The Chapter also considers the related question of the appropriate characterisation of criminal provisions in taxation legislation, as between penal and revenue. Surprisingly, this is an area that has given rise to very little, if any, academic commentary. This is perhaps partly due to the potentially chilling effect of the observations of both the US Supreme Court in *Milwaukee County v. M. E. White Co.*,¹¹⁶ and of the St. Louis Court of Appeals in Missouri in *State ex rel. Oklahoma Tax Commission v. Rodgers*,¹¹⁷ in relation to the nature of taxation legislation.¹¹⁸ Again, as with the primary question, this Chapter contains an examination of the case law on this topic from a range of common law jurisdictions. Consideration, if not resolution, of this issue is important, not least because the justifications advanced in respect of the Revenue Rule differ from those given for the restrictions on the enforcement of penal laws.¹¹⁹

¹¹⁴ Carter, *Transnational Recognition and Enforcement of Foreign Public Laws*, [1989] Cambridge Law Journal, 417.

¹¹⁵ Briggs, *The Revenue Rule in the Conflict of Laws: Time for a Makeover*, (2001) Singapore Journal of Legal Studies, 280.

¹¹⁶ (1935) 296 U.S. 268, 56 S. Ct. 229.

¹¹⁷ (1946) 238 Mo. App. 1115, 193 S.W. 2d 919.

¹¹⁸ See **paragraph 4.56**.

¹¹⁹ As to which see the discussion in **Chapter 8**.

What Constitutes a Revenue Law?

- 4.3** In considering the first of these questions it is apparent that the courts have adopted one of two complementary approaches, choosing to classify either the proceedings¹²⁰ or the law at issue. The courts are more likely to adopt the second approach where there is some doubt as to the nature of the law in question. In any event, when a court finds that the proceedings amount to an assertion of foreign sovereignty the prohibition on enforcement will apply.
- 4.4** The question of classification, be it of the proceedings or the law at issue, is a matter for the forum. In *Huntington v. Atrill*¹²¹ the Privy Council stated that the court appealed to must determine for itself the substance of the right sought to be enforced and whether its enforcement would, directly or indirectly, involve the execution of the penal law of another state. Similarly, in *United States of America v. Inkley*¹²² it was held that the consideration of whether the claim sought to be enforced was one that involved the assertion of foreign sovereignty was to be determined according to the criteria of the law of the forum.
- 4.5** The question of what constitutes a revenue law appears only to be of significance in proceedings concerning the enforcement of a sanction, power or right at the instance of a state in its sovereign capacity. In *United States of America v. Inkley*¹²³ it was held that the fact that a law is penal in nature will not deprive a person, who asserts a personal claim depending thereon, from having recourse to the courts of the forum. That this general approach extends to revenue law is apparent from the distinction made between the recognition and the enforcement of foreign revenue law.¹²⁴

¹²⁰ The particular case of a foreign state seeking to rely on forum (non-tax) law to pursue a claim, not for unpaid taxes but for damages arising as a result of a failure to pay such taxes, is considered in **Chapter 9**.

¹²¹ [1893] A.C. 150, at 155. The United States Supreme Court was of the same view in related litigation, also *Huntington v. Atrill* (1892) 146 U.S. 657, 13 S. Ct. 224, at 683.

¹²² [1989] Q.B. 255, at 265, cited with approval in *Bank of Ireland v. Meenaghan* [1994] 3 I.R. 111, at 121.

¹²³ [1989] Q.B. 255, at 265.

¹²⁴ Although, as will be discussed in **Chapter 5**, the distinction between recognition and enforcement is not without difficulties.

Classification of the Proceedings – Applicable Criteria

4.6 *Bank of Ireland v. Meenaghan*¹²⁵ adopted the approach of classifying the proceedings. A criminal prosecution was commenced in England against the first defendant in the proceedings in question for being knowingly concerned in the fraudulent evasion of value added tax. An English court made an order restraining the defendant from disposing of, or dealing with, his assets, including the proceeds of a deposit account in Ireland held with the plaintiff. In interpleader proceedings the Court held that, the restraint order was penal in nature and could not be enforced in Ireland. The Court, in considering whether a claim sought to be enforced in the Irish courts was one involving the assertion of foreign sovereignty, whether it be penal, revenue or other public law, quoted¹²⁶ with approval the following propositions from *United States of America v. Inkley*:¹²⁷

“(1) the consideration of whether the claim sought to be enforced in the English courts is one which involves the assertion of foreign sovereignty, whether it be penal, revenue or other public law, is to be determined according to the criteria of English law;

(2) that regard will be had to the attitude adopted by the courts in the foreign jurisdiction which will always receive serious attention and may on occasions be decisive;

(3) that the category of the right of action, i.e. whether public or private, will depend on the party in whose favour it is created, on the purpose of the law or enactment in the foreign state on which it is based and on the general context of the case as a whole;

(4) that the fact that the right, statutory or otherwise, is penal in nature will not deprive a person, who asserts a personal claim depending thereon, from having recourse to the courts of this country; on the other hand, by whatever description it may be known if the purpose of the action is the enforcement of a sanction, power or right at the instance of the state in its sovereign capacity, it will not be entertained;

¹²⁵ [1994] 3 I.R. 111.

¹²⁶ *Ibid*, at 121.

¹²⁷ [1989] Q.B. 255, at 265.

(5) that the fact that in the foreign jurisdiction recourse may be had in a civil forum to enforce the right will not necessarily affect the true nature of the right being enforced in this country.”

Classification of the Law – Applicable Criteria

- 4.7** Here the challenge has been to develop a consistent set of criteria for the purpose of determining what constitutes a revenue law. The Commentary to §483 of the Restatement (Third) of Foreign Relations,¹²⁸ in dealing with judgments for taxes, provides a starting point in the consideration of what constitutes a revenue law. A tax judgment, it asserts, is a judgment in favour of a foreign state, or one of its subdivisions, based on a claim for an assessment of a tax, whether imposed in respect of income, property, transfer of wealth, or transaction in the taxing state.
- 4.8** However, given its tautological features, this definition is of limited assistance. Difficulties begin to arise, for example, when consideration turns to the treatment of local property taxes such as rates and, given the trend towards privatisation of services previously provided by municipal authorities, whether, as Carter¹²⁹ asks, a distinction ought to be made between claims by local authority suppliers and private suppliers.¹³⁰
- 4.9** Similar issues have arisen in a public international law context in the course of the shift from absolute to restrictive immunity, in identifying what acts are to be regarded as *imperii* and what acts fall to be treated as *gestionis*.¹³¹ In turn the public international law position has informed the courts’ analysis in the context of challenges to proceedings on the basis of the Revenue Rule. In *Republic of Columbia v. Diageo North America Inc.*¹³² it was alleged that the defendants were members of a RICO¹³³ enterprise

¹²⁸ Restatement (Third) of Foreign Relations, §483, comment c.

¹²⁹ Carter, *Transnational Recognition and Enforcement of Foreign Public Laws*, [1989] Cambridge Law Journal, 417, at 423.

¹³⁰ As to which, see the analysis of Briggs, at **para. 4.10**.

¹³¹ See Brownlie, *Principles of Public International Law*, (7th ed. 2008), Ch. 16, and the cases cited therein.

¹³² 531 F.Supp.2d 365 (United States District Court, E.D. New York) (2007). The plaintiffs’ claims were subsequently dismissed with prejudice, see *Republic of Columbia v. Diageo North America Inc.* 2011 WL 4828814 (E.D.N.Y.). In the subsequent proceedings the Court held (at fn. 1 of its judgment) that the only reason why the withdrawing plaintiffs’ claims were not dismissed in the earlier proceedings was that there were arguably questions of fact about what types of claims – commercial or sovereign – the withdrawing plaintiffs possessed. In the later proceedings the withdrawing plaintiffs conceded that they had no viable claims.

¹³³ This is a reference to the RICO Act – Racketeer Influenced and Corrupt Organisations Act.

composed of illegal narcotics traffickers for the purpose of laundering the proceeds of illegal narcotics sales and illegally smuggling liquor into Columbia. The plaintiffs included various departments of the Republic of Columbia who possessed a constitutional monopoly on the domestic manufacture and sale of liquor products. The Court held¹³⁴ that claims brought by a foreign sovereign in a commercial capacity did not constitute the kind of direct enforcement of a foreign revenue law that was barred by the Revenue Rule.

- 4.10** Briggs¹³⁵ argues that there are two elements which identify a revenue law as such; the legal basis for the demand for payment and the identity of the payee. *Firstly*, if the subject of taxation has no legal right to renounce the benefits which the payments at issue go to support then he or she is being taxed. Conversely, if the subject has freedom under the law to renounce (albeit that he or she has little or no freedom in practice) the payment is voluntary and contractual. *Secondly*, only if the State may be regarded as the payee will it be proper to regard the charge as constituting taxation.
- 4.11** Briggs¹³⁶ notes that it can be argued that if the state provides a benefit in return for the payment the demand is not a tax but a charge for services. He is of the view that such an argument is misconceived in that it could be applied, if with a little strain, to all income taxes. He argues that the more incisive question is whether the payment is voluntary in the sense that the law, which imposes the charge on the person who satisfies the criterion for payment, permits the person to avoid liability to pay by renouncing the benefit. If the person is not entitled to renounce, then the relevant law is a revenue law.
- 4.12** Briggs asserts, that it is nothing to the point that an employee can avoid income tax by giving up his job or that a consumer can avoid VAT by not buying (say) shoes, for on that basis only death duties would be true revenue laws. The question, he continues, is whether the person may satisfy the condition which renders him liable to tax, but still renounce the benefit which is offered in return for payment. He concludes that if he

¹³⁴ 531 F.Supp.2d 365, at 387, (United States District Court, E.D. New York) (2007).

¹³⁵ Briggs, *The Revenue Rule in the Conflict of Laws: Time for a Makeover*, (2001) Singapore Journal of Legal Studies, 280, at 281 *et seq.*

¹³⁶ Briggs, *The Conflict of Laws*, pp. 45 to 46, (2nd ed.), Oxford University Press, (2008).

cannot it is a tax law and not a contractual liability; or, if there is a better test, that no one has yet identified it.

The Approach of the Courts in Specific Instances

- 4.13** The courts have had occasion to consider what constitutes a revenue law in a variety of circumstances. The case law, though not always consistent in result, is consistent in approach in applying a *substance over form* test.

Municipal Improvement Rate

- 4.14** In *Municipal Council of Sydney v. Bull*,¹³⁷ where the plaintiff sued in England for a municipal improvement rate in respect of land in Australia, the Court held that the action was in the nature of an action to recover a tax.

Employers' Contributions to State Health Insurance and Family Benefits Scheme

- 4.15** In the Scottish case of *Metal Industries (Salvage) Limited v. Owners of the S.T. "Harle"*¹³⁸ a claim was made on behalf of the French government in respect of arrears of compulsory employers' contributions to a state health insurance and family benefits scheme for seamen.

- 4.16** The Court held¹³⁹ that it was a general rule that no state would act as a tax gatherer for another or permit its courts to be used for that purpose, and it was a corollary of that rule that what constituted a revenue or fiscal claim was to be determined by the courts of the country where the claim was sought to be enforced and in accordance with the *lex fori*. The Court continued that what was fiscal and what would therefore be regarded as enforcement of a revenue claim or an attempt to recover taxes due under a foreign law, depended not so much upon the *form* which the imposition took, or the object upon or in respect of which it was levied but upon the *substance* of the claim, as viewed by a Scottish court, applying Scottish law.

¹³⁷ [1909] 1 K.B. 7, at 10. This case is considered in detail in **Chapter 5, paragraph 5.123 et seq.**

¹³⁸ 1962 S.L.T. 114.

¹³⁹ *Ibid.*, at 116 to 117.

- 4.17** The Court went on to note that the claimant was the French Consul-General, representing the Government of France, so that he was claiming money on behalf of that government and in particular two organisations which were specifically averred to come under the authority of a French ministry. These were agencies of the ministry for particular purposes. The levies which they imposed were presumably levied with Government authority because they were to defray and support state schemes for health insurance for seamen and for family benefits. The contributions were compulsory. On the basis of the averments it appeared that the schemes were state-administered.
- 4.18** In a reference to *Municipal Council of Sydney v. Bull*¹⁴⁰ the Court noted that if a municipal improvement rate levied by a city corporation in Australia was to be treated as a tax which could not be recovered in a Scottish court, then a compulsory contribution to a state insurance scheme levied on French citizens by a French government agency was in no better position and the sums so levied were properly to be regarded as part of the revenue of the state. “*Revenue*” in the Shorter Oxford English Dictionary was defined as “6. *The annual income of a government or state, from all sources, out of which the public expenses are defrayed.*”
- 4.19** Quite apart from this, compulsory contributions levied by state organisations, both of which came under the authority of a minister, and which were contributions due by employers in respect of state schemes for health, insurance and family benefits for persons employed, were nothing more or less than taxes or at least charges or impositions of a like nature and the sums so levied formed part of the revenues of the state.

Compulsory Hospital Insurance Scheme

- 4.20** In *Weir v. Lohr*¹⁴¹ a Saskatchewan resident, injured in an accident in Manitoba, brought an action for damages for personal injuries and claimed, *inter alia*, for hospital accounts. These accounts had been paid by the Saskatchewan Hospital Commission, which, under section 22 of the Saskatchewan Hospitalization Act, was entitled to an account for any recovery by the plaintiff and to be subrogated to any claim that the plaintiff might have.

¹⁴⁰ [1909] 1 K.B. 7.

¹⁴¹ *Weir v. Lohr; All State Insurance Co. of Canada, Third Party* (1967) 65 D.L.R. (2d) 717.

- 4.21** The Manitoba Queen’s Bench, in considering the case, observed¹⁴² that the Act provided for the levying and collection annually of a “tax” to be paid by, or on behalf of, every person who resided in Saskatchewan, varying in amount depending on the status and dependants of the person. All “taxes” collected were placed in a fund known as the Saskatchewan Hospitalization Fund. Residents of Saskatchewan who had “paid the tax” were entitled to “receive benefits” under the Act.
- 4.22** The Court noted¹⁴³ that the third party, which opposed the defendant’s liability to pay the hospital account, argued that; the plaintiff did not pay the hospital account; he was not indebted to the Saskatchewan Minister of Health or anyone else in respect of it; he had no interest in the outcome of this part of the litigation with the defendant; he was only a nominal plaintiff and was endeavouring to maintain the claim for the hospital account for the benefit of the Saskatchewan Minister of Health pursuant to the Act, and; in substance, this was an attempt to collect revenue for a foreign state or an attempt to collect the debts of a foreign revenue.
- 4.23** The Court held¹⁴⁴ that the hospital bill was not a tax claim nor was it a revenue debt and, that if it was either a tax claim or a revenue debt, it was not a foreign tax claim or the debt of a foreign revenue. The formula adopted by the Act, particularly its use of the words “tax” and “taxes” was not controlling. In essence, the Act provided a scheme of hospital insurance, albeit a compulsory one. The so-called tax was a premium and the persons paying it (and only such persons) were, in the words of the Act, “beneficiaries” and “entitled to receive benefits,” namely payment of hospital bills out of the Fund. This action was not to recover the “tax” but the hospital account. Section 22 of the Act was not an attempt by Saskatchewan to assert extra-territorial jurisdiction or to impose liability on a resident of another province. A claim pursuant to section 22 was not, on a proper construction of the Act, a tax claim or a revenue debt; this was so even if, although the Court stated that it made no finding on this point, the Fund was part of the consolidated funds of Saskatchewan.

¹⁴² *Ibid*, at 718.

¹⁴³ *Ibid*, at 719.

¹⁴⁴ *Ibid*, at 720 to 721.

Order for Costs in favour of Foreign Legal Aid Body

- 4.24** In *Connor v. Connor*¹⁴⁵ the judgment creditor, who had received legal aid in the State of Victoria, obtained registration under New Zealand legislation, of the order for costs against the judgment debtor, who was then resident in New Zealand. The sum, if recovered, would become payable to the Legal Aid Committee of Victoria. The judgment debtor moved to set aside registration, on the basis that, enforcement was contrary to public policy as it constituted enforcement of the revenue law of the State of Victoria.
- 4.25** Roper J. noted¹⁴⁶ that it appeared that no funds were being provided from the Consolidated Revenue although he indicated that he did not propose to decide the matter by reference to this issue. He went on to state¹⁴⁷ that it would be quite unreal to regard the case as one involving direct or indirect enforcement of a revenue law. Having considered the authorities, he held¹⁴⁸ that they did not support the proposition that merely because the enforcement of a judgment might result in reimbursement of a fund which had the blessing, or even the financial support, of a foreign State, enforcement of that judgment by another State would be contrary to public policy.

Order for Costs in favour of Foreign State

- 4.26** In *Deutsche Nemectron GmbH v. Dolker*¹⁴⁹ the defendant had brought an action against the plaintiff in the German courts. The Defendant was ultimately unsuccessful in the German proceedings and ordered to pay 90% of the hearing costs. The costs were revenue or indemnification to the Federal Republic of Germany. The defendant moved to Canada and the German court, in accordance with German law, collected the costs from the plaintiff. The plaintiff obtained an order of the German court assessing those costs against the defendant in its favour. In subsequent proceedings, relating to the registration of the German judgment in British Columbia, the defendant argued that the amount due under the order of the German court was not “costs” in the sense in which that word was used in the courts of British Columbia. The British Columbia Supreme

¹⁴⁵ [1974] 1 NZLR 632.

¹⁴⁶ [1974] 1 NZLR 632, at 635.

¹⁴⁷ [1974] 1 NZLR 632, at 636.

¹⁴⁸ [1974] 1 NZLR 632, at 636 to 637.

¹⁴⁹ 1984 CarswellBC 31, 51 B.C.L.R. 162, 41 C.P.C. 269.

Court held¹⁵⁰ that whilst this might be so, it was certainly not tantamount to taxation by a foreign state.

Order for Cost of Measures undertaken by Foreign State Agency

4.27 In *United States v. Ivey*¹⁵¹ the U.S. government brought an action in Canada, against the operators of a waste disposal site in the United States, for the cost of remedial measures undertaken by its Environmental Protection Agency in relation to the site. The measure of recovery was prescribed in the legislation and was directly tied to the cost of the required environmental clean-up. The amounts sought to be recovered were actually expended in response to an environmental threat and were incurred in accordance with the prescribed methods, which included notification to the owners, who were given an opportunity to respond. The owners did not defend the actions, which were brought in the United States. Judgments were given pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9607(a) (1980) (“CERCLA”). The United States government then brought an action and moved for summary judgment to enforce the judgments that it had obtained. The Court at first instance rejected the defendants’ argument that liability imposed by CERCLA was a revenue law or form of tax. The Court observed¹⁵² that, it was difficult to imagine how a claim for reimbursement of costs, incurred because of the actionable conduct of the defendants, could be viewed as a tax. The Court went on to state that, in view of the fact that the damages, claimed by the plaintiff, were measured directly and precisely by the actual cost of removal and remedial measures, it could see no basis for the argument that the judgments were to enforce the revenue laws of the United States.

Levy to Finance Airport Security

4.28 In *Transports Tyrelsen v. Ryanair Ltd.*¹⁵³ the plaintiff was a state entity, the Swedish Transport Authority, which sought to recover monies levied on airlines, including the defendant. The charges at issue were introduced by Swedish legislation that had been enacted in compliance with Regulation (EC) No. 2320/2002 of the European Parliament and the Council on the 16th of December, 2002. In rejecting the defendant’s argument

¹⁵⁰ 1984 CarswellBC 31, 51 B.C.L.R. 162, 41 C.P.C. 269 at paragraph 9 of its judgment.

¹⁵¹ (1995) 130 D.L.R. (4th) 674, affirmed (1996) 139 D.L.R. (4th) 570.

¹⁵² (1995) 130 D.L.R. (4th) 674, at 685, affirmed (1996) 139 D.L.R. (4th) 570, at 573.

¹⁵³ [2012] IEHC 226.

that the plaintiff was attempting to enforce a foreign revenue or public law debt in Ireland, the Court held that the charge was not collected for the benefit of the Swedish state, its purpose was not to raise revenue but to fund the costs of implementing security controls in Swedish airports as required by European Union law. The evidence before the Court was that the funds raised were not kept by the Swedish state but were disbursed to the airports to defray the cost of security controls. The loss of the charge therefore was not a loss to the Swedish state but to the various airport operators who were required to implement security controls in respect of flights made by the defendant into their airports.

Franchise Taxes

- 4.29** In *Standard Embossing Plate Mfg. Co. v. American Salpa Corporation*¹⁵⁴ Delaware appealed from disallowance, by the receivers of the defendant insolvent corporation, of franchise tax claims.
- 4.30** The decision of the Court of Chancery of New Jersey seems to have turned on the view¹⁵⁵ expressed by the New Jersey Court of Errors and Appeals¹⁵⁶ (and cited with approval by a Delaware court) that although the statute designated an imposition of this kind as a license fee or franchise tax, it was not a tax upon corporate franchises or, in fact, strictly speaking, a tax at all.
- 4.31** The Court of Errors and Appeals had gone on to express the view that it was in reality an arbitrary imposition laid upon a corporation, without regard to the value of its property or its franchises, and without regard to whether it exercises the latter or not, solely as a condition of its continued existence.
- 4.32** The Court of Chancery concluded that the disallowance by the receivers of the franchise tax claims presented to them on behalf of the state of Delaware was erroneous and that such claims ought to be allowed as preferred claims.

¹⁵⁴ (1933) 12 Backes 468, 113 N.J. 468, 167 A. 755.

¹⁵⁵ 12 Backes 468, at 471 to 472.

¹⁵⁶ In the case of *In re United States Car Co.* (1899) 60 N.J. Eq. 514, 43 A. 673, 674.

- 4.33** The case presents an interesting analysis but it has to be conceded that in the majority of cases United States courts have treated licence fees of this nature as taxes.

Theft of Treasury Funds

- 4.34** In *State of Yucatan v. Argumedo*¹⁵⁷ proceedings were instituted in New York, a redoubt of the Revenue Rule, by the authority of the then governor of Yucatan, one of the states constituting the Republic of Mexico, against a number of parties, including one Argumedo who, whilst acting as governor of the state when it was in a condition of revolution and anarchy, removed large sums of money from its treasury. The money had initially been obtained by way of a forced loan from a Mexican bank.
- 4.35** The New York Supreme Court held that the plaintiff, as the recognised state government, was vested with all state property, including title to the state funds accumulated during previous *de facto* regimes and to the cause of action which accrued to the State when its funds were misappropriated.¹⁵⁸ The Court held that the cause of action, being one for an accounting of the moneys had and received by the defendant in a fiduciary capacity, was fundamentally contractual in nature.¹⁵⁹
- 4.36** The Court stated that the only real question as to jurisdiction was whether it should decline jurisdiction and relegate the parties to the courts of Yucatan because the questions on the accounting, involving the lawfulness of the defendant's expenditures, so peculiarly concerned the internal and governmental affairs of Yucatan.¹⁶⁰ The Court observed that in determining whether to decline jurisdiction it could not ignore the admitted fact that the defendant did not intend to return to Yucatan.
- 4.37** The Court held that to decline jurisdiction would leave the state of Yucatan absolutely without remedy and went on to state that there were special circumstances in this case requiring it to retain jurisdiction. The Court concluded that any other rule would make the State of New York the haven of absconders.¹⁶¹

¹⁵⁷ (1915) 92 Misc. 547, 157 N.Y.S. 219.

¹⁵⁸ (1915) 92 Misc. 547, at 554.

¹⁵⁹ (1915) 92 Misc. 547, at 556.

¹⁶⁰ (1915) 92 Misc. 547, at 556.

¹⁶¹ (1915) 92 Misc. 547, at 557.

Foreign Exchange Legislation

- 4.38** The cases in relation to foreign exchange legislation may be usefully categorised into pre and post Bretton Woods. In *Frankman v. Prague Credit Bank*,¹⁶² a decision of the King's Bench Division of the High Court, the plaintiff, who was the administrator of the estate of a Czech national, unsuccessfully sought the delivery, to him, of certain bonds that had been deposited at the London branch of the Prague National Bank. Delivery had been refused, *inter alia*, on the basis that the permission of the National Bank of Czechoslovakia, pursuant to exchange control legislation, was necessary, before delivery could be effected, but that such permission had been refused.
- 4.39** It was argued on behalf of the plaintiff that the English courts would not enforce the revenue or penal laws of other countries. However, the High Court,¹⁶³ whilst acknowledging that this was so, went on to state that what was at issue in this case were financial restrictions which had to do with the financial position and, internationally, the financial relationship of Czechoslovakia. The Court went on to state that the United Kingdom was a party to the Bretton Woods Agreement and that a statutory instrument,¹⁶⁴ made pursuant to section 3 of the Bretton Woods Agreement Act, 1945, gave the force of law to certain provisions¹⁶⁵ of the Bretton Woods Monetary Fund Agreement and showed that the particular restrictions made by Czech law were honoured by members of the international monetary fund constituted by that agreement and, included amongst such members were both Czechoslovakia and the United Kingdom.
- 4.40** In *Kahler v. Midland Bank*,¹⁶⁶ a decision of the House of Lords, a somewhat different approach was adopted. A Czechoslovak bank held certain securities on behalf of Kahler, the securities having been previously transferred to it by another bank in Czechoslovakia. The securities had been deposited by the first Czechoslovak bank with the Midland Bank. Kahler sought to recover the securities from the Midland Bank.

¹⁶² [1948] 1 K.B. 730.

¹⁶³ [1948] 1 K.B. 730, at 746.

¹⁶⁴ Statutory Regulation and Order 1946, No. 36.

¹⁶⁵ Article VIII, section 2 (b).

¹⁶⁶ [1950] A.C. 24.

- 4.41** In a majority decision, the House of Lords held that Kahler could not recover as, pursuant to Czechoslovakian exchange control legislation, it was illegal for a Czech bank to part with foreign securities in its custody, without the consent of the Czechoslovak National Bank, which consent had not been given, even if the securities were situated in some other country.
- 4.42** Lord Reid, who was in the minority, in relation to the question of the appropriate classification of exchange control legislation, stated¹⁶⁷ that exchange control regulations did not come within the category of confiscatory or fiscal legislation which English courts could not recognise. Lord Radcliffe, who was in the majority, stated¹⁶⁸ that he would not have been prepared to treat the currency regulations in question as if they were no more than the penal or revenue laws of another state the existence of which the English courts were traditionally disposed to ignore.
- 4.43** In the pre-Bretton Woods decision of *King of the Hellenes v. Bostrom*,¹⁶⁹ it was common case between the parties that the object of the legislation under consideration was to secure, for the Greek government, the benefit of the foreign exchange in respect of goods exported from Greece.¹⁷⁰ In denying the Greek Government an injunction, restraining the sale in England, of a cargo of raisins that had been smuggled out of Greece, the King's Bench Division of the High Court held that, at issue were the revenue provisions of a foreign state.
- 4.44** Further, in *Banco do Brasil S.A. v. A.C. Israel Commodity Co.*,¹⁷¹ is a case in which the Court was willing to extend the Rule to exchange control legislation.¹⁷² A Brazilian government agency sought to recover damages from an American coffee importer for a conspiracy with a Brazilian coffee exporter to defraud the Brazilian government by

¹⁶⁷ [1950] A.C. 24, at 46-47.

¹⁶⁸ [1950] A.C. 24, at 57.

¹⁶⁹ (1923) Ll. L. Rep. 167, 190.

¹⁷⁰ (1923) Ll. L. Rep. 167, 190, see pp. 167 and 193.

¹⁷¹ 12 N.Y.2d 371, 239 N.Y.S.2d 235 (App. 1963).

¹⁷² The question of whether exchange control legislation comes within the meaning of revenue law for the purposes of the Revenue Rule has given rise to conflicting views, see Dicey, Morris & Collins, *The Conflict of Laws* (14th ed.), at paragraph 5-030, footnote 48. Dicey states that they may not be revenue laws, citing *Frankman v. Prague Credit Bank* [1948] 1 K.B. 730, 746; *Kahler v. Midland Bank* [1950] A.C. 24, 46-47, 57; but notes that export regulations designed to protect foreign exchange were treated as revenue laws in *King of the Hellenes v. Bostrom* (1923) Ll. L.R. 167.

means of a breach of exchange control regulations. Article VIII (s 2, subdivision. (b)) of the Bretton Woods Agreement, a multilateral treaty to which both the United States and Brazil were parties, provided:

“Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.”

- 4.45** The majority of the Court in refusing relief held that the government agency was attempting to enforce a revenue law. The dissent held that the argument advanced by reference to *City of Philadelphia v. Cohen*¹⁷³ and similar decisions erroneously assumed that the action before the Court was a suit to collect taxes when it was not even an effort to enforce Brazil’s currency regulations. The proceedings alleged a tortious fraud and conspiracy to deprive the government agency of the dollar proceeds of coffee exports to which it and its government were entitled. The membership of the Federal Government in the International Monetary Fund and other Bretton Woods enterprises made it impossible to say that the currency control laws of other member states were offensive to United States public policy. Refusal to entertain the suit did violence to the United States policy of co-operation with other Bretton Woods signatories and was not required by anything in the policy of New York.
- 4.46** Subsequently, in *Banco Frances e Brasileiro S.A. v. Doe*¹⁷⁴ a private Brazilian bank brought an action for fraud, deceit and conspiracy to defraud and deceive against twenty John Doe defendants and alleged that the defendants participated, in violation of Brazilian currency regulations, in submission of false applications which resulted in improper exchange by the bank, of Brazilian cruzeiros into travelers checks in United States dollars. In this instance the majority held that United States membership in the International Monetary Fund made it inappropriate to refuse to entertain the bank’s claim and that the suit was not subject to dismissal under the Revenue Rule.

¹⁷³ (1962) 11 N.Y. 2d 401, 184 N.E. 2d 167, 230 N.Y.S. 2d 188. See **Chapter 7**.

¹⁷⁴ 36 N.Y.2D 592, 331 N.E.2d 502, 370 N.Y.S.2D 534 (App. 1975).

The Appropriate Classification of Criminal Sanctions in Taxation Legislation

- 4.47** Taxation legislation may also contain criminal sanctions and a question that arises is whether such provisions fall to be regarded as revenue laws or whether they are more appropriately treated as penal laws. However, before embarking upon that issue, it is first necessary to consider a preliminary question.

What Constitutes a Penal Law?

- 4.48** The *Huntington and Attrill* litigation gave rise to both Canadian proceedings which ultimately came before the Privy Council and United States proceedings which ended up in the Supreme Court. Both Courts had occasion to consider the question of what constitutes a penal law.

- 4.49** The cases concerned a New York statute which provided that if any certificate given by the officers of a corporation should be false in any material representation, all the officers who had signed it would be jointly and severally liable for the debts of the corporation contracted whilst they were in office. The appellant had subscribed to a New York company, on the basis of a certificate signed by the respondent and others, to the effect that the whole capital of the company had been paid up in cash. The statement was false.

The Canadian Proceedings

- 4.50** The appellant, having obtained final judgment against the respondent in proceedings before the Supreme Court of New York State and, having failed to recover payment, instituted proceedings in Ontario, where the respondent resided. When those proceedings¹⁷⁵ came before the Privy Council it held that the statute was not penal because it was enacted, not for the benefit of the State, nor primarily as a punishment, but as a means of redress for an injured individual.

- 4.51** Lord Watson, who delivered judgment, stated:¹⁷⁶

“A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favour of the State whose law has been infringed. All the

¹⁷⁵ *Huntington v. Attrill* [1893] A.C. 150.

¹⁷⁶ [1893] A.C. 150, at 157.

provisions of Municipal Statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the state law, as well as against individuals who may be injured by their misconduct. But foreign tribunals do not regard these violations of statute law as offences against the State, unless their vindication rests with the State itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the State, or of an official duly authorised to prosecute on its behalf, or of a member of the public in the character of a common informer.”

The United States Proceedings

4.52 The plaintiff had also brought proceedings in Maryland to set aside an alleged fraudulent transfer of property by the defendant and to charge same with the payment of the New York judgment. The court of appeals of Maryland decided against the plaintiff’s claim on the basis that the New York judgment was for a penalty under the New York statute and therefore could not be enforced in Maryland.

4.53 In delivering judgment for the majority in the Supreme Court Gray J. stated:¹⁷⁷

“The question whether a statute of one state, which in some respects 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 a wrongful act.”

4.54 The Supreme Court went on to hold that the provision of the statute of New York in question, making the officers of a corporation, who signed and recorded a false certificate of the amount of its capital stock, liable for all its debts, was in no sense a criminal or quasi-criminal law.

¹⁷⁷ (1892) 146 U.S. 657, 13 S. Ct. 224, at 673 to 674.

4.55 If the purpose of the statute is to punish an offence against the public justice of the foreign state it will not be enforceable in the courts of the forum whereas if the purpose of the statute is to afford a private remedy to a person injured by a wrongful act then, provided the injured party otherwise make out their case, the courts of the forum will allow enforcement.

4.56 Notwithstanding the restriction on the enforcement of both foreign penal laws and foreign revenue laws the distinction between the two has been maintained by the Courts. In *Milwaukee County v. M. E. White Co.*,¹⁷⁸ the United States Supreme Court held,¹⁷⁹ that the obligation to pay taxes was not penal. In similar vein the St. Louis Court of Appeals in Missouri, in *State ex rel. Oklahoma Tax Commission v. Rodgers*,¹⁸⁰ noted that tax laws are not passed to punish people.¹⁸¹ In reaching that view, the Court stated:¹⁸²

“Revenue laws are similar to penal laws only in the sense that they are both state regulations of a civic duty but intrinsically they are different. A penal law is punitive in nature, while a revenue law defines the extent of the citizen’s pecuniary obligation to the state, and provides a remedy for its collection.”

4.57 However, notwithstanding such distinctions, as is apparent, *inter alia*, from *Wisconsin v. Pelican Insurance Co.*,¹⁸³ it is invariably the case that revenue laws contain criminal sanctions.

The Subsequent Case Law

4.58 The question of classification arose, but was not resolved, in *Buchanan v. McVey*,¹⁸⁴ where Kingsmill Moore J. considered at some length the decision in *Attorney General*

¹⁷⁸ (1935) 296 U.S. 268, 56 S. Ct. 229.

¹⁷⁹ 296 U.S. 268, at 271.

¹⁸⁰ (1946) 238 Mo. App. 1115, 193 S.W. 2d 919.

¹⁸¹ 238 Mo. App. 1115, at 1126 to 1128.

¹⁸² 238 Mo. App. 1115, at 1125 to 1126.

¹⁸³ (1888) 127 U.S. 265. Discussed in **Chapter 5**, at **paragraphs 5.105 to 5.109**.

¹⁸⁴ [1954] I.R. 89.

for Canada v. Schulze.¹⁸⁵ The defenders in the latter case were tweed merchants who imported woollen goods into Canada. In December 1895 they landed three packages of tweeds at Montreal which were seized by the customs authorities for an alleged infraction of Canadian revenue laws. The Controller of Customs subsequently declared the goods to be forfeited to the Crown. The matter was referred to the Exchequer Court of Canada, the parties to the reference being the defenders as claimants and the Crown as defendant. The Court confirmed the decision of the Controller of Customs and held that the Crown was entitled to recover the taxed costs of the reference. The defenders subsequently moved for leave to appeal to the Supreme Court, and leave having been refused, they were ordered to pay the taxed costs of the application. The action before the Scottish courts was for the recovery of the two amounts of taxed costs.

4.59 The Court noted that it was conceded by counsel for the pursuer that, if he had been suing for a penalty under the Revenue Statutes of Canada, the action would not have been maintainable. Counsel argued however, that this was not an attempt to enforce the execution of revenue laws, that the forfeiture of the goods was complete before the litigation in Canada began and that the costs were awarded to the Crown not as part of a penalty but as reimbursement of outlay occasioned by the fault of the defenders.

4.60 The Court acknowledged that whilst it was quite true that the proceedings before it did not take the form of a suit for a penalty, it was not accurate to say that the forfeiture was complete, in the sense of being final, before the litigation began. The question between the parties was truly whether the forfeiture was lawful, and if the defenders had succeeded the forfeiture would have been annulled. Accordingly, the suit was truly a revenue suit; that was to say, in the sense of the international rule, it was a penal suit. The only question, therefore was whether the costs of this penal suit could be so dissociated from the suit itself as to fall outside the rule of international law. Lord Stormonth Darling was of the opinion that the costs could not be so treated.

4.61 Lord Stormonth Darling went on to state:

¹⁸⁵ (1901) 9 Sc. L.T. 4 *et seq*, where the costs of subsequent court proceedings in Canada, confirming the seizure and forfeiture of goods by customs authorities, were unsuccessfully sought, in the Scottish courts, against the importers of the goods.

“I observe that Lord Watson in the case of Huntington ... said that “No proceeding even in the shape of a civil suit, which has for its object the enforcement by the state, whether directly or indirectly, of punishment imposed for such breaches by the lex fori, ought to be admitted in the Courts of any other country”. Now this proceeding seems to me to have that object indirectly. Its success would be an additional punishment to the defenders, and a gain to the Canadian Revenue.”

- 4.62** Kingsmill Moore J. in *Buchanan v. McVey*¹⁸⁶ noted that *Attorney General for Canada v. Schulze*¹⁸⁷ might more properly be regarded as an illustration of that branch of the principle that the courts will not enforce penalties for the infringement of foreign laws than as an example of the branch that prohibits the courts from enforcing the provisions of foreign laws of a revenue nature.
- 4.63** Kingsmill Moore J. had occasion to consider the matter again in *The State (Hully) v. Hynes*¹⁸⁸ and his judgment could be read as lending support to the view that criminal sanctions in taxation legislation come within the category of revenue law. The case concerned a challenge to an extradition warrant. The Court was satisfied¹⁸⁹ that the warrant had been obtained with a view to making the prosecutor available for arrest and prosecution for a revenue offence. Kingsmill Moore J. stated¹⁹⁰ that it was undoubted law now, and it was also the law before 1922, that the courts of England and Ireland would not lend their aid to the enforcement of the fiscal laws of another country, either directly or indirectly.
- 4.64** However, a review of the jurisprudence suggests that there is also support for the view that criminal provisions in taxation legislation fall to be classified as an instance of penal law rather than revenue law.

¹⁸⁶ [1954] I.R. 89, at 101 to 102.

¹⁸⁷ (1901) 9 Sc. L.T. 4 *et seq.*

¹⁸⁸ (1961) 100 I.L.T.R. 145.

¹⁸⁹ (1961) 100 I.L.T.R. 145, at 164 to 165.

¹⁹⁰ (1961) 100 I.L.T.R. 145, at 166.

- 4.65** *Nelson v. Minnesota Income Tax Division*,¹⁹¹ which came before the Supreme Court of Wyoming, concerned an action by the plaintiff to collect a state income tax from the defendant on income earned by him whilst he resided in Minnesota. Part of the amount claimed represented a penalty. The Supreme Court, making reference to the decision in *Gulledge Bros. Lumber Co. v. Wenatchee Land Co.*,¹⁹² (in which the Minnesota courts held that the rule that courts of one state would not enforce the penal laws of another applied to suits for the recovery of revenue penalties), upheld¹⁹³ the plaintiff's claim except insofar as the amount claimed represented a penalty or interest on a penalty.
- 4.66** In *City of Philadelphia v. Smith*¹⁹⁴ the plaintiff brought consolidated actions on judgments previously obtained for unpaid city wage taxes, costs and interest in the courts of Pennsylvania against New Jersey residents who were federal employees working in Philadelphia. A district court entered judgments for the plaintiff in the amounts of unpaid taxes, costs and interest thereon but refused to include the amount of the penalties in the judgments. The relevant legislation made provision for a civil penalty of 1% a month on the amount of unpaid tax.
- 4.67** On appeal, the State Supreme Court held¹⁹⁵ that the penalty involved was primarily compensatory in purpose and civil in nature and that once this penalty was reduced to judgment it was no different in kind from a money judgment in a civil suit that included punitive damages and which was entitled to full faith and credit. The State Supreme Court concluded that the penalty involved was not a punishment but rather a surcharge imposed to compensate Philadelphia for its trouble and expense in collecting delinquent taxes.
- 4.68** In *City of Philadelphia v. Austin*¹⁹⁶ the sole subject of the litigation before the State Supreme Court was the enforceability in New Jersey of a civil judgment rendered in a Philadelphia court for one \$300 fine for each of the eight years (a total of \$2,400) in

¹⁹¹ (1967) 429 P. 2d 324.

¹⁹² (1913) 122 Minn. 266, 142 N.W. 305.

¹⁹³ 429 P. 2d 324, at 325.

¹⁹⁴ (1980) 82 N.J. 429, 413 A.2d. 952.

¹⁹⁵ (1980) 82 N.J. 429, at 433.

¹⁹⁶ (1981) 86 N.J. 55, 429 A.2d. 568.

which the defendant had failed to file a return. Referring to *Huntington v. Atrill*¹⁹⁷ the Court observed¹⁹⁸ that punishment of a public offence was an essential characteristic of a penal law. The Court noted that in this case the civil judgment arose out of a fixed dollar penalty unrelated to the amount of the tax claim. Consequently, the question was whether the punitive nature of this penalty justified the denial of full faith and credit to a judgment of a sister state. The Court stated¹⁹⁹ that the reduction of the penalty to a civil judgment was a significant change in its status. That metamorphosis diminished the penal nature of the claim and enhanced the enforceability of the judgment under the full faith and credit clause.

4.69 The Court went on to state²⁰⁰ that other reasons supported the enforcement of the judgment under the full faith and credit clause. The \$300 penalty was part of a tax law designed to collect revenues; it was imposed for failure to file an income tax return, an offence closely related to the collection of revenues. The Court stated that in fact the penalty might be necessary to compensate Philadelphia for its expense in collecting delinquent taxes. As an aid to the collection of taxes, the nature and purpose of the penalty neutralised its penal sting. The Court concluded that the purpose of the penalty was not to punish but to grant a civil remedy to the plaintiff in its role as a tax collector.

4.70 The Court noted that the civil remedies provided by New Jersey legislation were similar to those in the Philadelphia Ordinance but that one difference was that the latter provided for a 90-day prison term in addition to the fine. The Court went on to hold²⁰¹ this provision was not relevant because the judgment was for a monetary penalty only. The Court noted that the extraterritorial enforcement of criminal judgments imposing imprisonment had generally been resolved not by recourse to the full faith and credit clause but through extradition and interstate rendition.

4.71 The Court observed that it was distinguishing between a purely penal law and a tax law with penal provisions. The Philadelphia Wage Tax Ordinance was a hybrid containing

¹⁹⁷ (1892) 146 U.S. 657, 13 S. Ct. 224.

¹⁹⁸ (1981) 86 N.J. 55, at 60.

¹⁹⁹ (1981) 86 N.J. 55, at 61.

²⁰⁰ (1981) 86 N.J. 55, at 62.

²⁰¹ (1981) 86 N.J. 55, at 63.

both tax and penal features and the penal provision intertwined with the revenue raising feature of the tax law. That penal provision was transformed by the reduction of the claim to a civil judgment.

Conclusion

- 4.72** Two questions were considered in this Chapter. *Firstly*, what constitutes a revenue law, and; *secondly*, the appropriate classification of criminal provisions in taxation legislation.
- 4.73** In relation to the first question, at a conceptual level, Briggs²⁰² advances robust criteria for identifying what constitutes a revenue law. Further, whilst, *prima facie*, the case law may appear to be contradictory, there is in fact an underlying consistency of approach across a range of jurisdictions to this question; it is possible to reconcile the apparently conflicting decisions in relation to, for example, employer's contributions to state health insurance and family benefits schemes on the one hand and compulsory hospital insurance schemes on the other, by recognising that in the latter case what was sought was re-imburement of costs already incurred. This willingness to allow re-imburement of expenses incurred is also apparent in the cases involving orders for legal costs and costs of measures undertaken by state agencies. Further, with the exception of one, isolated, New York decision, the cases involving foreign exchange legislation appear to be consistent when categorised into pre and post Bretton Woods decisions; cases coming within the former category were subject to the Revenue Rule, whilst in cases in the latter category, the obligations of the Bretton Woods Agreement prevailed.
- 4.74** However, in relation to the second question, which appears to have received comparatively little academic attention, notwithstanding a series of cases from a range of common law jurisdictions, it is not possible to definitively state whether criminal provisions in taxation legislation fall to be treated as penal laws or whether they are more appropriately classified as revenue laws.

²⁰² Briggs, *The Revenue Rule in the Conflict of Laws: Time for a Makeover*, (2001) Singapore Journal of Legal Studies, 280, at 281 *et seq.*

- 4.75** As noted at the outset, this uncertainty goes to, respectively, the precise reach of the Revenue Rule and its justifications.
- 4.76** In relation to the classification of criminal sanctions in taxation legislation, although, as was observed in *State ex rel. Oklahoma Tax Commission v. Rodgers*,²⁰³ tax laws are not passed to punish people, this should not obscure the true nature of criminal sanctions, be they in tax legislation or elsewhere. Accordingly, it is suggested that such sanctions should be classified as penal. However, even with this doctrinally purer approach, as the review of the jurisprudence demonstrates, there will continue to be uncertainty in relation to whether a particular provision in tax legislation constitutes a penal law or a revenue law. The *penal/revenue* distinction also assumes importance in identifying the rationale for the Revenue Rule, the subject of Chapter 8.

²⁰³ (1946) 238 Mo. App. 1115, 193 S.W. 2d 919.

PART III – THE REVENUE RULE: ORIGINS, EVOLUTION, TAXONOMY AND RATIONALE

Chapter 5 – The Origins and Evolution of the Revenue Rule

*“Reliance on **Holman** and **Planche** for the revenue rule runs contrary to the principles of the common law system. It has been observed that “reading judicial opinions ... not for their holdings but for their language, snatching away rule-like statements to be applied like statutory texts” is an improper method of determining the law in the common law system. Rather, the proper method is to “extract” rules and reasoning from precedents, weighing the policy they promote, and applying them to the facts at hand. With respect to the revenue rule, the courts citing **Holman** and **Planche** are merely selecting language from the cases and applying them as though they were statutes. These courts fail to examine the reasoning behind those two cases, and treat Lord Mansfield as if he were a legislature in and of himself.”²⁰⁴*

Introduction

- 5.1** The purpose of this Chapter is to examine the origins and evolution of the Revenue Rule; in particular, to consider the conceptual difficulties attendant upon the *recognition/enforcement dichotomy*, to advance an alternative framework for analysis and to examine the extensive jurisprudence (of which Lord Mansfield’s decisions form but a small part) in the context of that framework. The Chapter will consider the Revenue Rule from an historical perspective, starting with the early 18th century cases, and across a variety of (mainly) common law jurisdictions. In doing so the Chapter will trace the evolution of the Rule from its beginnings to its current form.
- 5.2** Apart from introductory remarks, the Chapter is divided into four main sections; *firstly*, a background discussion which explores the issues surrounding the *recognition/enforcement dichotomy*; *secondly*, a discussion of the Revenue Rule in the

²⁰⁴ Kovatch, *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, (1999 – 2000) 22 *Houston Journal of International Law*, 265, at 276 to 277.

context of litigation between private parties; *thirdly*, a discussion of the Rule in the context of litigation involving a foreign state, and; *fourthly*, concluding remarks.

Background

- 5.3** A key question arising in private international law is choice of law; if a forum court decides that it possesses jurisdiction, then which system of law, forum or foreign, must govern the case? If foreign law is held to govern the case then the forum court will not enforce the foreign law, rather it will enforce a right acquired under such foreign law,²⁰⁵ subject to the exclusion in respect of, *inter alia*, foreign tax law, as expressed in Lord Mansfield's *dictum*: "*For no country ever takes notice of the revenue laws of another.*"²⁰⁶
- 5.4** However, latterly, Lord Mansfield's *dictum* has come to be regarded as overbroad²⁰⁷ for whilst it is *generally* the case that common law courts will not, in dualist common law systems, absent legislation, *enforce* foreign revenue laws, they will *recognise* such laws.
- 5.5** Although this *recognition/enforcement dichotomy* has influenced the development of the Revenue Rule²⁰⁸ it is conceptually problematic. Indeed, the difficulties inherent in the *recognition/enforcement dichotomy* were acknowledged by the United States Supreme Court, in *Pasquantino v. United States*, when it stated that the line the Revenue Rule draws between impermissible and permissible enforcement of foreign revenue law has always been unclear.²⁰⁹ Leaving aside the less than absolute prohibition in practice on the enforcement of foreign tax claims, or judgments from a foreign court in respect of such claims, there is, as Carter²¹⁰ cogently argues, a loose sense in which any operative recognition of a foreign law must involve an element of its application and in a different but equally loose sense, any application of a foreign law must involve its enforcement. That the supposed dichotomy gives rise to a grey penumbra rather than a bright line rule

²⁰⁵ Cheshire, Fifoot & Furmston, *Law of Contract*, (11th ed., 1986), Butterworths, p. 9.

²⁰⁶ *Holman v. Johnson* (1775) 1 Cowp. 341, 98 E.R. 1120.

²⁰⁷ *Buchanan v. McVey* [1954] I.R. 89.

²⁰⁸ *Buchanan v. McVey* [1954] I.R. 89.

²⁰⁹ 544 U.S. 349, at 366 to 367. See **Chapter 9** for a discussion of this case.

²¹⁰ Carter, *Transnational Recognition and Enforcement of Foreign Public Laws*, [1989] Cambridge Law Journal, 417.

becomes even more apparent when trying to demarcate the boundary between recognition and indirect enforcement.

- 5.6** Briggs²¹¹ brings these difficulties into sharper focus by pointing out that where, for example, a supplier of professional services sues for unpaid fees, the Revenue Rule does not preclude recovery merely because the amount of the fees sued for include an amount for value added tax. He suggests two possible justifications.
- 5.7** *Firstly*, that the plaintiff's claim cannot be seen as one to enforce a revenue law when, at the time of the claim there is no actual revenue claim to be met; that such a claim may or will arise at a date in the future is not sufficient to invoke the Revenue Rule. Such a justification may be sustainable where the supplier of services is liable to account for VAT on a monies received basis however the reasoning is suspect where the supplier is liable to account for value added tax on an invoice basis insofar as such liability is deemed to arise at the time the chargeable supply is made.
- 5.8** *Secondly*, that the defendant has a contractual liability to pay the supplier and not a liability to pay tax; accordingly, it is suggested that there is no basis for treating the claim against the defendant purchaser as one to enforce a foreign revenue law. This is a *form over substance approach* which the courts have comprehensively rejected in their application of the Revenue Rule.
- 5.9** Further, whilst the proposition that, the Revenue Rule does not preclude recovery merely because the amount sued for includes an amount of tax, may be *generally* true, it is not *invariably* true. In *Korthinos v. Niarchos*,²¹² an action for seamen's wages, a complaint was made because deduction was allowed on account of taxes required to be deducted by the Greek government from the wages of seamen. The United States Court of Appeals held that it knew of no principle of law that would justify it ignoring such a requirement of the law of a foreign government with respect to the rights of its nationals serving as seamen on a vessel flying its flag and subject to its jurisdiction. However,

²¹¹ Briggs, (2001) *The Revenue Rule in the Conflict of Laws: Time for a Makeover*, Singapore Journal of Legal Studies, 280, at 284 *et seq.* (2001).

²¹² (1950) 184 F.2d 716 at 719 (United States Court of Appeals, Fourth Circuit).

notwithstanding the apparent willingness of the Court to recognize Greek tax law there is no indication from the report that the Greek government sought or received the amounts of tax in question.

- 5.10** Recent developments in the United States suggest a more nuanced approach by the courts. In *Republic of Columbia v. Diageo North America Inc.*,²¹³ the United States District Court, in dealing with the issue of the extent to which consideration of a foreign revenue law violates the Revenue Rule, in the context of proceedings brought by a foreign sovereign in its commercial capacity, stated:²¹⁴

“There is a continuum along which a claim will require a court to consider or “pass on” a foreign tax law. At the least problematic end of the continuum is the mere recognition of a foreign tax law. At the next point along the continuum, a court must apply such a foreign law. Next, a claim might require a court to rule on the validity of a foreign tax law. Finally, a claim might require a court to explicitly enforce a foreign tax law. The Second Circuit cases make clear that the revenue rule clearly bars explicit enforcement. However, I find that whether lesser forms of consideration of a foreign revenue law – recognition, application, and determination of validity – are permissible depends on the extent to which the consideration of the foreign revenue law raises separation of powers and sovereignty concerns.”

- 5.11** Given the conceptual and practical difficulties attendant on the *recognition/enforcement dichotomy*, for the purposes of analysis in this Chapter a distinction will instead be made between; *firstly*, cases involving private parties, and; *secondly*, cases where a foreign state, directly or indirectly, is a party to the proceedings. Litigation between private parties has generally involved an attempt by one of the parties to avoid an obligation to the other by pointing to a breach of foreign tax law by one or both of the parties. Litigation involving a foreign state has generally involved an attempt by that state to

²¹³ 531 F.Supp.2d 365 (United States District Court, E.D. New York) (2007).

²¹⁴ 531 F.Supp.2d 365, at 388, (United States District Court, E.D. New York) (2007).

enforce against a private party, through proceedings in the forum court, a tax claim or a judgment in respect of such a claim given by the courts of the foreign state.

Litigation between Private Parties

- 5.12** Early cases between private parties involving the Revenue Rule frequently arose in a contractual context. This section distinguishes between simple contracts and contracts by deed (dividing the former into four categories), moves on to a discussion of the modern position and concludes with the courts' treatment of transactions designed to violate the revenue law of a foreign and friendly state.
- 5.13** In simple contracts, defendants, given the fact that tax laws had been breached, sought to take advantage of the principle of public policy *ex dolo malo non oritur actio*. Whilst it is a well-established principle²¹⁵ that a contract to defraud the revenue,²¹⁶ whether local²¹⁷ or national,²¹⁸ is illegal at common law and therefore void *ab initio*,²¹⁹ the question posed in these cases was whether the same principle applied to contracts in breach of foreign revenue law. Broadly speaking, attempts to rely on such breaches were unsuccessful up until the early part of the 20th century.
- 5.14** In contracts by deed defendants sought to take advantage of the fact that the deed in issue had not been stamped, properly or at all. Such an argument was likely to succeed only if it could be established that the absence of a stamp went to the *validity* of the contract rather than merely its *admissibility*.

Simple Contracts

- 5.15** This thesis, in considering the Revenue Rule in the context of simple contracts, advances a conceptual framework which divides such contracts into four categories:
- (1) A forum contract which breaches forum tax law.

²¹⁵ Cheshire, Fifoot & Furmston, *Law of Contract*, (11th ed., 1986), Butterworths, p. 356.

²¹⁶ "It seems clear, when Bracton wrote (c. 1240), that it was an offence to defraud the Exchequer and that defrauding the Exchequer included non-payment of any tax, customs, as well as other hereditary and casual revenues.", McBain, *Modernising the Common Law Offence of Cheating the Public Revenue*, 8 *Journal of Politics and Law*, 40, at 49, (2015).

²¹⁷ *Re Mirams* [1891] 1 Q.B. 594.

²¹⁸ *Miller v. Karlinski* (1945) 62 T.L.R. 85; *Napier v. National Business Agency Ltd.* [1951] 2 All E.R. 264, 67 L.Q.R. 449 – 451.

²¹⁹ Cheshire, Fifoot & Furmston, *Law of Contract*, (11th ed., 1986), Butterworths, p. 359.

- (2) A foreign contract which breaches forum tax law.
- (3) A forum contract which breaches foreign tax law.
- (4) A foreign contract which breaches foreign tax law.

5.16 It will be noticed that the first two categories pertain to forum tax law and accordingly, do not implicate the Revenue Rule. However, *Holman v. Johnson*,²²⁰ one of the leading early authorities on the Rule, actually fell into the second of the categories identified above. The first category is discussed for the sake of completeness and perspective and also because another early authority on the Rule is contained within it.

5.17 It will also be noticed that the categorisation advanced distinguishes between forum and foreign contracts, by which is meant the proper law of the contract. Notwithstanding that the problem of ascertaining the proper law is more perplexing in the case of contracts than in almost any other area²²¹ the distinction relied upon does have the characteristic of forming one of the central questions posed in private international law.

A Forum Contract which breaches Forum Tax Law

5.18 Such an arrangement will constitute a contract to defraud the revenue authorities and will be illegal at common law.²²² In *Biggs v. Lawrence*,²²³ an early case in which the Revenue Rule was discussed, the plaintiffs unsuccessfully sued for the price of goods supplied to the defendant. The plaintiffs were several partners, one of whom resided in Guernsey, and the rest of whom were resident in England. The Guernsey partner had sold goods to the defendant and had packed them in a particular manner for the purpose of smuggling.

5.19 Both Lord Kenyon C.J. and Buller J. treated the contract as one made in the forum, England, with Lord Kenyon expressly approving the decision in *Holman v. Johnson*.²²⁴ Ashhurst J., the third of four judges in the case, held (as it would appear, did Lord

²²⁰ (1775) 1 Cowp. 341, 98 E.R. 1120.

²²¹ Cheshire, Fifoot & Furmston, *Law of Contract*, (11th ed., 1986), Butterworths, p. 665.

²²² *Miller v. Karlinski* (1945) 62 T.L.R. 85; *Napier v. National Business Agency Ltd.* [1951] 2 All E.R. 264, 67 L.Q.R. 449 – 451.

²²³ (1789) 3 Term Rep. 454.

²²⁴ (1775) 1 Cowp. 341, 98 E.R. 1120.

Kenyon) that the plaintiffs were *particeps criminis*, being agents to the very act of smuggling and therefore could not avail themselves of the laws of the forum in order to enforce a contract made in direct opposition to those laws.

5.20 Buller J., in contrast, distinguished the facts before the Court from those in *Holman v. Johnson*²²⁵ on the grounds that the plaintiffs in the latter case were foreigners and, as subjects of one country, residing there, were not bound to take notice of the revenue laws of any other. The fourth judge, Grose J. simply concurred and did not deliver a separate judgment.

A Foreign Contract which breaches Forum Tax Law

5.21 *Holman v. Johnson*,²²⁶ which is frequently cited as the seminal authority in this area, did not, on its facts, implicate the Revenue Rule from a forum perspective. The case involved a contract, made in Dunkirk, for the sale of tea. The buyer, who smuggled the tea into England, thereafter failed to pay the seller, who, consequently sued for the price of the goods. However, the seller was neither implicated in, nor concerned with, the smuggling operation and the Court held that he was entitled to recover. At the outset of his judgment Lord Mansfield declared that:²²⁷

“There can be no doubt, but that every action tried here must be tried by the law of England; but the law of England says, that in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern. There are a great many cases which every country says shall be determined by the laws of foreign countries where they arise. But I do not see how the principles on which that doctrine obtains are applicable to the present case. For no country ever takes notice of the revenue laws of another.”

5.22 *Prima facie*, the Revenue Rule appears to be symptomatic of a parochial or, at best, mercantilist approach to inter-state relations. Yet that is emphatically not the position

²²⁵ (1775) 1 Cowp. 341, 98 E.R. 1120.

²²⁶ (1775) 1 Cowp. 341, 98 E.R. 1120.

²²⁷ (1775) 1 Cowp. 341, 98 E.R. 1120, at 343, 1121.

emerging on an inspection of Lord Mansfield's judgment. In fact, his outlook, as evidenced both by his citing of the great Dutch jurist Huber and by his concern with what would be the French perspective on the transaction under consideration, is determinedly internationalist in outlook. In the course of giving judgment he stated:²²⁸

“The doctrine Huberus lays down, is founded in good sense, and upon general principles of justice. I entirely agree with him. He puts the general case in question, thus: ... In England, tea, which has not paid duty, is prohibited; and if sold there the contract is null and void. But if sold and delivered at a place where it is not prohibited, as at Dunkirk, and an action is brought for the price of it in England, the buyer shall be condemned to pay the price; because the original contract was good and valid. – He goes on thus ... But if the goods were to be delivered in England, where they are prohibited; the contract is void, and the buyer shall not be liable in an action for the price, because it would be an inconvenience and prejudice to the State if such an action could be maintained.

5.23 Indeed, on further consideration, Lord Mansfield's judgment is an extraordinary decision for whilst it could certainly be argued that forum policy was not to enforce foreign tax laws, could it really be said that forum policy was also to uphold a foreign objective of not enforcing forum tax laws? Whilst this conclusion is not explicitly stated in his judgment, it is an implicit and unavoidable consequence of the position that he adopts. Would this not result in the promotion of foreign interests at the expense of forum interests? It has been argued²²⁹ that this is precisely the outcome the Revenue Rule is designed to avoid.

5.24 Further, Lord Mansfield's decision, whilst achieving an aesthetically pleasing symmetry of treatment between cases in the second and third categories, does invite the question of which is more detrimental to the interests of the forum, the non-enforcement of forum tax laws or the enforcement of foreign tax laws? Perhaps because of the profound implications of Lord Mansfield's judgment, much of the subsequent jurisprudence is an

²²⁸ (1775) 1 Cowp. 341, 98 E.R. 1120, at 344 to 345, 1121 to 1122.

²²⁹ See **Chapter 8**.

account of how later judges sought to escape its implications by, in effect, largely confining the decision to its facts.

- 5.25** An early example of this restrictive approach is *Clugas v. Penaluna*,²³⁰ where a contract was made in Guernsey for the sale of brandy and gin to a buyer. It was part of the bargain that the seller should pack the brandy and gin in a manner appropriate to the smuggling operation that was intended to follow. It was held that this distinguished the case before the Court from that of *Holman v. Johnson*²³¹ and that the seller, being *particeps criminis* with the buyer, could not recover. *Bernard v. Reed*,²³² was to the same effect.
- 5.26** Similarly, in *Waymell v. Reed*,²³³ the plaintiff was again concerned in giving assistance to the defendants to smuggle goods, by packing them in the manner most suitable for, and with the intent to aid, that purpose. It was held that he could not resort to the laws of England to assist him in carrying his contract to execution.
- 5.27** However, in *Pellecat v. Angell*,²³⁴ on facts similar to *Holman*, the Court held that a foreigner, selling and delivering goods abroad to a British subject and knowing, at the time of sale and delivery, that the purchaser intended to smuggle them into England, was not debarred from recovering the price of the goods. Lord Abinger stated:²³⁵

“It is perfectly clear that where parties enter into a contract to contravene the laws of their own country, such a contract is void: but it is equally clear, from a long series of cases, that the subject of a foreign country is not bound to pay allegiance or respect to the revenue laws of this, except, indeed, that where he comes within the act of breaking them himself, he cannot recover here the fruits of that illegal act. But there is nothing illegal in merely knowing that the goods he sells are to be disposed of in contravention of the fiscal laws of another country. It would be most unfortunate if it were so in this country, where, for

²³⁰ (1791) 4 Term Rep. 466.

²³¹ (1775) 1 Cowp. 341, 98 E.R. 1120.

²³² (1794) 1 Esp. 91.

²³³ (1794) 5 Term Rep. 599.

²³⁴ (1835) 2 Cr. & M. 311.

²³⁵ (1835) 2 Cr. & M. 311, at 313.

many years, a most extensive foreign trade was carried on directly in contravention of the fiscal laws of several other states. The distinction is, where he takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels, or otherwise, there he must take the consequences of his own act; but it has never been said that merely selling to a party who intends to violate the laws of his own country is a bad contract.”

A Forum Contract which breaches Foreign Tax Law

- 5.28** One of the earliest cases linked to the development of the Revenue Rule is *Boucher v. Lawson*.²³⁶ This case concerned the export of gold from Portugal, an act illegal by the laws of that country at the relevant time. In the course of delivering judgment Lord Hardwicke stated:²³⁷

“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 off all benefit of such trade from this kingdom, which would be of very bad consequence to the principal and most beneficial branches of our trade; nor does it ever seem to have been admitted.”

- 5.29** Insofar as *Boucher v. Lawson*²³⁸ is concerned, Sack has observed:²³⁹

“The questions involved in this case were whether the prohibition in question was a good defense for nonperformance of the contract and whether a contract, the performance of which was to be made in violation of foreign revenue law, should be enforced in England. No question of “application” or “enforcement” of any foreign laws — “revenue” or others— was present, and no enunciation of any rule relating to this question was made by Hardwicke.”

²³⁶ (1734) Cas. T. Hard. 85.

²³⁷ (1734) Cas. T. Hard. 85, at 89.

²³⁸ (1734) Cas. T. Hard. 85.

²³⁹ Sack, *(Non-) Enforcement of Foreign Revenue Laws, In International Law and Practice*, 81 U. Pa. L. Rev. 559, at 560.

- 5.30** Perhaps the earliest authority for the Revenue Rule, at least in litigation between private parties, is *Planché v. Fletcher*²⁴⁰ which concerned the insurance of a ship that was intended to go, and did go, direct to Nantes, though it had been cleared to Ostend. It was the apparent, though not the actual, intention that the vessel should call at Ostend and not go direct to Nantes. This affected the customs duties that might be levied.
- 5.31** Lord Mansfield rejected the assertion that sailing direct to Nantes was a fraud on the underwriters and in the course of his judgment he stated:²⁴¹ “*One nation does not take notice of the revenue laws of another.*” In *Government of India v. Taylor*²⁴² Viscount Simonds referred to *Lever v. Fletcher*,²⁴³ which he could find only in a textbook,²⁴⁴ in which it was recorded that Lord Mansfield again advanced the doctrine set out in *Planché v. Fletcher*.²⁴⁵
- 5.32** An early civil law example of the Revenue Rule is *Kohn v. Renaissance*,²⁴⁶ a case that came before the Supreme Court of Louisiana. The plaintiff, who resided in New Orleans, shipped on board the schooner *Renaissance*, 6 bags containing 3,000 Mexican dollars, to be delivered in New Orleans. On arrival of the vessel in New Orleans the specie was demanded according to the contract, but it was not delivered. The plaintiff instituted proceedings for the amount against the master and owners.
- 5.33** At trial the defendants offered to prove that the shipment of specie was made, “*in violation of the revenue laws of Mexico, and in pursuance of an agreement, illegal and corrupt under the revenue laws of that country, between the shipper and the captain of the schooner, without the knowledge or consent of the consignee, who was regularly authorized to engage freight for said schooner.*” The District Judge refused to receive this evidence on the ground that United States courts could not notice or enforce the

²⁴⁰ (1779) 1 Doug. 251.

²⁴¹ *Ibid*, at 253.

²⁴² [1955] A.C. 491.

²⁴³ (1780) Unreported.

²⁴⁴ *Park on Marine Insurance*, 8th ed., Vol. 1, pages 506 to 507.

²⁴⁵ (1779) 1 Doug. 251.

²⁴⁶ (1850) 5 La. Ann. 25, 1850 WL 3925 (La.), 52 Am. Dec. 577.

revenue laws of a foreign country. In affirming the order of the District Judge the Supreme Court stated:

“We think the rule to be well settled by the jurisprudence of the United States, of England, and of France, that courts do not notice the revenue laws of foreign nations in contracts of this kind, and that agreements, having for their object the violation of those laws, may be enforced in our courts. We prefer to follow what may be considered the established jurisprudence of the leading commercial nations of Christendom, than to adopt the speculations of authors, however plausible and ingenious they may appear.

Pothier, who is the principal authority against this necessary and practical rule, appears to found his reasoning on a refined and rigid morality, rather than on an enlarged view of the state of commerce as it existed in his time, or of its necessary exigencies. There are nations who do not respect their own revenue laws; whose whole commerce is tainted with a violation of them; and the trade with these nations has formed a constituent part of the commerce of the world for more than a century. The subject has been often discussed in France by the most eminent jurists, whose opinions have generally concurred in the necessity of adhering to the established rule, which is one not of speculative morality, but of practical jurisprudence.”

- 5.34** *Dicta* from a number of cases are also supportive of the Revenue Rule. *Sharp v. Taylor*²⁴⁷ involved the purchase and repair, by the plaintiff and defendant, who were British subjects, of an American built ship, on a joint speculation, with a view to employing the ship in trade between the two countries, until an opportunity should occur for reselling it to advantage. They arranged for the ship to be registered in the United States in the name of a third party, Robinson, who was a citizen of that country, upon a false declaration that the ship was *bona fide* the sole property of the aforementioned third party.

²⁴⁷ (1848) 2 Ph. 801, 41 E.R. 1153.

5.35 After the ship had made several voyages, Taylor, who had sole management of it, attempted to exclude Sharp from his share in the speculation and, in spite of the dissent of Sharp, sent the ship on another voyage to America. In dealing with the matter, Lord Cottenham L.C. stated:²⁴⁸

“Will the Courts of this country refuse to administer justice between joint importers of any article of commerce upon proof that, in the production or exportation of such article, some fiscal law of the country of produce has been violated? During the French war the greater part of the foreign trade of this country was carried on in spite 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. The cases do not support any such proposition.

5.36 In the Canadian case of *Reid v. Diebel*²⁴⁹ the plaintiff had agreed to acquire the business of the defendant but subsequently decided not to proceed with the transaction and instituted proceedings for the recovery of a deposit that he had paid to the defendant. In attempting to establish that he was entitled to have the agreement cancelled the plaintiff alleged, *inter alia*, that the defendant had conducted an illegal business; in particular, that during a period of four or five years, residents of Detroit had smuggled goods, purchased at the defendant’s store, into the United States.

5.37 The Court found that the defendant was not privy to any of the goods purchased in his store being smuggled into the United States but went on to state that had the defendant permitted those in his employment to be parties to a violation of the revenue laws of the United States, it could not be taken cognisance of by the Canadian courts.

²⁴⁸ (1848) 2 Ph. 801, at 816.

²⁴⁹ 1909 CarswellOnt 347, 14 O.W.R. 77.

A Foreign Contract which breaches Foreign Tax Law

- 5.38** In *Ivey v. Lalland*²⁵⁰ the High Court of Errors and Appeals of Mississippi ventured the view that the general rule, that the validity and effect of a contract was to be determined by the law of the place where it was made, was perhaps subject to the exception that where a contract which violated the revenue laws of the country where it was made, came before the courts of another country, those courts would not take notice of the foreign revenue laws.

Contracts by Deed

- 5.39** In parallel with the development of the Revenue Rule in the context of simple contracts, the courts had occasion to consider the particular case of contracts by deed. Two broad approaches are discernible.
- 5.40** The *first approach* was to simply disregard the foreign law requirements in relation to stamping, an early example being *Ludlow et al., Trustees for Creditors of Randall v. Van Rensselaer*,²⁵¹ a stamp duty case, where the defendant had executed a promissory note in France payable to the agent of Randall. The payee resided in New York, where the note was to be paid. Under French law all promissory notes were required to be stamped and no recovery could be had upon a note in that country unless a stamp were affixed.
- 5.41** It was held that the plaintiffs could recover in New York, notwithstanding the absence of the stamp, the court stating that as it did not sit to enforce the revenue laws of other countries it was immaterial, in a suit before it, whether or not the note was stamped according to the laws of France.
- 5.42** United States courts have adopted a similar approach to licence taxes. In *Gulledge Bros. Lumber Co. v. Wenatchee Land Co.*²⁵² the defendant pleaded that the plaintiff, which had been incorporated under the laws of the state of Washington, was incapacitated from commencing and maintaining proceedings in Minnesota by reason of its failure to pay

²⁵⁰ 42 Miss. 444, 1869 WL 2706 (Miss. Err. & App.), at 3.

²⁵¹ (1806) 1 Johns. N.Y. 94. The Court, in *State ex rel. Oklahoma Tax Commission v. Rodgers* (1946) 238 Mo. App. 1115, 193 S.W. 2d 919, observed that this case appeared to be the first application of the Revenue Rule in the United States and went on to discuss the case, at 1121.

²⁵² (1913) 122 Minn. 266, 142 N.W. 305.

an annual license tax imposed by Washington. The relevant Washington legislation provided for the payment of an annual license fee by corporations incorporated in the state and further provided that no corporation could commence or maintain any suit, action or proceeding in any court in the state without alleging and proving that it had paid its annual license fee. The Supreme Court of Minnesota held that the statutes of Washington in question were of the class of penal acts which would not be enforced outside of the state where they were enacted.

- 5.43** In the Scottish case of *Stewart v. Gelot*²⁵³ the Court was concerned, *inter alia*, with the effect of a failure to comply with the law of Paraguay, regarding stamp duty, upon a bill of exchange drawn by a Scot, when in Paraguay, upon a drawee in Scotland, who did not accept, in favour of a Frenchman residing in Paris. The Court was of the view that regardless of whether the effect of the law of Paraguay was to treat the bill as null or merely to affect its admissibility, the Court would not give effect to such law. The Lord Justice-Clerk stated²⁵⁴ that the tribunals of Scotland did not take notice of or enforce, either directly or incidentally, the laws of trade or revenue of another state.
- 5.44** The *second approach* evidenced a concern with the proper law of the deed, asking whether the lack of the requisite foreign stamp rendered the instrument void or merely unenforceable. This approach can be seen in *Beadall v. Moore*²⁵⁵ where the plaintiff sued, in New York, upon promissory notes that had been executed in England. The defendant pleaded that the notes were void under English law, which required that duty be paid on such notes prior to their execution and delivery and a stamp evidencing payment be affixed to same.
- 5.45** The New York Supreme Court disregarded the defence, so far as it set forth the revenue law of England, as New York courts would not enforce the revenue laws of a foreign state or country.²⁵⁶ The Court went on to hold that contract law governed negotiable instruments and that the law of the place where it was made or was to be performed

²⁵³ (1871) 9 M. 1057.

²⁵⁴ (1871) 9 M. 1057, at 1062.

²⁵⁵ (1922) 199 A.D. 531, 191 N.Y.S. 826.

²⁵⁶ 199 A.D. 531, at 533.

determined the validity of a contract.²⁵⁷ Accordingly, recovery could be had to the extent that the notes were payable in New York.

- 5.46** The Court drew a further distinction between those laws that rendered an instrument void for lack of a stamp, and those that provided that the unstamped instrument was not enforceable. The latter related to a remedy and the Court held that the law of the forum applied. In such a case, provided the instrument was not obnoxious to the laws of New York, it could be enforced in the courts of the State, notwithstanding that it could not be enforced in the country where it was made.²⁵⁸
- 5.47** In *Alves v. Hodgson*²⁵⁹ the absence of a stamp on a contract made in a foreign country altogether invalidated the contract in that country so that it could not be proceeded upon there or anywhere else. *Clegg v. Levy*²⁶⁰ is further authority for the proposition that if a stamp is necessary to the *validity* of an agreement made in a foreign country, an agreement made there, unless it has such stamp, cannot be received in an English court. In the early New South Wales case of *Gilchrist v. Davidson*²⁶¹ the majority held that a promissory note could not be dealt with as valid in the proceedings on the ground that the note was inoperative and invalid in Great Britain, where it had been made.
- 5.48** In *James v. Catherwood*²⁶² and *Bristow v. Sequeville*²⁶³ however, the evidence was that the absence of a stamp in the foreign country only affected the *admissibility* of the contract in evidence, as distinct from its validity. In dealing with this issue in the latter case Rolfe B. stated:²⁶⁴

“The marginal note of Alves v. Hodgson is perfectly correct, although I cannot help thinking that there must be some mistake in the report of the case. The

²⁵⁷ 199 A.D. 531, at 533 to 534.

²⁵⁸ 199 A.D. 531, at 533.

²⁵⁹ (1797) 7 Term Rep. 241.

²⁶⁰ (1812) 3 Camp. 166.

²⁶¹ (1849) 1 Legge (N.S.W.) 539, accessed at https://archive.org/stream/cu31924024528568/cu31924024528568-_djvu.txt on the 15th of November, 2015.

²⁶² (1823) 3 Dowl. 7 Ry. 190.

²⁶³ (1850) 5 Exch. 275.

²⁶⁴ (1850) 5 Exch. 275, at 279.

marginal note is in these terms: “The plaintiff cannot recover upon a written contract made in Jamaica, which, by the laws of that island, was void for want of a stamp.” I agree that if for want of a stamp a contract made in a foreign country is void, it cannot be enforced here. But if that case is meant to decide, that where a stamp is required by the revenue laws of a foreign state before a document can be received in evidence there, it is inadmissible in this country, I entirely disagree.”

- 5.49** Similarly, in *Fant v. Miller & Mayhew*²⁶⁵ the Supreme Court of Appeals of Virginia considered the effect of the stamp act of the state of Maryland. Joynes J., delivering the majority judgment, stated²⁶⁶ that the Maryland legislation was nothing more than a measure for raising revenue for the benefit of that state. As a means of securing the payment of the stamp duty, and for that purpose only, the payment of the duty was made a condition of the right to use the instrument in the courts of Maryland. To impose a like condition on the right to use the instrument in Virginia would be lending the courts of Virginia the right to enforce the payment of revenue to the state of Maryland, contrary to the settled doctrine that the courts of one state would not enforce the revenue laws of another. Joynes J. stated that such a rule would not only be anomalous in principle, but inconvenient in practice and inconsistent with the dignity of an independent state.
- 5.50** Although the *second approach*, in asking what is the proper law of the contract, appears to be more nuanced it gives rise to two major difficulties. *Firstly*, in allowing for the possibility that a contract by deed may be rendered void through a failure to comply with a foreign stamping requirement, the approach departs, without explanation, from the general rule in private international law that the forum will enforce rights acquired under foreign law, subject to the exclusion, *inter alia*, in respect of foreign tax law.
- 5.51** This was an issue in *Rothwells Ltd. (In Liq.) v. Connell*,²⁶⁷ a decision of the Supreme Court of Queensland. Rothwells, a company incorporated in Queensland, sought to recover \$12 million from Mr. Connell under a covenant in a deed between those parties.

²⁶⁵ 17 Gratt. 47, 58 Va. 47 (Va.), 1866 WL 2416 (Va.).

²⁶⁶ 17 Gratt. 47, 58 Va. 47 (Va.), 1866 WL 2416 (Va.), at 16.

²⁶⁷ (1993) 119 ALR 538.

The deed was executed in Western Australia in January 1989; however, the deed was not then, nor for some time thereafter, stamped according to the law of Western Australia. A counterpart deed was, however, duly stamped in Queensland.

- 5.52** The defendant argued that the absence of a stamp rendered the contract void whilst the plaintiff (apparently implicitly accepting the premise upon which the defendant's position rested) counter argued that the question of whether a foreign stamping requirement applied depended upon the proper law of the deed; if the proper law was that of the forum then the requirement was not enforceable. In advancing this position the plaintiff relied on the *dicta* of Lord Somervell in *Government of India v. Taylor*²⁶⁸ that English courts would apply foreign law if it was the proper law of a contract, the subject of a suit.
- 5.53** McPherson J., who gave a separate concurring judgment in the case, stated²⁶⁹ that he was not convinced that Lord Somervell was saying that the enforceability of a foreign tax law fell to be determined according to the proper law of the contract. Rather, his Lordship appeared to be rejecting such a proposition in favour of the broader principle of private international law that precluded the enforcement of foreign revenue laws.
- 5.54** McPherson J. noted that it might be accepted that, in relation to contracts, the general rule was that matters of essential validity were governed by the proper law. However, it did not follow that wherever it went the proper law of a contract carried with it the provisions of foreign legislation relating to the imposition and enforcement of foreign tax. The two were by no means inseparable.
- 5.55** Before reaching this conclusion McPherson J. had noted that it was a settled principle of private international law that the courts did not assist the enforcement of foreign revenue laws, or claims under those laws and he said that it was not clear to him why the Court had not been invited to apply that principle in this case.

²⁶⁸ [1955] A.C. 491 at 514.

²⁶⁹ (1993) 119 ALR 538, at 548 to 549.

5.56 He went on to note that it could have been because of a statement in Monroe²⁷⁰ that the principle did not apply to foreign stamp duty. McPherson J. held²⁷¹ that the authorities cited in Munroe did not support that view of the law, which had, by the middle of the nineteenth century, been settled in the opposite sense.

5.57 The contemporary edition of Monroe,²⁷² which makes no reference to the *dicta* of McPherson J., re-iterates the proposition that, whilst British courts pay no attention to the revenue laws of a foreign (or Commonwealth) state, this rule is not applied to stamp duties.

5.58 Monroe notes that stamp duties have been of three types;

1. duties which if not paid render the document inadmissible in evidence until the duty is paid, which can be done (on terms) at any time;
2. duties which if not paid render the document inadmissible in evidence where the defect cannot be cured or cannot be cured after the expiration of a given time; and
3. documents which are void if not properly stamped;

and goes on to state that, if foreign stamp duties are of the third type, an instrument void by the law governing the instrument (because of the absence or insufficiency of a stamp), will be void in England.

5.59 Monroe argues that the suggestion that, to hold a foreign document to be void, by reason of the absence of a foreign stamp, is to enforce foreign stamp duties, would seem to be fallacious for two reasons. *Firstly*, if the invalidity of the document cannot be cured by late stamping²⁷³ there can be no question that the UK courts are indirectly assisting the foreign revenue authorities in collecting tax since the tax will never be paid, or if paid, it will be irrelevant – to suggest that the threat that the UK courts will not recognise the document in the event of litigation in the UK is possibly a means of enabling the foreign

²⁷⁰ Monroe, *The Law of Stamp Duties*, 5th ed., p. 22.

²⁷¹ 119 ALR 538, at 548 to 549.

²⁷² Munroe and Nock, *The Law of Stamp Duties*, Release 58: September 2015, para. 1-142.

²⁷³ As a matter of logic the qualification advanced by Monroe is problematic in that a question arises as to whether a document, which is treated as invalid, could ever be cured by late stamping given that the document may well be regarded as void *ab initio*.

revenue authorities to enforce taxes is unrealistic. *Secondly*, the suggestion ignores the private international law distinction between *recognising* the existence and effect of foreign laws and *enforcing* them.

- 5.60** The *first argument* advanced by Monroe is flawed. The difference between making a document inadmissible in evidence until it is stamped and making it void by reason of the absence of a stamp goes only to the question of timing. In the former case a person will have an incentive to have the document stamped at the time it is intended to rely on it for the purposes of litigation, in the latter case the person will have an incentive to have the document stamped (depending on the terms of the relevant legislation) contemporaneously with its execution. If UK courts were to recognise such void documents much of the incentive to have them stamped in their own jurisdiction would be removed and UK trial lawyers would no doubt enjoy additional business. Conversely, the refusal of the UK courts to treat such documents as other than void can only assist in enforcing foreign tax legislation.
- 5.61** Further, in *Pasquantino v. United States* the Supreme Court noted²⁷⁴ that at the same time that they were enforcing domestic contracts that had the purpose of violating foreign revenue law, the English courts also considered void foreign contracts that lacked the tax stamps required under foreign revenue law;²⁷⁵ cases voiding foreign contracts under foreign law no doubt “enforced” foreign revenue law in the sense that they encouraged the payment of foreign taxes; yet they fell outside the Revenue Rule’s scope. The merits of the *second argument* have already been addressed in the discussion of the conceptual difficulties attendant upon the *recognition/enforcement dichotomy*.²⁷⁶
- 5.62** Consequently, by their early concession of the possibility of a contract by deed being rendered void, by reason of the failure to comply with a foreign stamping requirement, it is arguable that the courts significantly undermined the operation of the Revenue Rule as originally conceived.

²⁷⁴ 544 U.S. 349, at 366 to 367.

²⁷⁵ *Alves v. Hodgson* 7 Term Rep. 241 and *Clegg v. Levy* (1812) 3 Camp. N.P. 166.

²⁷⁶ See **paragraph 5.5** *et seq.*

5.63 Sack²⁷⁷ seeks, in effect, to defend the *second approach* by arguing that cases concerning private law relationships, between private persons and the effect that foreign revenue laws have on them, do not, in fact, involve the Revenue Rule at all. He states that the key question is whether the law in issue is part of the foreign substantive law governing the given private law relationship before the Court.²⁷⁸

“The question, in all such cases, will be that of “qualification” of the given rules of the foreign law. Only those rules would be applied, which are part of the substantive law governing the contract; no other rules, whatever they are, would be applied. “Application” or “enforcement” of certain rules of a foreign law would depend upon whether they are part of the applicable substantive law, not upon whether they are “revenue” measures.”

5.64 Sack²⁷⁹ applies this analysis to cases involving stamp duty:

“Here the following situations are possible: First, the stamp formality is, under the lex contractus of the foreign loci celebrati contractus, preliminary to the substantive validity of the contract. In such a case, if, by the rules legis fori on the choice of laws, lex loci contractus is governing the question of validity of the contract, then such an unstamped document would not be enforced by the forum, because there is no valid contract in existence.

Second, the stamp formality is, under the foreign lex loci celebrati contractus, preliminary only to the enforcement of a remedy. The unstamped contract, in such a case, would be upheld. The forum always applies its own rules of procedure and disregards the adjective law loci celebrati contractus or of any other country. There would be no question, in such a case, of any refusal to “enforce” the foreign law because it is a “revenue” measure. This law would not be applied by the forum for the reason that it is not part of the substantive lex contractus, governing the contract before the court.”

²⁷⁷ Sack, (Non-) Enforcement of Foreign Revenue Laws, In *International Law and Practice*, 81 U. Pa. L. Rev. 559.

²⁷⁸ *Ibid*, at 563, [Internal citations from the passage cited have been omitted].

²⁷⁹ *Ibid*, at 565, [Internal citations from the passage cited have been omitted].

5.65 However, Sack fundamentally undermines this approach by immediately thereafter stating:²⁸⁰

*“Let it be supposed that the foreign law declares unstamped contracts to be definitely and irrevocably invalid. In some cases this law would be deemed properly to be part of the substantive *lex contractus*. But in other cases such a law may be nothing more than a penal and fiscal provision, which has nothing to do with the substantive *lex contractus*; the law was enacted not in the interest and for the security of parties to private contracts and generally of private economic turnovers, but solely for the purpose of effectively enforcing a burdensome stamp tax.*

*In such a case, it would seem, the rule of foreign law punishing the contracting party or parties by “killing” their contract would be disregarded. But even in such a case the foreign law would be disregarded not because it has a “fiscal” character, but because it is not part of the substantive *lex contractus* applicable to the contract.*

*It is difficult, sometimes, to determine, whether a given provision of foreign law relating to stamp formality is, or is not, part of the substantive *lex contractus*.
...”*

5.66 Sack’s suggestion that a given provision of foreign revenue law relating to stamp duty formalities *may* be part of the substantive *lex contractus* is problematic. He does not offer a convincing explanation as to why making a contract void for want of a stamp should not be seen simply as a stronger form of enforcement of a fiscal provision than is provided for by merely making the contract unenforceable nor does he offer clear guidance as to when a provision of foreign law relating to stamp duty formalities is a part of the substantive *lex contractus*.

²⁸⁰ *Ibid*, at 566, [Internal citations from the passage cited have been omitted].

5.67 The *second* major difficulty arising from the *second approach* is the fact that the forum is likely to have enacted corresponding, or even conflicting, legislation. Rolfe B. was aware of this difficulty when he stated, in *Bristow v. Sequeville*:²⁸¹

“I agree that if for want of a stamp a contract made in a foreign country is void, it cannot be enforced here. But if that case is meant to decide, that where a stamp is required by the revenue laws of a foreign state before a document can be received in evidence there, it is inadmissible in this country, I entirely disagree. If that were so, it would be impossible to get out of this dilemma, that if a document were properly stamped according to the law of this country, it could not be given in evidence here, because it was improperly stamped according to the law of a foreign country where it is given”

5.68 However, whilst his *dicta* foreclosed the possibility of conflict between forum and foreign law where the latter went merely to enforceability, the question of how conflict might be resolved where the foreign law went to validity was left open.

5.69 This precise question arose in *Rothwells Ltd. (In Liq.) v. Connell*,²⁸² where the defendant argued *firstly*, under Queensland law, the validity of the deed was to be determined by its proper law; *secondly*, the proper law of the deed was that of Western Australia; *thirdly*, the deed was presently a nullity under that law by virtue of section 27 (1)²⁸³ of the Western Australia Stamp Act.

5.70 The majority of the Court held²⁸⁴ that it had not been established that the proper law of the deed was Western Australia, nor should the Court be taken as accepting that section 27 (1) was applicable in the proceedings if the law of Western Australia was the proper law. The majority went on to state that in proceedings in a Queensland court section 22

²⁸¹ (1850) 5 Exch. 275, at 279.

²⁸² (1993) 119 ALR 538.

²⁸³ Section 27 (1) stated: *Except as otherwise provided by this Act, no instrument chargeable with duty and executed in Western Australia, or relating, wheresoever executed, to any property situate or to any matter or thing done or to be done in Western Australia, shall, except in criminal proceedings, be pleaded or given in evidence or admitted to be good, useful or available in law or in equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed.*

²⁸⁴ Fitzgerald P. and Williams J.: (1993) 119 ALR 538, at 545 to 546.

(5)²⁸⁵ of the Queensland Stamp Act prevailed over an inconsistent statutory provision of another state, if it purported to apply in the proceedings, and, over Queensland common law rules, if they would otherwise apply that other statutory provision. It was the clear and explicit effect of section 22 (5) that, once stamped under that Act, the deed was admissible in evidence and available for all purposes, i.e. not merely admissible but valid.

5.71 In a separate judgment McPherson noted²⁸⁶ that it was submitted that section 27 (1) had the effect of making a contract void if it was not stamped in accordance with the Western Australia stamp duty legislation, with the consequence that it was not enforceable in Queensland. He held however, that section 27 (1) did not in terms affect to render an unstamped instrument either void or invalid and even if it did set out to nullify or avoid an instrument for want of a stamp, it would remain an open question whether effect would be given to it under the law of Queensland. It was for the courts of Queensland to determine the true character of the provision of Western Australian law upon which it was sought to place reliance and not to blindly accept what foreign law said was the nature or effect of its rule.

5.72 McPherson J. concluded that it was not possible to classify section 27 (1) as a provision prescribing a form of execution which, if omitted, affected the intrinsic validity, or the existence, or even the efficacy of the deed, considered as a contract or a covenant that it was now sought to enforce in Queensland. The statutory disqualification or disability was therefore properly to be considered as one going only to enforceability and thus to procedure, rather than to the substance of the obligation. This meant that it was the *lex fori*, which here was the law of Queensland, by which the admissibility and enforceability of the indenture fell to be determined. It was section 22 (5) that was the critical provision; having been stamped in accordance with the Queensland statute, section 22 (5) made the indenture admissible in evidence and available for all purposes.

²⁸⁵ Section 22 (5) stated: *Every instrument stamped with the particular stamp, denoting either that it is not stampable with any duty or that it is duly stamped, shall be admissible in evidence and available for all purposes, notwithstanding any objection to duty.*

²⁸⁶ (1993) 119 ALR 538, at 550 to 552.

The Modern Position

- 5.73** In *Buchanan v. McVey*,²⁸⁷ a decision of the Irish High Court that was subsequently affirmed by the Supreme Court, Kingsmill Moore J. noted that Tomlin J. in the case of *In re Visser*²⁸⁸ had summarised the effect of the cases of *Alves v. Hodgson*,²⁸⁹ *Clegg v. Levy*²⁹⁰ and *Bristow v. Sequeville*²⁹¹ by stating that all those cases did was to indicate that however unwilling the courts might be to recognise foreign law, there were certain cases in which, although they did not enforce the foreign revenue law, they were bound to recognise some of the consequences of that law, namely those cases where, as one of the terms of the law, contracts were rendered invalid by the foreign law.
- 5.74** Kingsmill Moore J. observed²⁹² that according to *Anson's Law of Contracts*²⁹³ there was no trustworthy authority for Lord Mansfield's pronouncement that no country ever takes notice of the revenue laws of another; that *Dicey* questioned it in the fifth edition of his *Conflict of Laws* and that it was disapproved of by the editors of the sixth edition. He noted that in *Ralli Bros. v. Compañia Naviera Sota y. Aznar*²⁹⁴ the Court reserved liberty to consider the statement and in *Foster v. Driscoll*²⁹⁵ the Court clearly considered it to be too wide.
- 5.75** In particular, Scrutton L.J., in *Ralli Bros. v. Compañia Naviera Sota y. Aznar*,²⁹⁶ stated:²⁹⁷

"In my opinion the law is correctly stated by Professor Dicey in Conflict of Laws, 2nd ed., p. 533, where he says: 'A contract is, in general, invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed' – and I reserve liberty to consider whether it is any longer

²⁸⁷ [1954] I.R. 89, at 99 *et seq.*

²⁸⁸ *In re Visser H.M. The Queen of Holland (Married Woman) v. Drukker and Others* [1928] 1 Ch. 877.

²⁸⁹ (1797) 7 Term Rep. 241.

²⁹⁰ (1812) 3 Camp. 166.

²⁹¹ (1850) 5 Exch. 275.

²⁹² [1954] I.R. 89, at 99 *et seq.*

²⁹³ 19th ed., at page 218.

²⁹⁴ [1920] 2 K.B. 287, at 300.

²⁹⁵ [1929] 1 K.B. 470.

²⁹⁶ [1920] 2 K.B. 287.

²⁹⁷ [1920] 2 K.B. 287, at 300.

an exception to this proposition that this country will not consider the fact that the contract is obnoxious only to the revenue laws of the foreign country where it is to be performed as an obstacle to enforcing it in the English Courts. The early authorities on this point require reconsideration, in view of the obligations of international comity as now understood.”

- 5.76** In *Ralli Bros.*²⁹⁸ a contract was to be performed, and the final payment to be made, in Spain. Under a Spanish decree, enacted after the contract was made, the payment for the services in question was not to exceed a certain sum in local currency. Owing to this decree, the actual payment made in Spain was less than the amount agreed upon in sterling. The decree was held applicable and the claim for the unpaid balance was unsuccessful before the Court.²⁹⁹
- 5.77** Kingsmill Moore J. stated³⁰⁰ that he doubted that Lord Mansfield intended his remarks to preclude a court from informing itself as to the provisions of a foreign revenue law in order to determine the question whether a foreign transaction was or was not fraudulent and void according to the law of that country; but that if he so intended the High Court must refuse to follow his view.
- 5.78** Indeed, *Rossano v. Manufacturers' Life Insurance Co.*³⁰¹ appears to be only modern decision supporting the proposition that the courts will not recognise a foreign revenue law. The plaintiff was an Egyptian national, residing in Egypt, who applied, for three, 20-year endowment policies of insurance for £3,000, £4,000 and \$10,000. The policies were executed later that year, in Toronto, in the plaintiff's favour. The parties agreed that money was to be made payable in banker's demand drafts on London for pounds sterling in respect of the first two policies and in respect of the third policy the money was to be paid in banker's demand draft on New York for U.S. dollars. The three policies

²⁹⁸ The forgoing description of the case is taken from Sack, *(Non-) Enforcement of Foreign Revenue Laws, In International Law and Practice*, 81 U. Pa. L. Rev. 559, at 560.

²⁹⁹ Contrast with the decisions in *Indian and General Investment Trust Ltd. v. Borax Consolidated Ltd* [1920] 1 K.B. 539, *Spiller v. Turner* [1897] 1 Ch. 911 and *London and South American Investment Trust, Limited v. British Tobacco Company (Australia), Limited* [1927] 1 Ch. 107.

³⁰⁰ [1954] I.R. 89, at 100.

³⁰¹ [1963] 2 Q.B. 352.

matured on the 15th of March, 1960, and the plaintiff brought proceedings claiming the monies due.

- 5.79** Two defences were raised. Firstly, it was argued that the proper law of the contracts being Egyptian or the *situs* of the debt or the contractual place of performance being in Egypt, payment by the defendants would be illegal under the Egyptian exchange control law, if effected without the permission of the Egyptian control authorities. Secondly, that as there were two garnishee orders, served upon the defendants' branch in Egypt, by the Egyptian revenue authorities, in respect of tax alleged to be due by the plaintiff, payment to the plaintiff would expose the defendants to penalties or to the risk of having to pay the money twice.
- 5.80** The High Court held³⁰² that the proper law of the contracts was the law of Ontario and that accordingly, the Egyptian control legislation did not apply to the policies as part of the proper law of the contracts. The Court observed³⁰³ that it did not understand, from the argument addressed to it, that the *lex situs* was advanced as a ground for applying the Egyptian control legislation independent of the law of the place of performance and it went on to hold³⁰⁴ that although Egypt was a permissible place of performance, the defendants had no right to insist upon payment only in Egypt and that accordingly, Egypt was not the relevant place of performance.
- 5.81** Insofar as the defence was based upon the garnishee orders the Court held³⁰⁵ referring, *inter alia*, to *Buchanan*, that the fundamental objection to the recognition of the garnishee orders was that such recognition would offend against the well-settled principle that the English courts would not recognise or enforce, directly or indirectly, a foreign revenue law or claim.

³⁰² *Ibid*, at 369.

³⁰³ *Ibid*, at 371.

³⁰⁴ *Ibid*, at 372.

³⁰⁵ *Ibid*, at 376 to 378.

- 5.82** The Court's assertion that a revenue law will not even be recognised has been rightly criticised³⁰⁶ and the result is certainly surprising given the willingness of courts across a range of jurisdictions to mitigate the effects of the Revenue Rule where private parties would otherwise be adversely affected.
- 5.83** *Buchanan v. McVey*³⁰⁷ in form concerned litigation between private parties but in substance involved a dispute between a foreign state and a private party. A director and majority shareholder, Mr. McVey, of a company, Buchanan Ltd, liquidated the assets of the company, discharged all of its liabilities, save those owing to the revenue authorities, and moved to Ireland with the proceeds. A liquidator, appointed in Scotland, thereafter sought the assistance of the Irish High Court in recovering the proceeds. Mr. McVey argued that he was not liable to account as a shareholder and that what he did, *quoad* the company, was unexceptionable; he had received the money from the company in his capacity as a shareholder in pursuance of an agreement between all the corporators and the company could not now ask to have it back.
- 5.84** Kingsmill Moore J. noted that a director was in a fiduciary capacity and so was liable to account for his dealings with the property of the company over which he had control. A director might be able to account satisfactorily if he could show that he was merely obeying the lawful commands of the company. Notwithstanding that there had been no formal meeting of the company to authorise the disposal of its property to the defendant and no resolution, subject to two conditions, neither was needed if all the corporators agreed to the disposal. The two necessary pre-requisites were; *firstly*, that the transaction to which the corporators had agreed should be *intra vires* the company, and; *secondly*, that the transaction should be honest.
- 5.85** The defendant contended that the distribution of the company's property was in accordance with the memorandum of association and accordingly, *intra vires*. Kingsmill Moore J. held that the profits that the company had purported to distribute were illusory in that there was a revenue liability almost exactly equal to the profits that had been

³⁰⁶ Briggs, *The Revenue Rule in the Conflict of Laws: Time for a Makeover*, (2001) Singapore Journal of Legal Studies, 280, at 284, footnote 11.

³⁰⁷ [1954] I.R. 89.

made.³⁰⁸ It appeared, therefore, that the transaction amounted to a distribution of property otherwise than out of profits and was therefore *ultra vires*.³⁰⁹

- 5.86** The defendant advanced the proposition that the Court could not recognise, or even inform itself, of the revenue provisions of another country and that it must therefore blind itself to the existence of excess profits tax and, in so doing, find that the distribution was made only out of net profits. Kingsmill Moore J. rejected the defendant's proposition and concluded that the transaction amounted to a fraud on the Scottish revenue and was not honest. It followed that the company was entitled to question the validity of the transaction when in a position to do so.³¹⁰
- 5.87** Although it was only in the course of considering the question of honesty that Kingsmill Moore J. explicitly dealt with the issue of whether it was permissible to recognise the revenue provisions of another country, on appeal the Supreme Court observed that it was necessary to take notice of the claim of the Scottish revenue in considering both questions.³¹¹
- 5.88** The distinction drawn between cases involving private parties and litigation involving a foreign state is also clear in the case of *In re CINAR Corporation Securities Litigation v. Carson*.³¹² This case involved four separate civil actions arising out of allegedly fraudulent disclosures made by CINAR and its officers in various public financial statements issued between 1998 and 2000. In particular, it was alleged that CINAR issued several press releases, published financial reports and submitted SEC filings which contained inflated estimates of its financial position because they, *inter alia*, took into account improperly claimed tax credits granted by the Canadian authorities as part of an incentive scheme.
- 5.89** The defendants claimed that the Revenue Rule, which mandates that courts refrain from adjudicating cases where they will have to pass on the validity of the revenue laws of

³⁰⁸ *Ibid*, at 97.

³⁰⁹ *Ibid*, at 98.

³¹⁰ *Ibid*, at 100.

³¹¹ *Ibid*, at 118.

³¹² 186 F.Supp.2d 279, (E.D.N.Y.) (2002).

foreign nations, counselled for dismissal. The Court noted³¹³ that the plaintiffs rightly pointed out that the Revenue Rule applied in cases where a foreign nation sought to enforce its tax laws in the forum and that this was not a concern in this case. The Court went on to note that it would not be commenting on the validity of the Canadian incentive scheme but rather deciding whether the defendants' abuse of that scheme defrauded American investors.

Transactions Violating the Revenue Law of a Foreign and Friendly State

5.90 The extent of the departure from the early authorities on the Revenue Rule is apparent from the fact that the Courts, or at least those of England and New Zealand, will not countenance a transaction designed to violate the revenue law of a friendly and foreign state.

5.91 An early indication of a change in approach is evident from the decision in *Foster v. Driscoll*³¹⁴ (where, in Kingsmill Moore's opinion,³¹⁵ the Court clearly considered Lord Mansfield's statement to be too wide). Contracts contemplating the introduction of whiskey into the United States in violation of the prohibition laws were held to be invalid.

5.92 In *Controller and Auditor-General v. Davison*³¹⁶ Cooke P. noted:³¹⁷

“As Cheshire and North's Private International Law (12th ed, 1992) states, “on the ground that public policy demands the maintenance of harmonious relations with other nations, the courts will not countenance any transaction, such as a fraudulent tax-evasion scheme, which is knowingly designed to violate a revenue law of a foreign and friendly State”. The immediate supporting authorities cited are Re Emery's Investment Trusts [1959] Ch 410; Pye Ltd v B G Transport Service Ltd [1966] 2 Lloyd's Rep 300, 308-309; and Euro-Diam Ltd v Bathurst [1990] 1 QB 1, 39-40. As Kerr LJ pointed out in the passage just cited, one need

³¹³ 186 F.Supp.2d 279, at 293, fn. 9, (E.D.N.Y.) (2002).

³¹⁴ [1929] 1 K.B. 470.

³¹⁵ [1954] I.R. 89, at 99.

³¹⁶ [1996] 2 NZLR 278.

³¹⁷ [1996] 2 NZLR 278, at 287.

not go beyond the House of Lords case of Reggazzoni v K C Sethia (1944) Ltd [1958] AC 301 for authority that, while local Courts do not enforce foreign revenue or penal laws, it is contrary to comity and public policy to assist in their breach. There is no reason why New Zealand law should not embrace the same principle.”

- 5.93** In *Reggazzoni v. K.C. Sethia (1944) Ltd.*³¹⁸ Viscount Simonds noted that point arising in the appeal was whether, in a suit between private persons, the court would enforce a contract which involved the doing, in a foreign country, of an act which was illegal by, and violated, the law of that country.
- 5.94** The facts of the case were that the respondents agreed to sell and deliver to the appellant, jute bags; both parties contemplating that they should be shipped from India to Genoa for resale in South Africa. The parties were also aware that the export of jute from India to South Africa was prohibited by Indian law. English law was the proper law of the contract. The respondents repudiated the contract.
- 5.95** Viscount Simonds observed³¹⁹ that the cases relating to the breach of a revenue law were not germane to the appeal and whether they were still to be regarded as a binding authority was a question that must await determination. Notwithstanding this observation the case is important in tracing the development of the Revenue Rule.
- 5.96** Viscount Simonds noted³²⁰ that it could hardly be regarded as a matter of comity that the English courts would not entertain a suit by a foreign state to enforce its revenue laws. It was, on the other hand, nothing else than comity which had influenced the courts to refuse, as a matter of public policy, to enforce, or to award damages for the breach of, a contract which involved the violation of foreign law on foreign soil and it was the limits of this principle that fell to be examined in this appeal.

³¹⁸ [1958] A.C. 301 at 320 to 321.

³¹⁹ *Ibid*, at 323.

³²⁰ *Ibid*, at 318 to 319.

5.97 Viscount Simonds went on to hold³²¹ that it did not follow from the fact that today the court *would not* enforce a revenue law at the suit of a foreign state, that today it *would* enforce a contract which required the doing of an act in a foreign country which violated the revenue law of that country. The two things were not, in the view of Viscount Simonds, complementary or co-extensive. This could be seen, he continued, if for revenue law, penal law was substituted, for an English court would not enforce a penal law at the suit of a foreign state, yet it would be surprising if it would enforce a contract which required the commission of a crime in that state. Viscount Simonds concluded that it was sufficient however, for the purposes of this appeal, to say that whether or not an exception must still be made in regard to the breach of a revenue law in deference to old authority, there was no ground for making an exception in regard to any other law.

5.98 In the case of *In Re Emery's Investment Trusts*,³²² the plaintiff was a British subject married to a United States citizen with whom at all material times he lived in South America. The husband bought shares which were registered in the name of his wife; the intention of the husband was that the beneficial interest in the shares should be as to one-half to the wife and the other half to him. However, in order to avoid payment of United States withholding tax to which, as an alien, the husband was liable under United States Federal Law, no mention was made of his beneficial interest. Subsequent to the husband asking for a divorce the wife sold the shares. In the within proceedings, in which the husband sought certain reliefs, the Court held that the registration of the shares in the wife's name raised a presumption of advancement which could not be rebutted on the ground that the purpose of such registration was to enable the husband to avoid payment of United States taxes, for equity would not grant relief in respect of a transaction carried out in contravention of law, albeit a foreign revenue law.

5.99 In so finding Wynn-Parry J. cited³²³ a passage from the judgment of Denning J. in *Regazzoni v. K.C. Sethia (1944) Ltd.*³²⁴ in which he stated:

³²¹ *Ibid*, at 322.

³²² [1959] Ch. 410.

³²³ [1959] Ch. 410, at 420 to 421.

³²⁴ [1955] 2 Q.B. 490 at 515.

a. “It is perfectly true that the courts of this country will not enforce the revenue laws or the criminal laws of another country at the suit of that other country, either directly or indirectly. These courts do not sit to collect taxes for another country or to inflict punishments for it; and this is so even between countries of the Commonwealth, as the House of Lords held in *Government of India v. Taylor*. These courts will not enforce such laws at the instance of a foreign country. It is quite another matter to say that we will take no notice of them. It seems to me that we should take notice of the laws of a friendly country, even if they are revenue laws or penal laws or political laws, however they may be described, at least, to this extent, that if two people knowingly agree together to break the laws of a friendly country or to procure someone else to break them or to assist in the doing of it, then they cannot ask this court to give its aid to the enforcement of their agreement.”

5.100 *Pye Ltd. v. B & G Transport Service Ltd*³²⁵ concerned an action for the value of certain radio sets which were stolen whilst being transported by the defendants. There was evidence before the Court that the plaintiffs had issued false invoices to the Persian buyers of the goods for the purpose of defrauding Persian customs. In so doing they contravened United Kingdom customs and excise legislation. The Court, whilst holding that the plaintiffs did not have to rely on their contract with the buyers to establish or support their cause of action against the defendants, referred to the Court of Appeal’s decision in *Regazzoni* and stated,³²⁶ *obiter*, that if the plaintiffs had sued the buyer for the price of the goods their action would have failed.

5.101 In *Euro-Diam Ltd. v. Bathurst*³²⁷ Kerr L.J.³²⁸ re-iterated the view of the Court of Appeal that whilst the English courts did not enforce foreign revenue laws, neither would they assist in their breach.

³²⁵ [1966] 2 Lloyd’s Rep. 300.

³²⁶ [1966] 2 Lloyd’s Rep. 300, at 309.

³²⁷ [1990] 1 Q.B. 1.

³²⁸ [1990] 1 Q.B. 1, at 40.

Litigation involving a Foreign State

5.102 As discussed, cases involving a foreign state are generally concerned with seeking to enforce a tax claim, or a judgment obtained from the foreign state's courts in respect of same, through proceedings in the courts of the forum. In considering such litigation it is useful to distinguish between attempts at *direct enforcement*, where the foreign state or one of its agencies is a party to the proceedings; *indirect enforcement*, where an ostensibly private party brings proceedings which are *in substance* an attempt to enforce the foreign state's tax claim, and; *functional enforcement*, where the foreign state or one of its agencies brings proceedings relying on forum legislation. This last, newly emerging category, gives rise to special considerations and is discussed in **Chapter 9** after examining the rationale for the Revenue Rule.

5.103 This section discusses the impact of the penal law restriction on the development of the Revenue Rule in the context of litigation involving a foreign state before proceeding to discuss direct and indirect enforcement.

Impact of the Penal Law Restriction on the Development of the Revenue Rule

5.104 Before examining the restrictions on direct and indirect enforcement the impact of the penal law restriction on the development of the Revenue Rule is considered.

5.105 The consequences of the restriction of the enforcement of foreign penal laws for the enforcement of foreign revenue laws were made explicit by *Wisconsin v. Pelican Insurance Co.*³²⁹ In that case an action was brought in the United States Supreme Court upon a judgment recovered by the state of Wisconsin, in one of its own courts, against the Pelican Insurance Company, a Louisiana corporation, for penalties imposed by a statute of Wisconsin, for not making returns to the insurance commissioner of the state, as required by the relevant statute.³³⁰

³²⁹ (1888) 127 U.S. 265. Although it is undeniable that *Pelican* had an impact on the operation of the Revenue Rule in the United States, the (up until then) prevailing interpretation of the case was effectively repudiated by the US Supreme Court in *Milwaukee*, See **Chapter 8, paragraph 8.31, et seq.**

³³⁰ 127 U.S. 265, at 286 to 287.

5.106 The Supreme Court observed³³¹ that it had always been assumed that its original jurisdiction over, *inter alia*, controversies between a state and citizens of another state, did not extend to a suit by a state to recover penalties for breach of its municipal law.

5.107 In particular, the Court stated:³³²

“The rule that the courts of no country execute the penal laws of another applies, not only to prosecutions and sentences for crimes and misdemeanours, but to all suits in favour 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.”

5.108 The Court also stated:³³³

“The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action, (while it cannot go behind the judgment for the purpose of examining into the validity of the claim), from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it.”

5.109 In giving judgment for the defendant, the Court held³³⁴ that the statute of Wisconsin under which the plaintiff recovered in one of its own courts the judgment sued upon in these proceedings was, in the strictest sense, a penal statute.

³³¹ 127 U.S. 265, at 293 to 294.

³³² 127 U.S. 265, at 290.

³³³ 127 U.S. 265, at 292 to 293.

³³⁴ 127 U.S. 265, at 299.

- 5.110** The impact of *Pelican* is apparent in *Arkansas v. Bowen*³³⁵ where the defendant was one of five sureties on the official bond of Benton Turner, a collector of taxes for Faulkner county in the state of Arkansas. For alleged default on his part to account for his collections, Turner was adjudged to be indebted to the county. Proceedings were issued against Turner and his sureties to show cause why final judgment should not be rendered against each and all of them.
- 5.111** Bowen was a resident of the state of Arkansas at the time he entered upon the bond but it appeared that in 1874 he removed to Colorado and was resident there at the time of the proceedings against Turner and the sureties. Judgment had been given against Turner, and his sureties, for the amount of the defalcation, and a penalty of 25% was imposed for non-payment. It had been further adjudged, pursuant to the law of Arkansas, that the whole amount should bear interest, until it was paid, at the rate of 50% per annum.
- 5.112** The Court of Appeals of the District of Columbia applied *Pelican* and, in finding for Bowen, held that the judgment sought to be enforced in this case embraced such a penalty.
- 5.113** The impact of the penal law restriction on the development of the Revenue Rule insofar as it relates to *indirect enforcement* is apparent from *Buchanan v. McVey*,³³⁶ in which Kingsmill Moore J. noted³³⁷ that, although the authorities did not expressly go further, some of the *dicta* suggested that there might be a principle that forum courts would not lend themselves *indirectly* to the collection of a foreign tax and would not entertain a suit which was brought for that object. He then went on to refer to three cases on penalties.
- 5.114** *Firstly*, in *Huntington v. Attrill*,³³⁸ the Privy Council, in referring to the restriction on the enforcement of penal laws, had stated:³³⁹

³³⁵ 3 App. D.C. 537, 1894 WL 11939 (App. D.C.).

³³⁶ [1954] I.R. 89.

³³⁷ [1954] I.R. 89, at 103 *et seq.*

³³⁸ [1893] A.C. 150.

³³⁹ [1893] A.C. 150, at 156.

*“The rule has its foundation in the well recognised principle that ... all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of someone representing the public, are local in this sense, that they are only cognisable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lexi fori* ought to be admitted in the Courts of any other country.”*

- 5.115** Secondly, in *Raulin v. Fischer*³⁴⁰ the defendant was prosecuted in the French courts for negligent riding whereby she had injured the plaintiff and, under French law, in the same proceedings and by the same court, she was condemned to pay a sum of money to the plaintiff in respect of his injuries. She was subsequently sued for this sum in England and the English court ruled that it must determine for itself whether the enforcement of the plaintiff’s rights would either directly or indirectly involve the execution of the penal laws of another state. In giving judgment for the plaintiff the Court held that the penal element in the proceedings could be separated from the remedial.
- 5.116** Thirdly, in *Banco de Vizcaya v. Don Alfonso de Borbon y Austria*³⁴¹ the ex-King of Spain had deposited, with Westminster Bank, certain securities with instructions that they were to be held to the order of Banco de Vizcaya, as his agents. After the Spanish revolution both the King and Banco de Vizcaya claimed the securities, the latter on the grounds that by decree of the Spanish government, all the property of the King had been confiscated to the State and all Spanish bankers having such property on deposit had been ordered to deliver it to the Spanish treasury. In an interpleader issue the English court rejected the argument that Banco de Vizcaya was only enforcing its own contractual rights against the Westminster Bank. In substance, Banco de Vizcaya was not enforcing its own contractual rights, rather it was enforcing the rights of the Spanish Republic. The

³⁴⁰ [1911] 2 K.B. 93.

³⁴¹ [1935] 1 K.B. 140.

Court held that the enforcement of such right would, directly or indirectly, involve the execution of what were undoubtedly and admittedly penal laws of the Spanish Republic.

- 5.117** Kingsmill Moore J. went on to state³⁴² that the cases on penalties seemed to establish that it was not the form of the action or the nature of the complaint that must be considered, but the substance of the right sought to be enforced; and that if the enforcement of such right would even indirectly involve the execution of the penal law of another state, then the claim must be refused.
- 5.118** He further stated that he could not see why the same rule should not prevail where it appeared that the enforcement of the right claimed would indirectly involve the execution of the revenue law of another state and serve a revenue demand.
- 5.119** Kingsmill Moore J. noted that there seemed to be a reasonably close position between Banco de Vizcaya and the plaintiff in *Buchanan v. McVey*.³⁴³ In each case it was sought to enforce a personal right but as that right was being enforced at the instigation of a foreign authority and would indirectly serve claims of that foreign authority of such a nature as were not enforceable in the courts of Ireland, relief could not be given.

Direct Enforcement

- 5.120** *Attorney-General v. Lutwydge*³⁴⁴ appears to be the earliest case linked to the Revenue Rule. Dodge³⁴⁵ notes that this was a case in which the government of the United Kingdom apparently sued to collect Scottish taxes in an English court. He goes on to note that the court observed that “[b]efore the union [with Scotland] this court had no jurisdiction of the revenues in Scotland” but left open the question of whether the union had changed that jurisdiction.

³⁴² [1954] I.R. 89, at 104 to 105.

³⁴³ [1954] I.R. 89.

³⁴⁴ (1729) Bunb. 280, 281.

³⁴⁵ Dodge, *Breaking the Public Law Taboo*, (2002) 43 Harvard International Law Journal 161, at 172, fn. 60.

5.121 Further support for the prohibition on direct enforcement can be found in *Emperor of Austria v. Day & Kossuth*,³⁴⁶ a case involving the counterfeiting of the Hungarian currency, Lord Campbell L.C. stated:

“A more specious objection was rested on the class of cases in which it has been held that we take no notice of the ‘revenue laws’ of foreign countries, so that an injunction would certainly be refused to a foreign Sovereign who should apply for one to prevent the smuggling of English manufactures into his dominions to the grievous loss of his fisc. But, although from the comity of nations, the rule has been to pay respect to the laws of foreign countries, yet, for the general benefit of free trade, ‘revenue laws’ have always been made the exception; and this may be an example of an exception proving the rule.”

5.122 In *Marshall v. Sherman*,³⁴⁷ the Court of Appeals of New York, observed³⁴⁸ that the doctrine of comity had many limitations and qualifications and that there was a large class of foreign laws and statutes which, under the doctrine of comity, had no force in New York and it belonged exclusively to each sovereignty to determine for itself whether it could enforce a foreign law without, at the same time, neglecting the duty that it owed to its own subjects or citizens. The Court concluded that it had been and was a principle universally recognised that the revenue laws of one country had no force in another.

5.123 In *Municipal Council of Sydney v. Bull*³⁴⁹ the Council sued the defendant in England for a municipal improvement rate in respect of land in Australia. Grantham J., in rejecting the claim, observed³⁵⁰ that the action was in the nature of an action for a penalty or to recover a tax and was analogous to an action brought in one country to enforce the revenue laws of another. He went on to hold that in such cases it had always been held that an action would not lie outside the confines of the last mentioned state. However,

³⁴⁶ (1861) 3 De G. F. & J. 217, 241 to 242.

³⁴⁷ (1895) 2 E. H. Smith 9, 148 N.Y. 9, 42 N.E. 419.

³⁴⁸ 2 E. H. Smith 9, at 25.

³⁴⁹ [1909] 1 K.B. 7.

³⁵⁰ *Ibid*, at 10.

such remarks are more properly regarded as *obiter* because, as Mann³⁵¹ points out, Grantham J. actually disposed of the dispute by deciding that the Act requiring payment of the improvement rate did not empower the plaintiff to enforce its claim by action outside New South Wales.

5.124 In *Indian and General Investment Trust Ltd. v. Borax Consolidated Ltd*³⁵² the court had noted that whilst it was the duty of an English court to enforce an English taxing act, it was no part of its duty to enforce the taxing act of another country. The defendants, who were guarantors in respect of bonds issued by a railway company in the United States, had undertaken to pay the principal money and interest in London. They sought to deduct, from the annual payment under the bonds, an income tax of 2% imposed under United States legislation. The legislation required the railway company to deduct this tax on payment of interest. The Court rejected this defence stating that there was no Act of Parliament allowing payment of income tax to another country to be reckoned as a discharge.³⁵³ Similarly, in *Cotton v. Rex*³⁵⁴ it was stated that there was no accepted principle in international law to the effect that nations should recognise or enforce the fiscal laws of foreign countries.

5.125 A further indirect authority, in support of the Revenue Rule, is apparent from the United States Court of Appeals, Second Circuit, decision in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings Inc.*,³⁵⁵ in which it cited *Ætna Insurance Co. v. Robertson*,³⁵⁶ which concerned a suit of to recover penalties against certain insurance companies for the violation of the anti-trust laws of the state of Mississippi. In a dissenting judgment Ethridge J. observed,³⁵⁷ *inter alia*, that it was a familiar principle of law that one state or country will not aid another state or country in giving effect to judgments enforcing its penal laws or in collecting its revenues.

³⁵¹ Michael Mann, *Foreign Revenue Laws and the English Conflict of Laws*, [1954] 3 International and Comparative Law Quarterly 465, at 467.

³⁵² [1920] 1 K.B. 539. See to similar effect *Spiller v. Turner* [1897] 1 Ch. 911 and *London and South American Investment Trust Limited v. British Tobacco Company (Australia), Limited* [1927] 1 Ch. 107.

³⁵³ *Borax* can be distinguished from *Ralli Bros. v. Compañia Naviera Sota y. Aznar* [1920] 2 K.B. 287. In the latter the contract was to be performed, and the final payment was to be made, in the foreign state.

³⁵⁴ [1914] A.C. 176.

³⁵⁵ (2001) 268 F. 3d 103.

³⁵⁶ (1921) 127 Miss. 440, 90 So. 120.

³⁵⁷ 90 So. 120, at 126.

- 5.126** In the case of *In re Visser*³⁵⁸ the plaintiff was the Queen of Holland and the defendants were the executors of the deceased, Visser. The plaintiff asked for a declaration that she was a creditor of Visser's estate; for an account; and, if necessary, an order for the administration of the estate of the deceased person. Tomlin J. held that the English courts would not collect the taxes of foreign states for the benefit of the sovereigns of those states.
- 5.127** In *Kahler v. Midland Bank Ltd.*,³⁵⁹ reference to the existence of the Revenue Rule was made both in the judgments in the Court of Appeal and the speeches in the House of Lords, whilst in *Re Cohen (A Bankrupt)*³⁶⁰ it was stated that it was not the practice of civilised countries, such as France and England, to enforce foreign revenue laws.
- 5.128** The leading modern authority on *direct enforcement* is *Government of India v. Taylor*.³⁶¹ The appellant sought to prove in the voluntary liquidation of a company trading in India, but registered in the United Kingdom, for a sum due in respect of income and capital gains tax, which arose on the sale of the company's undertaking in India. There was no suggestion that the liquidator had surreptitiously removed the assets of the company from India to evade payment of tax.³⁶²
- 5.129** In the Court below, where the case had been reported under the title of *In re Delhi Electric Supply and Traction Co. Ltd.*,³⁶³ Jenkins L.J. observed³⁶⁴ that the earlier cases, whilst including decisions expressive of the recognition of the existence of a rule broadly of this nature, provided no very satisfactory account of its origin, and, indeed, little or nothing in the way of actual authority for its application in circumstances at all resembling those of the case before the Court.³⁶⁵

³⁵⁸ *In re Visser H.M. The Queen of Holland (Married Woman) v. Drukker and Others* [1928] 1 Ch. 877.

³⁵⁹ [1948] 1 All E.R. 811

³⁶⁰ [1950] 2 All E.R. 36.

³⁶¹ [1955] AC 491, *sub nom. In re Delhi Electric Supply and Traction Co. Ltd.* [1954] 1 Ch. 131.

³⁶² *Ibid*, at 143.

³⁶³ *In re Delhi Electric Supply and Traction Co. Ltd.* [1954] 1 Ch. 131.

³⁶⁴ *Ibid*, at 164.

³⁶⁵ That being said, by the time that *The Anne* 1 Mason 508, 1 F.Cas. 955 (1818) came to be decided, Story J. was able to cite the following in support of the Rule; Marsh. Ins. Bk. 1 c. 3 § 1, and 1 Valin, Comm, art. 49, p. 127; Pothier, Traite D'Assur. Note 58; 1 Emerig. 212, 215; *Planche v. Fletcher* 1 Doug. 251; *Lever v. Fletcher*, Park.

- 5.130** Lord Somervell of Harrow observed³⁶⁶ that there was no decision binding on the House of Lords and that the matter fell to be considered in principle. He noted that if one state could collect its taxes through the courts of another, it would have arisen through what was described, vaguely perhaps, as comity or the general practice of nations *inter se*. However, after considerable research, no case of any country could be found in which taxes due to State A had been enforced in the courts of State B; there was no authority apart from the comparatively recent English, Scottish and Irish cases. Lord Somervell concluded however, that there were many propositions for which no express authority could be found because they had been regarded as self-evident to all concerned. He further observed that there must have been many potential defendants.
- 5.131** Viscount Simonds noted³⁶⁷ that one of the questions that arose in the appeal was whether there was a rule of law that precluded a foreign state from suing in England for taxes due under the law of that state. Viscount Simonds went on to observe³⁶⁸ that the appeal relied upon two main grounds.
- 5.132** The first ground was that Lord Mansfield's proposition extended to revenue law a doctrine properly applicable only to penal law. It was argued that the suggestion that Lord Mansfield's proposition was too wide was supported partly by the fact that in *Huntington v. Attrill*³⁶⁹ the proposition was more narrowly stated as it also was in *Attorney-General for Canada v. Schulze*.³⁷⁰
- 5.133** Viscount Simonds noted³⁷¹ that in these cases the question was of enforcement of a penalty imposed by a foreign state and the observations of the court were directed to that question and he continued that this seemed an inadequate reason for challenging a wider statement in regard to a different subject matter.

Ins. (6th Ed.) 313; *The Courtney*, Edw. Adm. 239; *The Leander*, Id. 35; *The Fortuna*, 1 Dod. 81; *The Amedie*, Id. 84 note.

³⁶⁶ *Ibid*, at 514.

³⁶⁷ [1955] AC 491, at 503.

³⁶⁸ *Ibid*, at 506.

³⁶⁹ [1893] A.C. 150.

³⁷⁰ (1901) 9 S.L.T. 4.

³⁷¹ [1955] AC 491, at 506.

- 5.134** Viscount Simonds went on to note that upon the assumption, which must be made, that *Huntington v. Attrill*³⁷² was correct, it was conceded that it must cover not only a penalty strictly so-called but also any tax which could be regarded as penal or confiscatory. This created a difficult task of discrimination, which was not made easier by the test suggested by Counsel that, if a tax was the sort of tax that was recognised in England, it was not penal.
- 5.135** The second branch of the argument for the appellant was directed to showing that in the United States of America there had been, in certain States, a disposition to relax the rigidity of the rule. However, Viscount Simonds held³⁷³ that a development which was not universal, and was in any case confined to relations between State and State within the Union could have no weight in determining the law in England.
- 5.136** Viscount Simonds further noted that it had been urged that whatever the position between this country and a foreign country, it was not the same as between different members of the British Commonwealth, including those members which, though within the Commonwealth, did not acknowledge the sovereignty of the Crown. He stated that there was no authority or reason for such a distinction and that if such a change was to be made it was a task of governments and perhaps of parliaments.³⁷⁴
- 5.137** The issue of *direct enforcement* also arose in *United States of America v. Harden*³⁷⁵ a case considered in turn by the British Columbia Supreme Court, the British Columbia Court of Appeal and the Supreme Court of Canada. The plaintiff/appellant had brought an action against the defendant/respondent in the United States for income taxes alleged to be due by the defendant under U.S. law. As a result of pre-trial hearings the defendant consented to judgment for part of the amounts claimed by the plaintiff and formal judgment was entered on the 13th of March, 1961. On the 20th of March, 1961, the plaintiff brought an action on the judgment in the Supreme Court of British Columbia.

³⁷² [1893] A.C. 150.

³⁷³ [1955] AC 491, at 507 *et seq.*

³⁷⁴ The relationship between sovereignty and the Revenue Rule, including the impact of federal structures upon the operation of the Rule is considered further in **Chapter 5**.

³⁷⁵ (1963) 41 D.L.R. (2d) 721, affirming (1962) 36 D.L.R. (2d) 602, affirming (1961) 30 D.L.R. (2d) 566.

5.138 Two issues of relevance arose for consideration. *Firstly*, it was submitted that although a *claim* for taxes made by a foreign state would not be entertained by the Canadian courts, a *judgment* for payment of those taxes obtained in the Courts of a foreign state would be enforced. In holding that a judgment for taxes should be dealt with in no different way under the rule as stated in *Dicey* than a bare claim for taxes, Maclean J. held³⁷⁶ that the matter had been authoritatively dealt with in several cases, including *Wisconsin v. Pelican Insurance Co.*³⁷⁷

5.139 Maclean also noted:³⁷⁸

“The plaintiff strongly relied upon the judgment of the Supreme Court of the United States in the case of Milwaukee County v. M. E. White & Co. (1935), 296 U.S. 268, which was an action to enforce a judgment for State taxes within the territory of another State, and it was held that a State Court may by comity give a remedy which the “full faith and credit” clause of the American constitution does not compel. It was also held that a cause of action on a judgment is different from that upon which the judgment was entered. This pronouncement which at first blush appears to be in conflict with the previous judgment of the Supreme Court in the Pelican case appears to be based upon considerations of American constitutional law peculiar to that country and it is to be observed that although it was cited in the Government of India case, supra, that it was not followed.”

5.140 The Canadian Supreme Court, in dealing with this issue noted³⁷⁹ that Counsel for the appellant had not at any stage during the course of the proceedings before the Canadian courts questioned the well-established rule that in a foreign judgment there is no merger of the original cause of action. The Canadian Supreme Court went on to state³⁸⁰ that a foreign state could not escape the application of the Revenue Rule, which was one of public policy, by taking a judgment in its own courts and bringing suit in Canada on that

³⁷⁶ (1961) 30 D.L.R. (2d) 566, at 569.

³⁷⁷ (1888), 127 U.S. 265.

³⁷⁸ *Ibid*, at 570.

³⁷⁹ (1963) 41 D.L.R. (2d) 721, at 723.

³⁸⁰ *Ibid*, at 725.

judgment. The claim asserted remained a claim for taxes; it had not, in the Canadian courts, merged in the judgment; enforcement of the judgment would be enforcement of the tax claim.

5.141 *Secondly*, there arose for consideration the submission that the Canadian courts would enforce an agreement by way of compromise made for valuable consideration to pay an amount of money in satisfaction of a claim for foreign taxes. The Canadian Supreme Court held³⁸¹ that the argument that the claim asserted was simply for the performance of an agreement, made for good consideration, to pay a stated sum of money, must also fail. The Court was concerned not with *form* but with *substance* and if it could properly be said that the respondent made an agreement, it was simply an agreement to pay taxes which, by the laws of the foreign state, the respondent was obligated to pay.³⁸²

5.142 *Commissioner of Taxes, Federation of Rhodesia v. McFarland*,³⁸³ a further case on *direct enforcement*, concerned an unsuccessful application, before the Supreme Court of South Africa, for sums of money, with interest thereon, alleged to be owing by virtue of a final judgment granted by the High Court of Southern Rhodesia, which judgment was in respect of taxes owing under Rhodesian law. Vieyra J. noted³⁸⁴ that there had not previously been a judgment in the South African courts on this matter although there was a widespread view that the courts of one state had no jurisdiction to entertain legal proceedings involving the enforcement of the revenue laws of another state.

5.143 *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson*³⁸⁵ appears to be the first time that a foreign nation had sought to enforce a tax judgment in the courts of the United States.³⁸⁶ The Canadian province of British Columbia sued to recover on a judgment for taxes which had been awarded against the defendants by a

³⁸¹ *Ibid*, at 725.

³⁸² Strebel, *The Enforcement of Foreign Judgments and Foreign Public Law*, 21 Loyola Los Angeles International & Comparative Law Journal 55, at 75, fn. 108, (1999) (“... since January 1996, Canada and the United States mutually enforce revenue claims that are final determinations by the other country. See Article XXVI.A (“Assistance in Collection”) of the Third Protocol amending the Convention between Canada and the United States with respect to taxes on Income and on Capital (signed on Sept. 26, 1980).”).

³⁸³ 27 SATC 15, 1965 (1) SA 470 (W), accessed from Lexis Nexis.

³⁸⁴ Page 2 of the Lexis Nexis report.

³⁸⁵ (1979) 597 F. 2d 1161.

³⁸⁶ 597 F.2d 1161, at 1164.

British Columbia Court. The defendants, who were all citizens of Oregon, had received income from logging operations in British Columbia. The issue before the Ninth Circuit Court of Appeals was whether the courts of the United States would enforce a judgment rendered for taxes by the courts of a foreign government.

- 5.144** The Court noted³⁸⁷ that generally judgments from a foreign country were recognised by the courts of the United States when the general principles of comity were satisfied. Two often stated exceptions to comity occurred when the judgment was based on either the tax or penal laws of the foreign country. The Court stated³⁸⁸ that Revenue Rule had continued validity in the international context and that if a court were compelled to recognise the tax judgment from a foreign nation, it would have the effect of furthering the governmental interests of a foreign country, something which United States courts customarily refused to do.
- 5.145** The Court noted³⁸⁹ that there was no Oregon case law on point and that from an examination of statute law in that jurisdiction it appeared that the Oregon legislature continued to recognise the revenue rule. The Court further observed that notwithstanding that the United States government had entered into two tax treaties with the Canadian government they had not abolished the Revenue Rule as between themselves.
- 5.146** The Court also noted³⁹⁰ that from Oregon statute and recent Congressional action, it could be inferred that a reciprocity requirement was still important within the context of tax laws. The Court went on to state that reciprocity of itself would be a sufficient basis for denying British Columbia's claim; the courts of British Columbia, relying on the Revenue Rule, had refused to recognise the judgment of a United States court for taxes in *United States of America v. Harden*.³⁹¹

³⁸⁷ 597 F.2d 1161, at 1163.

³⁸⁸ 597 F.2d 1161, at 1164.

³⁸⁹ 597 F.2d 1161, at 1165.

³⁹⁰ 597 F.2d 1161, at 1165 to 1166.

³⁹¹ (1963) 41 D.L.R. (2d) 721, affirming (1962) 36 D.L.R. (2d) 602, affirming (1961) 30 D.L.R. (2d) 566. But see Strebel, *The Enforcement of Foreign Judgments and Foreign Public Law*, 21 Loyola Los Angeles International & Comparative Law Journal 55, at 75, fn. 108, (1999) (“... since January 1996, Canada and the United States mutually enforce revenue claims that are final determinations by the other country. See Article XXVI.A (“Assistance in Collection”) of the Third Protocol amending the Convention between Canada and the United States with respect to taxes on Income and on Capital (signed on Sept. 26, 1980).”).

Indirect Enforcement

- 5.147** The leading case on indirect enforcement is *Buchanan v. McVey*,³⁹² the facts of which have already been set out.³⁹³ Kingsmill Moore J. found³⁹⁴ as a fact that the sole object of the liquidation proceedings in Scotland was to collect a revenue debt. There was no evidence that any ordinary creditor would not have been paid in full out of the assets left in Scotland and as far as the ordinary creditors were concerned the result of the liquidation proceedings in Scotland would be to deprive them of payment by reason of the priority in Scotland of a Revenue debt.
- 5.148** Kingsmill Moore J. held that the sole object of the proceedings before him was to collect a Scottish revenue debt and that if he were to decide for the plaintiffs the only result of the proceedings would be that every penny recovered, after paying certain costs and liquidator's remuneration, could be claimed by the Scottish Revenue. Accordingly, he rejected the claim. It should be noted however, that, in the subsequent appeal to the Supreme Court, Maguire C.J. entered the significant caveat³⁹⁵ that, if the payment of the revenue claim in that case had only been incidental and there had been other claims to be met, it would have been difficult for the courts to refuse to lend assistance.
- 5.149** The approach of Kingsmill Moore J. to the question of indirect enforcement has since been followed in other common law jurisdictions.
- 5.150** In *QRS 1 ApS v. Fransden*³⁹⁶ the Court of Appeal noted³⁹⁷ that the facts of the case were in all material respects indistinguishable from those in *Buchanan*, the leading authority on this aspect of indirect enforcement. The Court stated³⁹⁸ that there could be no distinction between the defendant's sale of the company's assets and his pocketing of the proceeds in *Buchanan* and the defendant's sale of the companies' assets and use of

³⁹² [1954] I.R. 89.

³⁹³ See **paragraph 5.83**.

³⁹⁴ [1954] I.R. 89, at 108.

³⁹⁵ [1954] I.R. 89, at 117. See **Chapters 11 and 12**.

³⁹⁶ [1999] 1 W.L.R. 2169. See **Chapter 2, paragraph 2.11**, for earlier discussion of this case.

³⁹⁷ *Ibid*, at 2172.

³⁹⁸ *Ibid*, at 2173.

the proceeds to fund their purchase of his own shares in this case. Accordingly, it rejected the attempt to collect tax by the institution of the proceedings in question.

- 5.151** In *Relfo Ltd. (in liquidation) v. Varsani*,³⁹⁹ a case from Singapore, the plaintiff, a United Kingdom company, was placed in liquidation but the liquidator appointed by the directors was rejected by the majority creditor, the United Kingdom Inland Revenue, and its nominee was appointed. The Inland Revenue's nominee worked on a contingency fee basis and about 80% of his business came from the Inland Revenue.
- 5.152** The plaintiff had been incorporated in 1996 and up to June 2001 the defendant and his brother had each held 50% of the share capital of the company. The company went into liquidation in 2004. Prior to going into liquidation the plaintiff's directors had passed all of its assets to an overseas bank and the following day an almost equivalent amount appeared in the defendant's account in another overseas bank.
- 5.153** The liquidator succeeding in establishing before the Court that the plaintiff's assets had been disposed of in breach of trust and/or fiduciary duty; that the defendant had beneficially received assets which were traceable as representing the assets of the plaintiff that had been wrongly disposed of, and; that the defendant had knowledge that the assets he had received were traceable to a breach of trust or fiduciary duty such that it would make it unconscionable for him to retain the benefit of the assets.
- 5.154** The Court stated⁴⁰⁰ however, that it was satisfied that the claim was an attempt to enforce indirectly the revenue laws of the United Kingdom. The Court went on to state that it considered *Buchanan v. McVey* to be a highly persuasive authority that should be applied in Singapore.
- 5.155** The Court noted⁴⁰¹ that the plaintiff had sought to make several points of distinction between the case before it and *Buchanan v. McVey*. The first point of distinction was that the plaintiff had been put into liquidation by its directors and not by the revenue

³⁹⁹ (2008) 11 ITLR 783.

⁴⁰⁰ (2008) 11 ITLR 783 at 810.

⁴⁰¹ (2008) 11 ITLR 783 at 809.

authorities. The Court acknowledged that this was true, although the reason the plaintiff was put into liquidation was the issue of a notice, by the Inland Revenue, which made it plain that action was about to be taken against the plaintiff to recover the amounts of tax due. The second distinction was that the plaintiff had two creditors when the action commenced, the directors and the Inland Revenue. The Court was of the view that since there was only one creditor remaining when the hearing started the distinction the plaintiff sought to draw did not exist.

- 5.156** The plaintiff also argued that the proceedings in question were not a claim by the United Kingdom Inland Revenue because it was not funding the liquidator and was not directing this action or the liquidation proceedings. The Court stated that these differences were only superficial. The Inland Revenue had appointed the liquidator and it was his main client. There was no need for the Inland Revenue to direct the liquidation since it knew that the liquidator would have to pursue the plaintiff's claims if he was to receive any payment for his work.

Conclusion

- 5.157** The conceptual difficulties attendant upon the *recognition/enforcement dichotomy* were set out at the commencement of this Chapter; its deficiencies in terms of providing an explanation for the differing approaches of common law courts to cases implicating the Revenue Rule is apparent from the foregoing examination of the origins and evolution of the Rule.
- 5.158** As the examination conducted in this Chapter has demonstrated, and as Dodge notes,⁴⁰² the rules expressed in the dicta of Chief Justice Marshall in *The Antelope*⁴⁰³ that “[t]he Courts of no country execute the penal laws of another” and of Lord Mansfield in *Holman v. Johnson*⁴⁰⁴ that “no country ever takes notice of the revenue laws of another” were originally applied to prevent public law statutes from interfering with private rights. The Revenue Rule developed to allow the enforcement of private contracts that violated

⁴⁰² Dodge, *The Public-Private Distinction in the Conflict of Laws*, 18 Duke Journal of Comparative and International Law 371, at 389 to 390 (2008).

⁴⁰³ 23 U.S. (1 Wheat.) 66, 123 (1825).

⁴⁰⁴ (1775) 98 Eng. Rep. 1120, 1121 (K.B.).

the customs laws of other countries, whilst the penal law exception was initially applied to prevent foreign confiscation statutes from barring the enforcement of debts.⁴⁰⁵

5.159 Dodge goes on to state that in the twentieth century, the function of these rules in guarding private rights from public encroachment was abandoned. Courts stopped enforcing contracts that violated foreign customs laws and export restrictions.⁴⁰⁶

“[W]e should take notice of the laws of a friendly country, even if they are revenue laws or penal laws or political laws,” Lord Denning wrote, *“at least to the extent, that if two people knowingly agree together to break the laws of a friendly country ... then they cannot ask this court to give its aid to the enforcement of their agreement.”*⁴⁰⁷

5.160 The outcome of the evolution to date of the Revenue Rule is expressed thus by Dodge.⁴⁰⁸

“Although the verbal formulation of the revenue rule remained the same, the content of the rule changed dramatically during the twentieth century. Today it is applied to bar foreign governments from enforcing their tax laws and tax judgments, while contracts that violate foreign import and export restrictions are frequently declared void.”

5.161 It is clear, from the analysis of the jurisprudence in this Chapter, that the *recognition/enforcement dichotomy* not only suffers from major conceptual difficulties, but that it also fails to recognise that the Revenue Rule has evolved so that, in its present form, it operates to prevent, in the absence of reciprocal arrangements, and subject to the interests of private parties not being adversely affected, the enforcement of foreign tax

⁴⁰⁵ Dodge refers to *Folliott v. Ogden* [1789] 126 Eng. Rep. 75 (Ct. Com. Pl. 1789), *aff'd*, *Ogden v. Folliott* [1790] 100 Eng. Rep. 825 (Ch.); *Wolff v. Oxholm* [1817] 105 Eng. Rep. 1117 (K.B.).

⁴⁰⁶ In this regard, Dodge refers to *Regazzoni v. K.C. Sethia (1944) Ltd.* [1956] 2 Q.B. 490 (denying enforcement of contract to export jute bags from India to South Africa in violation of Indian export restrictions) and *Foster v. Driscoll* [1929] 1 K.B. 470 (denying enforcement of a contract to smuggle whiskey to the United States in violation of prohibition laws).

⁴⁰⁷ *Regazzoni v. K.C. Sethia (1944) Ltd.* [1956] 2 Q.B. 490, at 515 to 516.

⁴⁰⁸ Dodge, *Breaking the Public Law Taboo*, (2002) Harvard International Law Journal, 164, at 170.

claims. Accordingly, the following formulation is advanced to replace the orthodox statement of the Revenue Rule:

A forum court will not, absent evidence of reciprocity on the part of the courts of a foreign state,⁴⁰⁹ enforce a revenue claim⁴¹⁰ of that state, except where not to do so would adversely affect the interests of private parties,⁴¹¹ even when, as a consequence of so doing, such enforcement advances the interests of that foreign state: Further, whilst a forum court will not impose sanctions for the breach of foreign revenue law, except where forum legislation makes provision for penalties for such act or omission,⁴¹² neither will it sanction such breach.⁴¹³

⁴⁰⁹ *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson* (1979) 597 F. 2d 1161, see **Chapter 5**.

⁴¹⁰ A tax claim may be either adjudicated, that is, reduced to judgement in the courts of the foreign state, or unadjudicated.

⁴¹¹ *Buchanan v. McVey* [1954] I.R. 89, see **Chapter 5**.

⁴¹² *Pasquantino v. United States* 336 F.3d 321 (4th Cir. 2003), 544 U.S. 349, 125 S.Ct. 1766 (2004), see **Chapter 9**.

⁴¹³ *Reggazzoni v. K C Sethia (1944) Ltd* [1956] 2 Q.B. 490, [1958] AC 30, see **Chapter 5**.

Chapter 6 – The Taxonomy of the Revenue Rule

Introduction

- 6.1** This Chapter is concerned with the taxonomy of the Revenue Rule; in particular, whether the Rule is rooted in private international law,⁴¹⁴ *the conventional view*, as suggested by the examination, in **Chapter 5**, of its origins and evolution, or whether it is based in public international law, *the alternative hypothesis*.
- 6.2** The Chapter examines three issues. *Firstly*, it sets the context for the examination of the alternative hypothesis by considering the connections between the Revenue Rule and certain aspects of public international law, specifically the act of state doctrine and the doctrine of sovereign immunity. *Secondly*, it explores the taxonomy of the Revenue Rule. In particular, it develops a framework of analysis to test the alternative hypothesis which is grounded in the proposition that a foreign state, in bringing proceedings before the forum courts, to enforce a tax claim or a judgment in respect of such a claim obtained from the foreign state's courts, is acting, as a matter of public international law, without jurisdiction.⁴¹⁵ *Thirdly*, it notes the emerging confluence of public and private international law and the taxonomic implications of this development for the Revenue Rule.

Act of State, Revenue Rule and Sovereign or State Immunity

- 6.3** An act performed by a state, in connection with its taxing powers, generally falls to be treated as an act *jure imperii*.⁴¹⁶ An attempt to challenge such an act will, by virtue of the *act of state doctrine*,⁴¹⁷ most likely be unsuccessful because, as a general principle, forum courts do not enquire into the sovereign acts, and, in particular, the legislative and executive acts, of a foreign state, done within the territory of that state.⁴¹⁸

⁴¹⁴ “...it is sometimes, not happily perhaps, called a rule of private international law: ...” per Viscount Simonds in *Government of India v. Taylor* [1955] 1 A.C. 491, at 508.

⁴¹⁵ F.A. Mann, (1954) 40 *Papers of the Grotius Society* 25, at 30; *The International Enforcement of Public Rights*, (1987) 19 N.Y.U.J. Int'l L. & Pol. 603, at 608.

⁴¹⁶ As to which, see the discussion in **Chapter 3**.

⁴¹⁷ For the purposes of the present discussion the expression ‘act of state’ is confined to the executive and legislative acts of foreign states per Dicey, Morris & Collins, *The Conflict of Laws* (14th ed.), Vol. 1, para. 5-042 and 5-043, p. 114.

⁴¹⁸ Dicey, Morris & Collins, *The Conflict of Laws* (14th ed.), Vol. 1, para. 5-044, p. 115. An early, and anomalous, exception to this principle is *Henry v. Sargeant* (1843) 13 New Hamp. 323. The case, which came before the Superior Court of Judicature of New Hampshire, was one in which the plaintiff alleged he had been assessed with

- 6.4** *Williams & Humbert v. W & H Trade Marks*⁴¹⁹ is a case in point. Here there was an attempt to apply the Revenue Rule to a set of facts which actually came within the act of state doctrine. The case concerned two sets of proceedings. The first set involved an action, by an English subsidiary of a Spanish holding company, Rumasa S.A., to recover trademarks transferred to a Jersey company for the benefit of a Spanish family. The second set involved an action by the Spanish holding company and two associated Spanish banks to recover moneys credited to a Netherlands Antilles company, the shares in which were controlled by a member of the aforementioned family. Prior to the institution of the two sets of proceedings the Spanish state, as a result of expropriatory decrees, became entitled, to directly control the affairs of the Spanish holding company and the two Spanish banks and to indirectly control the affairs of the English subsidiary.
- 6.5** Lord Templeman noted⁴²⁰ that the reasons advanced, by the decrees, for the compulsory acquisition of the shares in the Spanish companies comprised in the Rumasa group and for the assumption by the government of the management of these companies, were that the Rumasa group had embarked on rash speculations and reckless expansions of credit, on a scale that threatened the stability of the Spanish economy, the livelihood of Spanish workers and the savings of bank depositors.
- 6.6** The defendants sought to challenge the proceedings on the basis that they were an attempt to enforce a foreign law that was penal or that otherwise ought not to be enforced by an English court. They sought to place particular reliance on the decision in *Buchanan v. McVey*.⁴²¹ Lord Templeman held,⁴²² however, that the principle that a country could not collect its taxes outside its territories could not be used to frustrate or contradict the principle that the English courts would recognise the law of compulsory acquisition of a

an illegal tax in the state of Vermont. The New Hampshire court, in holding that it *had jurisdiction* to deal with the matter, observed that whilst it was said that a court would not notice the penal or revenue laws of another state, that *principle was not applicable in this case as there was no attempt to enforce the penal or revenue laws of Vermont in these proceedings*. The Court held that there was no principle of comity by which the acts of a public officer could not be enquired into in any other government than that in which he was appointed and in which the acts were performed.

⁴¹⁹ [1986] 2 W.L.R. 24.

⁴²⁰ [1986] 2 W.L.R. 24, at 29.

⁴²¹ [1954] I.R. 89.

⁴²² [1986] 2 W.L.R. 24, at 35.

foreign country of assets within the foreign country, and; would accept and enforce the consequences of that compulsory acquisition.

- 6.7** Lord Templeman stated⁴²³ that it was doubtful whether the Spanish law in question could properly be described as a penal law for the purposes of the case under consideration but that, in any event, the plaintiffs in the two sets of proceedings were not seeking to enforce the Spanish law. He agreed⁴²⁴ with the observation of the court of first instance that the object of the decrees was to acquire direct ownership and control of Rumasa and the two banks and indirect ownership and control of the English subsidiary. That object had been duly achieved by perfection of the Spanish state's title in Spain. Accordingly, on a simple, but compelling, view of the matter there was nothing left to enforce.
- 6.8** Lord Mackay of Clashfern noted⁴²⁵ that counsel for the defendants had sought to derive a general principle from *Buchanan v. McVey*⁴²⁶ that even when an action was raised at the instance of a legal person distinct from the foreign government and even where the cause of action relied upon did not depend to any extent on the foreign law in question, nevertheless, if the action was brought at the instigation of the foreign government and the proceeds of the action would be applied by the foreign government for the purposes of a penal, revenue or other public law of the foreign state, relief could not be given.
- 6.9** Lord Mackay held⁴²⁷ that it could not be said that any approval was given by the House of Lords in *Government of India v. Taylor*⁴²⁸ to *Buchanan v. McVey*,⁴²⁹ except to the extent that it held that there was a rule of law that precluded a state from suing in another state for taxes due under the law of the first state. No countenance was given in *Government of India v. Taylor*,⁴³⁰ in *Rossano v. Manufacturers' Life Insurance Co.*⁴³¹ or in *Brokaw v. Seatrain*,⁴³² to the suggestion that an action in England could be properly

⁴²³ [1986] 2 W.L.R. 24, at 30.

⁴²⁴ [1986] 2 W.L.R. 24, at 31.

⁴²⁵ [1986] 2 W.L.R. 24, at 41.

⁴²⁶ [1954] I.R. 89.

⁴²⁷ [1986] 2 W.L.R. 24, at 42.

⁴²⁸ [1955] A.C. 491, at 503.

⁴²⁹ [1954] I.R. 89.

⁴³⁰ [1955] A.C. 491, at 503.

⁴³¹ [1963] 2 Q.B. 352.

⁴³² [1971] 2 Q.B. 476.

described as the indirect enforcement of a penal or revenue law in another country when no claim under that law remained unsatisfied. He noted that the existence of such unsatisfied claim, to the satisfaction of which the proceeds of the action would be applied, appeared to be an essential feature of the principle enunciated in *Buchanan v. McVey*⁴³³ for refusing to allow the action to succeed.

6.10 Lord Mackay concluded that there was no allegation of any unsatisfied claim under the law of Spain, no provision of that law would provide a foundation for making any of the claims in the proceedings and the decision in *Buchanan* gave no basis for the substitution, in place of such an unsatisfied claim, of a general desire on the part of the foreign state to secure a particular result, object or purpose from the enactment of the law.

6.11 It is tempting to see a symmetry between the act of state doctrine and the prohibition, pursuant to the Revenue Rule, of proceedings by foreign states, to enforce their tax claims, or judgments from their courts in respect of such claims, in the courts of the forum. Indeed, parallels between the Revenue Rule and the act of state doctrine have been noted in case law,⁴³⁴ in professional writings⁴³⁵ and in the academic literature.⁴³⁶ Just as a foreign sovereign's act cannot be the subject of litigation in a forum court so, likewise, a foreign sovereign cannot seek to litigate, on the basis of such an act, in the forum court.

⁴³³ [1954] I.R. 89.

⁴³⁴ The United States Supreme Court, in *Banco Nacional de Cuba v. Sabbatino* (1964) 376 U.S 398, at 437 to 438, 84 S. Ct. 923, noted that the Rule and the act of state doctrine have a common rationale.

⁴³⁵ Dicey, Morris & Collins, *The Conflict of Laws* (14th ed.), Vol. 1, Rule 3, para. 5R-019, p. 100 *et seq* where discussion of the Revenue Rule precedes reference to the act of state doctrine.

⁴³⁶ Cohen, *Nonenforcement of Foreign Tax Laws and the Act of State Doctrine: A Conflict in Judicial Foreign Policy*, 11 *Harvard International Law Journal*, 1 (1970). Cohen observes, at p. 20, fn. 8, that although the theoretical basis for the act of state doctrine would encompass all fully executed acts of a foreign state, legislative, executive or adjudicatory, current usage limits the doctrine to acts of a legislative or executive nature. The enforcement of foreign tax laws, on the other hand, may present problems both of legislative and adjudicatory jurisdiction. The authority of the taxing country to impose a tax on a given individual or a given activity involves a question of legislative jurisdiction, and when a foreign country is requested to enforce an assessment under a given tax law, as opposed to a tax judgment, it is only legislative jurisdiction that may be at issue. When enforcement of a foreign tax judgment is requested, the adjudicatory authority of the court which rendered the judgment may be questioned as well.

6.12 Such an analysis finds support in the bases advanced in support of the act of state doctrine and the Revenue Rule. In respect of the former the United States Supreme Court stated,⁴³⁷ in a dictum that was subsequently adopted by the English Court of Appeal:⁴³⁸

“Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”

6.13 In respect of the latter Lord Keith of Avonholm in the House of Lords noted:⁴³⁹

“One explanation of the rule ... may be thought to be that enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim⁴⁴⁰ by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties.”⁴⁴¹

6.14 However, this apparent symmetry is called into question by the fact that the act of state doctrine has no application when it is clear that the relevant act was done outside the territory of the foreign state.⁴⁴² Cohen, from a United States perspective, notes that

⁴³⁷ *Underhill v. Hernandez* 168 U.S. 250, at 252 (1897).

⁴³⁸ *Luther v. Sagor* [1921] 3 K.B. 532, at 548.

⁴³⁹ *Government of India v. Taylor* [1955] 1 A.C. 491, at 511.

⁴⁴⁰ Speaking in relation to the above cited passage Lord Philips in *Government of Iran v. Barakat Galleries* [2007] EWCA Civ 1374; [2008] 3 WLR 486, stated, at paragraphs 132 to 133, stated that where a foreign state has acquired title under its law to property within its jurisdiction in cases not involving compulsory acquisition of title from private parties, there is no reason in principle why the English court should not recognise its title in accordance with the general principle that title to moveables depended on the *lex situs*.

⁴⁴¹ Dicey asserts that this is the best explanation of the theoretical basis of the Revenue Rule, Dicey, Morris & Collins, *The Conflict of Laws* (14th ed.), Vol. 1, Rule 3, para. 5-020, p. 101.

⁴⁴² Dicey cites *The Playla Larga* [1983] 2 Lloyd’s Reports 171, at 194, (C.A.), as authority for the proposition that in such circumstances the act of state doctrine has no application, Dicey, Morris & Collins, *The Conflict of Laws* (14th ed.), Vol. 1, para. 5-046, p. 116. However, Lord Sumption questions this proposition in *Belhaj & Anor. v. Straw & Ors.* [2017] UKSC 3, where in he observes; *firstly*, at para. 235, that the claim in *Playla Larga* arose from a commercial transaction, not a sovereign act, and; *secondly*, at para. 236, that the statement in Dicey is applicable to, what he terms municipal law act of state, (para. 228 – broadly, foreign acts of state which occur within the jurisdiction of the foreign state) but not international law act of state (para. 234 – broadly, foreign acts of state which occur outside the jurisdiction of the foreign state). However, Lord Sumption goes on to state, at para. 237, that arguably the act of state doctrine does not apply where the relevant act of the foreign state occurs in the United Kingdom. It will be noted that in the *Laane and Balster* case, discussed at **para. 6.15**, the act of the foreign state purported to take effect in the jurisdiction of the forum. I am grateful to Prof. Andrew Dickinson, of St. Catherine’s College, Oxford, for bringing the *Belhaj* case to my attention.

whilst, traditionally, the rule has been viewed as expressly applicable to public acts of a recognised foreign country, fully executed within its own territory, in considering acts of state which purport to affect property or persons outside the territory of the acting state, the U.S. courts, in the absence of a controlling federal agreement, have generally not felt constrained to observe the act of state doctrine. He goes on to state:⁴⁴³

“In a sense, the attempt made by a foreign state to enforce its revenue laws abroad can logically be viewed as strongly analogous to such acts. The state is seeking to assert its authority to compel payment (as compared to obtaining title) out of extraterritorial assets for obligations incurred by the owner through his relation to or actions in the assessing country. While in the matter of taxes the question is usually phrased in the form of a request for assistance, rather than as a claim of right, tax assessments could, without undergoing a change in the theoretical base for their imposition, be promulgated by decrees like executive expropriatory decrees.”

6.15 Similar reasoning is apparent in *Laane and Balster v. Estonian State Cargo & Passenger SS. Line*.⁴⁴⁴ The Supreme Court of Canada held that the courts would not give effect to a nationalisation decree of a confiscatory character, issued by a *de facto* foreign government and purporting to have extra-territorial effect, where such decree sought to reach a merchant ship (or the proceeds of sale thereof) in a Canadian port, where such ship had never been in the possession of the foreign government, although the owners were citizens of, and domiciled in, the foreign country. The Supreme Court went on to state that this principle applied to a nationalisation decree which provided for compensation of only 25% of the value of the nationalised property. Rand J. drew an analogy⁴⁴⁵ between the nationalisation decrees at issue in the case and the operation of a revenue law asking why, if the courts refused to assist in the lesser extraction imposed by taxation, they should assist in respect of the greater extraction imposed by the decrees?

⁴⁴³ Cohen, *Nonenforcement of Foreign Tax Laws and the Act of State Doctrine: A Conflict in Judicial Foreign Policy*, 11 Harvard International Law Journal, 1, at 16 *et seq* (1970), [Internal citations from the passage cited have been omitted].

⁴⁴⁴ [1949] 2 D.L.R. 641, 1949 CLB 479, [1949] S.C.R. 530, [1949] RCS 530, reversing [1948] 4 D.L.R. 247.

⁴⁴⁵ [1949] 2 D.L.R. 641, at 656 to 657.

- 6.16** Further, when it comes to the exercise by a state of its taxing powers, a claim to sovereign or state immunity, seeking to shield a foreign sovereign act from scrutiny in the courts of the forum, may not be successful. In *Controller and Auditor-General v. Davison*,⁴⁴⁶ whilst the majority held that the activities of the Cook Islands Government in issue constituted acts *jure gestionis*, both Richardson J, who dissented in holding that they were acts *jure imperii* and Thomas J, who held with the majority on the question of classification, declined to uphold a claim of sovereign or state immunity.
- 6.17** Is there then, as suggested by Cohen, a sense in which the institution of proceedings by a foreign state, in the courts of the forum, seeking to enforce either a tax claim or a judgment from the courts of the foreign state in respect of same, can logically be viewed as strongly analogous to acts of state that are performed outside the territory of the foreign state? *Prima facie*, the *dicta* of Lord Keith, referred to earlier, arguably give *some* support to that position insofar as he describes the enforcement of a claim for foreign taxes as but an extension of sovereign authority by one state, within the territory of another, contrary to all concepts of independent sovereignties.⁴⁴⁷
- 6.18** If such a view is correct then it would tend to undermine the suggestion that just as acts of state performed within the territory of a foreign state are not justiciable so far as forum courts are concerned, so also forum courts have no jurisdiction⁴⁴⁸ to entertain proceedings to enforce either foreign tax claims, or judgments in respect of same. Indeed, given that the act of state doctrine does not apply to acts performed by the foreign state outside its territory and, accordingly, are justiciable, does it then follow that proceedings to enforce foreign taxes should also be treated as justiciable?
- 6.19** It is certainly true that there is a key difference between acts of state performed within the territory of a foreign state and proceedings to enforce foreign taxes. In the case of

⁴⁴⁶ [1996] 2 NZLR 278. See **Chapter 3**.

⁴⁴⁷ *Prima facie* only because Lord Keith was referring to the enforcement of a claim, not the institution of proceedings *per se*.

⁴⁴⁸ The assertion that forum courts lack jurisdiction in relation to such proceedings has been rejected both by the United States Supreme Court in *Milwaukee County v. M. E. White Co.* (1935) 296 U.S. 268, 56 S. Ct. 229 and by Lord Goff in the House of Lords in the case of *In re Norway's Application (Nos. 1 & 2)* [1990] 1 A.C. 723.

the former, as Lord Templeman observed in *Williams & Humbert v. W & H Trade Marks*,⁴⁴⁹ there is nothing left to enforce, a condition that is manifestly not met in proceedings to enforce foreign taxes.

- 6.20** However, whilst the institution of proceedings by a foreign state, in the courts of the forum, is an act of state performed, perforce, outside the territory of that state, can it really be said to be beyond the jurisdiction of that state? The issue of the jurisdiction of the foreign state is examined in the next section.

The Taxonomy of the Revenue Rule

- 6.21** The conventional view holds that the Revenue Rule forms a part of private international law. Mann,⁴⁵⁰ advances the contrary hypothesis that the rationale for the Rule is to be found in the public international law doctrine of international jurisdiction and that, in particular, it is derived from the rule of public international law according to which exercise of a State's imperium is territorially limited.

- 6.22** Mann argues that these territorial limits constitute a bar irrespective of whether the claimant state, by *executive* action, sends its officials to the forum state to take its debtor's property or whether, by *legislative* measures, it transfers forum property⁴⁵¹ to itself or whether, for the purpose of enforcing its rights, it *invokes the jurisdiction of the forum courts* and thus asserts a title denied to it by public international law. Each of these acts of state are considered in detail below.

Foreign Legislative Overreach

- 6.23** Mann's reference, in the context of the Revenue Rule, to the use by a foreign claimant state of legislative measures, for the purpose of transferring forum property to itself, is misconceived. Whilst such a scenario is an apt description of acts of expropriation by a foreign state, it does not describe the exercise of taxation powers by a state, forum or

⁴⁴⁹ [1986] 2 W.L.R. 24.

⁴⁵⁰ F.A. Mann, (1954) 40 *Papers of the Grotius Society* 25, at 30; *The International Enforcement of Public Rights*, (1987) 19 N.Y.U.J. Int'l L. & Pol. 603, at 608.

⁴⁵¹ By which is meant property, the *situs* of which is the forum, rather than property owned by the forum state *per se*.

foreign, notwithstanding the similarities noted by Cohen⁴⁵² and discussed earlier in this Chapter. That is not to say that Mann's concerns are without foundation, as the ensuing discussion of the jurisprudence relating to legislative overreach demonstrates.

6.24 The forum is not likely to take issue with the right of a foreign state, through legislation, to impose taxes where it considers that foreign state to have jurisdiction, even though it may not, as a matter of *private international law*, enforce such claims. Entirely different considerations arise however where a foreign state purports, through legislative overreach, to impose taxation where it does not have jurisdiction. This raises an issue of *public international law*,⁴⁵³ and the foreign state's pretensions, from a forum perspective, to jurisdiction, will be rebuffed by the latter.

6.25 An examination of the jurisprudence reveals that legislative overreach can occur in two ways. *Firstly*, the foreign state may attempt to impose tax where it does not, in the eyes of the forum, have jurisdiction; in particular, the person, property or business which it is sought to tax is outside the state. *Secondly*, the legislative provisions of the foreign state and the forum may clash; examples include conflicting provisions relating to, probate, the admissibility or validity of unstamped documents and the *situs* of property. In such cases the forum will give precedence to its own legislation.

Cases in the First Category

6.26 In *Dewey v. City of Des Moines*⁴⁵⁴ a petition was filed by the plaintiff, a resident of the state of Illinois, to set aside certain assessments upon his lands in the state of Iowa, which had been imposed thereon for the purpose of certain street improvements upon which the lands abutted. In finding for the plaintiff, the United States Supreme Court held⁴⁵⁵ that *the jurisdiction to tax existed only in regard to persons and property or upon the business done within the state* and that such jurisdiction could not be enlarged, by a statute, which assumed to make a non-resident personally liable, to pay a tax of the

⁴⁵² Cohen, *Nonenforcement of Foreign Tax Laws and the Act of State Doctrine: A Conflict in Judicial Foreign Policy*, 11 Harvard International Law Journal, 1, at 16 *et seq* (1970).

⁴⁵³ As to which, see **Chapter 6**.

⁴⁵⁴ (1899) 173 U.S. 193, 19 S. Ct. 379.

⁴⁵⁵ 173 U.S. 193, at 203.

nature of the one in question in these proceedings. The Supreme Court observed⁴⁵⁶ that whilst *the power of the state to tax extended to all objects within the sovereignty of the state*, that such power was *limited to persons, property and business within the state and could not reach the person of a non-resident*.

6.27 In *City of New York v. McLean*⁴⁵⁷ the plaintiff had assessed and levied a tax on certain stock owned by the defendant, (who was a citizen and resident of the state of New Jersey), in a bank, located and doing business in, New York. The New York Court of Appeals, finding against the plaintiff and applying the decision in *Dewey v. City of Des Moines*,⁴⁵⁸ held that whilst the legislation enacting the tax provided for enforcement, by providing for remedies against the property assessed, it did not impose a personal liability upon a non-resident taxpayer.

6.28 The case of *In re Maltbie*⁴⁵⁹ concerned a New Jersey corporation engaged in business activities in New York. The corporation was assessed to tax on the basis of the capital it had invested in its business in New York. In subsequent enforcement proceedings the Court of Appeals of New York, referring to *City of New York v. McLean*,⁴⁶⁰ held⁴⁶¹ that the tax upon the assessment did not become a debt, that it did not create a personal liability but rather that it subjected the capital of the corporation to liability for the tax.

6.29 The Court of Appeals in finding for the corporation went on to state,⁴⁶² referring to *Dewey v. City of Des Moines*,⁴⁶³ that the state could provide for the sale of the property upon which the assessment was made but that *it could not*, under any guise or pretence, proceed further and *impose a personal liability upon a non-resident* to pay the assessment. To enforce such an assessment against a non-resident so far as his personal liability was concerned, would amount to the taking of property without due process of law and would be a violation of the federal Constitution. The Court of Appeals

⁴⁵⁶ 173 U.S. 193, at 204.

⁴⁵⁷ (1902) 8 Bedell 374, 170 N.Y. 374, 63 N.E. 380.

⁴⁵⁸ (1899) 173 U.S. 193, 19 S. Ct. 379.

⁴⁵⁹ (1918) 223 N.Y. 227, 119 N.E. 389.

⁴⁶⁰ (1902) 8 Bedell 374, 170 N.Y. 374, 63 N.E. 380.

⁴⁶¹ 223 N.Y. 227, at 233.

⁴⁶² 223 N.Y. 227, at 234.

⁴⁶³ (1899) 173 U.S. 193, 19 S. Ct. 379.

concluded that *the taxing power of the state was limited to persons and property within and subject to its jurisdiction.*

6.30 *State Tax Commission of Utah v. Cord*⁴⁶⁴ was an action by the Utah Tax Commission, which came before the Supreme Court of Nevada, to recover income tax. The complaint was in a number of counts. The first count alleged that an income tax warrant was docketed as a judgment in accordance with Utah legislation and was constitutionally entitled to full faith and credit in Nevada. In the alternative, it was asserted that a deficiency assessment was made against the defendants in accordance with Utah legislation and, as an official record of that state, was to be afforded full faith and credit in Nevada. In refusing relief, the Supreme Court held,⁴⁶⁵ in a majority judgment, that due process of law required that there be jurisdiction of the person or subject matter by the home state where the judgment was entered for full faith and credit to apply. Upon examination of the relevant Utah legislation, the Court found⁴⁶⁶ that the requirements as to jurisdiction had not been satisfied.

6.31 In *State of Minnesota v. Karp*⁴⁶⁷ the plaintiff sought to recover a judgment for income tax plus interest and penalty. The case came before the Court of Appeals of Ohio, on appeal from a judgment for the defendant, following the sustaining of a demurrer to the plaintiff's amended petition. The argument upon which the case was determined by the Court was that the amended petition did not state facts constituting a cause of action. The Court observed⁴⁶⁸ that it was fundamental that jurisdiction of all governments was *geographical or territorial*. Any attempt at extra-territorial jurisdiction constituted an invasion of another sovereignty. Jurisdiction could only be exercised over either persons, activities or property. The jurisdiction of a state, acting either through its executive, legislative or judicial department, or by the combined action of one or more of such departments, must confine itself to persons and property and activities within its boundaries and any attempt to control persons or things beyond such boundaries was ineffective and void for want of power and violated the due process clause of the United

⁴⁶⁴ (1965) 81 Nev. 403, 404 P. 2d 422.

⁴⁶⁵ 81 Nev. 403, at 405 to 406.

⁴⁶⁶ 81 Nev. 403, at 425 to 426.

⁴⁶⁷ (1948) 84 Ohio App. 51, 84 N.E. 2d 76, 52 Ohio Law Abs, 513.

⁴⁶⁸ 84 Ohio App. 51, at 56 to 57.

States Constitution. Before the ratification of the Constitution no state had any power to govern except within its own borders and the Constitution did not extend the power of the states – on the contrary it restricted their power.

6.32 The Court went on to consider⁴⁶⁹ the allegations of the amended petition to ascertain the basis for the exercise of its power to tax the income of the defendant and the extent of that power. The Court found that the only claim on that subject was that in 1940 the defendant received income derived from business transacted within the state of Minnesota. It was not alleged that it was net income, although the statute quoted in the amended petition purported to impose a tax only on net income. Further, it was not alleged that the net income received by the defendant, or any property of the defendant, was located in Minnesota at any time in 1940, or at any other time. When there was added to these omissions the failure to allege that the defendant was ever physically in Minnesota and the express allegation that at no time was he a resident of that state, what was shown upon which the power and authority of the state could operate?

6.33 The Court noted⁴⁷⁰ that in this situation in 1944, the Commissioner of Taxation, an administrative official, without personal service, assessed the tax at issue, which, under the law, was made *prima facie* evidence against the defendant. That, it seemed to the Court, was an attempt by Minnesota to extend its sovereignty beyond its boundaries and control and bind the defendant. No such power resided in any state and any attempt to so extend its power was void and violated the Constitution – to give effect to such an attempt would deprive the defendant of property without due process of law. The Court concluded that the amended petition failed to show a cause of action enforceable in Ohio.

Cases in the Second Category

6.34 In the Australian case of *Permanent Trustee Company (Canberra) Ltd. v. Finlayson*⁴⁷¹ a testatrix, who was domiciled and resident in New South Wales at the date of her death, left property in New South Wales and personal property in the Australian Capital

⁴⁶⁹ 84 Ohio App. 51, at 80 to 81.

⁴⁷⁰ 84 Ohio App. 51, at 81 to 82.

⁴⁷¹ (1967) 9 FLR 424 (Supreme Court of Australian Capital Territory) reversed on appeal to the High Court of Australia. The facts as set out above are taken from the headnote to the case.

Territory. She made two wills, one dealing with her estate in New South Wales and appointing a New South Wales trustee company her executor, of which probate was granted in New South Wales, and the other, made in Canberra, dealing with her property in the Australian Capital Territory and appointing a Canberra trustee company her executor, of which probate was granted in the Australian Capital Territory. The New South Wales Commissioner of Stamp Duties assessed the estate to stamp duty, pursuant to the Stamp Duties Act of New South Wales, on the basis that the assets in the Australian Capital Territory were included in the assessable estate. An unpaid balance of duty as assessed remained after the New South Wales executor had paid to the Commissioner the whole of the amount realized by the disposition of the assets in New South Wales. The Commissioner gave notice to the Canberra trustee company of a claim against the estate for the unpaid balance.

- 6.35** On appeal,⁴⁷² the High Court of Australia held⁴⁷³ that as a matter of construction, none of the relevant provisions of the New South Wales stamp duty legislation conferred upon the Commissioner a right to recover the unpaid duty from the Canberra executor. Further, section 18 of the State and Territorial Laws and Records Recognition Act 1901 – 1964 and section 118 of the Constitution did not produce the extra-territorial result, which a state statute could not constitutionally have, of altering the law of the Australian Capital Territory as to Territory administrations.
- 6.36** Questions of jurisdiction also arose before the Supreme Court of Queensland in *Rothwells Ltd. (In Liq.) v. Connell*,⁴⁷⁴ where recovery of \$12 million was sought pursuant to a covenant in a deed between the litigants. Although the deed had been executed in Western Australia, it had not been stamped according to the law of that state. A counterpart deed had, however, been duly stamped in Queensland. In resisting the claim, Mr. Connell argued, by reference to the provisions of the Western Australia Stamp Act, that the deed was a nullity.⁴⁷⁵

⁴⁷² (1968) 122 CLR 338.

⁴⁷³ As summarized in the headnote for the case.

⁴⁷⁴ (1993) 119 ALR 538.

⁴⁷⁵ Section 27 (1) stated: *Except as otherwise provided by this Act, no instrument chargeable with duty and executed in Western Australia, or relating, wheresoever executed, to any property situate or to any matter or thing done or to be done in Western Australia, shall, except in criminal proceedings, be pleaded or given in evidence or admitted*

- 6.37** The majority held that in a proceeding in a Queensland court the Queensland Stamp Act⁴⁷⁶ prevailed over an inconsistent statutory provision of another state. Once the deed had been stamped under the Queensland legislation it was admissible in evidence and available for all purposes, i.e. not merely admissible but valid.
- 6.38** In a separate judgment McPherson J. noted⁴⁷⁷ that the critical point was that if the Queensland duty was appropriately denoted on the instrument, as it had been, it must, in accordance with the Queensland stamp duty legislation, be admitted in evidence in proceedings in Queensland. This was so even though the requisite Western Australia stamp duty had not been paid, in which instance its legislation asserted that the instrument was not to be given in evidence. McPherson J. stated that it was not possible to resolve such an inconsistency, except by preferring one statutory provision over another; it was impossible to give full faith and credit to both.
- 6.39** He went on to note that in the United States, from which section 118 of the Australian Constitution was derived, it had been held that the requirement of full faith and credit did not compel one state to substitute the statute of another state for its own statute in a matter in which it was competent to legislate. Otherwise the absurd result would ensue that, whenever a conflict arose, the statutes of each state must be enforced by the courts of another state, but could not be enforced in its own courts.⁴⁷⁸
- 6.40** In Australia, selecting the applicable rule was not a function of section 118 which, it had been held, left it to common law principles of private international law to determine the choice between conflicting laws, to which section 118 only then gave recognition and effect.

to be good, useful or available in law or in equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed.

⁴⁷⁶ Section 22 (5) stated: *Every instrument stamped with the particular stamp, denoting either that it is not stampable with any duty or that it is duly stamped, shall be admissible in evidence and available for all purposes, notwithstanding any objection to duty.*

⁴⁷⁷ 119 ALR 538, at 548.

⁴⁷⁸ This logical paradox was also adverted to by Rolfe B. in *Bristow v. Sequeville* (1850) 5 Exch. 275, at 279.

- 6.41** The *situs* of the property played a part in the Court's analysis in *Re Dwelle Estate*.⁴⁷⁹ The case concerned a testator who had died resident and domiciled in the state of California. The executor of her Canadian estate brought an application to allow or bar a claim of California, under its inheritance tax laws, against her estate in the province of Alberta. All of the Canadian estate was physically located in Alberta; none of it was located in California. The Alberta Supreme Court stated⁴⁸⁰ that it was a rule of the common law, in force in Alberta, that the court had no jurisdiction for the enforcement, directly or indirectly, of a foreign revenue law.
- 6.42** The Court stated⁴⁸¹ that property could, for the purposes of determining *situs* as among the different provinces in Canada, in relation to the incidence of a tax imposed by a provincial law upon property transmitted owing to death, have only one local situation; *situs*, in respect of intangible property, must be determined by reference to a coherent system of principles. The Court cited *Rex v. National Trust Co.*⁴⁸² as authority for the proposition that a provincial legislature was not competent to prescribe the conditions fixing the *situs* of intangible property for taxation purposes and that provincial legislation in that regard was *ultra vires*. The Court held⁴⁸³ that accordingly, under Canadian law, a tax upon property, transmitted owing to death, could only be imposed upon property having a *situs* within the province and that property could only have one local situation.
- 6.43** The Court concluded⁴⁸⁴ that the executor was prohibited from making any payment of estate funds, which would, in effect, be payment of a tax to a foreign government. In particular, the executor was prohibited from paying any tax imposed by the state of California, under a statute invoked by it to claim a tax on property not locally situated within California, as the statute was *ultra vires*. California was not competent, according to the Canadian Supreme Court, to prescribe the conditions fixing the *situs* of property

⁴⁷⁹ (1969) 69 W.W.R. 212 (Alta.).

⁴⁸⁰ 69 W.W.R. 212, at paragraph 5.

⁴⁸¹ 69 W.W.R. 212, at paragraph 26.

⁴⁸² [1953] S.C.R. 670, affirming 54 Que. K.B. 351.

⁴⁸³ 69 W.W.R. 212, at paragraph 29.

⁴⁸⁴ 69 W.W.R. 212, at paragraphs 32 to 34.

locally situated in the province of Alberta and which was not locally situated in the state of California. It followed that the claim of California was barred.

- 6.44** In the case of *In re Gyfteas' Estate*⁴⁸⁵ the testator, a citizen and domiciliary of Greece, died there in 1967. By a proceeding comparable to admission to probate, his will was established in the Athens Court of First Instance. About one third of the assets of the estate were located in the United States and the appellant was appointed ancillary administrator c.t.a.⁴⁸⁶ in a proceeding in the Surrogate's Court,⁴⁸⁷ New York County. Concerned in the proceedings were three legacies, to the sister, niece and brother of the testator. Advance payments had been made by the appellant to each of the legatees.
- 6.45** The proceedings before the Court had been instituted to compel further advance payments to the legatees. The surrogate granted the application to make specified advance payments. Subsequent to the decree the appellant was able to calculate the Greek inheritance taxes and found that if the advance payment ordered by the surrogate was made to the niece, one of the petitioners, that the unpaid amount of the legacy would not equal the tax; in fact, the unpaid balance of the legacy, without the advance payment directed by the surrogate, only slightly exceeded the amount of the estimated tax. The petitioner claimed that the amount should nevertheless be paid, because of the established legal principle that New York did not act as a tax collector for another jurisdiction.
- 6.46** The Supreme Court of New York noted⁴⁸⁸ that the assets of the testator out of which the legacies were directed to be paid consisted of bank accounts. By virtue of a treaty with Greece the *situs* of a bank deposit of a domiciliary of one of the contracting states was deemed to be situated in the state in which the deceased person was domiciled at the time of death. It followed that in legal contemplation the funds out of which the legacy was to be paid were located in Greece and would be subject to Greek law. Furthermore, the petitioner, in the probate proceedings in Greece, had sought to contest the will. The

⁴⁸⁵ 36 A.D.2d 380, 320 N.Y.S.2d 540.

⁴⁸⁶ *Cum testamento annexo* – with the will annexed.

⁴⁸⁷ The Surrogate's Court hears cases involving the affairs of decedents, including the probate of wills and the administration of estates. www.nycourts.gov, accessed on the 11th of September, 2016.

⁴⁸⁸ 36 A.D.2d 380, at 382.

will, including the petitioner's legacy, was sustained. It appeared that the petitioner had subjected herself to the jurisdiction of the Greek courts as to all questions of the validity and extent of her inheritance.

6.47 The Court further noted that no one was suing the petitioner or seeking to collect anything from her. She was not using the rule of law as a protective shield. On the contrary, she was seeking to use it as a sword to collect moneys. There was a marked distinction, particularly in that all the considerations of policy that had been advanced to support the Revenue Rule would have no application. What she was asking was a direction to the ancillary executor to pay her in contravention of the laws of the testator's domicile. Accordingly, the Court modified the surrogate's decree directing advance payments of testamentary bequests.

Foreign Executive Overreach by Direct Action

6.48 *Secondly*, where the claimant state sends its officials to the forum state to take its debtor's property. Akehurst notes⁴⁸⁹ that an act by one state in the territory of another is forbidden by international law if it is, by its nature, one which only the officials of the local state are entitled to perform, so, for instance, collecting taxes is something which can only be done by public officials and, accordingly, the officials of one state are not allowed to collect taxes in the territory of another state.

6.49 He also notes⁴⁹⁰ that an act by one state in the territory of another state may constitute a usurpation of the sovereign powers of the latter state by reason of the purpose for which the act is done, so that, if information is sought for the purpose of enforcing the first state's revenue laws, the inquiry is contrary to international law. The power to tax is a sovereign power and no state may take any step to give effect to that power in the territory of another state.

6.50 In support of these propositions he refers⁴⁹¹ to a decision of Germany's Supreme Tax Court of the 27th of September, 1933, to the effect that, if officials of the German Tax

⁴⁸⁹ Akehurst, *Jurisdiction in International Law*, (1974) 46 Brit. Y.B. Int'l L. 145, at 146.

⁴⁹⁰ Akehurst, *Jurisdiction in International Law*, (1974) 46 Brit. Y.B. Int'l L. 145, at 147.

⁴⁹¹ Akehurst, *Jurisdiction in International Law*, (1974) 46 Brit. Y.B. Int'l L. 145, at 150, fn. 2.

Office were to enter a foreign state, without that state's permission, they would commit a violation of the territory of that state contrary to public international law. This was the scenario posited by Vieyra J. in the South African case of *Commissioner of Taxes, Federation of Rhodesia v. McFarland*⁴⁹² in which he stated *obiter* that just as one state cannot send its police force into another state so also can it not send its tax gatherers.

6.51 Albrecht⁴⁹³ recounts an attempt by Mexico, in 1937, to extend its fiscal system into the United States by making collection agents of its representatives in the latter jurisdiction. The United States asserted that such action was in derogation from its sovereignty and in 1938 the Mexican government decided to cancel the tax. The United States Supreme Court touched upon the issue in *United States v. First National City Bank*⁴⁹⁴ when Harlan J., for the minority, observed⁴⁹⁵ that nations, generally chary of having foreign officials enter their borders for the purpose of serving process, are even more unlikely to look with favour upon a foreign official entering in an attempt to enforce a tax judgment.

6.52 The issue also arose, in somewhat unusual circumstances, in *Controller and Auditor-General v. Davison*,⁴⁹⁶ where Richardson J., held that the acts in question were acts *jure imperii*, and went on to hold the state activity was New Zealand based in three respects. *First*, tax payment certificates issued by the Cook Islands were to be utilised to secure a tax credit in New Zealand and for New Zealand income tax purposes. *Second*, all the documents sought by the Commission for production for inspection were presently in New Zealand. *Third*, the documents were in the possession of the Audit Office of New Zealand. Whilst the Audit Office had carried out its activities as constitutional auditor of the Cook Islands and held documents in that capacity, it remained a New Zealand agency constituted under New Zealand law and amenable in the ordinary way to the jurisdiction of New Zealand courts and commissions of inquiry. It was not immune *ratione personae* from the jurisdiction of the Commission.

⁴⁹² 27 SATC 15, 1965 (1) SA 470 (W), accessed from Lexis Nexis, at page 4 of the Lexis Nexis report.

⁴⁹³ Albrecht, *The Enforcement of Taxation under International Law*, (1953) 31 Brit. Y.B. Int'l L. 453, at 460 to 461.

⁴⁹⁴ (1965) 379 U.S. 378, 85 S.Ct. 528.

⁴⁹⁵ (1965) 379 U.S. 378, at 396, 85 S.Ct. 528, at 538, fn. 17.

⁴⁹⁶ [1996] 2 NZLR 278.

Foreign Executive Overreach by Institution of Proceedings in the Forum Courts

- 6.53** Thirdly, where the claimant state, for the purpose of enforcing its rights, invokes the jurisdiction of the forum courts and thus asserts a title denied to it by public international law. Mann⁴⁹⁷ argues that the state that pursues penal, tax or other public claims outside the confines of its own territory is attempting to invoke its sovereign rights within the territory of the forum state.
- 6.54** He goes on to state that the institution of legal proceedings itself implies an assertion that the plaintiff state is entitled to prosecute its public rights in the forum state, that it does not humbly and simply pray to make domestic courts available to it; instead, it puts forward a sovereign or public right. Mann concludes that this fact involves the infringement of domestic jurisdiction or sovereignty and, accordingly, of public international law, insofar as the consent of the forum state is lacking.
- 6.55** However, Mann's argument is fundamentally misconceived. In this regard Cohen states:⁴⁹⁸

“When one sovereign applies to the courts of another, it is not asserting a prerogative directly to enforce its laws within a foreign nation, but is instead looking for assistance and using means that have been created by the forum itself. Indeed, the foreign state, not attempting to enforce tax claims with its own tax collectors, is recognizing the limits of its legitimate sphere of enforcement action and is acknowledging here the authority of the forum state. Since the forum maintains complete control over the implementation of any decision rendered, the apprehension over encroachment of enforcement jurisdiction is unsound.

While this objection to the “overreaching” of foreign states is not properly directed to enforcement jurisdiction, it does reflect a legitimate concern, a

⁴⁹⁷ F.A. Mann, *The International Enforcement of Public Rights*, (1987) 19 N.Y.U.J. Int'l L. & Pol. 603, at 608.

⁴⁹⁸ Cohen, *Nonenforcement of Foreign Tax Laws and the Act of State Doctrine: A Conflict in Judicial Foreign Policy*, 11 Harvard International Law Journal, 1, at 20 (1970), [Internal citations from the passage cited have been omitted].

fundamental concern underlying all judicial confrontation with foreign public laws, that the foreign sovereign may be exceeding proper limits of legislative or adjudicatory jurisdiction as viewed by the forum.”

- 6.56** In truth, the proposition advanced by Mann is fatally compromised by his necessary concession that the foreign state *invokes the jurisdiction of the forum court*. Indeed, to the extent that the foreign state seeks to assert a title, it must necessarily do so on the basis of the municipal law of the forum state. The extent to which public international law denies such a title, if it does at all, is simply an irrelevance.
- 6.57** In the event that the forum state court *does grant relief*, Mann’s argument is open to the objection that no state enforces any law of any other state *as such* but merely takes cognisance of rights accruing under those laws.⁴⁹⁹ Further, the Restatement (Third) Foreign Relations Law §483⁵⁰⁰ provides, *inter alia*, that no rule of international law would be violated if a court in the United States enforced a judgment of a foreign court for payment of taxes.
- 6.58** In Mann’s later writings⁵⁰¹ the force of his argument is considerably weakened by the concession that there is no infringement of domestic jurisdiction or sovereignty and, accordingly, of public international law, where the consent of the forum state is forthcoming.

Lacuna in Mann’s Framework

- 6.59** There is a curious lacuna in the circumstances advanced by Mann as giving rise to overreach by a foreign State. Whilst he explicitly considers the possibilities of legislative and executive overreach, he appears to fail to consider the issue of judicial or adjudicatory overreach. Far from being a theoretical consideration this aspect of overreach has exercised legislatures, executives, courts and academic commentators,

⁴⁹⁹ Note: *Conflict of Laws – Revenue Law – Action on Tax Claim by Municipal Corporation of Another State*, (1950 – 1951) 25 St. John’s L. Rev. 341, at 343.

⁵⁰⁰ Restatement (Third) Foreign Relations Law §483, Comment a.

⁵⁰¹ F.A. Mann, *The International Enforcement of Public Rights*, (1987) 19 N.Y.U.J. Int’l L. & Pol. 603, at 608.

particularly in the context of United States courts' decisions pursuant to anti-trust legislation.

Commonality and Confluence of Public and Private International Law

- 6.60** In light of the underlying commonality and perhaps even emerging confluence of public and private international law, Mann's assertion that the rationale for the Revenue Rule is to be found in the former rather than the latter may appear to be increasingly moot. However, notwithstanding any such development it is submitted that Mann's assertion should fall on the basis that it effectively obscures rather than clarifies the law in this area by conflating two conceptually distinct issues.

Conflation of Questions of Jurisdiction and Enforcement

- 6.61** Specifically, the alternative hypothesis proposed by Mann conflates the issue of the jurisdiction of the taxing State, a question of public international law, with the question of the extent to which such jurisdiction will be enforced in the courts of the forum State, a question of private international law. This distinction reflects the approach taken in the literature. Cohen,⁵⁰² for instance, observes that, in working out both the Revenue Rule and the act of state doctrine, the courts are actually reacting to two distinct issues; *first*, the authority of the foreign state to perform the act or levy the tax that it does, and *second*, the power and propriety of forum courts either granting or withholding effect to the foreign action.
- 6.62** Akehurst⁵⁰³ adopts a similar approach in considering the question of jurisdiction in international law. He makes a distinction between; *firstly*, the power of one state to perform acts in the territory of another state (executive jurisdiction), the power of a state's courts to try cases involving a foreign element (judicial jurisdiction), the power of a state to apply its laws to cases involving a foreign element (legislative jurisdiction), and; *secondly*, the recognition of the exercise of such jurisdiction by other states.

⁵⁰² Cohen, *Nonenforcement of Foreign Tax Laws and the Act of State Doctrine: A Conflict in Judicial Foreign Policy*, 11 Harvard International Law Journal, 1, at 19 (1970).

⁵⁰³ Akehurst, *Jurisdiction in International Law*, (1974) 46 Brit. Y.B. Int'l L. 145.

6.63 Carter, in dealing with the issue states:⁵⁰⁴

“It is, of course, correct to assert that public international law can place limits upon the entitlement of a State to require that its laws be accorded extra-territorial effect. But what is in a sense the converse of this does not follow. It does not follow that the courts of a State are enjoined by public international law from according effect to laws of another State in excess of that other State’s entitlement.”

6.64 Dodge is also supportive of this view, noting:⁵⁰⁵

“The Restatement (Third) of Foreign Relations Law correctly observes that “{n}o rule of United States law or of international law would be violated if a court in the United States enforced a judgment of a foreign court for payment of taxes or comparable assessments,” and a committee of the International Law Association concurs that “there is no general rule of public international law prohibiting the transnational recognition or enforcement of foreign public laws as such.”

6.65 Baade⁵⁰⁶ argues that the assertion that the rationale for the Revenue Rule is to be found in the public international law doctrine of international jurisdiction is untenable. He observes that whilst a foreign state cannot exercise enforcement jurisdiction abroad to collect its tax claims or to ensure effect for the judgments of its courts or compliance with its laws, states can and do exercise prescriptive tax jurisdiction over persons and events abroad. He argues that a state acts within the jurisdictional limits imposed upon it by international law in trying to collect a tax from one of its resident nationals who later absconds to another country and that it is beyond dispute that the forum state can, if it so wishes, consent to the use of its judicial machinery for the collection of the tax thus evaded.

⁵⁰⁴ Carter, *Transnational Recognition and Enforcement of Foreign Public Laws*, [1989] 48 Cambridge Law Journal, 417, at 427, [Internal citations from the passage cited have been omitted].

⁵⁰⁵ Dodge, *Breaking the Public Law Taboo*, (2002) Harvard International Law Journal, 164, at 218, [Internal citations from the passage cited have been omitted].

⁵⁰⁶ Baade, *The Operation of Foreign Public Law*, 30 Texas International Law Journal, 429, at 483 (1995).

6.66 Strebel⁵⁰⁷ writes that the principle of territorial sovereignty states only that a state may not exercise sovereign rights within the territory of another state against the latter's will and that the mere filing of a foreign public law claim or the application to enforce such a judgment cannot be viewed as an unlawful extension of sovereign power. He goes on to state that even if a domestic court decides to grant, or enforce, judgment for the foreign state, it is solely the forum state that acts *jure imperii*. He further maintains that whether a state wants to enforce foreign public law is entirely up to that state and it has to be decided in accordance with its own interests; the internal laws of each state must decide whether, and to what extent, the courts have the power to enforce foreign public law judgments. Strebel⁵⁰⁸ concludes that there is no rule of public international law that actually prohibits the enforcement of foreign penal, tax and other public law judgments.

The Confluence of Public and Private International Law and the Revenue Rule

6.67 The significance of the conclusions drawn in relation to the taxonomy of the Revenue Rule is perhaps less than it might otherwise be in light of the deep connections between public and private international law. Mills,⁵⁰⁹ in arguing that there is an emerging confluence of the two areas, draws attention to their underlying commonality:

“In the context of the rules on the regulatory authority of states, three types of public international law jurisdiction are usually distinguished. These frequently overlap and thus the distinction is not always easy to maintain, nor is it universally accepted as reflecting international law. First, jurisdiction to prescribe or legislate, or (roughly) the limits on the law-making powers of government. The issue here is the permissible scope of application of the laws of each state; in private law disputes, this may be viewed as related to the private international law problem of the determination of the applicable law. Second, jurisdiction to adjudicate, or (roughly) the limits on the judicial branch of

⁵⁰⁷ Strebel, *The Enforcement of Foreign Judgments and Foreign Public Law*, 21 Loyola Los Angeles International & Comparative Law Journal 55, at 118 (1999).

⁵⁰⁸ Strebel, *The Enforcement of Foreign Judgments and Foreign Public Law*, 21 Loyola Los Angeles International & Comparative Law Journal 55, at 122 (1999).

⁵⁰⁹ Mills, *The Confluence of Public and Private International Law*, Cambridge University Press, (2009), at pp. 228 to 229, [Internal citations from the passage cited have been omitted].

government. In private disputes, this is evidently closely related to the idea of jurisdiction in private international law. Third, jurisdiction to enforce, or (roughly) the limits on the executive branch of government. This limit is directly concerned with the acts of authorities implementing the law, such as police or bailiffs. In the private law context, it is related to the pragmatic question of whether the court can enforce any judgment by exercising physical power over the defendant or their property. ... Because the limits on enforcement jurisdiction mean that a judgment is only directly effective within the judgment state, they also necessitate mechanisms for the enforcement of foreign judgments in private international law. The correspondence in structure between the three aspects of public international law rules of 'jurisdiction' and the three basic components of private international law (jurisdiction, applicable law and the recognition and enforcement of judgments) suggests their underlying commonality."

- 6.68** The work of Mills opens up the possibility of a Hegelian dialectic where the thesis that the Revenue Rule is rooted in private international law versus the antithesis that it is based in public international law gives way to a synthesis which recognises that there are both public and private international law dimensions to the Rule.⁵¹⁰
- 6.69** Proceedings wherein a foreign state seeks to enforce a tax claim (a claim which arises from a *jure imperii* act) in the forum's courts, necessarily raise questions of inter-state relations, which undeniably fall within the domain of public international law. Forum courts, when declining to enforce such claims, frequently raise the question of whether they have jurisdiction, and assert that such matters involve issues of international relations and are, pursuant to the doctrine of separation of powers, better dealt with by the other branches of government.⁵¹¹
- 6.70** Where provision is made, by a forum, for such assistance to be given to a foreign state, it is generally done by way of tax treaty, itself a species of international convention. Yet

⁵¹⁰ I am grateful to Professor Andrew Dickinson, of St. Catherine's College, Oxford, whose incisive questioning has helped me clarify my thoughts in this area.

⁵¹¹ **Chapter 8.**

treaties constitute one of the sources of public international law:⁵¹² Can it logically be said that, the question of whether the forum will assist, in the enforcement of foreign tax claims, only gains its international law characterisation by virtue of being dealt with by international convention?

- 6.71** Even if such a position were logically sustainable, the prevalence and durability of the Revenue Rule, throughout the common law world, and the fact that it is also a feature of civil legal systems is, it is submitted, indicative of a widespread state practice that, in turn, is capable of constituting evidence in favour of the proposition that this practice forms part of customary international law.
- 6.72** It is a consequence of the equality and independence of states that municipal courts accept the validity of the acts of foreign states and their agents, including legislation; in practice, however, courts may refuse to recognise foreign acts considered to be contrary to international law, or the public policy of the forum and there is also a rule, in effect an adjunct of the public policy proviso, that no effect will be given to foreign penal, fiscal or political laws.⁵¹³ It is submitted, as a matter of logic that, just as the principle of equality and independence of states (and the legal consequences which flow from the principle) forms part of public international law, so also, must the provisos thereto.

Conclusion

- 6.73** The alternative hypothesis regarding the taxonomy of the Revenue Rule is that it forms a part of public international law. This hypothesis is advanced by Mann on the basis that, a foreign state, in bringing proceedings seeking to enforce either a tax claim, or a judgment, obtained from the courts of the foreign state, in respect of such a claim, before the courts of the forum, is acting in excess of its jurisdiction as a matter of public international law.
- 6.74** The hypothesis fails for the reason that, in bringing such proceedings, the foreign state, far from acting in excess of its jurisdiction, is submitting to the jurisdiction of the forum

⁵¹² Article 38 of the Statute of the International Court of Justice.

⁵¹³ Brownlie, *Principles of Public International Law*, (7th ed. 2008) Oxford University Press, at p. 324 and fn. 6.

and, in particular, to the jurisdiction of its courts. Further, to seek to assert that the mere bringing of such proceedings is an act that is in breach of the law of nations, is to fail to recognise that it is accepted, as a matter of public international law, that the jurisdictional competence of states is not exclusively territorial. It follows that the formulation adopted by *Dicey*⁵¹⁴ (in connection with delimiting the act of state doctrine) is unduly narrow.

6.75 However, notwithstanding the difficulties which have been highlighted with the basis for Mann's assertion that the Revenue Rule is rooted in public international law, the work of Mill's, in noting the emerging confluence of public and private international law, points the way to a synthesis of the conventional view and the alternative hypothesis, with a recognition that the Rule has both a public and private international law dimension.

⁵¹⁴ Dicey, Morris & Collins, *The Conflict of Laws* (14th ed.), Vol. 1, para. 5-046, p. 116, refers to territory *simpliciter*.

Chapter 7 – The Relationship between the Revenue Rule and Sovereignty

Introduction

- 7.1** The thesis advanced herein is that key aspects of the Revenue Rule are characterised by uncertainty. However, if this thesis is to be established, in relation to the rationale for the Rule, it must answer the assertion that sovereignty is the best explanation of the doctrinal basis for the Revenue Rule.⁵¹⁵ The function of this Chapter is to meet that challenge. It does so by constructing a testable hypothesis and by testing this hypothesis in both its strong form and its weak form.⁵¹⁶
- 7.2** It has been asserted that a departure from the Revenue Rule constitutes a derogation from sovereignty.⁵¹⁷ If sovereignty *is* the basis for the Revenue Rule, this gives rise to a testable hypothesis; specifically, that, in circumstances of constrained⁵¹⁸ sovereignty, departures from the Rule will be observable. Hereafter, this will be referred to as the “converse” hypothesis. Accordingly, this Chapter will examine the jurisprudence for evidence in support of the converse hypothesis. However, before proceeding to testing, it is necessary to define terms and to discuss the circumstances under which the hypothesis is testable.
- 7.3** Constrained sovereignty can arise where a state or jurisdiction⁵¹⁹ forms part of an overarching political and legal structure. The degree to which sovereignty is constrained

⁵¹⁵ Dicey, Morris & Collins, *The Conflict of Laws* (14th ed.), Vol. 1, para. 5-020, p. 101, referring to the *dicta* of Lord Keith of Avonholm in *Government of India v. Taylor* [1955] 1 A.C. 491, at 511.

⁵¹⁶ The inspiration for proposing a strong and weak form of the hypothesis comes from finance theory; specifically, the Efficient Market Hypothesis which is postulated in a strong, semi-strong and weak form. See Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, Journal of Finance, Vol. 25, No. 2, (May 1970), pp. 383 – 417.

⁵¹⁷ The assertion, which is implicit in the sovereignty rationale, was made explicit in *Commissioner of Taxes, Federation of Rhodesia v. McFarland* 27 SATC 15, 1965 (1) SA 470 (W), accessed from Lexis Nexis, at pages 3 to 4 of the Lexis Nexis report, where, citing Oppenheim, *International Law*, Vol. 1 pp. 329-330, the Court stated that to enforce [foreign] revenue laws, would, in effect, mean to assist states in the performance of acts of sovereignty in foreign countries in derogation of their territorial supremacy.

⁵¹⁸ Whilst it falls to the forum court to determine whether it should depart from the Revenue Rule, it is not within the jurisdiction of the forum court to determine whether the state, of which it forms part, should derogate from its sovereignty. It is arguably for this reason that it is sometimes said that the Revenue Rule goes to jurisdiction. In any event, the term “constrained sovereignty” is used rather than the formulation “derogation from sovereignty.”

⁵¹⁹ In the case of an overarching political and legal structure taking the form of an empire a variety of entities may exist, not all of which might be regarded as states, for example, self-governing dominions, colonies, settled territories, dependencies, protectorates and mandates. See generally *Halsbury's Laws of England*, (5th ed., 2009), Vol. 13, paras. 702 to 708.

may vary, depending upon the characteristics of the overarching structure. Such a structure may either be characterised by states within a country standing in an ostensibly equal relationship, one with another, as in the case of federal entities such as the United States, Canada and the Commonwealth of Australia,⁵²⁰ or supra-national organisations, such as the European Union⁵²¹ or the Commonwealth of Nations,⁵²² or, alternatively, by one state playing a predominant role compared with other jurisdictions,⁵²³ as did the United Kingdom within the British Empire. Each of these cases shall be considered in turn.⁵²⁴

- 7.4** The hypothesis is testable either where there is no constitutional or legislative provision requiring the enforcement of tax claims, or judgments in respect of same, of other entities within the overarching political and legal structure or where, notwithstanding the Revenue Rule, a common law right, to enforce such claims and/or judgments, exists independently of such provision.
- 7.5** Recognising that the degree to which sovereignty is constrained may vary, the converse hypothesis is stated in two forms, specifically: That constrained sovereignty *will* result in a departure from the Rule (the converse hypothesis – strong form) and: That constrained sovereignty *may* result in a departure from the Rule (the converse hypothesis – weak form).
- 7.6** Evidence supporting the strong form of the converse hypothesis would advance the proposition that sovereignty is the doctrinal basis of the Revenue Rule. If, however, the evidence is only sufficient to support the weak form of the converse hypothesis, then it follows that there are other reasons for the existence of the Rule.

⁵²⁰ Although, in the case of the United States, for example, the number of members each state has in the House of Representatives is dependent upon population, whilst the District of Columbia is not regarded as a state at all.

⁵²¹ Although, *inter alia*, the number of representatives in the Parliament, the number of Commissioners and the number of votes in the Council vary between member states of the European Union.

⁵²² The Commonwealth of Nations is a voluntary association of independent sovereign states. *Halsbury's Laws of England*, (5th ed., 2009), Vol. 13, para. 701, although the retention, for the moment at least, of the position of Head of the Commonwealth by the British monarch, is a departure from the principle of equality.

⁵²³ As discussed earlier, the term 'jurisdiction' is used in preference to the term 'state' as it encompasses both entities that may be regarded as having met the criteria of statehood and entities which fall short of meeting such criteria.

⁵²⁴ It should be noted that the level of examination, in any particular jurisdiction, will be dependent upon the extent to which the issues discussed, have arisen in litigation in that jurisdiction.

7.7 Given that the Revenue Rule originated in the courts, it is appropriate to examine court decisions for evidence of such departure: The converse hypothesis will be tested by means of a qualitative assessment of the jurisprudence involving the Rule where the forum’s sovereignty is constrained. Accordingly, the focus of this Chapter is to examine the operation of the Revenue Rule in circumstances where the forum state or jurisdiction forms part of an overarching political and legal structure.

The United States

7.8 In marked contrast to other common law jurisdictions, when it comes to the Revenue Rule, both state and federal court decisions in the United States (in particular those concerning sister state tax claims) provide a treasure trove of empirical data. However, the relevance of this material when it comes to testing the converse hypothesis is open to question given that since the decision of the United Supreme Court in *Milwaukee County v. M. E. White Co.*⁵²⁵ it has been clear that the Revenue Rule is overruled by Article IV, section 1 of the United States Constitution – the *full faith and credit* provision.⁵²⁶

7.9 Notwithstanding this concern the aforementioned material is of relevance for three reasons. *Firstly*, prior to *Milwaukee* it was *not* clear that Article IV was relevant; indeed, state and federal courts proceeded on the basis that it was not controlling. Consequently, earlier court decisions continue to constitute a valid source of material when it comes to testing the converse hypothesis, notwithstanding the fact that they were decided without a proper appreciation of the impact of Article IV.

7.10 *Secondly*, the Supreme Court, in deciding *Milwaukee*, distinguished between sister state tax claims that had been reduced to judgment⁵²⁷ and sister state tax claims *simpliciter*. It expressly left open the question as to whether the full faith and credit provisions of the

⁵²⁵ (1935) 296 U.S. 268, 56 S. Ct. 229.

⁵²⁶ Article IV, section 1, provides: “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.” <https://www.law.cornell.edu>constitution>, accessed 19th of September, 2016. See **paragraph 7.37**, *et seq.*

⁵²⁷ In the state seeking enforcement.

United States Constitution required the enforcement of the latter category; thus, cases coming within that category continue to be relevant for the purposes of testing the converse hypothesis.

- 7.11** *Thirdly*, even though the Supreme Court in *Milwaukee* clarified the scope of Article IV in certain cases involving the Revenue Rule, it also made clear that the result achieved in that case (a sister state tax claim that had been reduced to a judgment could be enforced) was not dependent upon the provisions of Article IV. Accordingly, it is possible that circumstances may arise where a sister state tax claim that has been reduced to judgment will be enforced without reference to Article IV. Any such case law would constitute evidence in support of the strong form of the converse hypothesis.

The Revenue Rule as between Sister States

- 7.12** Some of the jurisprudence and the literature, albeit post *Milwaukee*, is supportive of the converse hypothesis in its strong form. In *State ex rel. Oklahoma Tax Commission v. Rodgers* the St. Louis Court of Appeals in Missouri, speaking of the Revenue Rule, stated:⁵²⁸

“It was applied as between wholly sovereign states. It has no place in a union of states such as the United States, where the interest of both the state and the taxpayer will be protected from arbitrary power by the provisions of the federal Constitution. The taxpayer who enjoys the protection of government should bear his share of the expense of maintaining the government, and should not be permitted to escape his obligation by crossing state lines.”

- 7.13** In *State of Oklahoma ex rel. Oklahoma Tax Commission v. F. S. Neely*⁵²⁹ the Court stated:⁵³⁰

“The original rule, in its application to cases of international aspect, may well find some justification in one sovereign’s reluctance to inquire into another’s

⁵²⁸ 238 Mo. App. 1115, at 1126 to 1128.

⁵²⁹ (1955) 225 Ark. 230, 282 S.W. 2d 150.

⁵³⁰ 225 Ark. 230, at 233 to 234.

system of law or to risk the giving of affront by the denial of a sovereign demand. Obviously those considerations are without weight in litigation originating in and confined to the United States.”

7.14 Again, in *State ex rel. Oklahoma Tax Commission v. Rodgers*⁵³¹ the Court stated:⁵³²

“Nor can it be said that Missouri has a local public policy opposed to the imposition of an income tax, which would prompt our courts to refuse enforcement of the Oklahoma tax.”

7.15 Freeze,⁵³³ writing in a federal context, notes that a forum may refuse to enforce a tax claim because it disapproves of the foreign cause of action but he notes that it is not likely that the public policy of one state would be offended by the taxes of another. He concludes that the argument that the forum might be embarrassed in dealing with the relations between a sister state and its citizen does not particularly commend itself.

7.16 The ensuing discussion of the position in the United States is divided into three parts; *pre-Milwaukee*; the *Milwaukee* decision, and; post *Milwaukee*.

Pre-Milwaukee

7.17 With just two exceptions, both of which concerned franchise tax decisions at state level, state and federal courts consistently applied the Revenue Rule to sister state tax claims, whether adjudicated⁵³⁴ or unadjudicated.

First Application of the Revenue Rule to a Sister State Tax Claim

7.18 *State of Maryland v. Turner*⁵³⁵ was the first attempt made by one state to sue for tax in another.⁵³⁶ The case involved proceedings in which the state of Maryland and the city of

⁵³¹ (1946) 238 Mo. App. 1115, 193 S.W. 2d 919.

⁵³² 238 Mo. App. 1115, at 1126 to 1128.

⁵³³ Freeze, *Extraterritorial Enforcement of Revenue Laws*, (1937 – 1938) 23 Washington University Law Quarterly, 321, at 333.

⁵³⁴ A tax claim in respect of which a judgment has been obtained in the courts of the sister state bringing enforcement proceedings in the forum.

⁵³⁵ (1911) 75 Misc. 9, 132 N.Y.S. 173.

⁵³⁶ According to the Court in *City of Detroit v. Gould* (1957) 12 Ill. 2d 297, 146 N.E. 2d 61.

Baltimore sought to recover, as against the defendant, a sum of money, equal to the amount of taxes assessed against him upon personal property, whilst he was a resident of the city and the state. The New York Supreme Court applied the Revenue Rule and upheld the defendant's objections.

First Application of the Revenue Rule by a Court of Last Resort

- 7.19** It was not until 1921, in *State of Colorado v. Harbeck*,⁵³⁷ that the Revenue Rule was unequivocally applied by an American court of last resort as a ground for denying the assertion of a tax claim by a sister state.⁵³⁸ The question arising was whether Colorado inheritance tax could be collected, extraterritorially, by suit against the beneficiaries.
- 7.20** Colorado brought proceedings, which ended up before the Court of Appeals of New York, against the executrix and legatees, to recover inheritance tax upon the estate of the deceased, who had been a resident of Colorado but who had left that state with the intention of going abroad. He died in the city of New York, whilst *en route*. The will of the deceased, and four codicils, were admitted to probate in New York county, and letters testamentary thereunder were issued to the widow, who was also the principal legatee under the will. Whilst transfer taxes were assessed and paid in New York no provision was made for the payment of transfer tax in Colorado.
- 7.21** After the executrix had accounted, and the estate had been distributed in New York, Colorado instituted proceedings in its courts to assess a transfer tax under its legislation. The estate assessed for taxation consisted of personalty, none of which was physically present in Colorado at the time of the decedent's death, nor had, at the time the New York Court of Appeals gave its judgment, subsequently come into the State.
- 7.22** The Court of Appeals held⁵³⁹ that, although a liability to pay tax existed under the Colorado legislation, under the due process clause of the United States Constitution, where; *firstly*, delinquents were non-residents of the taxing state and outside its

⁵³⁷ (1921) 232 N.Y. 71, 133 N.E. 357.

⁵³⁸ As noted in *State of Oklahoma ex rel. Oklahoma Tax Commission v. F. S. Neely* (1955) 225 Ark. 230, at 232, 282 S.W. 2d 150.

⁵³⁹ 232 N.Y. 71, at 83.

jurisdiction, so that no personal liability or enforceable duty could be established as against them, and; *secondly*, the property involved was outside the taxing state, so that no *res* existed upon which the taxing state could impose a lien; the state was powerless to collect the tax in its own courts and powerless to invoke the aid of a sister state to collect its revenue.

- 7.23** It was also argued that the Colorado legislation gave the power to collect the tax in question by a common law action. The Court of Appeals held⁵⁴⁰ that the attempt to give such a statutory provision extraterritorial effect would conflict with the well settled principle of international law which precluded one state from acting as a collector of taxes for a sister state and from enforcing its penal or revenue laws as such. The Court went on to state that the rule was universally recognised that the revenue laws of one state had no force in another.

Application of the Revenue Rule at Federal Level to Sister State Tax Claims

- 7.24** *Moore v. Mitchell*,⁵⁴¹ a decision of the Circuit Court of Appeals, Second Circuit, concerned an action by the county treasurer of Grant County, Indiana, to recover taxes alleged to be due and unpaid.

- 7.25** The appellees were the executors of the last will and testament of Richard Edwards Breed, who was alleged to have resided in Indiana between 1903 and 1926 and to have not paid tax as required by state legislation. An assessment was made after Breed's death. There was no allegation that any of the deceased's property was ever physically within the state of Indiana or that the deceased died there. No lien was claimed to have been imposed upon the property of the deceased by reason of the proceedings for the assessment of taxes; thus only a personal liability was asserted for taxes which were not liquidated until after the death of the deceased.

⁵⁴⁰ 232 N.Y. 71, at 85.

⁵⁴¹ (1929) 30 F.2d. 600, affirmed on different grounds by the United States Supreme Court at 281 U.S. 18, 50 S. Ct. 175.

7.26 Manton J. noted⁵⁴² that with the appellees and the property being outside the State, and the estate being administered in New York, the effort to collect a tax, for a political subdivision of Indiana, was repugnant to the settled principles of private international law, which precluded one state from acting as a collector of taxes for a sister state, and from enforcing its penal or revenue laws as such. He also rejected the appellant's argument that extraterritorial imposition was to be distinguished from extraterritorial collection or enforcement of tax.⁵⁴³

Impact of Statutory Reciprocity Provisions

7.27 The case of *In re Martin's Estate*,⁵⁴⁴ involved an attempt by Connecticut to compel payment, by the executor, out of the assets of the estate of the deceased, transfer tax claimed to be due to it. The proceedings arose in circumstances where, shortly after the death of the decedent, tangible property in Connecticut was removed to New York.

7.28 Connecticut claimed that the public policy of New York and the law of the *Harbeck* and *Bliss*⁵⁴⁵ had been fundamentally changed by the adoption, by New York, of reciprocity provisions in its tax legislation in 1925. Similar provisions had been enacted by Connecticut in the same year.

7.29 The Surrogate's Court held⁵⁴⁶ that the abolition of the Revenue Rule by the legislature should not be spelled out by implication from the enactment in 1925 of a mere reciprocity provision, nor should such a far reaching change of law be established by judicial decision, if the legislature had intended to change public policy its purpose would have been expressed in a clear unequivocal mandate.

⁵⁴² 30 F.2d. 600, at 602.

⁵⁴³ As to which see **Chapter 6**.

⁵⁴⁴ (1930) 136 Misc. 51, 240 N.Y.S. 393 and upheld by the Court of Appeals at 255 N.Y. 359, 174 N.E. 753.

⁵⁴⁵ (1923) 121 Misc. 773, 202 N.Y.S. 185. The Vermont Commissioner of Taxes unsuccessfully sought the transfer of the assets of the estate, (after the payment of administration expenses, taxes due to the state of New York and debts due to New York creditors) to the executors appointed by the Vermont probate court or, in the alternative, no distribution be decreed until all taxes due to Vermont had been paid. See **Chapter 11**.

⁵⁴⁶ 136 Misc. 51, at 54.

7.30 The Court further held⁵⁴⁷ that it was immaterial that the law of Connecticut declared the tax to be a lien upon the property. The Court observed that it might be such in that state, but that its enforceability ceased when the property crossed the border.

Sister State Taxes Not Entitled to Priority

7.31 In *Holshouser v. Gold Hill Copper Co.*⁵⁴⁸ a question arose as to whether the state of New Jersey was entitled to priority or preference over other creditors, including lien creditors, in respect of an annual license fee or franchise tax, in the payment of the debts of a copper company out of its assets, which were in the hands of the receiver. The Supreme Court of North Carolina held that New Jersey was not entitled to the priority or preference claimed.

7.32 Subsequently, the Superior Court of Delaware in *City of Detroit v. Proctor*⁵⁴⁹ observed that, in allowing recovery, the North Carolina court did not even mention, much less decide, the question of whether an action might be brought in one state to enforce the revenue laws of another state. However, the decision was cited with approval both by the United States Supreme Court in *Milwaukee County v. M. E. White Co.*⁵⁵⁰ and by the St. Louis Court of Appeals in Missouri, in *State ex rel. Oklahoma Tax Commission v. Rodgers*.⁵⁵¹

Pre-Milwaukee Rejection of the Revenue Rule

7.33 In *People of the State of New York v. Coe Mfg. Co.*⁵⁵² the state of New York recovered, in its Supreme Court, a judgment for a franchise tax imposed by its legislation upon foreign corporations doing business within the state. Following the New York judgment an action was instituted in New Jersey. The defendant, on appeal to the Court of Errors and Appeals, argued that the claim was based on penalties that could not be prosecuted in New Jersey.

⁵⁴⁷ 136 Misc. 51, at 55.

⁵⁴⁸ (1905) 70 L.R.A. 183, 50 S.E. 650.

⁵⁴⁹ (1948) 5 Terry 193, at 196, 44 Del. 193, 61 A. 2d 412.

⁵⁵⁰ (1935) 296 U.S. 268, 56 S. Ct. 229.

⁵⁵¹ (1946) 238 Mo. App. 1115, 193 S.W. 2d 919.

⁵⁵² (1934) 112 N.J.L. 536, 172 A. 198.

- 7.34** The Court expressed⁵⁵³ the view that the record failed to show that the New York legislation in question was penal in its nature. The Court observed⁵⁵⁴ that, when New York exacted a franchise tax upon a corporation doing business in the state, it was wholly within its rights. It was then for the corporation to decide whether it was going to transact business in New York. When it did avail itself of the opportunity thus afforded, it did so under the implied obligation that it would comply with the conditions upon which it was permitted to do business.
- 7.35** The Court acknowledged that whilst it was true that the legislation imposed certain penalties for failure to comply with the obligation thus assumed, these were nothing more than the obligation frequently imposed in ordinary contracts between individuals and became, as it were, liquidated damages for the breach.
- 7.36** The Court concluded⁵⁵⁵ that if such claims were not enforceable against foreign corporations wherever found, the states of the Union would be subject to such grave wrongs from without, inasmuch as corporations establish important connections in states other than those of their incorporation, and transact large business therein without the investment of a dollar or the placing of tangible property within their borders whereby redress may be had against corporations in default.

The Milwaukee Decision

- 7.37** In *Milwaukee County v. M. E. White Co.*⁵⁵⁶ the United States Supreme Court was called upon to decide whether a United States District Court, sitting in Illinois, had jurisdiction of an action upon a judgment for taxes rendered by a court of the state of Wisconsin. The Court distinguished between an action upon *a judgment for taxes* and an action upon *a claim for taxes*, deciding that an action in respect of the former could be maintained before a United States court sitting in a state other than the state levying the tax and

⁵⁵³ 112 N.J.L. 536, at 538.

⁵⁵⁴ 112 N.J.L. 536, at 539.

⁵⁵⁵ 112 N.J.L. 536, at 540.

⁵⁵⁶ (1935) 296 U.S. 268, 56 S. Ct. 229.

stating that it was not a question of jurisdiction but rather a question as to the merits of the claim.⁵⁵⁷

The Background to the Case

- 7.38** The appellant, Milwaukee county, a county and citizen of Wisconsin, brought suit in the District Court for Northern Illinois against M. E. White Co., the appellee, a corporation and citizen of Illinois, to recover on a judgment which the appellant had entered against the appellee in Wisconsin. The judgment was for taxes duly assessed against the appellee, under Wisconsin statutes, upon income received from its business transacted within the state under state license. The District Court dismissed the cause on the ground that, as the suit was, in substance, brought to enforce the revenue laws of Wisconsin, it could not be maintained in the District Court in Illinois.

The Question Arising

- 7.39** The Supreme Court observed⁵⁵⁸ that the question of whether one state must enforce the revenue laws of another remained open.⁵⁵⁹ It noted⁵⁶⁰ that the precise question arising in the case appeared to have been decided in only a single case, *People of the State of New York v. Coe Mfg. Co.*⁵⁶¹ For the purposes of the case the Court assumed that the courts of one state were not required to entertain a suit to recover taxes levied under the statutes of another. Accordingly, it confined its enquiry to the single question of whether they must, nevertheless, give full faith and credit to judgments for such taxes.

Purpose of the Full Faith and Credit Clause

- 7.40** In answering that question in the affirmative the Court stated:⁵⁶²

“We can perceive no greater possibility of embarrassment in litigating the validity of a judgment for taxes and enforcing it than any other for the payment of money. The very purpose of the full faith and credit clause was to alter the

⁵⁵⁷ The foregoing summary was set out by the Court of Appeals of Ohio in *State of Minnesota v. Karp* (1948) 84 Ohio App. 51, at 55 to 56, 84 N.E. 2d 76, 52 Ohio Law Abs, 513.

⁵⁵⁸ 296 U.S. 268, at 275.

⁵⁵⁹ *Moore v. Mitchell* 281 U.S. 18, 50 S. Ct. 175.

⁵⁶⁰ 296 U.S. 268, at 278 to 279.

⁵⁶¹ (1934) 112 N.J.L. 536, 172 A. 198.

⁵⁶² 296 U.S. 268, at 276 to 277.

status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin. That purpose ought not lightly to be set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighed against the policy of the constitutional provision and the interest of the state whose judgment is challenged. In the circumstances here disclosed, no state can be said to have a legitimate policy against payment of its neighbor's taxes, the obligation of which has been judicially established by courts to whose judgments in practically every other instance it must give full faith and credit.

Full Faith and Credit not required for Enforcement of Sister State Tax Judgments

7.41 The Supreme Court held⁵⁶³ that the obligation to pay taxes was *not* penal. It was a statutory obligation, quasi-contractual in nature, enforceable, if there was no exclusive statutory remedy, in the civil courts, by the common law action of debt; it held that this was the rule established in the English courts before the Declaration of Independence. Further, even if full faith and credit was not commanded, there was nothing in the Constitution and laws of the United States that required a court of a state to deny relief upon a judgment because it was for taxes. A state court could, in conformity with state policy, by comity, give a remedy that the *full faith and credit* clause did not compel; in *Holshouser v. Gold Hill Copper Co.*⁵⁶⁴ a suit, to recover taxes due under the statutes of another state, had been allowed without regard to the compulsion of the *full faith and credit* clause.

Post Milwaukee

7.42 *Milwaukee* cannot be advanced in support of the strong form of the converse hypothesis, namely that the consequence of constrained sovereignty is that the Revenue Rule does not apply as between sister states. However, the decision does offer some support for the weak form of the hypothesis, that in consequence of constrained sovereignty, sister states

⁵⁶³ 296 U.S. 268, at 271.

⁵⁶⁴ (1905) 70 L.R.A. 183, 50 S.E. 650.

may decide (leaving aside the requirements of the *full faith and credit* provision) not to apply the Revenue Rule in respect of sister state tax claims reduced to judgment. Post *Milwaukee* the jurisprudence moved on to the question of whether, and to what extent, sister state tax claims would be enforced. The decisions have divided between an expansive and a restrictive view on this issue.

The Expansive View

- 7.43** In *State ex rel. Oklahoma Tax Commission v. Rodgers*⁵⁶⁵ successful proceedings were brought, before the St. Louis Court of Appeals in Missouri, for the collection of an income tax obligation, and associated interest, incurred by the respondents while they were residents of Oklahoma.
- 7.44** *State of Ohio ex rel. Duffy v. Arnett*⁵⁶⁶ was a case before the Court of Appeals of Kentucky, where the appellant, Ohio, recovered, from the appellee, *premia* for workmen's compensation insurance coverage extended to the latter. The appellee argued that the claim was for taxes and invoked the Revenue Rule. The Court held⁵⁶⁷ that assuming that the amount involved was a tax, the courts of Kentucky should act as a forum for the enforcement of tax claims of other states of the United States.
- 7.45** *State of Oklahoma ex rel. Oklahoma Tax Commission v. F. S. Neely*⁵⁶⁸ was another successful action to recover income tax and interest. The Supreme Court of Arkansas stated⁵⁶⁹ that the oft repeated dogma, that one sovereign did not enforce the revenue laws of another, was rapidly approaching a deserved extinction in those instances in which the dispute was not international but merely interstate.
- 7.46** The Court noted that the English cases in which the Rule originated involved the laws of nations rather than the laws of the American states and in none of these cases was a foreign sovereign actually denied access to the English courts. The Court went on to

⁵⁶⁵ (1946) 238 Mo. App. 1115, 193 S.W. 2d 919. This case has been referred to in **paragraphs 7.12** and **7.14** and is discussed in further detail in **Chapter 8**.

⁵⁶⁶ (1950) 314 Ky. 403, 234 S.W. 2d 722.

⁵⁶⁷ 314 Ky. 403, at 408 to 409.

⁵⁶⁸ (1955) 225 Ark. 230, 282 S.W. 2d 150.

⁵⁶⁹ 225 Ark. 230, at 232.

state⁵⁷⁰ that whilst the Rule, in its application to cases of international aspect, might well find some justification in one sovereign's reluctance either to inquire into another's system of law or to risk the giving of affront by the denial of a sovereign demand, such considerations were without weight in litigation originating in, and confined to, the United States.

7.47 In *City of New York v. Shapiro*,⁵⁷¹ an action against two Massachusetts residents, who conducted business in New York City, to enforce the City Comptroller's determination of taxes, penalties and interest, the United States District Court held⁵⁷² that there was no reason of policy for distinguishing between a State's duty to give effect to a sister State's court judgment for taxes and its duty to give effect to a sister State's binding administrative determination of taxes. The Court went on to hold⁵⁷³ that normal interest and moderate penalties for delinquency imposed by a tax law and entering into a tax judgment could be recovered when suit was brought on that judgment in a sister state.

7.48 *City of Detroit v. Gould*⁵⁷⁴ concerned a successful action against a resident of Illinois, to recover 1954 and 1955 taxes assessed against personal property located in the City of Detroit and owned by the defendant. In granting relief, the Supreme Court of Illinois stated:⁵⁷⁵

“The oft-mouthed principle that one State will not enforce the revenue laws of another State loses its force and semblance of validity when examined with a view to its merits. The doctrine originated purely in considerations of commercial convenience and, in consequence of blind application, acquired a status to which reasons were thereafter assigned. To refuse to give sanction to the revenue laws of the State of Michigan in an action in Illinois has no commercial effect, salutary or otherwise. A revenue law is not a penal law and the reasons for failing to enforce the penal laws of a sister State have no real

⁵⁷⁰ 225 Ark. 230, at 233.

⁵⁷¹ (1954) 129 F.Supp. 149.

⁵⁷² (1954) 129 F.Supp. 149, at 154.

⁵⁷³ (1954) 129 F.Supp. 149, at 155.

⁵⁷⁴ (1957) 12 Ill. 2d 297, 146 N.E. 2d 61.

⁵⁷⁵ 12 Ill. 2d 297, at 303 to 304.

application when the cause is based upon the revenue laws of a sister State. These defendants enjoyed the protection afforded them by the laws of Michigan during the years 1954 and 1955. There is no valid reason why they should not contribute to the cost incurred in affording themselves and their property such protection. The Michigan statutes constitute the tax assessed as a debt owing from the defendants to the city of Detroit. This action then resolves itself into an action in the nature of debt for moneys due in the circuit court of Cook County. The remedy for the debt created by the tax assessed in the city of Detroit is not, by statutory provision or otherwise, created as an exclusive remedy in the courts of Michigan. Consequently, in our view of the doctrine here in issue, there remains no reason in comity upon which the courts of this State should deny this action, pursuant to the taxing statutes of Michigan, to the plaintiff herein.”

- 7.49** *State of Ohio, Department of Taxation v. Kleitch Bros. Inc.*⁵⁷⁶ concerned a successful action to enforce, in Michigan, three tax judgments previously entered in Ohio courts under the Ohio Highway Use Tax Law. The Supreme Court of Michigan noted⁵⁷⁷ that art. 4 § 1, of the United States Constitution required Michigan to give ‘*Full Faith and credit*’ to ‘*the public Acts, Records, and judicial Proceedings of every other State.*’ The Court stated that even if it did not conceive of the Ohio ‘*judgments*’ as ‘*judicial proceedings*’, they plainly represented ‘*records*’ of that State, entered in compliance with one of its ‘*public acts*’, and should be given full faith and credit. The Court also stated that Michigan certainly had no public policy against collection of taxes which should be weighed against the unifying principle of the *full faith and credit* clause.
- 7.50** In *Pennhurst State School v. Goodhartz’ Estate*⁵⁷⁸ the Supreme Court of New Jersey, dealing with an action to recover from the decedent’s estate for the care of his mentally incompetent son, stated⁵⁷⁹ *obiter* that it accepted the reasons advanced in the case law in support of the extraterritorial enforcement of tax claims.

⁵⁷⁶ (1959) 357 Mich. 504, 98 N.W.2d 636.

⁵⁷⁷ (1959) 357 Mich. 504, at 516.

⁵⁷⁸ (1964) 42 N.J. 266, 200 A. 2d 112.

⁵⁷⁹ 42 N.J. 266, at 272.

7.51 *State Tax Commission of Utah v. Cord*⁵⁸⁰ was a successful action to recover income tax, it being alleged that the defendants had sold property in Utah, resulting in an income tax liability; in filing a non-resident tax return the defendants had claimed deductions, to which they were not entitled, causing the commission to levy a deficiency assessment which had not been paid and had become final.

7.52 The Supreme Court of Nevada stated⁵⁸¹ that there was no longer any serious contention that one state would not enforce the tax laws of a sister state. Time, history and review had virtually erased the contentions that taxes were penal in nature and that one state need not enforce the taxes of a sister state because *full faith and credit* did not apply to criminal or revenue matters. The Court went on to state⁵⁸² that Nevada courts would enforce valid tax obligations imposed by another state, even though they had not been reduced to judgment.

The Narrow View

7.53 In *Hamilton County Treasurer v. Hartzell*⁵⁸³ the plaintiff brought proceedings against the defendant, a Pennsylvania resident, seeking to collect from her, money alleged to be due for personal property taxes assessed by Hamilton County, Ohio, against her, during her period of residence, in Ohio. The Court noted that it had held, in an earlier stage of these proceedings, that it would not entertain an action for the collection of taxes imposed by Ohio. The Court went on to state⁵⁸⁴ that no new reasons or authorities had been advanced by the plaintiff to persuade the Court to alter its former decision, in accord with the American Law Institute Restatement of the Law, Conflicts, §610, that: “*No action can be maintained on a right created by the law of a foreign State as a method of furthering its own governmental interests.*”

7.54 *City of Detroit v. Proctor*⁵⁸⁵ concerned an action for tax levied on the defendant’s personal property by the plaintiff. The Superior Court of Delaware observed⁵⁸⁶ that it

⁵⁸⁰ (1965) 81 Nev. 403, 404 P. 2d 422.

⁵⁸¹ 81 Nev. 403, at 408.

⁵⁸² 81 Nev. 403, at 409.

⁵⁸³ (1945) 61 Montg. 329, 55 Pa. D. & C. 100 (Pa.Com.Pl.), 1946 WL 2450 (Pa.Com.Pl.).

⁵⁸⁴ 55 Pa. D. & C. 100, at 107 (Pa.Com.Pl.).

⁵⁸⁵ (1948) 5 Terry 193, 44 Del. 193, 61 A. 2d 412.

⁵⁸⁶ 5 Terry 193, at 195 to 196.

was not alleged that a judgment was ever obtained in Michigan against the defendant for these taxes and therefore the case was not governed by the decision in *Milwaukee*.⁵⁸⁷ The Court declined to follow *State ex rel. Oklahoma Tax Commission v. Rodgers*,⁵⁸⁸ stating⁵⁸⁹ that, it could not agree that a tax liability was quasi-contractual. It might be true that a tax was not a penalty, but this did not necessarily mean that it was a quasi-contract. The Court quoted, with approval, the *dicta* in *Boyd v. Dillman*,⁵⁹⁰ another Delaware decision, where it was held that:

“Generally speaking, a tax is an impost levied for the support of the government, or for some special purpose, or by some agency having certain governmental functions delegated to it, such as a municipal corporation. It is not based on contract, either express or implied, as the consent of the taxpayer is not necessary for its collection.”

- 7.55** The Court, in *City of Detroit v. Proctor*,⁵⁹¹ went on to state that the court in *Rodgers* seemed to ignore the fact that Michigan’s sovereignty was as foreign to Delaware as Russia’s and that those practical reasons, which militated in favour of enforcing taxes for another state of the Union, were not very potent when applied to actions by a foreign country; if the courts were opened to one, could they be logically closed to the other, in the absence of express constitutional or statutory authority?
- 7.56** In *Wayne County v. American Steel Export Co.*⁵⁹² the Supreme Court, Appellate Division, of New York based its decision on the ground that New York courts, as a matter of state policy, did not lend themselves to the enforcement of the revenue laws of another state. The Court noted⁵⁹³ that, the plaintiffs sought to invoke the aid of the New York courts, to recover a personal judgment for delinquent taxes, against the defendant, as owner of taxable property in the state of Michigan, where no suit was ever brought in

⁵⁸⁷ (1935) 296 U.S. 268, 56 S. Ct. 229.

⁵⁸⁸ (1946) 238 Mo. App. 1115, 193 S.W. 2d 919.

⁵⁸⁹ 5 Terry 193, at 202.

⁵⁹⁰ (1938) 9 W. W. Harr. 231, 197 A. 830, at 834.

⁵⁹¹ (1948) 5 Terry 193, 44 Del. 193, 61 A. 2d 412.

⁵⁹² (1950) 277 A.D. 585, 101 N.Y.S. 2d 522.

⁵⁹³ 277 A.D. 585, at 587.

Michigan for such purpose, and no personal judgment had ever been obtained against the defendant for the taxes in default. The Court concluded⁵⁹⁴ that to entertain the suit in this case would conflict with the Revenue Rule.

- 7.57** In *Wayne County v. Foster & Reynolds Co.*,⁵⁹⁵ decided by the Supreme Court, Appellate Division, of New York, on the same day as the immediately preceding case, the Court again concluded that to entertain the suit would conflict with the Revenue Rule and held that the plaintiffs could not collect taxes, against a non-resident, through the instrumentality of the courts of New York, without first having the assessment reduced to judgment against the tax payer in the taxing jurisdiction, in compliance with due process.
- 7.58** In *City of Philadelphia v. Cohen*⁵⁹⁶ proceedings were brought to collect taxes due to Philadelphia, from the defendant, who carried on business in that city. The question before the Court of Appeals of New York was whether *full faith and credit* required the courts of New York to entertain an action brought to enforce a defendant's alleged liability, not reduced to judgment, under the tax laws of another state. In refusing relief the Court, in a majority ruling, held⁵⁹⁷ that so far as comity and New York's policy was concerned, all the New York decisions said that New York courts would not act as collectors of taxes for another state. The dissenting member of the Court, Fuld J. held⁵⁹⁸ that, since what was sued upon was not the underlying tax liability, but a final administrative determination, which had, in essence, the same force and effect as a judgment, it was entitled to full faith and credit.
- 7.59** In *Hamm v. Berrey*⁵⁹⁹ the Court of Civil Appeals of Texas held that, the Alabama Commissioner of Revenue could not recover income tax from a Texas citizen, through an action in the Texas courts, where the action brought was based, not upon a judgment

⁵⁹⁴ 277 A.D. 585, at 588.

⁵⁹⁵ (1950) 277 A.D. 1105, 101 N.Y.S. 2d 526.

⁵⁹⁶ (1962) 11 N.Y. 2d 401, 184 N.E. 2d 167, 230 N.Y.S. 2d 188.

⁵⁹⁷ 11 N.Y. 2d 401, at 406.

⁵⁹⁸ 11 N.Y. 2d 401, at 407.

⁵⁹⁹ (1967) 419 S.W.2d 401.

rendered by a court of Alabama, but upon an assessment made by the Alabama Department of Revenue and.

The Culmination of Milwaukee?

7.60 Arguably, *Milwaukee* finds its fullest expression in *Buckley v. Huston*,⁶⁰⁰ which provides an interesting, but isolated, instance of an outright rejection of the Revenue Rule. The case concerned an action by the taxing authority of the City of Philadelphia to recover taxes from the defendant, a New Jersey resident. Although New Jersey had enacted reciprocal enforcement legislation its Supreme Court held⁶⁰¹ that such legislation *did not* nullify the common law principle under which Philadelphia could maintain an action in the New Jersey courts to collect taxes lawfully imposed by it on the defendant and now owing by him; there was nothing in the relevant legislation to even remotely suggest an accompanying intention to curb existing common law rights in the New Jersey courts. Smith⁶⁰² notes that the Court allowed Philadelphia to maintain an action in the New Jersey courts to collect municipal taxes despite the reciprocal legislation limiting recognition to state tax claims. He goes on to observe that the Court questioned the constitutional power of the legislature to prohibit judicial recognition of foreign municipal taxes, but avoided the issue by concluding that the legislature's intent was not to delimit recognition practice but to strengthen New Jersey's ability to maintain tax claims in sister states. However, whilst *Milwaukee* may find its fullest expression in the *Buckley* decision, given the divergent positions adopted by the state courts it cannot be said to represent the culmination of the process initiated by the United States Supreme Court.

Canada

7.61 The Canadian case of *Weir v. Lohr*⁶⁰³ is consistent with the converse hypothesis. The Manitoba Queen's Bench dealt with the question of whether, if a hospital bill could be considered to be within the concept of a tax claim or revenue debt, it fell within the foreign category. The Court noted that the only other case where a Canadian court had

⁶⁰⁰ (1972) 60 N.J. 472, 291 A.2d. 129.

⁶⁰¹ (1972) 60 N.J. 472, at 480.

⁶⁰² Smith, *The Nonrecognition of Foreign Tax Judgments: International Tax Evasion*, (1981) University of Illinois Law Review, 241 at 254 to 255, fn. 95.

⁶⁰³ *Weir v. Lohr; All State Insurance Co. of Canada, Third Party* (1967) 65 D.L.R. (2d) 717, at 721 to 722.

faced the problem of direct enforcement of foreign taxes was in *City of Regina v. McVey*,⁶⁰⁴ where the Saskatchewan city had brought an action in Ottawa, Ontario, for an income tax claim. The Court in that case, applying *Municipal Council of Sydney v. Bull*⁶⁰⁵ had dismissed the action. Whilst the Canadian Court accepted that the authority of *Municipal Council of Sydney v. Bull* was not in doubt, it did note that, in *Government of India v. Taylor*, Lord Keith⁶⁰⁶ had left open the question whether the foreign state rule should be applied as between states of a federal union, stating that it might be possible to find reasons for modifying the rule as between such states. In reaching the view that it was possible, and should be done, the Court referred to *State ex rel. Oklahoma Tax Commission v. Rodgers*⁶⁰⁷ and *State of Oklahoma ex rel. Oklahoma Tax Commission v. F.S. Neely*.⁶⁰⁸

The Commonwealth of Australia

- 7.62** The Australian courts have had occasion to consider the Revenue Rule within the context of the Australian federation. However, the extent to which the converse hypothesis reflects the laws governing the Commonwealth is uncertain.
- 7.63** *O'Sullivan v. Dejneko*,⁶⁰⁹ a decision of the High Court of Australia, involved the enforcement of a New South Wales revenue law against a person who was domiciled and resident in South Australia. The respondent had been convicted, in a New South Wales court, of an offence under the Road Maintenance (Contribution) Act 1958 (N.S.W.), of failing to deliver a record of all journeys, along public streets in New South Wales, during January 1959, of a commercial goods vehicle, of which he was alleged to be the owner. The respondent, who was neither present nor represented at the hearing, was fined and ordered to pay costs and, in default of payment, it was ordered that he be imprisoned with hard labour.

⁶⁰⁴ (1922) 23 O.W.N. 32.

⁶⁰⁵ [1909] 1 K.B. 7.

⁶⁰⁶ [1955] A.C. 491, at 511 to 512.

⁶⁰⁷ (1946) 193 S.W. 2d 919.

⁶⁰⁸ (1955) 282 S.W. 2d 150.

⁶⁰⁹ (1964) 110 C.L.R. 498.

- 7.64** The respondent, who was a resident of South Australia and who had never been in New South Wales, did not pay the fine and, in July 1960, the New South Wales Court issued a warrant for his arrest. Subsequently, an officer of the South Australian police force applied to a Special Magistrate, in South Australia, for an order that the respondent be returned⁶¹⁰ to New South Wales. The Special Magistrate made the order sought and remanded the respondent in custody.
- 7.65** The High Court held⁶¹¹ that there was no doubt that the use of a motor vehicle upon a public street in New South Wales was a matter with which the legislature of New South Wales could validly deal, subject to such limitations as might exist under the Commonwealth Constitution. The purpose of the Road Maintenance (Contribution) Act 1958 was to impose upon those whose vehicles used those streets, an obligation to contribute towards their upkeep. However, such an obligation could not be imposed upon the vehicle, it could only be imposed upon someone who could contribute and the obvious person to select was the owner of the vehicle. He was the person in whom was vested the right either to use the vehicle, or by his servant or agent, or to permit or refuse to permit it to be used by others. The High Court noted that in *Broken Hill South Ltd. v. Commissioner of Taxation (N.S.W.)*⁶¹² it had been held that if the State could tax property located within its territory, then the constitutional authority of the State was not transcended because it taxed the owners, legal or equitable, of that property, whether domiciled or resident within the State or not – the *situs* of the property attracted the constitutional authority of the State to tax it, and thus enabled it to cast the burden upon the owners of the property. The High Court went on to note that, in this case it was the presence, in New South Wales, of the vehicle, and the use of it upon the public streets of New South Wales, that attracted the constitutional authority of the State and enabled its legislature to impose the obligation, of contributing to the upkeep of its streets, upon

⁶¹⁰ An argument that because the respondent had never been to New South Wales, he could not therefore be “returned” to that state was rejected both by the Special Magistrate and, on first appeal, the Supreme Court of South Australia. Kitto J. in the High Court of Australia, expressed the view, at page 502, that the expression “to be returned” must have a wider meaning than that of being taken back to a state from which a person had come and must refer rather to the person being taken back with the original warrant to the state from which the warrant had been brought.

⁶¹¹ (1964) 110 C.L.R. 498, at 509.

⁶¹² (1937) 56 C.L.R. 337, at 366.

the person who owned it, no matter where he was domiciled or resided or carried on business.

- 7.66** In *Permanent Trustee Company (Canberra) Ltd. v. Finlayson*⁶¹³ a testatrix, domiciled and resident in New South Wales at the date of her death, made two wills, one dealing with her estate in New South Wales and the other, made in Canberra, dealing with her property in the Australian Capital Territory. The New South Wales commissioner of stamp duties assessed the estate to New South Wales stamp duty, on the basis that the assets in the Australian Capital Territory were included in the assessable estate. An unpaid balance of duty remained after the New South Wales executor had paid the whole of the amount realised by the disposition of the assets in New South Wales. The commissioner gave notice to the executor in the Australian Capital Territory of a claim against the estate for the unpaid balance.
- 7.67** The Supreme Court of the Australian Capital Territory held⁶¹⁴ that the Revenue Rule had been displaced as between the states and territories of the Australian federation, by parliament, through the full faith and credit provisions of section 118 of the Commonwealth of Australia Constitution Act⁶¹⁵ and section 18 of the State and Territorial Laws and Records Recognition Act 1901 – 1964. The Court went on to hold⁶¹⁶ that, the full faith and credit provision extended to the public acts of every state and included the Stamp Duties Act of New South Wales.
- 7.68** On appeal,⁶¹⁷ the High Court of Australia held⁶¹⁸ that none of the relevant provisions of the New South Wales stamp duty legislation conferred upon the commissioner a right to recover the unpaid duty from the Canberra executor and that a state statute could not

⁶¹³ (1967) 9 FLR 424 (Supreme Court of Australian Capital Territory) reversed on appeal to the High Court of Australia. The facts as set out above come from the headnote to the case.

⁶¹⁴ 9 FLR 424, at 436.

⁶¹⁵ Section 118 of the Commonwealth of Australia Constitution Act provides: “*Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.*” www.austlii.edu.au/au/coaca430/s118, accessed on the 19th of September, 2016.

⁶¹⁶ 9 FLR 424, at 439.

⁶¹⁷ (1968) 122 CLR 338.

⁶¹⁸ As summarized in the headnote for the case.

constitutionally have the extra-territorial effect of altering the law of the Australian Capital Territory as to Territory administrations.

- 7.69** The High Court expressed no view in relation to the question of whether the Revenue Rule applied as between states and territories of the Australian federation. The High Court did note⁶¹⁹ that whilst, under the rules of private international law in force in the Territory, the *distribution* of the testatrix's estate, unlike the *administration* that preceded it, was ordinarily governed by the *lex domicilii* and for that reason it was often better to submit assets that were available for distribution to that law, that the court of the *situs* had a discretion in the matter.
- 7.70** The High Court went on to note that there was authority for saying that a remission to the representative, in the place of domicile, would not be directed if, as was the case here, the result would be to subject the property to a claim which was not enforceable against it in the administration under the *lex fori*. However, the Court concluded that this was not a matter upon which it was opportune to express any opinion.
- 7.71** However, in *Rothwells Ltd. (In Liq.) v. Connell*,⁶²⁰ a decision of the Supreme Court of Queensland, the majority of the Court held⁶²¹ that, by the law of Queensland, a foreign revenue law would not be enforced. In a separate judgment McPherson J. also stated⁶²² that it was a settled principle of private international law that the courts did not assist the enforcement of foreign revenue laws, or claims under those laws.

The British Empire

- 7.72** For the purposes of analysis, this thesis formulates a conceptual model of the power relationships within an empire, distinguishing between more dominant and less dominant entities comprising such an overarching political and legal structure. The advantage of such a model is that it allows for a closer investigation, in a systematic

⁶¹⁹ 122 CLR 338, at 346.

⁶²⁰ (1993) 119 ALR 538. This case, which was considered in **Chapter 5**, decided that a Queensland court could receive in evidence a deed that had been stamped in accordance with Queensland law, even though it had not been stamped in accordance with the law of Western Australia, the place of its execution.

⁶²¹ Fitzgerald P. and Williams J.: (1993) 119 ALR 538, at 545 to 546.

⁶²² 119 ALR 538, at 548.

fashion, of the operation of the Revenue Rule in a political and legal structure which is likely to be characterised by a greater degree of complexity than, (say) a federal state, in terms of the relationships between entities comprising the structure.

7.73 Where a state plays the predominant role in an overarching political and legal structure, as did the United Kingdom within the British Empire, at least three scenarios arise in considering the relationship between the Revenue Rule and sovereignty, specifically, the extent to which the rule is applied as between;

- (a) A less dominant jurisdiction⁶²³ and the predominant state;
- (b) Less dominant jurisdictions, *inter se*;
- (c) The predominant state and a less dominant jurisdiction.

7.74 Of course, the above model makes simplifying assumptions regarding state/jurisdiction relations, in effect acknowledging just two categories, predominant and less dominant. In practice the less dominant category may, reflecting the predominant state's level of control, comprise a variety of entities.⁶²⁴ Further, the predominant state's constitutional arrangements may be less than straightforward, as was (and is) the case with the United Kingdom. All of these considerations will significantly complicate the picture in practice.

7.75 The simplified model, which effectively treats less dominant jurisdictions as just one category, will be retained notwithstanding; *firstly*, for ease of analysis; *secondly*, and most importantly, because, in any event, it captures the essential characteristic which is being tested for, namely the impact of variations in sovereignty on the operation of the Revenue Rule, and; *thirdly*, because of constraints with regard to the availability of empirical evidence.

7.76 So far as concerns evidential constraints, this thesis considers the Revenue Rule from a common law perspective, to examine its operation in the context of empire, in practice, means the British Empire. Further, as will become apparent, case law from the British

⁶²³ The term 'jurisdiction' is used in preference to the term 'state' as it encompasses both entities that may be regarded as having met the criteria of statehood and entities which fall short of meeting such criteria.

⁶²⁴ See generally *Halsbury's Laws of England*, (5th ed., 2009), Vol. 13, paras. 702 to 708.

Empire relevant to this issue is limited. There appear to be no reported cases dealing with the Rule as between entities within category (b) whilst the number of cases pertaining to the other categories is small.

Category (a) - A less dominant jurisdiction and the predominant state

- 7.77** What case law that does exist in relation to category (a) supports the converse hypothesis. *Gilchrist v. Davidson*,⁶²⁵ a mid-19th century case from the then colony of New South Wales, indicated, *obiter*, a willingness to enforce English revenue law.

Category (c) - The predominant state and a less dominant jurisdiction

- 7.78** *Prima facie*, a state which plays the predominant role in an overarching political and legal structure, should enforce the tax claims, and judgments given in respect of such claims obtained from the courts of the less dominant jurisdiction, in its own courts. Given that such jurisdictions constitute a part of the larger structure in which it plays the predominant role, sovereignty concerns ought not to arise. Further, the absence of any suggestion that the enforcement of such proceedings will impoverish the forum's treasury is striking, indeed, *ceteris paribus*, it is arguable that enforcement would tend to further imperial interests.

- 7.79** Consistent with the above analysis, the possibility that England might be willing to enforce the tax laws of its colonies in its courts was raised in *Satterthwaite v. Doughty*.⁶²⁶ In that case the Court advanced an explanation for the different outcomes in *Alves v. Hodgson*,⁶²⁷ and *Clegg v. Levy*⁶²⁸ on the one hand and *James v. Catherwood*⁶²⁹ and *Bristow v. Sequeville*⁶³⁰ on the other. The Court noted⁶³¹ that the English elementary writers attempted to reconcile these apparently conflicting decisions on the basis that if a bill, note or agreement was drawn or made in a foreign independent state it might be enforced in England, though requiring a stamp in the country where drawn or made, but

⁶²⁵ (1849) 1 Legge (N.S.W.) 539, accessed at https://archive.org/stream/cu31924024528568/cu31924024528568-_djvu.txt on the 15th of November, 2015.

⁶²⁶ Busb. 44 N.C. 314 (N.C.), 1853 WL 1333 (N.C.).

⁶²⁷ (1797) 7 Term Rep. 241.

⁶²⁸ (1812) 3 Camp. 166.

⁶²⁹ (1823) 3 Dowl. 7 Ry. 190.

⁶³⁰ (1850) 5 Exch. 275.

⁶³¹ Busb. 314, 44 N.C. 314 (N.C.), 1853 WL 1333 (N.C.), at 2.

not if drawn or made in any part of the British Empire. However, in *Attorney General for Canada v. Schulze*⁶³² this suggestion was dealt a fatal blow; Lord Stormonth Darling stated:

“It is no doubt rather anomalous that the King, through his Courts in Scotland, should refuse to recognise a debt due to himself in Canada, merely because it arises out of the execution of a Revenue Statute. But it was not maintained, and I think is not maintainable that in the sense of international law, the mother country and her self-governing colonies stand in different relationship from that which exists between two foreign states. If that relationship is ever to be modified it must be done by reciprocal legislation.”

7.80 A similar result obtained in *Municipal Council of Sydney v. Bull*.⁶³³ The results arrived at by the courts in these two cases appear counterintuitive, the application of the Revenue Rule to tax claims arising within the Empire would appear to undermine that Empire, a result that was surely inimical to the sovereignty of the forum.

The Commonwealth of Nations

7.81 The Commonwealth constitutes an overarching political and legal structure, but one that has been characterised as a voluntary association of independent foreign states.⁶³⁴ Consequently, this structure does not entail a derogation of sovereignty by members and, *ceteris paribus*, it is to be expected that the Revenue Rule would continue to apply as between members of the Commonwealth. This analysis is consistent with the *dicta* of Viscount Simonds in *Government of India v. Taylor*:⁶³⁵

“Finally, it was urged that, whatever might be the position as between this country and a foreign country, it was not the same as between different members of the British Commonwealth, including those members which, though within the Commonwealth, do not acknowledge the sovereignty of the Queen. For such a

⁶³² (1901) 9 Sc. L.T. 4, *et seq.*

⁶³³ [1909] 1 K.B. 7.

⁶³⁴ *Halsbury's Laws of England*, (5th ed., 2009), Vol. 13, para. 701.

⁶³⁵ [1955] A.C. 491, at 507. See **Chapter 5**.

distinction there is no authority and I can see no reason. If such a change is to be made, it is not for the courts to make it. It will be the task of Governments and perhaps of Parliaments. I do not think that it will be an easy task.”

7.82 Given the historical unwillingness, in any event, of Scottish and English courts to uphold the revenue claims of jurisdictions forming part of the then British Empire, notwithstanding the predominant role of the United Kingdom, the outcome in *Government of India v. Taylor*⁶³⁶ is unsurprising.

The European Union

7.83 The willingness of common law courts to modify the application of the Revenue Rule in light of the forum’s accession to the Treaty of Rome arose in *QRS 1 ApS v. Fransden*,⁶³⁷ where the Court of Appeal was required to consider, *inter alia*, whether the authorities on indirect enforcement survived the United Kingdom’s accession to the EEC.

7.84 *Prima facie*, the case lends some support to the converse hypothesis in that the Court acknowledged⁶³⁸ that there might be good arguments for disapplying the Revenue Rule within the European Union⁶³⁹ with regard to both direct and indirect tax claims, notwithstanding the fact that the plaintiffs decided not to argue that point – indeed the plaintiffs went further and acknowledged the applicability of the Revenue Rule as between members of the European Union.

7.85 Simon Brown L.J., giving the judgment of the Court of Appeal, noted⁶⁴⁰ that the facts of the case were in all material respects indistinguishable from those in *Buchanan v. McVey*,⁶⁴¹ the leading authority on this aspect of indirect enforcement. He stated⁶⁴² that there could be no distinction between the defendant’s sale of the company’s assets and

⁶³⁶ [1955] A.C. 491.

⁶³⁷ [1999] 1 W.L.R. 2169.

⁶³⁸ [1999] 1 W.L.R. 2169, at 2180.

⁶³⁹ In the discussion that follows the terms European Community and European Union are used interchangeably. Although this may be somewhat jarring to the reader it reflects the terminology used in the report of the case and accordingly it has been retained.

⁶⁴⁰ [1999] 1 W.L.R. 2169, at 2172.

⁶⁴¹ [1954] I.R. 89.

⁶⁴² [1999] 1 W.L.R. 2169, at 2173.

his pocketing of the proceeds in *Buchanan v. McVey* and the defendant's sale of the companies' assets and use of the proceeds to fund their purchase of his own shares in this case.

7.86 However, the plaintiffs contended that the principle established by *Buchanan v. McVey* could not apply in the Community law context. They argued that Community law precluded the English courts from declining to hear the claim on its merits, and to enforce it if it succeeded, and that insofar as the Revenue Rule extended to indirect enforcement, it was incompatible with the EEC Treaty.

7.87 The Court summarised⁶⁴³ the plaintiffs' argument as follows;

- (1) Assuming that the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters did not extend to this claim,⁶⁴⁴ it followed that the national rules on jurisdiction and enforcement applied;
- (2) Those national rules were, and had always been, subject to the rules of the EEC Treaty. The Convention did not alter or reduce the scope of the EEC Treaty;
- (3) The liquidator was seeking to provide a cross-border service within article 59⁶⁴⁵ of the EEC Treaty, namely the recovery in England of monies owed to Danish companies, for which he was being remunerated by the Danish tax authorities;
- (4) The rule that the English courts would not enforce, directly or indirectly, a foreign revenue law, had the effect of restricting the liquidator's rights under article 59;
- (5) Such a restriction needed to be objectively justified and no such justification existed in this case.

⁶⁴³ [1999] 1 W.L.R. 2169, at 2178.

⁶⁴⁴ The Court of Appeal decided that the Convention did not apply, see the discussion in **Chapter 2**, in the section dealing with European Union measures.

⁶⁴⁵ Article 56 of the Treaty on the Functioning of the European Union.

- 7.88** The Court assumed the correctness of the first four propositions and went on to examine the fifth. Essential to it was the plaintiffs' criticism of the rationale underlying the rule that the English courts would not enforce, directly or indirectly, a foreign revenue law.
- 7.89** The plaintiffs accepted⁶⁴⁶ that the first of the two explanations offered by Lord Keith in *Government of India v. Taylor* (the invasion of sovereignty objection) applied no less today than in the past and, indeed, applied equally amongst member states of the European Union as amongst other nations and justified the exclusion of direct enforcement claims. They argued, however, that this first explanation had no application to indirect enforcement claims as, in these proceedings, Denmark was not asserting any sovereign authority, rather the claim was brought by the plaintiff companies in liquidation.
- 7.90** Insofar as the second explanation was concerned, the need to guard against the embarrassment of having to scrutinise foreign revenue laws, the plaintiffs argued that there could be no possible need, in a case such as this one, to scrutinise Danish tax law so that this second explanation, which in any event was fanciful within the context of the European Community, could not apply either.
- 7.91** The Court held⁶⁴⁷ that these arguments were misconceived. Once it was recognised that an indirect claim was caught by the Revenue Rule simply because it was, in *substance*, a claim brought by a nominee, for a foreign state, to give extraterritorial effect to that state's revenue law, both explanations applied equally to justify a bar on indirect claims as on direct claims. Given that the Court rejected (as on the authority of *Buchanan* it must) the plaintiffs' core argument that this was a private law claim, not merely in *form* but in *substance*, there could be no better reason for allowing indirect claims than direct ones.
- 7.92** Whilst, as noted at the outset, the Court acknowledged that there might be good arguments for disapplying the Revenue Rule within the European Union that was not to

⁶⁴⁶ [1999] 1 W.L.R. 2169, at 2178 to 2180.

⁶⁴⁷ [1999] 1 W.L.R. 2169, at 2180.

say that it could be circumvented in the way that the plaintiffs suggested. The Court went on to refer⁶⁴⁸ to the dicta of Lord Templeman in *Williams & Humbert v. W & H Trade Marks*⁶⁴⁹ to the effect that whilst the Revenue Rule might in future be modified by international convention or the laws of the EEC, at present the international law with regard to the non-enforcement of revenue and penal laws was absolute.

- 7.93** It would have been interesting, had the circumstances of the case necessitated a reference pursuant to the then Article 177⁶⁵⁰ of the Treaty of Rome, to see how the Court of Justice might have approached the issues presented by the Revenue Rule. However, the point would now appear to be moot given the legislative measures in place in relation to tax collection as between Member States of the European Union.⁶⁵¹

Conclusion

- 7.94** With one arguable exception, there is a paucity of evidence contradicting the converse hypothesis. *Prima facie*, *QRS I ApS v. Fransden*⁶⁵² constitutes that exception. However, it must be noted that the party seeking enforcement of the tax claim concerned conceded that the Revenue Rule should apply to cases of direct enforcement, as that term was used in *Buchanan*, as between Member States of the European Union. Accordingly, the case was decided without the benefit of argument on this point.
- 7.95** There is certainly some evidence in support of the strong form of the hypothesis, albeit *dicta*, in that it would appear that, notwithstanding the unwillingness of Scottish or English courts to enforce tax claims or judgments originating from other parts of the British Empire, it is arguable that the Revenue Rule did not apply, within the Empire, to claims originating from the United Kingdom.
- 7.96** Insofar as common law jurisdictions characterised by a federal structure are concerned, the evidence from Canada is in support of the strong form of the hypothesis. The situation in Australia is less certain, with the High Court reserving its position in relation

⁶⁴⁸ [1999] 1 W.L.R. 2169, at 2180.

⁶⁴⁹ [1986] 2 W.L.R. 24.

⁶⁵⁰ Now Article 267 of the Treaty on the Functioning of the European Union.

⁶⁵¹ As to which see **Chapter 2**.

⁶⁵² [1999] 1 W.L.R. 2169.

to the role of the Revenue Rule in the context of the Commonwealth. The picture in the United States is varied. The decision of the Supreme Court in *Milwaukee* is consistent with the weak form of the hypothesis, so far as tax claims reduced to judgment are concerned, whilst it is possible to read some of the subsequent decisions at state level as evidence in support of the strong form of the hypothesis. Yet other state decisions proceed on a conception of state sovereignty that precludes the enforcement of sister state tax claims – these decisions constitute, not a rejection of the converse hypothesis, rather an implicit assertion that it simply doesn't arise for consideration.

7.97 Given the evidence that the converse hypothesis exists in both strong and weak form, sovereignty cannot be considered to be the sole justification for the Revenue Rule. Accordingly, it is necessary to consider what other justifications have been advanced in support of the Rule. This is the subject of the Chapter 8.

Chapter 8 – Rationale for the Revenue Rule

*“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”*⁶⁵³

Introduction

- 8.1** The purpose of this Chapter is to consider whether there are existing grounds for the Revenue Rule or whether it persists from blind imitation of the past. This is of particular importance in circumstances where, with some notable exceptions, discussions of the rationale for the Revenue Rule have been a feature of the academic literature rather than the jurisprudence. Courts have frequently applied the Rule without a detailed consideration of the justification for so doing, thereby, in effect, treating Lord Mansfield, in the words of one commentator,⁶⁵⁴ as a legislature in and of himself.
- 8.2** The Chapter commences by setting out some of the criticisms of the Revenue Rule, as well as the leading statement in its defence, and attention is drawn to the fact that, in the application of the Rule, the courts adopt a *substance over form* approach. Consideration is given to what is perhaps, to contemporary lawyers, the most glaring omission from the reasons advanced in support of the Revenue Rule, the absence of an explicit human rights rationale, a gap that is arguably filled, to some extent, by the public policy rationale. The Chapter goes on to comprehensively consider the various justifications advanced in support of the Revenue Rule, specifically promotion of trade, the penal law analogy, sovereignty, separation of powers, international relations, public policy, forum non conveniens, refusal to further foreign governmental interests and promotion of reciprocity, making reference to academic commentary and jurisprudence throughout. In so doing, the Chapter will both refer to the analyses offered by others, and advance its own analysis where appropriate.

⁶⁵³ Oliver Wendell Holmes, *The Path of the Law*, 10 Harvard Law Review 457, at 469 (1897).

⁶⁵⁴ Kovatch, *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, (1999 – 2000) 22 Houston Journal of International Law, 265, at 276 to 277.

Criticism of the Rule

8.3 As early as 1818, Story J., in considering the Revenue Rule, stated:⁶⁵⁵

“I confess that I have always been a good deal staggered by this doctrine. It has appeared to me more consonant with national comity, sound morals, and public justice, that courts of all countries should lend their aid to discountenance frauds upon the revenue laws of other countries, and decline to enforce any agreements entered into for the purpose of evading those laws. An exception might very properly apply, where those laws were in direct hostility to our own policy or laws, or were inconsistent with the principles of general justice. But the rule is now too stubborn to be controlled, and has been so long established, that it has become almost a formula in our text-books.”

8.4 Pothier considered the Revenue Rule from a civil law perspective in his *Traité du Contrat d’Assurance*, art. 58, and was highly critical of domestic courts countenancing foreign smuggling; it was, in his view, inconsistent with good faith and the moral duties of nations.⁶⁵⁶

8.5 In *State of Oklahoma ex rel. Oklahoma Tax Commission v. F. S. Neely*⁶⁵⁷ the Court – whilst conceding that the Revenue Rule, in its application to cases of international aspect, might well find some justification in one sovereign’s reluctance to inquire into another’s system of law or to risk the giving of affront by the denial of a sovereign demand – went on to state that those considerations were without weight in litigation originating in, and confined to, the United States. It criticised the Rule, stating:⁶⁵⁸

“[T]he rule encourages wilful, dishonest tax evasion. As Professor Leflar points out, the higher tax rates that have resulted from the broadening of governmental

⁶⁵⁵ *The Anne* 1 Mason 508. 1 F.Cas 955, (1818) at 956. The case involved a ship chartered at Cork, the stated intention being to sail to Quebec. Part way through the voyage the passengers took control of the ship and it sailed to Boston. British legislation then in force restricted British and foreign vessels to a very small number of passengers when bound to the United States but allowed a very large number when bound to the neighbouring British provinces.

⁶⁵⁶ (1954) 71 S. African L.J. 275 1954, at 276.

⁶⁵⁷ (1955) 225 Ark. 230, 282 S.W. 2d 150.

⁶⁵⁸ 225 Ark. 230, at 233 to 234.

services have provided a correlatively stronger incentive for tax avoidance. A few decades ago taxes were generally modest enough to constitute an annoyance rather than a substantial burden upon income or property. But today an income or estate levy may consume half or more of the object taxed, supplying a tempting motive for tax evasion.

Enforcement of the rule now in question offers a legally respectable asylum to the tax dodger. An heir, for example, may frequently be in a position to convert an inherited fortune into cash and move to another state. If pursued in his new home by the defrauded state he may confidently demur even to allegations of conscious and deliberate wrongdoing, for one sovereign does not notice the revenue laws of another. Other similar examples come readily to mind.”

8.6 These sentiments have been echoed in academic commentary. Carter⁶⁵⁹ has written:

“The rationale of [sic] refusal to enforce foreign revenue laws is less clear. An eminent Canadian commentator, Professor Castel, has pertinently asked: “Why is it unlawful in Canada to evade local taxes and yet perfectly legitimate to refuse to pay foreign taxes? How can the public policy of Canada be invoked to protect foreign tax dodgers when our own legislative bodies impose similar taxes?” It would perhaps not be unduly cynical to say that part of the answer to this question might lie in acceptance in the international context of a sporting theory of tax evasion.”

8.7 In the Restatement (Third) of the Foreign Relations Law of the United States §483, Reporters’ Note 2 at 613, it is stated:

“In an age when virtually all states impose and collect taxes and when instantaneous transfer of assets can easily be arranged, the rationale for not recognising or enforcing tax judgments is largely obsolete.”

⁶⁵⁹ Carter, *Transnational Recognition and Enforcement of Foreign Public Laws*, [1989] Cambridge Law Journal, 48(3), p. 417, at 423, [Internal citations from the passage cited have been omitted].

8.8 Some commentators and courts⁶⁶⁰ have stated that it is difficult to find reasons for the Revenue Rule in the early cases⁶⁶¹ and it is fair to say that reasons have generally been advanced *a posteriori*.

8.9 The most comprehensive judicial statement of the rationale for the Revenue Rule is contained in the oft cited passage of Learned Hand J. in *Moore v. Mitchell*⁶⁶² where he advanced a series of reasons relating to public policy; international relations; the doctrine of the separation of powers and the jurisdiction of the courts, and; the supposed analogy between penal laws and revenue laws:⁶⁶³

“While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognise those arising in a foreign state, if they run counter to the ‘settled public policy’ of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign state and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which the courts are incompetent to deal, and which are entrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.”

⁶⁶⁰ (1954) 71 S. African L.J. 275 1954, at 277.

⁶⁶¹ Thus arguably overlooking Lord Hardwicke’s *dicta* in *Boucher v. Lawson*, (1734) Cas. T. Hard. 85. See **paragraph 8.17**.

⁶⁶² (1929) 30 F. 2d. 600.

⁶⁶³ (1929) 30 F. 2d. 600, at 604.

8.10 We turn now to an evaluation of these, and other, reasons advanced for the Revenue Rule. For clarity of exposition these reasons are examined under distinct headings though in practice they tend to form a continuum rather than a series of mutually exclusive alternatives.

The Nature of the Proceedings

8.11 The Revenue Rule operates in circumstances where a forum court is confronted with proceedings in which a foreign state seeks to enforce a tax claim. Further, it is clear that the courts adopt a *substance over form* approach in extending the operation of the Rule to circumstances where there is an attempt to indirectly enforce such a claim for the reasons given by Kingsmill Moore J. in *Buchanan v. McVey*.⁶⁶⁴

“If I am right in attributing such importance to the principle then it is clear that its enforcement must not depend merely on the form in which the claim is made. It is not a question whether the plaintiff is a foreign State or the representative of a foreign State or its revenue authority. In every case the substance of the claim must be scrutinised and if it then appears that it is really a suit brought for the purpose of collecting the debts of a foreign revenue, it must be rejected ... If the strict application of the principle were in any way relaxed then evasion would be easy and the Court would be faced with all the difficulties which the adoption of the rule was designed to avoid.”

8.12 It is also clear that the Revenue Rule extends to proceedings brought before the forum courts by a foreign state to enforce a judgment that it has obtained in its own courts in respect of a tax claim and that such proceedings do not benefit from the doctrine of merger.⁶⁶⁵

“The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the

⁶⁶⁴ [1954] I.R. 89, at 107.

⁶⁶⁵ Gray J., in *Wisconsin v. Pelican Insurance Co.* (1888), 127 U.S. 265, at pp. 292 – 293.

original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action, (while it cannot go behind the judgment for the purpose of examining into the validity of the claim), from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it.”

The Absence of an Explicit Human Rights Rationale

- 8.13** Human rights concerns, have not explicitly formed the basis for the Revenue Rule and to the extent that such concerns have formed part of the courts’ considerations, they have tended to be subsumed either under the public policy rationale or the penal law rationale.
- 8.14** In *Ben Nevis (Holdings) Ltd. v. Commissioners for Her Majesty’s Revenue & Customs*⁶⁶⁶ the Court of Appeal held that the Revenue Rule did not exist for the benefit or protection of taxpayers. An issue arose in relation to the temporal scope of certain mutual assistance provisions between the United Kingdom and the Republic of South Africa. The Court was satisfied⁶⁶⁷ that there was no unfairness in the relevant provisions permitting the enforcement of pre-existing tax liabilities. The Court stated that whilst the precise basis for the Rule had long been debated it seemed clear that it lay in relationships between sovereign states and that its abrogation, therefore, could not be regarded as an injustice to a party seeking to resist enforcement of a tax liability. The Court concluded that from a taxpayer’s point of view the Revenue Rule was a collateral benefit and, therefore, he or she could not complain of injustice if deprived of its benefit.
- 8.15** However, the absence of explicit reference to human rights concerns has not, on occasion, prevented the articulation of concerns that would be recognisable to human rights advocates. For example, Kingsmill Moore J. before rejecting an indirect attempt to collect foreign taxes in *Buchanan v. McVey*⁶⁶⁸ set out the history of the case including the previous imposition, of retrospective taxation, by the United Kingdom authorities, on the defendant in these proceedings, a matter that is subject to constitutional

⁶⁶⁶ [2013] EWCA Civ 578.

⁶⁶⁷ [2013] EWCA Civ 578, at paragraph 53.

⁶⁶⁸ [1954] I.R. 89.

constraints in Ireland. It is difficult not to infer that this fact formed part of the background to the concerns expressed by Kingsmill Moore in rejecting the attempt to collect United Kingdom taxation indirectly through the liquidation proceedings instituted in Scotland.

- 8.16** In terms of academic commentary Dodge⁶⁶⁹ does refer to protection of nationals, but in the context of offering a rationale for the Revenue Rule based on a refusal to further foreign governmental interests. He advances the view that the concern is not with protecting one's citizens against foreign laws that are repugnant to the forum's values, which can be dealt with by applying a public policy exception, but with shielding them from foreign laws that are similar to those of the forum as enforcement of a foreign tax claim or judgment against a forum citizen would result in a net reduction of the wealth of the forum and a net increase in the wealth of the foreign state.

Promotion of Trade – A Precursor to the Free Movement of Goods?

- 8.17** The Revenue Rule has its roots in an English desire to promote commerce beneficial to it and arose in suits between private parties involving contracts invalid under foreign revenue laws.⁶⁷⁰ In *Boucher v. Lawson*⁶⁷¹ Lord Hardwicke stated:⁶⁷²

“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 off all benefit of such trade from this kingdom, which would be of very bad consequence to the principal and most beneficial branches of our trade; nor does it ever seem to have been admitted.”

- 8.18** Baade⁶⁷³ notes that in his *Commentaries on the Conflict of Laws*, Story stated that in view of the “settled principle” that no nation is bound to protect or regard the revenue laws of another country, “a contract made in one country by subjects or residents there

⁶⁶⁹ Dodge, *Breaking the Public Law Taboo*, (2002) Harvard International Law Journal, 164, at 215 to 216.

⁶⁷⁰ (1948 – 1949) U. Pa. L. Rev. 432, at 435.

⁶⁷¹ (1734) Cas. T. Hard. 85.

⁶⁷² (1734) Cas. T. Hard. 85, at 89.

⁶⁷³ Baade, *The Operation of Foreign Public Law*, 30 Texas International Law Journal, 429, at 455 (1995).

to evade the revenue laws of another country, is not deemed illegal in the country of its origin” and that whilst he condemned the doctrine he also conceded that it was “firmly established in the actual practice of modern nations.”

8.19 Baade observes that, in part because of Story’s own judicial efforts, the practice is now overwhelmingly to the contrary in that major trading nations refuse judicial enforcement to domestic agreements contemplating the smuggling of goods into other countries in violation of the tariff laws of the country of import. He goes on to assert that this change in judicial attitude largely reflects the decline of mercantilism after the Napoleonic Wars and more particularly the twentieth century movement towards cooperation and mutual accommodation in tariff matters.

8.20 Freeze⁶⁷⁴ opines that this historical reason for the non-enforcement of foreign revenue laws, namely the desire to foster free trade, has no validity in the United States federal system whilst Silver⁶⁷⁵ observes that maintaining the Revenue Rule for historic reasons is unpersuasive in light of the circumstances which gave rise to the Rule in that the economic conditions underlying its creation no longer exist. Indeed, it is also unpersuasive for legal reasons; the specific proposition established in *Boucher* was overturned in *Foster v. Driscoll*.⁶⁷⁶

8.21 However, the extinguishing of the rationale enunciated in *Boucher* did not occur before, as Freeze observes:⁶⁷⁷

“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.”

⁶⁷⁴ Freeze, *Extraterritorial Enforcement of Revenue Laws*, (1937 – 1938) 23 Washington University Law Quarterly, 321, at 333.

⁶⁷⁵ Silver, *Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments*, (1992) 22 Ga. J. Int’l & Comp. L. 609, at 613.

⁶⁷⁶ [1929] 1 K.B. 470.

⁶⁷⁷ Freeze, *Extraterritorial Enforcement of Revenue Laws*, (1937 – 1938) 23 Washington University Law Quarterly, 321, at 325.

8.22 This expansion was also the subject of comment in *State ex rel. Oklahoma Tax Commission v. Rodgers*⁶⁷⁸ where the St. Louis Court of Appeals in Missouri, having reviewed the English and U.S. case law on the Revenue Rule, stated that:⁶⁷⁹

“... the doctrine promulgated by Lord Hardwicke and Lord Mansfield has been applied to situations far beyond the probable anticipation of those learned judges. The dogmatic rule that ‘one state does not enforce the penal or revenue laws of another state’ did not originate with cases involving an attempt to collect a tax, but had its inception in cases raising the question of whether a contract which did not comply with the revenue laws of the place where made was enforceable in the courts of the forum. Considerations of commercial convenience led to its adoption. The next step was to apply it to suits brought to collect a tax, but, in doing so, the courts have, except in the concurring opinion of Judge Hand in Moore v. Mitchell, supra, merely repeated the time-worn axiom, without considering whether the reasons which made it desirable to apply it to the early cases were applicable to the new situation presented.”

Revenue Laws analogous to Penal Laws⁶⁸⁰

8.23 The conjunction of the rule governing penal enforcement with the rule governing tax enforcement has been described by Palmer⁶⁸¹ as a rhetorical accident rather than a logical necessity. He goes on to assert that the Revenue Rule was founded on a misconception and perpetuated by judicial dicta.

8.24 The justification offered for this conjunction is that as revenue laws are analogous to penal laws and as one state will not enforce the penal laws of another, neither should it enforce the other state’s revenue laws. Clearly this line of reasoning is not a rationale for the Revenue Rule *per se*.

⁶⁷⁸ (1946) 238 Mo. App. 1115, 193 S.W. 2d 919.

⁶⁷⁹ 238 Mo. App. 1115, at 1125 to 1126.

⁶⁸⁰ The Revenue Rule is justified by reference to penal laws in two ways. Firstly, on the basis of an asserted analogy between such laws and revenue laws, this argument is considered in the foregoing section. Secondly, as an aspect of the sovereignty argument; this is considered in the succeeding section.

⁶⁸¹ Palmer, *Extrastate Enforcement of Tax Claims*, (1949) 18 U. Cin. L. Rev. 498, at 506 and 508.

- 8.25** However, this justification is undermined by Freeze.⁶⁸² He notes that although penal laws and revenue laws are of the same genus in so far as each is a claim existing in favour of government, yet they are not of the same species, since the latter are devoid of retributive qualities.
- 8.26** Leflar⁶⁸³ explains the Revenue Rule as being rooted in, *inter alia*, historical reasons based on the intensely local character of early legal systems, including the fact of collective responsibility of the community for acts done within its borders and the notion of the trial body as a jury of neighbours personally acquainted with the facts in the case.
- 8.27** Further, it is apparent that courts in the United States, Scotland, England and Ireland, in developing the Revenue Rule, have done so by reference to the restriction on the enforcement of foreign penal laws. As previously noted, the *Pelican Case*⁶⁸⁴ has been cited as authority for the proposition that the rule that the courts of no country execute the penal laws of another, extends to all suits in favour of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue laws, and to all judgments for such penalties.
- 8.28** In *Attorney General for Canada v. Schulze*⁶⁸⁵ proceedings were brought in the Scottish courts, seeking an order enforcing an award of costs, by the Canadian courts in favour of the Crown, in proceedings where the seizure of goods by the Canadian customs authorities had been upheld. Referring to the *dicta* in *Pelican* the Scottish Court held that the proceedings were truly a revenue suit; that was to say, in the sense of the international rule, a penal suit and accordingly it refused the relief sought.

⁶⁸² Freeze, *Extraterritorial Enforcement of Revenue Laws*, (1937 – 1938) 23 Washington University Law Quarterly, 321.

⁶⁸³ Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, (1932) Harvard Law Review 193, at 201.

⁶⁸⁴ (1888) 127 U.S. 265, 8 S. Ct. 1370. Discussed in **Chapter 5**, at **paragraphs 5.105 to 5.109**.

⁶⁸⁵ (1901) 9 Sc. L.T. 4 *et seq.*

8.29 In *Municipal Council of Sydney v. Bull*⁶⁸⁶ Grantham J., in rejecting a claim for a municipal improvement rate in respect of land in Australia, observed⁶⁸⁷ that the action was in the nature of an action for a penalty or to recover a tax and was analogous to an action brought in one country to enforce the revenue laws of another. In *Buchanan v. McVey*⁶⁸⁸ Kingsmill Moore J. extended the operation of the Revenue Rule to encompass attempts to indirectly enforce foreign revenue claims by reference to the restriction on the enforcement of foreign penal laws.

8.30 However, the penal law analogy has been subjected to criticism by academic commentators. Leflar⁶⁸⁹ questioned the analogy as early as 1932:

“Are there any reasons whatever, apart from those represented by local public policy, forum non conveniens, and absence of a fair remedy, for refusing to adjudicate a non-criminal case coming from another state? It is submitted that there are not, and that exclusion of so-called penal claims of a non-criminal nature should not go beyond these three grounds for exclusion. Essentially civil claims should never be denied extrastate enforcement merely because the epithet penal can be attached to them. The reasons for the non-enforcement of foreign criminal law do not generally apply to civil claims at all. Such claims can be excluded on more relevant grounds when there is a real reason for excluding them, and they should only be excluded when such real reasons exist.”

8.31 The analogy was rejected by the United States Supreme Court in *Milwaukee County v. M. E. White Co.*⁶⁹⁰ where it held⁶⁹¹ that the obligation to pay taxes was not penal. It was a statutory obligation, quasi-contractual in nature, enforceable, if there was no exclusive statutory remedy, in the civil courts, by the common law action of debt.

⁶⁸⁶ [1909] 1 K.B. 7. See **Chapter 5, paragraph 5.123**.

⁶⁸⁷ *Ibid*, at 10.

⁶⁸⁸ [1954] I.R. 89.

⁶⁸⁹ Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, (1932) Harvard Law Review, 193, at 202, [Internal citations from the passage cited have been omitted].

⁶⁹⁰ (1935) 296 U.S. 268, 56 S. Ct. 229.

⁶⁹¹ 296 U.S. 268, at 271.

- 8.32** The decision of the United States Supreme Court in *Milwaukee* was discussed by the Supreme Court of New Jersey in *City of Philadelphia v. Austin*.⁶⁹² The New Jersey court noted⁶⁹³ that a “*penal exception*” to the full faith and credit clause of the United States Constitution had grown from the statement of Marshall C.J. in *The Antelope*⁶⁹⁴ that “*The courts of no country execute the penal laws of another*”.
- 8.33** The New Jersey court went on to note⁶⁹⁵ that although neither *The Antelope* nor subsequent cases interpreting the penal exception involved the enforcement of state tax laws, the exception developed to encompass the enforcement of civil money claims in favour of a government entity.
- 8.34** In particular, it noted that in *State of Wisconsin v. Pelican Insurance Company of New Orleans*⁶⁹⁶ the United States Supreme Court declined to exercise original jurisdiction over the enforcement of a judgment recovered against a Louisiana insurance company by the State of Wisconsin in a Wisconsin court. Underlying the decision was the principle that the Court could exercise original jurisdiction where the action would be entertained by the courts of the state of citizenship of the defendant. Because the penal exception precluded enforcement of the judgment in the courts of Louisiana, the Court ruled that it could not exercise original jurisdiction.
- 8.35** The Supreme Court of New Jersey noted that although the reference to revenue laws was *obiter*, the decision resulted in the denial of full faith and credit to claims for taxes for almost fifty years. The Court went on to note that in *Huntington v. Atrill*⁶⁹⁷ it had been held that the question of whether a law was penal depended upon the question of whether its purpose was to punish an offence against the public justice of the State or to afford a private remedy to a person injured by the wrongful act. Thus, the New Jersey Supreme

⁶⁹² (1981) 86 N.J. 55, 429 A.2d. 568.

⁶⁹³ (1981) 86 N.J. 55, at 58.

⁶⁹⁴ (1825) 23 U.S. 66, 1825 W.L. 3130.

⁶⁹⁵ (1981) 86 N.J. 55, at 59.

⁶⁹⁶ (1888) 127 U.S. 265, 8 S. Ct. 1370.

⁶⁹⁷ (1892) 146 U.S. 657, 13 S. Ct. 224.

Court observed,⁶⁹⁸ punishment of a public offence was an essential characteristic of a penal law.

8.36 The Court went on to observe that in an attempt to avoid liability on out-of-state judgments for unpaid taxes, some delinquent taxpayers sought to analogise the enforcement of a claim for taxes to punishment of a public offence. However, the United States Supreme Court in *Milwaukee County v. M. E. White Co.*⁶⁹⁹ rejected this analogy and the import of the decision was that the mere fact that a tax claim was asserted by a government entity did not invoke the penal exception.

8.37 The rejection of the analogy by the Supreme Court in *Milwaukee* was taken up in *State ex rel. Oklahoma Tax Commission v. Rodgers*⁷⁰⁰ where the St. Louis Court of Appeals in Missouri noted that:⁷⁰¹

“Revenue laws are similar to penal laws only in the sense that they are both state regulations of a civic duty but intrinsically they are different. A penal law is punitive in nature, while a revenue law defines the extent of the citizen’s pecuniary obligation to the state, and provides a remedy for its collection. We will not exclude a suit to enforce a revenue law unless the considerations which have been thought to preclude the enforcement of penal laws are applicable to taxing statutes.”

8.38 The Court went on to reject the proposition that the application of revenue laws was inconsistent with the theory of retributive justice:⁷⁰²

⁶⁹⁸ (1981) 86 N.J. 55, at 60.

⁶⁹⁹ (1935) 296 U.S. 268, 56 S. Ct. 229. The Supreme Court (296 U.S. 268, at 278) made it clear that insofar as *State of Wisconsin v. Pelican Insurance Company of New Orleans* (1888) 127 U.S. 265, 8 S. Ct. 1370 could be taken to suggest that full faith and credit was not required with respect to a judgment unless the original cause of action would have been entitled to like credit, it was inconsistent with the jurisprudence of the Court and was discredited in *Fauntleroy v. Lum* (1908) 210 U.S. 230, 28, S. Ct. 641 and *Kenney v. Supreme Lodge* (1920) 252 U.S. 411, 40 S. Ct. 371.

⁷⁰⁰ (1946) 238 Mo. App. 1115, 193 S.W. 2d 919.

⁷⁰¹ 238 Mo. App. 1115, at 1125 to 1126.

⁷⁰² 238 Mo. App. 1115, at 1126 to 1128.

“Another reason why foreign penal laws are regarded as unenforceable outside of the state which enacts them is the idea that punishment by a state whose laws have not been violated is inconsistent with the theory of retributive justice, which historically has been the underlying reason for the enactment and enforcement of penal laws. In other words, one state should not seek revenge for a violation of the law of a foreign state. This has no application to revenue laws. Tax laws are not passed to punish people.”

8.39 Dealing with the right to trial by jury the Court stated:⁷⁰³

“Another reason for the refusal of a state to enforce foreign penal laws which are criminal in their nature is the constitutional guarantee of the right of trial by jury in the vicinity of the offense. Of course, this reason does not exist with respect to revenue laws.”

8.40 Leflar⁷⁰⁴ states that even if the penal law analogy is to be accepted the position with regard to the enforcement of foreign tax claims needs to be reformed:

“The principal support for the exclusion of extrastate actions for revenue collection is by analogy drawn to the criminal law. The primarily governmental purposes served by the imposition of liabilities in each case is emphasized, and the same treatment is insisted upon. It has already been pointed out that at least among the American states the effective enforcement of the criminal law would be well-nigh impossible without some provision for extradition and interstate rendition whereby offenders may be returned to the state of the offense for trial. Although this executive procedure is available in connection with the criminal law, the suggestion has never been seriously advanced that such procedure should be extended to include the return of evaders of revenue laws or of fugitives from the enforcement of private claims which have been classed as penal. The intervention of state boundary lines enables such persons to avoid their liabilities

⁷⁰³ 238 Mo. App. 1115, at 1126 to 1128.

⁷⁰⁴ Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, (1932) Harvard Law Review 193, at 219, [Internal citations from the passage cited have been omitted].

altogether. They take advantage of a little area of incomplete development in the law, carelessly left lying in between two large areas whose development has been along other lines. On the one side lies the great body of law enforcing civil liabilities as such. The device there adopted to prevent evasion by fugitives from liability is the transitory nature of causes of action. On the other side the criminal law seeks to exert itself by the device of extradition and interstate rendition. The neglected middle ground was at one time unimportant, an area within which there arose little litigation. That is no longer true. Attempts to evade taxation alone have become so important within this area that some equivalent device for protection against them is becoming a practical necessity. The ready answer, of course, is annexation of the unclaimed middle ground to the large area within which causes of action are transitory.”

Sovereignty

- 8.41** Dicey⁷⁰⁵ acknowledges that the doctrinal basis for the Revenue Rule is a matter of some controversy but suggests that the best explanation for it is that given by Lord Keith of Avonholm, in *Government of India v. Taylor*,⁷⁰⁶ that enforcement of such claims would be an extension of the sovereign power which imposed the taxes and:

“an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties.”

- 8.42** The dicta of Lord Keith were subsequently endorsed by Lord Goff of Chieveley in the case of *In re Norway’s Application (No.s 1 & 2)*.⁷⁰⁷
- 8.43** The sovereignty rationale holds that for the forum state to enforce the tax laws or judgments of a foreign state would be contrary, not only to the sovereignty of the forum, but also to the sovereignty of the foreign state. This latter issue is considered in the context of the international relations rationale.

⁷⁰⁵ Dicey, Morris & Collins, *The Conflict of Laws* (14th ed.), Vol. 1, para. 5-020, p. 101.

⁷⁰⁶ [1955] A.C. 491, at 511.

⁷⁰⁷ [1990] 1 A.C. 723, at 808.

- 8.44** The sovereignty rationale is grounded in the concern, noted by Baade,⁷⁰⁸ that a state which permits other states to exercise sovereign authority on its territory, beyond specific instances expressly agreed upon, faces the danger of losing one of the essential prerequisites for statehood.
- 8.45** That being said, the Dutch theorist Huber, who started from the position that the laws of a sovereign are effective within its territory but not beyond, allowed for the possibility that a forum might act from comity so as to permit the laws of a foreign state to “retain their effect everywhere” so far as they did not prejudice the rights of the forum or its citizens.⁷⁰⁹
- 8.46** The sovereignty rationale was considered by Vierya J., sitting in the Supreme Court of South Africa, Witwatersrand Local Division, in *Commissioner of Taxes, Federation of Rhodesia v. McFarland*.⁷¹⁰ Drawing an analogy to penal laws, he noted that an independent state was entitled to exercise supreme authority over all persons and things within its territory. That right, he held, must be recognised as existing in other states, which involved reciprocal obligations not to carry out acts of sovereignty in the territory of another state.⁷¹¹ He cited the decision of the Permanent Court of International Justice in the *Lotus* case⁷¹² as authority for the proposition that the first and foremost restriction imposed by international law upon a State was that it could not exercise its powers in any form in the territory of another State.
- 8.47** Vierya J. went on to hold that the imposition of a tax created a duty that was not to be likened to any other debt – the fiscal power was an attribute of sovereignty. To enforce revenue laws would, in effect, mean to assist states in the performance of acts of sovereignty in foreign countries in derogation of their territorial supremacy.⁷¹³ To allow

⁷⁰⁸ Baade, *The Operation of Foreign Public Law*, 30 Texas International Law Journal, 429, at 441 (1995).

⁷⁰⁹ Binchy, *Irish Conflicts of Law*, Butterworth, p. 9; Mills, *The Confluence of Public and Private International Law*, Cambridge University Press, (2009), pp. 46 to 47.

⁷¹⁰ 27 SATC 15, 1965 (1) SA 470 (W), accessed from Lexis Nexis, at pages 3 to 4 of the Lexis Nexis report.

⁷¹¹ Oppenheim, *International Law*, Vol. 1 pp. 286, 295, sec 144 (a) pp. 327-8.

⁷¹² *SS 'Lotus' (France v. Turkey)* (1927) PCIJ Ser A, No. 10 253.

⁷¹³ Citing Oppenheim, *International Law*, Vol. 1 pp. 329-330.

a foreign state, whether directly or indirectly, to obtain a judgment for taxes imposed on all those, who in its eyes shared in the economic or social life of that state, in the courts of another country, would be a judicial intervention in direct derogation of that country's territorial supremacy.

8.48 Vierya J. held that these considerations were decisive and they did not allow a distinction to be made between an action brought directly based on the tax laws or one in respect of a judgment already obtained in the domestic state.

8.49 The sovereignty rationale continues to inform judicial thinking. In *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings Inc.*⁷¹⁴ the United States Court of Appeals, Second Circuit, stated:⁷¹⁵

“[T]he class of laws which will be enforced are those laws which are an exercise by the sovereign government of its sovereign authority over property within its territory or over its subjects wherever they may be. But other laws will not be enforced. By international law every sovereign state has no sovereignty beyond its own frontiers. The courts of other countries will not allow it to go beyond the bounds. They will not enforce any of its laws which purport to exercise sovereignty beyond the limits of its authority.”

Difficulties with the Sovereignty Rationale

8.50 This section considers the work of both Mills and of Buxbaum, before going on to offer its own, independent analysis of the difficulties inherent in the sovereignty rationale.

8.51 The rationale is grounded in a positivist conception of absolute sovereignty. This conception, however, has been criticised. Mills⁷¹⁶ argues that the idea of *a priori* or absolute sovereignty is a myth, that it has never been meaningful outside the pages of

⁷¹⁴ 268 F.3d 103, (2d Cir. 2001).

⁷¹⁵ 268 F.3d 103, at 111, (2d Cir. 2001), (n.6 quoting *Attorney General of New Zealand v. Ortiz* [1984] A.C. 1 (H.L.)), cited by Rearden, “*A Delicate Inquiry*”: *Foreign Policy Concerns Revive the Revenue Rule in the Second Circuit and Bar Foreign Governments from Suing Big Tobacco*, 51 *Saint Louis University Law Journal*, 203, at 215 (2006- 2007).

⁷¹⁶ Mills, *The Confluence of Public and Private International Law*, Cambridge University Press, (2009), at pp. 76 to 77.

the theorist and that its origin and limitations are perhaps each best explained as an overstretch of the analogy between the individual and the State.

- 8.52** He contends that an assertion of sovereignty necessarily involves a claim that the power of a state (or individual) is not limited by external influences; he goes on to point out however, that states (and individuals) are always limited by their own capacities and their environment and, in particular, by the capacities of other states. It is only coherent, he argues, to imagine a state as possessing unrestricted power in the abstraction and isolation of philosophical hypothesis.
- 8.53** Mills goes on to contend that the assertion of an absolute sovereignty fails to recognise that sovereignty, like freedom, is not defined *a priori* but refers to a contested space. He concludes that the positivist concept of absolute sovereignty has long been no more than a myth or political emotion, and that it is increasingly ineffective and descriptively inapposite in a globalising world.
- 8.54** The work of Buxbaum⁷¹⁷ provides empirical support for the arguments advanced by Mills. She points to developments in economic regulation over the past few decades as changing the perception of what sovereign authority means. These include the widespread utilisation of sub-state level agreements (for example, bilateral memoranda of understanding executed between regulatory agencies) and the re-allocation of regulatory authority to the regional level.
- 8.55** Buxbaum argues that these developments have reconfigured regulatory authority to address the globalised economy, retreating from a model in which sovereign power is power over discrete territory, and pointing, not to the disappearance of the State but to the disaggregation of its elements into what she terms, '*transgovernmental*' networks. She concludes that what is taking place is a reconceptualisation of sovereignty that deemphasises the notion of absolute control over particular territory but nevertheless maintains the importance of statehood and of an international community of states.

⁷¹⁷ Buxbaum, *Transnational Regulatory Litigation*, 46 Virginia Journal of International Law 251, at 306 to 307, (2006).

- 8.56** Turning from the work of Mills and Buxbaum, the proposition that the enforcement of a foreign tax claim is contrary to all concepts of independent sovereignties appears to rely on two premises; *firstly*, that the power to impose taxation is an attribute of sovereignty,⁷¹⁸ and; *secondly*, that the exercise of sovereignty is territorially circumscribed. Accordingly, where a State exercises its sovereignty outside its territory it acts in excess of its jurisdiction and, leaving aside the possibility of *terra nullius*, it necessarily infringes the sovereignty of the State in whose territory it has so purported to act.
- 8.57** However, whilst the bringing of proceedings by a foreign executive in the courts of the forum, seeking the enforcement of a tax claim or judgment of a court of the foreign State, may be conceded to be an exercise of sovereignty by that executive, it is not clear as to why it falls to be regarded either as an exercise in *excess* of the foreign State's jurisdiction or in *infringement* of the sovereignty of the forum.
- 8.58** In seeking enforcement of a tax claim or judgment in the courts of the forum it is clear that the foreign State is not exceeding its *adjudicatory* jurisdiction, rather there is a submission to the jurisdiction of the courts of the forum, who are asked to adjudicate on the foreign State's claim. Further, in bringing such proceedings it is not apparent how it could be said that the *executive* of the foreign State is exceeding its jurisdiction. Nor can it be argued, in circumstances where a defendant has removed him/herself and his/her assets from the territory of the foreign State in order to evade taxes lawfully imposed there,⁷¹⁹ that the foreign *legislature* has sought to exercise its jurisdiction in an extra-territorial manner.
- 8.59** Turning to the forum, neither is it apparent how its sovereignty has been infringed. Proceedings brought in the courts of the forum, seeking the enforcement of a foreign tax claim or judgment, cannot, by definition, constitute an infringement of the *adjudicatory*

⁷¹⁸ *George Cook (U.S.) v. United Mexican States* UN Rep Vol IV 593, at 595 (1930) cited in O'Connell, *International Law*, (2nd ed. 1970), Vol. 2, page 715.

⁷¹⁹ The argument that, as the taxes were imposed in the territory of the foreign State, they cannot be collected outside of that territory is dealt with in the succeeding paragraphs.

jurisdiction of those courts. Nor is there any suggestion that the *legislative* powers of the forum have been infringed. In the event that the foreign tax claim or judgment is upheld by the forum court it is apparent that to the extent that the *executive* is involved in enforcing the forum court's judgment, it will be the executive of the forum.

8.60 Even if the view is taken that the application or enforcement of a foreign revenue law *per se* constitutes an infringement of forum sovereignty and that “*no court can enforce any law but that of its own sovereign*”⁷²⁰ an objection on sovereignty grounds to the enforcement of foreign revenue laws is problematic in that it fails to recognize that the laws of the sovereign include not only positive rules that regulate acts and events occurring within the jurisdiction but also rules for the choice of the applicable law.⁷²¹ Arguably it is the failure to appreciate this distinction that has led to the unnecessary justifications advanced both by the theory of vested or acquired rights, a theory that has been devastatingly criticised⁷²² and the local law theory which has, in turn, been stigmatised as little more than a sterile truism.⁷²³

8.61 In any event, whilst the territorial principle may be the starting point for the exercise of State jurisdiction⁷²⁴ it is not the only basis upon which jurisdiction, in particular in criminal matters, may be exercised. Leaving aside the fact that revenue laws are invariably backed by criminal sanctions, it is apparent that states do not exercise their power to impose taxation solely on a territorial basis. The United States, for example, imposes taxation, *inter alia*, by reference to nationality, whilst in the Irish case taxation may be imposed on a person by reference to the concept of ordinary residence;⁷²⁵ in both examples the person will be liable to taxation notwithstanding the fact that neither they, nor their source of income, is within the territory of the taxing State.

⁷²⁰ Learned Hand J., *Guinness v. Miller* 291 F.769, 770 (S.D.N.Y. 1923).

⁷²¹ Cheshire, North & Fawcett, *Private International Law*, (14th ed.) Oxford University Press, at page 25.

⁷²² Cheshire, North & Fawcett, *Private International Law*, (14th ed.) Oxford University Press, at page 24, citing, at footnote 40, a number of commentators.

⁷²³ Cheshire, North & Fawcett, *Private International Law*, (14th ed.) Oxford University Press, at page 27, citing, at footnote 50, Yntema (1953) 2 AJCL 297, 317.

⁷²⁴ Brownlie, *Principles of Public International Law*, (7th ed.) Oxford University Press, at page 299.

⁷²⁵ Under Irish law if an individual has been resident in the State for three consecutive tax years they are regarded as ordinarily resident in the State from the beginning of the fourth tax year. See section 820 of the Taxes Consolidation Act 1997, as amended.

- 8.62** It cannot be that the objection to the upholding, by the forum courts, of a foreign tax claim or judgment is grounded on the fact that the foreign law underlying such claim or judgment could never have extra-territorial consequences.
- 8.63** *Firstly*, if that were the basis for the objection then it is difficult to see how, in conflicts of law,⁷²⁶ foreign law could ever govern a case, given that, for the purposes of conflicts, the expression “foreign system of law” means a distinctive legal system prevailing in a territory other than that in which the court functions.⁷²⁷
- 8.64** *Secondly*, the objection fails to recognise that a distinction may be made between, in the first instance, the intra-territorial *imposition* of a tax by a foreign legislature and, in the second instance, the submission to the adjudicatory jurisdiction of the forum and perhaps, in the event of the tax claim or judgment being upheld by the forum, reliance ultimately upon the executive of the forum for the purposes of *collection* of the amount sought.⁷²⁸
- 8.65** *Thirdly*, reliance upon territoriality as the basis for objection, harks back to a statist approach,⁷²⁹ within which two basic ideas of law co-existed; the idea of a *personal law*, associated with an individual by virtue of their identity and the idea of a *local law*, associated with a particular territory: If a law was local it applied only within the territory of the statutory authority whereas if it was personal it attached to the person and applied outside the territory of the statutory authority.
- 8.66** This approach can be seen in the decision in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings Inc.*⁷³⁰ where, as noted earlier, the United States Court of Appeal stated,⁷³¹ *inter alia*, that “[T]he class of laws which will be enforced are those

⁷²⁶ The objection that this is an intellectual sleight of hand given that what is at issue is *private* international law is dealt with in the succeeding passages.

⁷²⁷ Cheshire, North & Fawcett, *Private International Law*, (14th ed.) Oxford University Press, at p. 9.

⁷²⁸ The distinction between extra-territorial imposition and extra-territorial collection was summarily rejected by Manton C.J. in *Moore v. Mitchell* (1929) F.2d 600, at 602.

⁷²⁹ Mills, *The Confluence of Public and Private International Law*, Cambridge University Press, (2009), at pages 32 to 33.

⁷³⁰ 268 F.3d 103, (2d Cir. 2001).

⁷³¹ 268 F.3d 103, at 111, (2d Cir. 2001), (n.6 quoting *Attorney General of New Zealand v. Ortiz* [1984] A.C. 1 (H.L.)), cited by Rearden, “*A Delicate Inquiry*”: *Foreign Policy Concerns Revive the Revenue Rule in the Second*

laws which are an exercise by the sovereign government of its sovereign authority over property within its territory or over its subjects wherever they may be.”

- 8.67** This gives rise to the possibility that the Revenue Rule would be found to have no application if the taxing act in question were found by the forum to constitute a personal law. Such a possibility was considered in *Armendiaz v. De La Serna*,⁷³² where the Supreme Court of Texas raised, without answering, the question of whether the Revenue Rule applied where all the persons were residents of the foreign country whose laws were in question.
- 8.68** Applying the statist approach to modern bases of taxation would produce the paradoxical result, for those with sovereignty concerns, of encouraging states to attempt to, *in effect*, legislate extra-territorially, by deeming taxation legislation to come within category of personal law.
- 8.69** In response to the above objections, it can be argued that conflicts is concerned with *private* international law and that the gravamen of the objection in this instance is the necessarily *public* nature of revenue law, foreign or domestic. Leaving aside the sustainability of the distinction between public and private law,⁷³³ the fact that such law may be regarded as public by the forum does not, of itself, establish an infringement of forum sovereignty for if it did, then enforcement in the context of litigation between private parties would, in principle, be equally objectionable: However, denial of recognition is not the practice of courts that uphold the Revenue Rule. In any event, to the extent that foreign taxation legislation is territorial in scope, by definition, it cannot

Circuit and Bar Foreign Governments from Suing Big Tobacco, 51 Saint Louis University Law Journal, 203, at 215 (2006- 2007).

⁷³² 40 Tex. 291, 1874 WL 7932 (Tex.), at 10. The concept of personal law is arguably implicit in the decision in *Frankman v. Prague Credit Bank* [1948] 1 K.B. 730 (see **Chapter 4, paragraph 4.38 et seq.**) where the King’s Bench Division of the High Court upheld the application of Czech foreign exchange legislation, in litigation concerning the estate of a deceased Czech national, notwithstanding that she had died resident in the United Kingdom.

⁷³³ “*In the early twentieth century, the public-private distinction came under attack, particularly from legal realists who argued that because private-law rights were enforced by the state they should be conceptualized as delegations of public power to private individuals. ‘By 1940, it was a sign of legal sophistication to understand the arbitrariness of the division of law into public and private realms.’*” Dodge, “*The Public-Private Distinction in the Conflict of Laws*,” 18 *Duke Journal of Comparative & International Law*, 371 (2008).

conflict with legislative jurisdiction of the forum and, accordingly, cannot give rise to an infringement of forum sovereignty.

- 8.70** In truth perhaps, the objection is based not so much on protection of forum state sovereignty as on a reluctance to advance the interests of a foreign state.⁷³⁴ In any event, as was discussed during the consideration of the issue of taxonomy, the application, or otherwise, of the Revenue Rule, speaks to an *exercise* of sovereignty by the forum.

Separation of Powers and the Jurisdiction of the Courts

- 8.71** The doctrine of the separation of powers provides a rationale for the Revenue Rule in two ways. *Firstly*, it is contended that the enforcement of foreign tax claims or judgments is a matter for the legislature, not the courts, and; *secondly*, that the public policy analysis that a court would necessarily embark upon, in deciding whether to enforce a foreign tax claim or judgment, would lead it impermissibly into the political domain.

Enforcement a Matter for the Legislature

- 8.72** In adopting the position that the enforcement of foreign tax claims or judgments is a matter for the legislature the court is effectively neutral on the question of whether such claims or judgments should be enforced, it simply recognises that there exist limits to its jurisdiction pursuant to the doctrine of the separation of powers.
- 8.73** The proposition that the courts should not take the initiative in allowing the enforcement of foreign tax claims or judgments is certainly consistent with the Irish constitutional framework; there is limited legislative provision for imposition of taxation by the executive, whilst Articles 17, 21 and 22 make clear the pre-eminent position of the legislature, and in particular, the Dáil,⁷³⁵ in matters of taxation.
- 8.74** The Irish courts have considered this issue on a number of occasions. In *The State (Hully) v. Hynes*⁷³⁶ Kingsmill Moore J. stated that whilst it was undisputed law that the courts would not, directly or indirectly, enforce the penal or fiscal laws of a foreign state, that

⁷³⁴ See **paragraph 8.156** *et seq.* for a discussion of this issue.

⁷³⁵ The lower house of the Irish legislature.

⁷³⁶ (1961) 100 I.L.T.R. 145.

nevertheless the executive, provided it was so authorised by the legislature, could deport a person to stand trial for a crime, including a fiscal offence, committed in another country.⁷³⁷

8.75 In the case of *In re Austin Gibbons*⁷³⁸ the Court again acknowledged the measure of discretion afforded to the legislature stating that there was no doubt that the latter had power, under the Constitution, to enact legislation which would make provision for the making of orders by Irish courts, enabling the English revenue authorities to collect monies in this country on foot of English revenue debts.⁷³⁹ Walsh J. took the view that the legislature, by virtue of section 71 of the Bankruptcy (Ireland) Amendment Act, 1872, conferred a discretion upon the Court, which he declined to exercise.

8.76 A justification advanced for the separation of powers rationale is that were the courts to recognise and enforce foreign tax claims and judgments they would thereby weaken the negotiating position of the executive in seeking recognition and enforcement of forum tax claims and judgments. If forum courts pre-empted the executive, foreign states would have no incentive to enter into reciprocal recognition and enforcement arrangements. Dodge⁷⁴⁰ explains the position thus:

“Here, ... courts face a dilemma. It is commonly known in game theory as the “prisoner’s dilemma,” but one may think of it in this context as the “judge’s dilemma.” If the judges of country A and country B cooperate in enforcing each other’s law, both countries will be better off than if neither cooperates because each country’s law will be more effective. However, if the judges of country A cooperate and those in country B do not, country A will be worse off than if neither had cooperated.”

⁷³⁷ *Ibid*, at 166.

⁷³⁸ *In re Austin Gibbons, A Bankrupt in England, Ex parte Arthur Aaron Walter, Official Receiver and Trustee, Applicant* [1960] Ir. Jur. Rep. 60.

⁷³⁹ *Ibid*, at 61.

⁷⁴⁰ Dodge, *Breaking the Public Law Taboo*, (2002) Harvard International Law Journal, 164, at 224.

8.77 Dodge⁷⁴¹ goes on to state that the way to escape the judge's dilemma is for the political branches to enter agreements with other governments for the mutual enforcement of each other's penal, tax and regulatory laws. He notes F.A. Mann's comment that "[j]udges who ignore the paramount rights of their sovereign deprive their sovereign of the opportunity to insist on reciprocity."

8.78 However, Dodge⁷⁴² also notes that attempts to include general collection assistance provisions in United States double taxation treaties as far back as 1947 have encountered stiff resistance from American business. In light of this background the judge's dilemma explanation bears the hallmark of *ex post facto* reasoning.

8.79 A further justification for the separation of powers rationale lies in the recognition that constitutional arrangements for the imposition of taxation generally assign the primary role to the legislature, with a limited role in prescribed circumstances, for the executive, at least in the Irish context. What is clear is the absence of a role for the third branch of government in initiating the process of imposition of taxation.

8.80 Given such constitutional arrangements it seems incongruous that a foreign government could successfully seek to utilise the judicial branch of government to collect tax within the jurisdiction of the forum without explicit constitutional provision to that effect.⁷⁴³

Necessary Public Policy Analysis would lead the Courts into the Political Domain

8.81 Separation of powers issues also arise in the context of the public policy analysis which, it is argued, would necessarily precede a decision to permit the enforcement in the courts of the forum of any such claim or judgment. Smith explains:⁷⁴⁴

⁷⁴¹ Dodge, *Breaking the Public Law Taboo*, (2002) Harvard International Law Journal, 164, at 225.

⁷⁴² Dodge, *Breaking the Public Law Taboo*, (2002) Harvard International Law Journal, 164, at 202 to 206; see also Smith, *The Nonrecognition of Foreign Tax Judgments: International Tax Evasion*, (1981) University of Illinois Law Review, 241, at 261 to 263.

⁷⁴³ In the United States, in the absence of tax treaty, congressional power to levy and collect taxes is limited to taxes collected for the welfare of the United States. See Smith, *The Nonrecognition of Foreign Tax Judgments: International Tax Evasion*, (1981) University of Illinois Law Review, 241 at 264.

⁷⁴⁴ Smith, *The Nonrecognition of Foreign Tax Judgments: International Tax Evasion*, (1981) University of Illinois Law Review, 241, at 258.

“A court’s decision to recognize a foreign nation’s tax claim or judgment necessarily includes scrutinizing the nature of the revenue law upon which the tax liability is based to determine whether the law conforms with forum public policy. Because tax laws are integrally related to the particular political system and directly affect the foreign government, any public policy analysis of a foreign tax law will likely involve an incursion into the political domain.”

8.82 Smith comes to this conclusion in light of the decision of Kingsmill Moore J. in *Buchanan v. McVey*,⁷⁴⁵ citing, in particular, the following *dicta*:⁷⁴⁶

“[I]f the courts had ... an option to recognise such [foreign tax] claims, instead of imposing a general rule of exclusion, the task of formulating and applying the principles of selection would have been one, not only of difficulty, but danger, involving inevitably an incursion into political fields with grave risks of embarrassing the executive in its foreign relations and even of provoking international complications [T]he nature and incidence of revenue claims are not dictated by any moral principles, but are the offspring of political considerations and political necessity [M]odern history [is not] without examples of revenue laws used for purposes which would not only affront the strongest feelings of neighbouring communities, but would run counter to their political aims and vital interests. Such laws have been used for religious and racial discrimination; for the furtherance of social policies and ideals dangerous to the security of adjacent countries; and for the direct furtherance of economic warfare. So long as these possibilities exist, it would be equally unwise for the Courts to permit the enforcement of the revenue claims of foreign States or to attempt to discriminate between those claims which they would and those which they would not enforce. Safety lies only in universal rejection.”

⁷⁴⁵ *Buchanan v. McVey* [1954] IR 89, at 106 to 107.

⁷⁴⁶ Smith, *The Nonrecognition of Foreign Tax Judgments: International Tax Evasion*, (1981) *University of Illinois Law Review*, 241, at 257, fn. 110.

Reducing Public Policy Review

- 8.83** Silver⁷⁴⁷ suggests that the Revenue Rule should be limited to permit recognition of final tax decisions issued abroad whilst still excluding actions for collections of assessments themselves. This reflects the distinction made, in a sister state context, by the United States Supreme Court in *Milwaukee v. M.E. White & Co.*⁷⁴⁸ to the effect that a cause of action on a judgment was different from that upon which the judgment was entered. In a suit upon a money judgment for a civil cause of action, the validity of the claim upon which it was founded was not open to inquiry whatever its genesis. Regardless of the nature of the right which gave rise to it, the judgment was an obligation to pay money in the nature of a debt upon the speciality. Recovery upon it could be resisted only on the grounds that the court which rendered it was without jurisdiction, or that it had ceased to be obligatory because of payment or other discharge, or that it was a cause of action for which the state of the forum had not provided a court, unless it was compelled to do so by the privileges and immunities clause or, possibly, because procured by fraud. The Court stated that trial of these issues, even though the judgment was for taxes incurred under the laws of another state, required no scrutiny of its revenue laws or of relations established by those laws with its citizens and called for no pronouncement upon the policy of a sister state. It involved no more embarrassment than the interstate rendition of fugitives from justice, the constitutional command for which was no more specific than that requiring full faith and credit.⁷⁴⁹
- 8.84** Silver⁷⁵⁰ asserts that in an action to enforce a final tax decree, which is in essence a proceeding for recovery upon a money judgment, any inquiry into the validity of the underlying claim is limited to whether jurisdictional requirements were met and to the *narrow evaluation of public policy considerations*. She argues that in such circumstances intrusions into international affairs are lessened to a satisfactory level. However, she provides no basis for assessing what constitutes a satisfactory level of intrusion.

⁷⁴⁷ Silver *Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments*, (1992) 22 Ga. J. Int'l & Comp. L. 609, at 629 to 630.

⁷⁴⁸ 296 U.S. 268, at 275 to 276.

⁷⁴⁹ See **Chapter 7, paragraph 7.37** *et seq* for discussion of *Milwaukee* and full faith and credit provision.

⁷⁵⁰ Silver *Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments*, (1992) 22 Ga. J. Int'l & Comp. L. 609, at 629 to 630.

8.85 Silver⁷⁵¹ goes on to suggest that since there is less assurance that a levying state's causes of action are accurate or fair in a default judgment, as opposed to a decision in a contested suit, a court could initiate a policy to exclude enforcement of default tax decrees. In suggesting such a refinement Silver does not address the contention that judgments in default are frequently obtained where it is clear to the defendant that there is either no, or a minimal basis for defending the proceedings. More particularly, as the case law illustrates, the enforcement of a foreign tax judgment is frequently sought where the defendant has removed both themselves and their assets from the taxing jurisdiction. A rule refusing to enforce default judgments would merely encourage recalcitrant taxpayers to ignore proceedings in the taxing state.

Eliminating Public Policy Review

8.86 Smith⁷⁵² suggests that a revision of tax treaty collection provisions will not eliminate tax evasion unless the judiciary also abandon the Revenue Rule. He argues that the requirement of courts to engage in a public policy review of the underlying claim augurs for continued adherence to the Revenue Rule and advocates a reappraisal of the merger doctrine, allowing judicial enforcement of foreign tax judgments *without a public policy review*. Writing in the United States context Smith asserts⁷⁵³ that the merger doctrine could apply to foreign nation tax judgments as it does to sister state judgments. He observes that because the tax claim is merged into the foreign money judgment, the court can enforce the foreign tax judgment without undertaking a public policy analysis. He concludes that such a procedure would diminish the concern for judicial intrusion into foreign affairs.

8.87 In a case note⁷⁵⁴ on *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.* a more radical view is advanced. It is argued that the Court, in hiding behind

⁷⁵¹ Silver *Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments*, (1992) 22 Ga. J. Int'l & Comp. L. 609, at 632.

⁷⁵² Smith, *The Nonrecognition of Foreign Tax Judgments: International Tax Evasion*, (1981) University of Illinois Law Review, 241, at 265 to 266.

⁷⁵³ Smith, *The Nonrecognition of Foreign Tax Judgments: International Tax Evasion*, (1981) University of Illinois Law Review, 241, at 267.

⁷⁵⁴ *Separation of Powers – Foreign Affairs – Second Circuit holds that the Revenue Rule bars a Foreign Sovereign's Civil RICO suit for Tax Revenue - Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001), 115 Harvard Law Review 2333, at 2337 *et seq.* (2002).

increasingly blurred principles of separation of powers, failed to appreciate its own unique and necessary role within foreign affairs.

- 8.88** It is asserted that sovereign power has shifted within government from legislatures and executives to global networks of courts and administrative agencies that regularly deal with international issues thus undermining the traditional notion of a unitary state actor in the realm of foreign affairs. It is further asserted that the proclivity of courts to view foreign policy authority as limited to executive and legislative branches perpetuates an antiquated perspective of the judiciary's role in global affairs in that it presumes that domestic issues are completely separate from foreign issues.
- 8.89** It is suggested that the courts' reliance on the Revenue Rule in deferring to the political branches ignores the reconfiguration of sovereign authority as well as the nascent, though vital, role of the courts in confronting issues in which domestic and foreign concerns are inextricably intertwined.

Difficulties with Separation of Powers Rationale

- 8.90** Notwithstanding the cogency of the arguments advanced in favour of the separation of powers rationale, the jurisdictional conclusion that necessarily follows has been explicitly rejected, both by the United States Supreme Court in *Milwaukee County v. M. E. White Co.*⁷⁵⁵ and by Lord Goff in the House of Lords in the case of *In re Norway's Application (Nos. 1 & 2)*.⁷⁵⁶

International Relations

- 8.91** The *dicta* of Learned Hand J. in *Moore v. Mitchell*,⁷⁵⁷ *inter alia*, advance reasons of international relations for the courts' adherence to the Revenue Rule. In his view a court will not recognise ordinary municipal liabilities arising in a foreign state if they run counter to the settled public policy of its own. In refusing such recognition the courts of the forum might commit it to a position that would seriously embarrass the taxing state. To pass judgment upon the provisions for the public order of another state involves the

⁷⁵⁵ (1935) 296 U.S. 268, 56 S. Ct. 229, at least in the context of sister tax applications to enforce judgments in respect of taxes.

⁷⁵⁶ [1990] 1 A.C. 723.

⁷⁵⁷ (1929) 30 F. 2d. 600.

relations between the states themselves, which the courts are not competent to deal with and which are entrusted to other authorities.

8.92 In *City of Detroit v. Proctor*⁷⁵⁸ the Court noted that Beale⁷⁵⁹ commented thus in relation to Learned Hand's *dicta*:

“It is undoubtedly true that in many instances the courts have repeated the rule without careful consideration and merely as a literary corollary to the proposition that no state will enforce the penal laws of another state. Nevertheless it is not difficult to find fundamental considerations which seem to furnish ample justification for the refusal to allow the action. As Judge Learned Hand pointed out, the relation between a foreign state and its citizens is properly no concern of the forum. Furthermore since the interest of the foreign state is directly affected, the interstate relation should be determined not by the court but by the respective foreign powers.”

8.93 In *Buchanan v. McVey*⁷⁶⁰ Kingsmill Moore J. stated⁷⁶¹ that in the absence of any express authority defining the limits of the principle that the revenue legislation of a foreign state will not be given effect, directly or indirectly, in the forum, it was natural to seek guidance in the reasons which were assigned for establishing the principle when it was first enunciated.

8.94 Having referred to the *dicta* of Learned Hand J. in *Moore v. Mitchell*,⁷⁶² Kingsmill Moore J. stated⁷⁶³ that the courts have always exercised the right to reject foreign law on the ground that it conflicted with public policy or affronted the accepted morality of the domestic forum. He continued that if, in disputes between private citizens, it had been considered necessary to reserve an option to reject foreign law as incompatible with the views of the community, it must have been equally, if not more, necessary, to reserve a

⁷⁵⁸ (1948) 5 Terry 193, at 200 to 201, 44 Del. 193, 61 A. 2d 412.

⁷⁵⁹ Volume 3, *Conflict of Laws* 1638 [30 F.2d 603.].

⁷⁶⁰ [1954] I.R. 89.

⁷⁶¹ [1954] I.R. 89, at 105 to 107.

⁷⁶² 30 F.2d 600 (1929). The views expressed by Learned Hand J. have been considered in depth in **Chapter 6**.

⁷⁶³ [1954] I.R. 89, at 106.

similar option where an attempt was made to enforce the governmental claims (including revenue claims) of a foreign state.

8.95 Kingsmill Moore J. noted that if the courts had contented themselves with an option to refuse such claims, instead of imposing a general rule of exclusion, the task of formulating and applying the principles of selection would have been one, not only of difficulty, but danger, involving inevitably an incursion into political fields with grave risks of embarrassing the executive in its foreign relations and even of provoking international complications. Kingsmill Moore J. concluded⁷⁶⁴ that safety lay only in universal rejection and that enforcement of the principle must not depend merely on the form in which the claim was made.

8.96 More recently Smith has written that:⁷⁶⁵

“The most persuasive argument against recognition of foreign nation tax claims or judgments is that the courts’ public policy review will inevitably lead to selective enforcement of such claims, creating the possibility of offending a foreign government and hindering the conduct of foreign relations.”

Key Issues

8.97 In assessing the international relations ground two key issues are considered; *firstly*, how likely is it that a court will find that a foreign tax claim or judgment in respect of same is going to run counter to the public policy of the forum, and; *secondly*, how likely is it that such a finding will give rise to complications in relations between the forum and the taxing state?

Likelihood of a finding that Foreign Tax is contrary to Public Policy

8.98 Vierya J. in *Commissioner of Taxes, Federation of Rhodesia v. McFarland*⁷⁶⁶ was of the view that it was difficult to see how non-recognition of foreign revenue laws was to be founded on this “*unruly horse*” and he went on to state that one would have thought that

⁷⁶⁴ [1954] I.R. 89, at 107.

⁷⁶⁵ Smith, *The Nonrecognition of Foreign Tax Judgments: International Tax Evasion*, (1981) University of Illinois Law Review, 241, at 256.

⁷⁶⁶ 27 SATC 15, 1965 (1) SA 470 (W), accessed from Lexis Nexis, at page 3 of the Lexis Nexis report.

it was public policy that persons should pay their taxes and not evade such payment by escaping from the country that imposed them.

8.99 It has been observed⁷⁶⁷ that there should be no general policy against state tax collection and that the enforcing state should realise that tax revenues are vital to the existence of governments. Although it is realised that there could be situations in which one state should refuse to enforce the revenue laws of another, *i.e.* where the tax is confiscatory in nature or where the enforcement of another state's revenue laws would be detrimental to the enforcing state's collection of its own taxes, these situations seldom occur and cannot sustain a rule which refuses to give extraterritorial enforcement to *any* state revenue law.

8.100 Kovatch,⁷⁶⁸ starting from the premise that Learned Hand J.'s justification for the Revenue Rule is so as to avoid the examination of the revenue laws and policies of other nations by U.S. courts, concludes that this justification is inadequate to support its continued existence. He notes that the application of the public policy exception would not necessarily lead to an embarrassment of the foreign nation involved as there exist safeguards within the law to limit the number of foreign judgments rejected under this exception. He states:

“In order for a court to decline the recognition of a foreign judgment due to public policy, the foreign judgment must be “repugnant to the fundamental notions of what is decent and just in the State where enforcement is sought”. The foreign judgment must clearly tend “to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property.” It is not enough that the law of the foreign nation is different from the law of the state in which enforcement is sought. As one court noted, “The standard is high and infrequently met.”

⁷⁶⁷ *Conflict of Laws: Extraterritorial Enforcement of Tax Claims*, (1958) Washington University Law Quarterly, 283, at 286.

⁷⁶⁸ Kovatch, *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, (1999 – 2000) 22 Houston Journal of International Law, 265, at 277 to 278.

- 8.101** Dodge⁷⁶⁹ also expresses the view that foreign tax, penal, and regulatory laws are not particularly likely to run afoul of the public policy exception given that every state collects taxes, every state has a criminal law and nearly every state regulates commerce in one way or another. Criticising Learned Hand’s advocacy of a blanket refusal to enforce, Dodge asserts that if one expected courts to have to declare foreign tax laws in violation of public policy relatively often, the balance might tip in favour of denying enforcement of such laws altogether.
- 8.102** Kovatch⁷⁷⁰ goes further and suggests that recognition of foreign tax judgments would actually be consistent with the fundamental principles of American government. Referring to the political theory of John Locke and the idea that the authority of the government rests on the consent of the governed he makes the case that individuals can be viewed as having ceded their autonomy to a central authority in return for the benefits of civil society.
- 8.103** Kovatch notes that one instance in which the courts may properly exercise jurisdiction is when “*the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.*”⁷⁷¹ He argues that this concept should apply with equal force in the context of enforcing a foreign tax judgment, saying that when a person receives income from a foreign jurisdiction, that person has received the benefits of the ordered society that the government of the foreign jurisdiction provides. He argues that by recognising this concept United States courts would stay true to the notion of reciprocity and consent inherent in the social contract.

Likelihood that Selective Refusal Will Offend

- 8.104** An early response to Learned Hand’s contention that the courts should refuse to enforce any foreign revenue laws was given by Leflar⁷⁷² who wrote:

⁷⁶⁹ Dodge, *Breaking the Public Law Taboo*, (2002) Harvard International Law Journal, 164, at 214.

⁷⁷⁰ Kovatch, *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, (1999 – 2000) 22 Houston Journal of International Law, 265, at 280 to 282.

⁷⁷¹ Citing *Hanson v. Denckla* 357 U.S. 235, at 253 (1958) in turn citing *International Shoe* 326 U.S. 310, 66 S. Ct. 154, at 319 (1945).

⁷⁷² Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, (1932) Harvard Law Review, 193, at 217.

“If it be objected that the possibility of a holding that a given foreign tax statute is invalid or not applicable to the thing sought to be taxed might give such offense to the taxing state as to produce public ill feeling of a delicate sort, the reply must be that though this may have real importance as between sovereign nations it is altogether insignificant as between the states of the United States. And even between nations this would seldom be more offensive than a flat refusal to permit any action at all.”

8.105 In similar vein, in *State ex rel. Oklahoma Tax Commission v. Rodgers*,⁷⁷³ the St. Louis Court of Appeals in Missouri observed:⁷⁷⁴

“Nor would a holding that a given foreign tax statute was invalid tend any more to the production of ill feeling than a refusal to permit an action at all. At any rate, in the American Union it would hardly lead to interstate complications of a serious nature. Such a possibility is so insignificant that it can very well be disregarded.”

8.106 In rebutting Learned Hand’s reasoning it has been argued⁷⁷⁵ that it is probable that the revenue laws of the taxing state will have been previously interpreted by its own courts so that the forum would have little difficulty in their application, and that it is difficult to see how the taxing state’s relationship with its citizens would be embarrassed since the same defences to the tax claim could be asserted by the evader in the forum of trial as would be available to him in the taxing state.

8.107 Silver⁷⁷⁶ addresses the concern that the public policy analysis itself would involve the enforcing state too closely in the internal processes of the taxing location by arguing that the taxing state, in submitting itself to the laws of the forum, implicitly accepts any

⁷⁷³ (1946) 238 Mo. App. 1115, 193 S.W. 2d 919.

⁷⁷⁴ 238 Mo. App. 1115, at 1126.

⁷⁷⁵ *Conflict of Laws: Extraterritorial Enforcement of Tax Claims*, (1958) Washington University Law Quarterly, 283, at 285 to 286.

⁷⁷⁶ Silver, *Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments*, (1992) 22 Ga. J. Int’l & Comp. L. 609, at 621 *et seq.*

attendant interference in related foreign affairs. She argues that Learned Hand's *dicta* loses some persuasiveness because it is discussed in the context of the application of foreign revenue laws rather than final judgments, the necessary examination of relevant foreign policies involved in recognising the latter being far less intrusive than that required to implement the former.

- 8.108** Kovatch⁷⁷⁷ also doubts the position of Learned Hand J. stating that there is no reason why the fact that the party seeking enforcement of the foreign judgment is the foreign state itself should cause the potential for more embarrassment. He notes that, whenever any foreign judgment is challenged as counter to public policy, the forum courts will examine the foreign state's law and the policy that supports the judgment.
- 8.109** Kovatch argues that because this public policy exception has existed with respect to most foreign judgments, the application of the exception to tax judgments would cause no more embarrassment to the foreign state seeking enforcement than is already created. He contends that despite the potential for embarrassment, that the forum may reject a foreign judgment because it violates its public policy is widely accepted; further it is an exception embodied in international conventions addressing the recognition of foreign judgments.
- 8.110** Kovatch concludes that the ability of a forum court to examine the policy behind a foreign judgment and reject it as contrary to public policy has gained widespread acceptance across the globe.
- 8.111** Dodge⁷⁷⁸ observes that Learned Hand's argument that selective enforcement is more likely to give offence when the law is of particular importance to the foreign country is offset by the fact that a flat refusal to enforce foreign law is also more likely to give offence when the law is of particular importance. He suggests that – given that it appears that forum courts will rarely have to resort to the public policy exception – the balance tips in favour of selective enforcement.

⁷⁷⁷ Kovatch, *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, (1999 – 2000) 22 *Houston Journal of International Law*, 265, at 278 to 280.

⁷⁷⁸ Dodge, *Breaking the Public Law Taboo*, (2002) *Harvard International Law Journal*, 164, at 214.

8.112 Dodge also notes that if the possibility of finding a foreign law contrary to the forum's public policy is the problem, then it might be solved either by a rule against enforcing all such laws or by a rule requiring enforcement without public policy review and that Learned Hand does not explain why the former rule is preferable to the latter.

The Question of State Immunity and the Converse of the Revenue Rule

8.113 Courts have managed to overcome their international relations concerns where a foreign state has exercised its power to tax through the commission of acts outside the territory of that state, notwithstanding claims to sovereign or state immunity arising therefrom.

8.114 In *Controller and Auditor-General v. Davison*⁷⁷⁹ the majority held that the activities of the Cook Islands Government that were at issue constituted acts *jure gestionis*. However, Richardson J., who dissented in holding that they were acts *jure imperii*, went on to deal with the question of sovereign or state immunity, as did Thomas J., who held with the majority on the question of classification.

The Judgment of Richardson J.

8.115 Richardson J. stated⁷⁸⁰ that the principle of sovereign immunity was founded not on any technical rule of law but on broad considerations of public policy, international law and comity. In assessing the weight which might legitimately be given, at common law, to New Zealand public policy considerations in *Davison*, three factors⁷⁸¹ were relevant.

8.116 *Firstly*, the doctrine of state immunity was the result of an interplay of two fundamental principles of international law; the principles of territoriality and state personality, both being aspects of state sovereignty. Under that principle, sovereign states had jurisdiction to prescribe rules of law and processes applying within their territory. *Secondly*, the state activity in question was based in New Zealand.

⁷⁷⁹ [1996] 2 NZLR 278. See **Chapters 3 and 6** *supra* for a discussion of the facts of the case.

⁷⁸⁰ [1996] 2 NZLR 278, at 304.

⁷⁸¹ [1996] 2 NZLR 278, at 304 to 305.

- 8.117** *Thirdly*, the particular expression of the recognised international law principle of good faith in the special relationship between the two states was a relevant factor. Cook Islanders were New Zealand citizens and in a 1973 exchange of letters the Prime Minister of New Zealand stated, and the Premier of the Cook Islands agreed, that the bond of citizenship also created an expectation that the Cook Islands would uphold, in their laws and policies, a standard of values generally acceptable to New Zealanders.
- 8.118** Against that background, the public policy argument for requiring production by the Audit Office of the specified documents could be put very shortly. It was not a matter of the forum state simply preferring public policies underlying its domestic laws to those of the foreign state. Fundamental values must be at stake. Where the conduct of the foreign state was in question, refusal of a claim to sovereign immunity could be justified only where the impugned activity, if established, breached a fundamental principle of justice or some deep-rooted tradition of the forum state.
- 8.119** Richardson J. held⁷⁸² that the due imposition and collection of taxes was fundamental to the functioning of government. The State had a prime interest in tax enforcement and in the investigation of abuses of its tax system. Defrauding the public revenue struck at the heart of government. It would be indefensible for a friendly state to be a party to an attempt to evade or abuse New Zealand tax laws. It would also undermine those values generally acceptable to New Zealanders which the Cook Islands had committed itself to uphold.
- 8.120** Richardson J. noted⁷⁸³ that the documents in question were held within New Zealand, by an agency of New Zealand. They were believed to contain evidence of a conspiracy, to which the Cook Islands Government was party, to make an abusive claim to foreign tax credits in which reliance on tax certificates issued by the Cook Islands Government was a key feature. Richardson J. concluded that to insist on production of those documents for the purpose of copying them would be a proportionate response by New Zealand and should be justified under New Zealand law.

⁷⁸² [1996] 2 NZLR 278, at 306.

⁷⁸³ [1996] 2 NZLR 278, at 307.

The Judgment of Thomas J.

- 8.121** Notwithstanding that he constituted part of the majority which had held that the activities at issue were commercial, Thomas J. went on to consider the question of sovereign or state immunity. He commenced by noting⁷⁸⁴ that the concept of jurisdiction was founded on the notion of state sovereignty. The State was supreme within its own territory. State immunity represented an immunity from that jurisdiction. The competence of the courts of the forum state was not in question. In this respect the doctrine of sovereign immunity differed from the concept of act of state. The latter was beyond the competence of the domestic courts in that they did not have jurisdiction to adjudicate upon the foreign act. However, in the case of such immunity the court relinquished the jurisdiction which it possessed pursuant to the basic concept of territorial jurisdiction.
- 8.122** Thomas J. observed⁷⁸⁵ that the agents of one state entered the territory of another and acted in their official capacity in that state by licence.⁷⁸⁶ The existence of immunity from the jurisdiction of the local courts was seen as a concomitant of the privilege to enter and remain within the territory. The notion that a state may not interfere with the territorial sovereignty of another state, other than by licence, did not disappear simply because the act of the other state was performed beyond its territorial boundaries. Once the notion of licence was accepted, it again became more acceptable for the courts to determine whether the act of the foreign state was an abuse of that licence, being contrary to public policy or a perceived breach of international law as might be determined by the courts in the exercise of the forum state's full and absolute territorial jurisdiction. Thomas J. went on to set out⁷⁸⁷ the relevant factors and criteria in determining whether the Cook Islands should be granted sovereign immunity.
- 8.123** *Firstly*, the Commission of Inquiry had been endorsed by Parliament and it would subvert the intention of Parliament if the Court were to grant sovereign immunity to the Cook Islands in the circumstances of this case.

⁷⁸⁴ [1996] 2 NZLR 278, at 314.

⁷⁸⁵ [1996] 2 NZLR 278, at 315.

⁷⁸⁶ In so observing, Thomas J. made reference to Brownlie, *Principles of Public International Law*, (4th ed. 1990), Ch. XV, pp. 322 to 323.

⁷⁸⁷ [1996] 2 NZLR 278, at 315 to 319.

- 8.124** *Secondly*, the apparent involvement of the Cook Islands Government in the transactions under inquiry had already been subject to adverse comment but more general regard might be had to the Cook Islands Government's establishment of a tax haven in that country. The use of tax havens led to decisions which were at variance with what a neutral tax system would command and resulted in undesirable economic distortions in international competition and the flow of capital. Both New Zealand and the Cook Islands had the sovereign right to impose taxes on their own residents but the characteristics of a tax haven could not be ignored. In a real sense the erosion of a country's tax base undermined the basic principle of the resident country's tax system and was an invasion of its sovereign right to tax. The Cook Island's interference with New Zealand's sovereign right to tax provided a sound reason for not granting it sovereign immunity.
- 8.125** *Thirdly*, the inquiry being undertaken was not directed at the Cook Islands Government itself. It was not directly impleaded in the process.
- 8.126** *Fourthly*, the Auditor-General and the documents in issue were within New Zealand. The physical presence of the property reinforced the state's full and absolute territorial jurisdiction. Similarly, if the person having control of the documents was within the jurisdiction, jurisdiction *in personam* could be acquired.
- 8.127** *Fifthly*, the Commissioner's inquiries had revealed that the Cook Islands Government had been involved in arrangements in which the taxpayers concerned had presented tax credit certificates issued by the Cook Islands Government to the Inland Revenue Department in New Zealand in order to enable those taxpayers to obtain a credit for that amount of tax in New Zealand. The state had a prime interest in tax enforcement and in the investigation of abuses of its tax system and defrauding the public revenue struck at the heart of government. It would be indefensible for a friendly state to be party to an attempt to evade or abuse New Zealand tax laws. This point could, in itself, provide a proper public policy basis for withholding immunity.

- 8.128** *Sixthly*, this was not a case where the dispute would be best dealt with politically or through diplomatic channels. The New Zealand Government had not been moved to indicate that state immunity was thought appropriate in the circumstances or that refusing it would cause difficulties in its relationship with the Cook Islands Government that it was not prepared to meet.
- 8.129** *Finally*, it was relevant to assess whether sovereign immunity should be granted having regard to the principles underlying the doctrine. It had been argued that the exercise of jurisdiction by the Commissioner would be incompatible with the dignity and independence of the Cook Islands, that it could upset international relations, that it would amount to interference with the sovereignty of the Cook Islands and that, in effect, it would be an interference with the property rights of that country. Thomas J. rejected these arguments.
- 8.130** *Firstly*, it might be questioned how realistic it was in this day and age to suggest that it would be undignified for a foreign state to be subjected to the legal processes of another state in respect of matters in which it was directly involved. It could not be validly claimed that, once the Cook Islands Government chose to enter into the arrangements in issue with the ramifications which that had for the New Zealand tax regime, it was an affront to the dignity of that nation to have its actions examined in the course of an inquiry in New Zealand.
- 8.131** *Secondly*, much the same observation could be made with reference to the theory that the equality and independence of nations gave rise to a duty on the part of states to refrain from intervening in the internal or external affairs of other states. The point could at once forcibly be made that no such duty arose in the circumstances of this case. By virtue of its involvement in arrangements apparently designed to defraud the New Zealand tax revenue, the Cook Islands forfeited any claim to have its sovereign equality and independence recognised by the grant of sovereign immunity.
- 8.132** *Thirdly*, comity could not provide a sound basis for exempting the Cook Islands from the jurisdiction of New Zealand as it presupposed comity and goodwill as between states

in their international relations. It could not properly be suggested that refusing to waive its jurisdiction would demonstrate a lack of comity or goodwill on New Zealand's part. Indeed, it could be suggested that the essential comity and goodwill, and the element of good faith, was lacking in the actions of the Cook Islands Government in participating in the arrangements in question.

- 8.133** Finally, Thomas J. rejected the suggestion that New Zealand's refusal to confer sovereign immunity on the Cook Islands in this case would result in the international order being disrupted. Countries which operated tax havens having the features previously described could not fairly claim that they should be immune from the scrutiny of other countries whose tax base was adversely affected. Nor could the maintenance of international order be used as a shelter for conduct which was itself damaging to that international order.

Respect for the Sovereignty of the Foreign State

- 8.134** As previously noted, the sovereignty rationale holds that for the forum state to enforce the tax laws or judgments of a foreign state would be contrary, *inter alia*, to the sovereignty of the foreign state and would give rise to difficulties in international relations.
- 8.135** Leflar⁷⁸⁸ disposes of this argument by noting that respect for the sovereignty of the suing state lends no such support; that state wants to sue. The St. Louis Court of Appeals in Missouri, in *State ex rel. Oklahoma Tax Commission v. Rodgers*,⁷⁸⁹ speaking in a federal context, adopted this reasoning when it stated:⁷⁹⁰

“The foremost reason given for refusal to enforce foreign penal laws is the sovereign nature of independent states and the fear that the enforcement of penal laws of another state would be considered as interference with the prerogatives of that state, which might produce disagreeable international complications. This is a sound reason where the purpose of the law is to punish an offense

⁷⁸⁸ Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, (1932) Harvard Law Review 193, at 217.

⁷⁸⁹ (1946) 238 Mo. App. 1115, 193 S.W. 2d 919.

⁷⁹⁰ 238 Mo. App. 1115, at 1126 to 1128.

against public justice, but it lends no support to a rule excluding the foreign state from seeking relief in a local forum for the collection of a tax due it, for the obvious reason that the foreign state is the one that wants to sue. It could not be considered an unwarranted interference with the prerogatives of a foreign state when that state is the motivating party asking for relief and undertaking to submit itself to the jurisdiction of a sister state.”

Public Policy

8.136 Public policy has already been considered in the context of the separation of powers rationale and the international relations rationale. It has been argued that a consideration of public policy issues may cause the courts to stray into the political domain, whilst the likelihood of public policy reasons, if they were to be applied to foreign tax enforcement proceedings on a case by case basis, giving rise to selective enforcement and thereby complicating international relations, was considered in the immediately preceding section.

8.137 Notwithstanding the serious concerns expressed by Learned Hand J. and Kingsmill Moore J. regarding the application of public policy giving rise to international relations complications, as we have seen, other courts and commentators appear to consider the likelihood of refusal to enforce on public policy grounds to be relatively low. Atik⁷⁹¹ provides an explanation for this disparity:

“The problem with “public policy” is that the term is seldom precisely defined and therefore does not provide a manageable standard for judicial decisions. Clearly, the public policy exception should be preserved to block enforcement against someone who has been denied an opportunity to be heard. It should also be used to block an act of individualized political oppression. The concept, however, provides little guidance when applied to judgments based on taxes, which though fairly imposed, are foreign to the particular legal culture.”

⁷⁹¹ Atik, *The Problem of Reciprocity in Transnational Enforcement of Tax Judgments*, (1981) 8 *The Yale Journal of World Public Order* 156, at 165.

- 8.138** Atik⁷⁹² notes that the function of the public policy exception is to screen out judgments according to their legal compatibility, the requirement being that the foreign law does not offend the forum's public policy. Such offence, Atik contends, which will arise from a contextually incongruous placement of foreign law in the forum's legal culture, may be based on either substantive or procedural grounds. Atik argues that the public policy exception is essential to safeguard due process, though he concedes that when applied to the transnational enforcement of tax judgments it has been subject to criticism because of the potential for abuse in its application.
- 8.139** Accordingly, Atik suggests that if a notion of legal compatibility (at least as to taxes) were accurately defined then public policy tests could be used with greater precision. He proposes a framework, what he terms structural reflection, to replace the vague generalities of the public policy exception. His framework is based on a systematic matching of firstly, the kind and secondly, the scope of taxes imposed in two or more legal systems.
- 8.140** Atik states that structural reflection, as a test in transnational enforcement, has a simple premise; no nation should be asked to enforce a tax which it would not itself impose. He proposes that if the test for structural reflection is met enforcement should be required, unless the traditional public policy exception is applied because of failure of due process or fair play.
- 8.141** It is clear that in the three decades that have elapsed since Atik advanced his proposals that structural reflection has not replaced the public policy exception. It is suggested that one explanation is that the framework that he provides does not capture all the reservations that a state may have in regard to enforcing a foreign tax claim or judgment. This is a matter that will be re-visited at the conclusion of this Chapter.

⁷⁹² Atik, *The Problem of Reciprocity in Transnational Enforcement of Tax Judgments*, (1981) 8 *The Yale Journal of World Public Order* 156, at 164 *et seq.*

8.142 Silver⁷⁹³ notes the objection that any validation given to a tax claim or judgment would have the effect of furthering the governmental interests of a foreign country. However, she points out that many United States courts traditionally find no problem entertaining decisions which directly benefit other governments. Further, most taxes on their own rarely conflict with the enforcing state's public policy since virtually all sovereigns impose levies.

Forum Non Conveniens – Procedural or Administrative Difficulties

8.143 Procedural and/or administrative difficulties have provided a rationale for the Revenue Rule. An early, and blunt expression of this rationale is to be found in the Scottish case of *Stewart v. Gelot*⁷⁹⁴ where Lord Neaves stated:

“I concur also that the revenue laws of a foreign country are not binding upon us, whether they seek to enforce themselves by excluding documents as inadmissible, or whether they seek to enforce themselves by punishing the parties to these documents. In either case it is a sanction or penalty for a breach of revenue laws, and for us to interfere in one way or other would be making us what we are not – the tax gatherers of a foreign country. Let them look after their own affairs; we have enough to do; we get quit of a number of international questions in that way, and are reduced to the position of judging our own law.”

8.144 In *City of Detroit v. Proctor*⁷⁹⁵ the Court noted that Beale⁷⁹⁶ commented:

“Also the court may well feel very reluctant to assume the burden of administering an intricate tax system with which it is totally unacquainted, especially in view of the crowded dockets which are to be found almost everywhere.”

⁷⁹³ Silver, *Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments*, (1992) 22 Ga. J. Int'l & Comp. L. 609, at 621 *et seq.*

⁷⁹⁴ (1871) 9 M. 1057, at 1066 to 1067.

⁷⁹⁵ (1948) 5 Terry 193, at 200 to 201, 44 Del. 193, 61 A. 2d 412.

⁷⁹⁶ Volume 3, *Conflict of Laws* 1638 [30 F.2d 603.].

8.145 In *Government of India v. Taylor*⁷⁹⁷ Lord Somervell stated:

“Tax gathering is an administrative act, though in settling the quantum as well as in the act of final collection judicial process may be involved. Our courts will apply foreign law if it be the proper law of a contract, the subject of a suit. Tax gathering is not a matter of contract but of authority and administration as between the State and those within its jurisdiction. If one considers the initial stages of the process, which may, as the records of your Lordship’s House show, be intricate and prolonged, it would be remarkable comity if State B allowed the time of its courts to be expended in assisting in this regard the tax gathers of State A.”

8.146 This issue continues to be identified by commentators. Baade⁷⁹⁸ writes:

*“[T]here is the difficulty of applying foreign tax law correctly. A mature tax system is likely to be a very intricate network of rules, regulations, and accounting practices administered by a special bureaucracy under judicial supervision by a separate tax court hierarchy, aided by a specialised tax bar and accounting profession. The even-handed application of such a body of law by a foreign court of general jurisdiction is, to say the least, not easy. Additionally, the procedural difficulties of translating a foreign tax assessment (or even a foreign default tax judgment) into a domestic judgment are likely to be substantial, if not overwhelming.”*⁷⁹⁹

⁷⁹⁷ [1955] 1 A.C. 491, at 514.

⁷⁹⁸ Baade, *The Operation of Foreign Public Law*, 30 Texas International Law Journal 249, at 483 (1995).

⁷⁹⁹ However, Baade’s conclusion – that it is mainly for this reason that modern double taxation conventions fail to provide for the reciprocal enforcement of tax claims – is open to doubt in light of the empirical evidence cited by Dodge that attempts to include general collection assistance provisions in United States double taxation treaties as far back as 1947 have encountered stiff resistance from American business. (See Dodge, *Breaking the Public Law Taboo*, (2002) Harvard International Law Journal, 164, at 202 to 206; see also Smith, *The Nonrecognition of Foreign Tax Judgments: International Tax Evasion*, (1981) University of Illinois Law Review, 241, at 261 to 263.).

- 8.147** Leflar⁸⁰⁰ has identified and answered the various procedural and administrative issues that are perceived to attend the enforcement of foreign tax claims or judgments. Each of these issues is considered in turn below.
- 8.148** *Procedural difficulties*, of which Leflar gives three examples. *Firstly*, the issue arising in *Moore v. Mitchell*,⁸⁰¹ the fact that the official capacity of the county treasurer of the taxing state existed only in the state of his appointment, so that, as a private citizen, he had no authority to collect tax in another state. Leflar notes that this difficulty can be overcome by the taxing state providing for foreign suits in its own name.
- 8.149** *Secondly*, the non-availability at the forum of a remedy by which reasonably equivalent relief could be assured. This situation arose in *State of California ex rel. Houser v. St. Louis Union Trust Co.*⁸⁰² The plaintiff sought, by proceedings which ended up before the St. Louis Court of Appeals, Missouri, to collect an alleged deficiency in the payment of inheritance tax. The Court, having considered the relevant Californian legislation, concluded⁸⁰³ that the right to levy an inheritance tax was inextricably bound up with a prescribed statutory remedy available only in California. In declining to grant the reliefs sought, the Court concluded that where a legislature so ties together a right and a remedy it was impossible for the courts of any other state to exercise jurisdiction. However, the facts of this case seem very much to be the exception. Leflar maintains that no serious difficulties necessarily arise in relation to procedure, stating that the form of the tax collecting action would be the customary suit for a money judgment directed either against a person or a *res*.
- 8.150** *Thirdly*, the failure of the taxing state, in its legislation setting up exclusive methods for the collection of taxes levied, to make provision for foreign enforcement suits. Clearly this is a matter to be addressed by the state seeking enforcement in the forum. The second and third procedural difficulties identified by Leflar were dealt with by the St. Louis

⁸⁰⁰ Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, (1932) Harvard Law Review 193, at 201 to 202 and 215 to 222.

⁸⁰¹ (1929) 30 F.2d. 600.

⁸⁰² (1953) 260 S.W. 2d 821.

⁸⁰³ 260 S.W. 2d 821, at 830.

Court of Appeals in Missouri, in *State ex rel. Oklahoma Tax Commission v. Rodgers*⁸⁰⁴ where it observed:⁸⁰⁵

“Penal laws are also excluded on the ground of procedural difficulties, such as the non-availability at the forum of a remedy by which relief may be granted equivalent to that offered by the foreign state. In respect to the matter involved in the case at bar no such difficulty arises. The Oklahoma Statute, Section 1464, Title 68 Oklahoma Statutes 1941, provides that a suit for taxes may be brought by the Oklahoma Tax Commission in any court of competent jurisdiction in the same manner as for the enforcement of a right of action for debt.”

8.151 *Added expense* to taxpayers of conducting trials and enforcing sentences and judgments. Such an argument is of questionable merit if states generally allow the enforcement of foreign tax claims and judgments on the basis that the costs of allowing such proceedings would be offset by the benefits accruing in successfully pursuing evaders of forum taxes to the benefit of compliant taxpayers in the forum. In any event, in *State ex rel. Oklahoma Tax Commission v. Rodgers*⁸⁰⁶ the Court observed:⁸⁰⁷

“Another reason for excluding suits to enforce penal laws is the inconvenience to the enforcing state in the way of added expense of conducting the trials and enforcing the judgments. This is an objection that is also applicable to suits to enforce foreign revenue laws. However, we are not convinced that it would become an intolerable burden upon the state. If experience should demonstrate otherwise, the situation could be remedied by the Legislature forbidding such suits.”

8.152 *Overcrowding of dockets* by unnecessarily imported suits. Leflar concedes that the assertion that a state allowing foreign tax collecting suits would soon find itself in the role of full time tax collector for its neighbours contains an element of truth. However,

⁸⁰⁴ (1946) 238 Mo. App. 1115, 193 S.W. 2d 919.

⁸⁰⁵ 238 Mo. App. 1115, at 1126 to 1128.

⁸⁰⁶ (1946) 238 Mo. App. 1115, 193 S.W. 2d 919.

⁸⁰⁷ 238 Mo. App. 1115, at 1126 to 1128.

the correctness of this concession is open to question. Over time it is likely that such actions would diminish on the basis that if the Revenue Rule were no longer in place there would be no incentive for persons to move themselves and their assets to another jurisdiction for the purposes of tax evasion.

8.153 *Inconvenience to the defendant* from having to appear with witnesses at a distance from the place where the events in question occurred. However, any such inconvenience is self-inflicted.

8.154 *Difficulty of proof of facts* at a distance from the place of their occurrence. Leflar observes that proof of facts would presumably be less difficult than in the taxing state, because such facts, in the form of the taxable persons or interests, are present in the forum. The Court in *State ex rel. Oklahoma Tax Commission v. Rodgers*⁸⁰⁸ dealt with both inconvenience to the defendant and difficulty of proof of facts. It observed:⁸⁰⁹

“It is also said that foreign penal laws will not be enforced because of the inconvenience to the defendant in being compelled to conduct his defense outside the jurisdiction where the acts giving rise to the claim for penalty took place, and the difficulty of proving facts at a distance from the place of their origin. These are practical inconveniences that are as applicable to tax suits as to suits to enforce a penalty. But, they are inconveniences which are common to all transitory civil actions, and have never been considered as a reason to bar them. It must also be remembered that in cases of this character the above mentioned inconveniences are brought about by the taxpayer’s removal from the taxing state, and by his refusal to make himself or his property available there. We see no reason why a different rule should obtain in this kind of action than in other civil actions. If it should appear, however, that relief could be obtained in the foreign state, we would perhaps be justified in applying the doctrine of forum non conveniens, and excluding the action.”

⁸⁰⁸ (1946) 238 Mo. App. 1115, 193 S.W. 2d 919.

⁸⁰⁹ 238 Mo. App. 1115, at 1126 to 1128.

8.155 *Difficulty of proof of foreign law.* Leflar notes that the courts have undertaken equally difficult judicial problems previously. In *Commissioner of Taxes, Federation of Rhodesia v. McFarland*⁸¹⁰ Vierya J. observed⁸¹¹ that whilst there might be difficulties in interpreting foreign tax laws, such difficulties were met in relation to other foreign laws with which the courts, on occasion, had to grapple. Further, as noted by Walden,⁸¹² forum courts not only can but ought to turn to decisions of the courts of the taxing state in which the applicable law has been interpreted, for assistance in reaching a proper result. Black⁸¹³ points out that the normal choice of law process does not contemplate any concern with the difficulties of applying foreign law. He states:

“... it is no part of the choice of law process that, if the process points to the application of, say, a foreign jurisdiction’s tort law, the forum court may refuse to apply that foreign law on the grounds that it is too complex or hard to figure out. The only way in which the regular choice of law process appears to contemplate a problem with the difficulty of ascertaining the content of foreign law is through its procedures for the proof of such law. When a foreign law is selected by the applicable choice of law rule, the normal choice of law process puts the task of proving the content of the foreign law on the party which asserts its application. It is that party which must present the expert evidence on the content of the applicable law and run the risk of that law’s non-application through failure to prove it sufficiently. However, once appropriate proof is offered, the process does not contemplate judges refusing to apply the foreign law simply because that law is hard to figure out.”

Refusal to Further Foreign Governmental Interests

8.156 Writing in a United States context, Dodge⁸¹⁴ advances another reason for the Revenue Rule, that to enforce foreign tax law “*would have the effect of furthering the governmental interests of a foreign country, something which our courts customarily*

⁸¹⁰ 27 SATC 15, 1965 (1) SA 470 (W).

⁸¹¹ 27 SATC 15, 1965 (1) SA 470 (W), accessed from Lexis Nexis, at page 3 of the Lexis Nexis report.

⁸¹² Walden, *Enforcement by State Courts of Tax Claims of Sister States – Ohio v. Arnett*, (1951 – 1952) 39 Kentucky Law Journal, 472, at 474.

⁸¹³ Black, *Old and in the Way? The Revenue Rule and Big Tobacco*, (2003) 38 Canadian Business Law Journal 1, at 25.

⁸¹⁴ Dodge, *Breaking the Public Law Taboo*, (2002) Harvard International Law Journal, 164, at 215 to 219.

refuse to do.”⁸¹⁵ He notes that there are three reasons why a nation might not want its courts to further such interests; *firstly*, to protect its own nationals; *secondly*, to protect its sovereignty, and; *thirdly*, to encourage reciprocity.

8.157 As noted earlier, the protection, by the forum, of its nationals, is, in Dodge’s view, a means to avoid furthering foreign interests. This justification, he notes, is rarely made explicit, perhaps because it seems much less noble than protecting sovereignty or seeking to ensure reciprocity, yet it seems the most plausible explanation for exemptions for judgments against the enforcing country’s own nationals found in all the current⁸¹⁶ United States tax treaties providing for collection assistance. Dodge questions this rationale on the basis that it ignores the gains to be had from co-operation.

8.158 In making these observations Dodge echoes the reasoning of Smith:⁸¹⁷

“But the unarticulated rationale for the continued nonrecognition of foreign nation tax liabilities more likely derives from self-interest: the protection of domestic sources of revenue. Frequently, a foreign nation that seeks to enforce a tax claim brings suit in the jurisdiction where the taxpayer presently resides. Consequently, if the forum nation enforces the foreign tax liability it runs the risk of forcing an otherwise tax paying resident to flee the country. Thus, a myopic concern for the protection of revenue may account for governmental unwillingness to cooperate in the collection of taxes and judicial reluctance to recognize foreign tax judgments. As international tax evasion increases, the mutual loss of revenue may compel governments to reappraise the traditional rule against the recognition of foreign nation tax judgments.”

8.159 Baade⁸¹⁸ echoes this view in noting that there are public policy considerations for the Revenue Rule which gain little in attractiveness by being spelled out judicially. He goes

⁸¹⁵ Dodge, *Breaking the Public Law Taboo*, (2002) Harvard International Law Journal, 164, at 215, fn. 369 and the cases cited therein.

⁸¹⁶ As is evident from the above footnotes, Dodge was writing in 2002.

⁸¹⁷ Smith, *The Nonrecognition of Foreign Tax Judgments: International Tax Evasion*, (1981) University of Illinois Law Review, 241, at 267 to 268.

⁸¹⁸ Baade, *The Operation of Foreign Public Law*, 30 Texas International Law Journal, 429, at 484 (1995).

on to note that some states are known “tax havens,” not adverse to attracting wealthy prospective residents with promises of protection by bank secrecy and, less vocally, the implied assurance of continued local judicial adherence to the Revenue Rule.

Promotion of Reciprocity

8.160 Whilst the promotion of reciprocity has already been referred to in the context of both the separation of power rationale and the refusal to further foreign governmental interests, it is capable of constituting an independent rationale for the Revenue Rule. The adoption of a policy of reciprocity is consistent with a policy of co-operative territorialism⁸¹⁹ and would arguably serve to enhance sovereignty.

8.161 Promotion of reciprocity as a rationale also explains the differing approach of the courts to public and private litigants. Whilst the Revenue Rule can be justified on the grounds that its enforcement is more likely to promote reciprocity of recognition of tax claims and judgments amongst states as Dodge⁸²⁰ notes, fairness justifies a distinction between public and private litigants in that the interests of private parties seeking to enforce foreign law should not be held hostage to a state’s interest in promoting reciprocity.

Conclusion

8.162 This Chapter has considered the various justifications advanced in support of the Revenue Rule. Whilst *promotion of forum trade* may have provided an early impetus for the Rule it can no longer constitute a rationale given the existence of international and supra-national organisations and agreements designed to promote free trade. In any event, the early cases, involving the Revenue Rule, concerned private parties seeking to escape contractual obligations rather than foreign states seeking to enforce tax claims.

8.163 It is certainly the case that the *penal law analogy* has not only been advanced as a justification for the Revenue Rule but that it has also played a part in its development, most notably in *Buchanan v. McVey*.⁸²¹ However, the validity of the analogy has been doubted in the literature and it was rejected as a justification by the United States

⁸¹⁹ See **Chapter 12**.

⁸²⁰ Dodge, *Breaking the Public Law Taboo*, (2002) Harvard International Law Journal, 164, at 230.

⁸²¹ *Buchanan v. McVey* [1954] IR 89.

Supreme Court in *Milwaukee v. White*.⁸²² As the Court in *State ex rel. Oklahoma Tax Commission v. Rodgers*⁸²³ pithily stated, tax laws are not passed to punish people.

8.164 *Sovereignty*, the explanation advanced by Lord Keith in *Government of India v. Taylor*,⁸²⁴ is also deeply problematic. The underlying absolutist conception of sovereignty has been subjected to criticism on a theoretical level whilst, on an empirical level, it has been argued that there has been a disaggregation of the State into trans-governmental networks. These developments aside, it is open to question whether the enforcement of a foreign tax claim (or a judgment from a foreign court in respect of such a claim), by the forum courts, can be properly regarded as an infringement of the forum's sovereignty.⁸²⁵ Further, the explanatory power of this justification is called into question by the ambiguous relationship between the Revenue Rule and sovereignty.⁸²⁶

8.165 *Prima facie*, the doctrine of *separation of powers*, provides a more promising alternative. Insofar as the imposition of domestic taxes is concerned, the primary role, in an Irish context, is given, by virtue of the Constitution, to the legislature, with a constrained role for the executive.⁸²⁷ The function of the courts is to apply the law enacted by the legislature. In such circumstances the view that it is for the legislature to determine whether the courts should enforce foreign tax claims (or judgments from foreign courts in respect of same) appears to be well founded in the doctrine of the separation of powers. However, on further consideration there are difficulties with this explanation. *Firstly*, it suggests that, in the absence of a legislative sanction, the courts lack jurisdiction to deal with certain matters. However, this cannot be the case in an Irish context, because, excepting courts of local and limited jurisdiction, the competencies of the respective branches of government are a matter for the Constitution. *Secondly*, there are circumstances in which courts are willing to enforce foreign tax claims, notwithstanding the absence of legislative imprimatur.⁸²⁸ *Thirdly*, as was referred to

⁸²² (1935) 296 U.S. 268, 56 S. Ct. 229.

⁸²³ (1946) 238 Mo. App. 1115, 193 S.W. 2d 919.

⁸²⁴ [1955] A.C. 491.

⁸²⁵ See **Chapter 6**.

⁸²⁶ See **Chapter 7**.

⁸²⁷ See **Chapter 3**.

⁸²⁸ See **Chapters 11 and 12**.

earlier, the view that the Revenue Rule goes to jurisdiction has been rejected both by the United States Supreme Court, in *Milwaukee v. White*,⁸²⁹ and by the House of Lords in the case of *In re Norway's Application (Nos. 1 & 2)*.⁸³⁰

8.166 The *international relations* justification for the Revenue Rule is also problematic. The proposition that the enforcement of a foreign state's revenue laws might be offensive to it seems particularly thin where it is the one that is seeking such enforcement in the courts of the forum. Further, it is questionable whether a blanket refusal to enforce foreign revenue law is less offensive than selective refusal.

8.167 *Public policy* is a particularly nebulous justification. Furthermore, the literature suggests that the number of occasions upon which enforcement of foreign revenue law will be refused on public policy grounds will be comparatively limited. Speaking in a federal context the United States Supreme Court in *Milwaukee v. White*⁸³¹ stated that *no state can be said to have a legitimate policy against payment of its neighbor's taxes*: Speaking in an international context, the Court, in the South African case of *Commissioner of Taxes, Federation of Rhodesia v. McFarland*,⁸³² stated that one would have thought that it was public policy that persons should pay their taxes and not evade such payment by escaping from the country that imposed them.

8.168 *Procedural and/or administrative difficulties* have also been raised as a justification for the Revenue Rule. However, whilst there might be difficulties in interpreting foreign tax laws, forum courts overcome these difficulties in relation to other foreign laws. It has also been asserted that enforcing foreign revenue laws would lead to over-crowded dockets. However, the likelihood of such cases arising in the first instance would be diminished if it were the practice of the forum to enforce foreign revenue laws.

8.169 This thesis, having considered and rejected the other justifications advanced for the Revenue Rule, agrees with the views of Smith, Baade and Dodge that, ultimately, the

⁸²⁹ (1935) 296 U.S. 268, 56 S. Ct. 229.

⁸³⁰ [1990] 1 A.C. 723.

⁸³¹ (1935) 296 U.S. 268, 56 S. Ct. 229.

⁸³² 27 SATC 15, 1965 (1) SA 470 (W), accessed from Lexis Nexis.

most convincing justification for the Rule is a particular conception of *self-interest* on the part of the forum, specifically, that it is against the interests of the forum to assist foreign states in enforcing their tax claims. tempered with a willingness to safeguard the position of private parties, as was apparent in *Buchanan*, where Maguire C.J. noted⁸³³ that, if the payment of the revenue claim in that case had only been incidental and there had been other claims to be met, it would have been difficult for the courts to refuse to lend assistance. To subsume this *self-interest* justification under the heading of *public policy* would, it is submitted, be to obfuscate the true rationale for the Rule given the diversity of justifications that have been advanced under the umbrella of policy.

- 8.170** This conception of *self-interest* views tax collection as a zero-sum game where the gain of the foreign state represents a loss to the forum. Such a view appears to pervade the approach of many states to questions of taxation and although it is defended on the basis that it promotes tax competition, in truth it represents a beggar thy neighbour approach which ultimately leads to losses for all states.
- 8.171** This is not to suggest that states should abandon *self-interest*, rather that they should adopt a policy of *enlightened self-interest* and that they should act on the basis of *reciprocity*. Dodge, whilst agreeing that co-operation is a desirable outcome, suggests that the courts should refrain from enforcing foreign revenue laws as it prevents the executive from insisting on reciprocity from foreign governments.⁸³⁴ The difficulty with such an approach is that there may well be vested interests within the forum who lobby successfully to prevent such co-operation in the first instance.⁸³⁵
- 8.172** Accordingly, it is suggested that the courts should be willing to enforce foreign revenue law, but retain the option of reviewing their position in subsequent cases should the courts of the foreign state concerned fail to extend similar treatment to forum tax laws.

⁸³³ [1954] I.R. 89, at 117. See **Chapters 11 and 12.**

⁸³⁴ *Breaking the Public Law Taboo*, (2002) Harvard International Law Journal, 164, at 225.

⁸³⁵ In 1946 the United States concluded a treaty with France which extended the collection assistance provision to taxes owed by the nationals of the country from which assistance was requested. The provision drew strong opposition from the United States business community. The business community again objected when the United States tried to put general collection assistance provisions in treaties with Greece, Norway and South Africa. See Dodge, *Breaking the Public Law Taboo*, (2002) Harvard International Law Journal, 164, at 203 to 204.

Such an approach has been adopted as between United States and Canadian courts in bankruptcy proceedings,⁸³⁶ notwithstanding the distinctly unpromising Canadian precedent of *United States v. Harden*⁸³⁷ and United States precedent of *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson*.⁸³⁸

8.173 Adopting such an approach would likely be in the interest of all states and would make clear that the real basis for the Revenue Rule lies in *self-interest*. It would also be historically appropriate in that the courts would be resolving an issue that they had created in the first instance.

⁸³⁶ See **Chapter 12**.

⁸³⁷ [1963] SCR 366.

⁸³⁸ (1979) 597 F. 2d 1161.

PART IV – THE CONTEMPORARY OPERATION OF THE REVENUE RULE

Chapter 9 – Functional Enforcement

Introduction

- 9.1** This thesis, in discussing litigation involving a foreign state and implicating the Revenue Rule, distinguishes between *direct*, *indirect*⁸³⁹ and *functional* enforcement, which forms the subject matter of this Chapter.⁸⁴⁰
- 9.2** The recent development, by US federal courts, of the doctrine of *functional* enforcement, has significantly extended the ambit of the Revenue Rule in the United States. The doctrine operates in circumstances where the application of federal legislation would, in the opinion of the court, amount, functionally, to the enforcement of foreign tax law.
- 9.3** Functional enforcement arises *either* where a given set of facts constitutes a breach of both forum (non-tax) law and the tax law of a foreign state *or* where the foreign state seeks to rely upon the (non-tax) law of the forum to pursue a claim, not for unpaid taxes but for damages arising from the failure to pay such taxes.
- 9.4** The doctrine of functional enforcement was initially enunciated, in the context of a criminal prosecution, by the United States Court of Appeals, First Circuit, in *United States v. Boots*.⁸⁴¹ Whilst the application of the doctrine to criminal proceedings was subsequently rejected by the Second and Fourth Circuits and, ultimately, by the United States Supreme Court, it has prospered in Second Circuit and Eleventh Circuit decisions in the context of civil proceedings.

⁸³⁹ See **Chapter 5**.

⁸⁴⁰ It is important to avoid terminological confusion in this area. The jurisprudence on functional enforcement distinguishes between direct and indirect enforcement, but not in the same sense as the jurisprudence on the Revenue Rule generally, and not in a way that is internally consistent. In *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings Inc.* 268 F.3d 103 (2d. Cir. 2001) the term direct enforcement refers to lost tax revenues and indirect enforcement refers to law enforcement costs whereas in *Republic of Columbia v. Diageo North America Inc.* 531 F.Supp.2d 365 (United States District Court, E.D. New York) (2007) direct enforcement refers to the foreign state's claim for lost revenues from its liquor manufacture and distribution activities whereas indirect enforcement refers to the state's claim for losses due to tax evasion and money laundering.

⁸⁴¹ 80 F.3d 580 (1st Cir. 1996).

- 9.5** The Chapter also considers the refinement of the functional enforcement doctrine, by the United States District Court for the Eastern District of New York, in *Republic of Columbia v. Diageo North America Inc.*⁸⁴² to distinguish between, proceedings in which a government claims damages in its sovereign capacity, and proceedings in which it seeks damages suffered as a commercial actor.
- 9.6** This Chapter will consider seven leading United States decisions in this area. It will also consider the possibility of foreign tribunals being able to bring about functional enforcement, and will conclude with an examination of the contrasting approach taken by the House of Lords, and by the European Court of Justice, in circumstances where reliance is placed on the (non-tax) law of the state whose taxes have not been paid, in order to pursue a claim for damages.

First Circuit – Criminal Proceedings – Boots

- 9.7** In *United States v. Boots*⁸⁴³ the defendants were convicted, *inter alia*, of wire fraud, in furtherance of a scheme to transport tobacco into Canada without paying Canadian taxes and excise duties. The Court observed⁸⁴⁴ that the object of the scheme was exclusively to defraud a foreign government of customs and tax revenues imposed under foreign law. The Court held⁸⁴⁵ that foreign customs and tax frauds were intertwined with enforcement of a foreign sovereign's own laws and policies to raise and collect such revenues – laws with which the United States might, or might not, be in sympathy and over which it had no authority. Consequently, United States courts had traditionally been reluctant to enforce foreign revenue laws.
- 9.8** Even though the case did not require the Court to enforce a foreign tax judgment as such, *upholding the defendants' convictions would amount functionally to penal enforcement of Canadian customs and tax laws.* The scheme to defraud – proof of which was essential

⁸⁴² 531 F.Supp.2d 365 (United States District Court, E.D. New York) (2007). The plaintiffs' claims were subsequently dismissed with prejudice, see *Republic of Columbia v. Diageo North America Inc.* 2011 WL 4828814 (E.D.N.Y.). In the subsequent proceedings the Court held, at fn. 1, that the only reason why the withdrawing plaintiffs' claims were not dismissed in the earlier proceedings was that there were arguably questions of fact about what types of claims – commercial or sovereign – the withdrawing plaintiffs possessed. In the later proceedings the withdrawing plaintiffs conceded that they had no viable claims.

⁸⁴³ 80 F.3d 580 (1st Cir. 1996).

⁸⁴⁴ 80 F.3d 580, at 586.

⁸⁴⁵ 80 F.3d 580, at 587 to 588.

to conviction – had, as its sole object, the violation of Canadian revenue law. To convict, therefore, the District Court and this court had to determine whether a violation of Canadian tax laws was intended and had occurred. In so ruling, the United States courts would have to pass judgment on the defendants’ challenges to such laws and any claims not to have violated or intended to violate them. Where a domestic court was effectively passing judgment on the validity and operation of the revenue laws of a foreign country, the important concerns underlying the Revenue Rule were necessarily implicated.

9.9 Of particular concern was the principle of non-interference by the federal courts in the legislative and executive branches’ exercise of their foreign policymaking powers. This principle could be undermined if federal courts were to give general effect to wire fraud prosecutions for schemes aimed at violating the revenue laws of any country. If Congress had meant to authorise the courts to enforce this kind of application of the wire fraud statute it must speak more clearly than it had. However, this argument was rejected by the Fourth Circuit in *Pasquantino v. United States*,⁸⁴⁶ the Court stating:

“[W]e have no doubt that a significant separation of powers problem would arise were we to play diplomat from the bench by relying on a novel expansion of the common law revenue rule, no doubt a policy laden rule, to set aside the Defendants’ wire fraud convictions and sentences.”

9.10 Wilson⁸⁴⁷ notes that there is a concern that recognising mail and wire fraud liability in the circumstances arising in *Boots* creates the risk that foreign governments will use the American criminal justice system to further policies, embedded in their tax laws, which are fundamentally opposed to the prevailing social policies of the United States. He points out however, that this has the perverse effect of preventing the federal government from promoting its own policies and interests.

⁸⁴⁶ 336 F.3d 321, at 331 (4th Cir. 2003) cited by West, *Federal Fraud Prosecutions of Schemes to Defraud Foreign Sovereigns of Import Taxes*, 50 Wayne Law Review 1061, at 1071 (2004).

⁸⁴⁷ Wilson, *Subtle Indiscretions? International Smuggling, Federal Criminal Law, and the Revenue Rule*, 89 Cornell Law Review, 231, at 249 (2003).

9.11 A further criticism of the Court’s reasoning is that it asserts that to uphold the convictions under appeal would amount to the *penal* enforcement of foreign tax law. The relevant question is whether a foreign penal or revenue law ought to be enforced *simpliciter*: the jurisprudence does not support the existence of a concept of penal enforcement. Alternatively, if what the Court intended was that revenue law was penal in nature, then it clearly failed to have regard to the distinction made by the Supreme Court in *Milwaukee* as between revenue and penal law.

Second Circuit – Criminal Proceedings – Trapilo

9.12 The reasoning in *Boots* failed to find favour in *United States v. Trapilo*,⁸⁴⁸ a decision of the United States Court of Appeals, Second Circuit. The Court held that a scheme to defraud a foreign government of tax revenue did fall within the wire fraud statute. It stated⁸⁴⁹ that the language of the Statute unambiguously prohibits the use of interstate or foreign communications systems by anyone who intended to devise *any* scheme or artifice to defraud. The Statute neither expressly, nor impliedly, precluded the prosecution of a scheme to defraud a foreign government of tax revenue and the common law Revenue Rule provided no justification for departing from the plain meaning of the legislation.

9.13 The Court went on to state⁸⁵⁰ that at the heart of the indictment was the misuse of the wires in furtherance of a scheme to defraud the Canadian government of tax revenue, not the validity of a foreign sovereign’s revenue laws. The Statute condemned the intent to defraud – intent which did not hinge on whether or not the defendants were successful in violating Canadian revenue law, as the section punished the scheme itself, not its success. Consequently, there was no obligation to pass judgment on the validity of Canadian revenue law and the common law Revenue Rule was not properly implicated.

Second Circuit – Civil Proceedings – R.J. Reynolds

9.14 Notwithstanding its decision in *Trapilo*, the Second Circuit has shown its willingness to apply the concept of functional enforcement in civil proceedings. In *Attorney General*

⁸⁴⁸ (1997) 130 F.3d 547 (2d. Cir.).

⁸⁴⁹ 130 F.3d 547, at 551.

⁸⁵⁰ 130 F.3d 547, at 552 to 553.

of *Canada v. R.J. Reynolds Tobacco Holdings Inc.*⁸⁵¹ Canada brought proceedings under RICO⁸⁵² against cigarette manufacturers and others, to recover costs incurred as a result of an alleged conspiracy to smuggle cigarettes into the country for sale on the black market. The claim for damages was based on lost tax revenue and additional law enforcement costs.

9.15 The United States Court of Appeals, Second Circuit, held,⁸⁵³ Calabresi J, dissenting, that the case fell within the Revenue Rule. The Court found no evidence that Congress intended to limit the Revenue Rule when it enacted RICO. As Canada was requesting that a United States court enforce Canadian tax laws on its behalf, the Revenue Rule barred the action in its entirety.

9.16 The Court noted that although the United States Supreme Court and the Second Circuit had not ruled on the precise scope of the Revenue Rule, they had acknowledged its continuing vitality in an international context: *Sun Oil Co. v. Wortman*⁸⁵⁴ (noting the Rule’s continued existence in the nation-to-nation setting); *Banco Nacional de Cuba v. Sabbatino*⁸⁵⁵ (noting the view that many courts in the United States have adhered to the principle that “a court need not give effect to the penal or revenue laws of foreign countries”); *Oklahoma v. Gulf, Colorado & Santa Fe Rly. Co.*⁸⁵⁶ (“The rule that the courts of no country execute the penal laws of another applies, not only to prosecutions and sentences for crimes and misdemeanours, but to all suits in favour 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.”) citing *State of Wisconsin v. Pelican Insurance Company of New Orleans*;⁸⁵⁷ *United States v. First National City Bank*⁸⁵⁸ (“It has long been a general rule that one sovereignty may not maintain an action in the courts of another state for the collection of a tax claim”);

⁸⁵¹ 268 F.3d 103 (2d. Cir. 2001).

⁸⁵² Racketeer Influenced and Corrupt Organizations Act.

⁸⁵³ 268 F.3d 103, at 109.

⁸⁵⁴ (1988) 486 U.S. 717 at 740 n. 3, 108 S. Ct. 2117.

⁸⁵⁵ (1964) 376 U.S. 398, at 413 to 414, 84 S. Ct. 923.

⁸⁵⁶ (1911) 220 U.S. 290 at 299, 31 S. Ct. 437.

⁸⁵⁷ (1888) 127 U.S. 265, 8 S. Ct. 1370.

⁸⁵⁸ (1963) 321 F.2d 14, at 23 to 24 (2d. Cir.).

*United States v. Trapilo*⁸⁵⁹ (appearing to recognise the endurance of the Revenue Rule in the international context but finding it inapplicable to that case); *United States v. Pierce*⁸⁶⁰ (describing this aspect of *Trapilo*).

- 9.17** The Court went on to state⁸⁶¹ that tax laws embodied a sovereign’s political will. They created property rights and affected each individual’s relationship to his or her sovereign. They mirrored the moral and social sensibilities of a society. In part, the reluctance of courts to delve into such matters was based on the “*desire to avoid embarrassing another state by scrutinising its penal and revenue laws,*”⁸⁶² and in part because, as the Irish High Court in *Buchanan v. McVey*⁸⁶³ had observed, modern history was not without examples of revenue laws used for purposes which would not only cause affront to the strongest feelings of neighbouring communities but would run counter to their political aims and vital interests. The Court stated⁸⁶⁴ that addressing the public policy concerns raised by the imposition of such taxes could embroil the United States courts in delicate issues in which they had little expertise or capacity.
- 9.18** This was not to suggest that the Revenue Rule always barred United States courts from furthering the tax policies of foreign sovereigns; however, on the particular facts of this case, most notably that a foreign sovereign plaintiff was directly seeking to enforce its tax laws and that the United States government had negotiated and signed a treaty with this sovereign providing for limited extraterritorial tax enforcement assistance but stopping well short of the assistance requested here, led the Court to be wary, in this instance, of becoming the enforcer of foreign tax policy.
- 9.19** The Court noted⁸⁶⁵ that concerns about institutional role and competence provided particularly compelling support for the application of the Revenue Rule in the case before it. When a foreign nation appeared, seeking enforcement of its revenue laws, the

⁸⁵⁹ (1997) 130 F.3d 547, at 551 to 553 (2d. Cir.).

⁸⁶⁰ (2000) 224 F.3d 158, at 167 (2d. Cir.).

⁸⁶¹ 268 F.3d 103, at 111 to 112.

⁸⁶² *Banco Nacional de Cuba v. Sabbatino* (1964) 376 U.S. 398, at 437, 84 S. Ct. 923, citing *Buchanan v. McVey* [1954] I.R. 89.

⁸⁶³ [1954] I.R. 89.

⁸⁶⁴ 268 F.3d 103, at 113.

⁸⁶⁵ 268 F.3d 103, at 114.

judiciary risked being drawn into issues and disputes of foreign relations policy that were assigned to, and better handled by, the political branches of government.

- 9.20** The Court further stated⁸⁶⁶ that it believed that the political branches of the United States government had clearly expressed their intention to define and limit the parameters of any assistance given with regard to the extraterritorial enforcement of a foreign sovereign's tax laws.
- 9.21** The Court observed⁸⁶⁷ that whilst the Second Circuit had previously allowed criminal actions to proceed, notwithstanding the Revenue Rule, there was a critical difference between a civil suit brought by a foreign sovereign and criminal actions, where the executive branch of the United States government brought the case. When the United States prosecuted a criminal action, the United States Attorney acted in the interest of the United States and his or her conduct was subject to the oversight of the executive branch. Thus, the foreign relations interests of the United States could be accommodated throughout the litigation. In contrast, a civil RICO case brought to recover tax revenues by a foreign sovereign to further its own interests could be, but was not necessarily, consistent with the policies and interests of the United States.
- 9.22** Canada argued that the Revenue Rule was not relevant because it brought its action under a United States statute – civil RICO – rather than under Canadian tax law. The Court stated⁸⁶⁸ that because it found that the Revenue Rule was a doctrine with continuing force, Canada could not succeed unless it could show that RICO barred the application of the Revenue Rule. The Court further stated⁸⁶⁹ that notwithstanding Canada's assertion that Congress was not aware of the broad scope of the Revenue Rule at the time of RICO's enactment, it was clear that the Revenue Rule was well established by that date. Numerous decisions had professed the vitality of the Rule in the years leading up to the enactment of RICO including; *Carl Zeiss Stiftung v. V.E.B. Carl Jena*⁸⁷⁰ (recognising

⁸⁶⁶ 268 F.3d 103, at 115.

⁸⁶⁷ 268 F.3d 103, at 123.

⁸⁶⁸ 268 F.3d 103, at 126.

⁸⁶⁹ 268 F.3d 103, at 126 to 127.

⁸⁷⁰ (1968) 293 F. Supp. 892, at 913 (S.D.N.Y.)

the Revenue Rule); *Newcomb v. Commissioner of Internal Revenue*⁸⁷¹ (“It is generally recognized that courts as a matter of policy decline to enforce the penal or revenue laws of a foreign jurisdiction.”); *De Sayve v. De La Valdene*⁸⁷² (referring to “the rule that the courts of one State do not enforce the revenue laws of another”); *Cermak v. Bata Akciova Spolecnost*⁸⁷³ (same); *Bowles v. Barde Steel Co.*⁸⁷⁴ (“It is held that ordinarily a state court will not enforce the revenue laws of another ... country.”).

- 9.23** The Court was of the view⁸⁷⁵ that Canada had not shown that RICO barred the application of the Revenue Rule. The language and structure of RICO and its legislative history offered no hint that Congress intended the statute to afford a civil remedy to foreign nations for the evasion of foreign taxes. Moreover, there was no language in RICO or in its legislative history that demonstrated any intent by Congress to abrogate the Revenue Rule.
- 9.24** Canada further argued that nothing in the Revenue Rule prohibited a foreign nation from bringing a suit in the United States to enforce rights established under United States law. This was not an attempt by Canada to assert its sovereignty extraterritorially, it was not a claim to enforce Canadian tax law or any other Canadian law. The Court stated⁸⁷⁶ that what mattered was not the *form* of the action but the *substance* of the claim. The Court took the view⁸⁷⁷ that Canada was seeking to use United States law to enforce its tax laws, directly and indirectly.
- 9.25** As to direct enforcement, Canada had alleged that the defendants had evaded the payment of customs and excise tax and duty owed directly to it. This evasion was a direct cause of lost revenue to Canada. The defendant’s conduct had forced Canada to roll back tobacco taxes in 1994, resulting in lost revenue into the future. In essence, Canada would have a United States court require the defendants to reimburse Canada for its unpaid

⁸⁷¹ (1955) 23 T.C. 954, at 960 (U.S. Tax Court).

⁸⁷² (1953) 124 N.Y.S.2d 143, at 153 (N.Y. Sup. Ct.).

⁸⁷³ (1948) 80 N.Y.S.2d 782, at 785 (N.Y. Sup. Ct.).

⁸⁷⁴ (1945) 177 Or. 421, at 441, 164 P.2d 692.

⁸⁷⁵ 268 F.3d 103, at 129.

⁸⁷⁶ 268 F.3d 103, at 130.

⁸⁷⁷ 268 F.3d 103, at 131.

taxes, plus pay a significant penalty due to RICO's treble damages provision. Thus, Canada's object was clearly to recover allegedly unpaid taxes.

- 9.26** The Court also stated that Canada's claim for damages based on law enforcement costs was in essence an indirect attempt to have a United States court enforce Canadian revenue laws, an exercise barred by the Revenue Rule. The Court went on to hold⁸⁷⁸ that additional considerations reinforced its determination that Canada's claim for law enforcement costs must be dismissed. To proceed with the law enforcement costs claim, the Court would have to examine the tax laws at issue in order to assess the causation aspect of the claim which inquiries could draw the courts into troubled waters.
- 9.27** Canada asserted that the Revenue Rule might prohibit the enforcement of Canadian tax laws but not their recognition to calculate damages. The Court observed that Canada's argument was not assisted insofar as reliance was placed on criminal cases because such cases did not raise the same issues as those arising in this civil suit.
- 9.28** Canada also referred to *In re Norway's Application (Nos. 1 & 2)*,⁸⁷⁹ and *Regazzoni v. K.C. Sethia (1944) Ltd.*,⁸⁸⁰ arguing that, in both of these cases there was recognition, but not enforcement, of foreign revenue laws. However,⁸⁸¹ in neither case was the English court called upon to allow damages that would serve as a substitute for previously unpaid taxes. Further, in *Sethia* a foreign sovereign did not come to the United Kingdom for relief, rather, private parties sought the court's assistance to resolve a commercial dispute.

The Dissent

- 9.29** Calabresi J. held⁸⁸² that the Revenue Rule had nothing to do with the case. The suit before the Court in no way required the Court to enforce foreign judgments or claims; it was simply an action for damages provided for, and brought under, federal law. The Canadian tax laws came into play only indirectly, as a factor to be used in the calculation

⁸⁷⁸ 268 F.3d 103, at 133.

⁸⁷⁹ [1990] 1 A.C. 723. See **Chapter 10**.

⁸⁸⁰ [1958] A.C. 301. See **Chapter 5**.

⁸⁸¹ 268 F.3d 103, at 134.

⁸⁸² 268 F.3d 103, at 136.

of damages and did so entirely because the RICO statute itself made the Canadian laws relevant to that calculation. Canada, in suing for damages resulting from the violation of a United States statute, neither was seeking to have non-Canadian courts enforce Canadian judgments, laws or policies, nor was basing the action on the violation of the Canadian statute.

- 9.30** Calabresi J. noted⁸⁸³ that the majority cited *three major bases* for the Revenue Rule. The *first argument* had to do with a reluctance to permit, much less promote, extraterritorial effect of foreign laws. This concern for extraterritoriality had no meaning whatever when what was enforced by imposing damages or penalties was, in fact, a domestic law. The Court had no obligation to further Canada's sovereign interests but it did have an obligation to further America's sovereign interests. It was bound to entertain suits brought under federal statutes and to award the damages that such statutes established. The government had determined that this suit advanced United States interests and any collateral effect, such as furthering the interests of a foreign sovereign, was therefore necessarily incidental.
- 9.31** Calabresi J. noted⁸⁸⁴ that the majority's *second argument* supporting the rule related to separation of powers, foreign policy and court competency concerns. It suggested that enforcement of particular foreign laws by American courts might not reflect United States policy. However, this concern was misplaced whenever the legislative and executive branches had created the cause of action; the courts could not be said to be formulating foreign policy, they were simply implementing the policy established by the other branches.
- 9.32** Calabresi J. found⁸⁸⁵ the *third argument*, which was based on the alleged difficulty involved in figuring out the meaning and significance of foreign tax laws to be unpersuasive.

⁸⁸³ 268 F.3d 103, at 135.

⁸⁸⁴ 268 F.3d 103, at 136 to 137.

⁸⁸⁵ 268 F.3d 103, at 137 to 138.

9.33 Farnam⁸⁸⁶ challenges the assertion that RICO claims are just indirect tax claims, noting,⁸⁸⁷ *inter alia*, that both the basis for liability and the rule of decision for Canada’s claim is U.S. federal statutory law. Farnam further asserts⁸⁸⁸ that the policy behind RICO is the relevant foreign policy for the purposes of determining whether a separation of powers problem exists within a RICO claim; because RICO established Canada’s cause of action the court would not be forced to formulate foreign policy, adjudicating the claim would implement the policy established by Congress. Farnam argues that the dismissal of the case by the Court actually frustrates Congress’ chosen policy.

Eleventh Circuit – Civil Proceedings – Philip Morris

9.34 The concept of functional enforcement has also found favour in the Eleventh Circuit. In *Republic of Honduras v. Philip Morris Companies, Inc.*⁸⁸⁹ the Court of Appeals, Eleventh Circuit, considered whether the Revenue Rule prevented a foreign sovereign from bringing suit in a federal court for violations of RICO involving schemes to avoid the sovereign’s tax laws.

9.35 The Republics of Belize, Honduras and Ecuador (“The Republics”) brought RICO, state and common law claims against the appellees (“Big Tobacco”). All the Republics taxed tobacco products as a means of regulating smoking and for providing funds for anti-smoking activities and they alleged that Big Tobacco engaged in various illegal schemes to avoid paying those taxes.

9.36 After noting⁸⁹⁰ that the Eleventh Circuit had not previously considered or adopted the Revenue Rule, the Court recognised its continuing vitality, adopted it as a rule of the Circuit and applied it to the facts of the case. The Court stated that it was the *substance* of the claim, not the *form*, which was important under the Revenue Rule; if it were otherwise litigants could freely avoid the impact of the Revenue Rule by bringing tax

⁸⁸⁶ Farnam, *Racketeering, RICO and the Revenue Rule in Attorney General of Canada v. R.J. Reynolds: Civil RICO Claims for Foreign Tax Law Violations*, 77 Washington Law Review, 843, at 866 to 875, (2002).

⁸⁸⁷ *Ibid*, at 870.

⁸⁸⁸ *Ibid*, at 868 to 869.

⁸⁸⁹ 341 F.3d 1253 (2003, 11th Cir.).

⁸⁹⁰ F.3d 1253, at 1256.

claims under the guise of non-tax related causes of action. This was, in the view of the Court, precisely what the Republics were attempting to do in this case.

- 9.37** The Court observed⁸⁹¹ that the Republics' claims fundamentally dealt with the adjudication of foreign tax claims. Although they had framed their claims as civil RICO violations, their complaints made clear that Big Tobacco's schemes to avoid their tax laws was at the heart of all their claims. Taking the Republics' allegations as true, all of their claims of wire fraud, mail fraud and money laundering involved schemes to avoid paying taxes and seeking to collect those unpaid taxes. The Revenue Rule applied whether the Republics sought to address these alleged violations through civil RICO or direct tax claims. Furthermore, the Rule applied regardless of whether the Republics framed their damages as the direct loss of tax revenue or the indirect effects of such lost revenue, such as increased law enforcement costs or increased costs of combating smoking.
- 9.38** The Court stated that the Revenue Rule existed to prevent the courts of a sovereign nation from enforcing policy choices of a foreign sovereign that might run counter to its own. This justification for the Rule was compelling. Because the tax laws underlying the Republics' RICO claims embodied specific policy choices the Rule applied to these claims and prevented the Court from considering them.
- 9.39** The Court stated⁸⁹² that, if it were to provide them with the relief that they sought, it would be allowing them to assert their sovereign political will, as embodied in their tax laws, in the United States. This was precisely what the Revenue Rule existed to prevent. However, the respect for sovereignty justification was not absolute because the legislative and executive branches had the power, under the Constitution, to allow foreign sovereigns to enforce their policies in the United States.
- 9.40** Although the Revenue Rule had developed as a prudential common law doctrine, the Court recognised that it had taken on constitutional significance based upon the

⁸⁹¹ F.3d 1253, at 1257.

⁸⁹² F.3d 1253, at 1258.

separation of powers in the Constitution. The Court noted⁸⁹³ that the political branches had expressed a continuing policy preference against enforcing foreign tax laws. Until such time as the political branches took action in favour of allowing extraterritorial enforcement of unadjudicated foreign tax claims in domestic courts, the Court lacked constitutional authority to consider such claims.

- 9.41** The Court held that the Republics had not demonstrated, nor had the Court discovered, any evidence of a statutory purpose in RICO that would exempt actions brought under it from the strictures of the Revenue Rule and concluded⁸⁹⁴ that the mere fact that RICO was written in broad terms did not, standing alone, pre-empt the application of the Revenue Rule to the Republics' RICO claims.

The Supreme Court – Criminal Proceedings – Pasquantino

- 9.42** In *Pasquantino v. United States*,⁸⁹⁵ in a five to four decision, the United States Supreme Court noted⁸⁹⁶ that at common law the Revenue Rule generally barred courts from enforcing the tax laws of foreign sovereigns. The question arising in the in this case was whether a plot to defraud a foreign government of tax revenue violated the federal wire fraud statute.⁸⁹⁷ Because the plain terms of the statute criminalised such a scheme and because this construction of the wire fraud statute did not derogate from the common law revenue rule, the Supreme Court held that it did.

- 9.43** The petitioners were indicted and convicted of federal wire fraud for carrying out a scheme to smuggle large quantities of liquor into Canada from the United States. Uncontested evidence at trial showed that Canadian taxes then due on alcohol purchased in the United States and thereafter transported to Canada were approximately the liquor's purchase price.

⁸⁹³ F.3d 1253, at 1259.

⁸⁹⁴ F.3d 1253, at 1260.

⁸⁹⁵ 544 U.S. 349, 125 S.Ct. 1766 (2004). Thomas, J. delivered the opinion of the Court, in which Rehnquist, C.J. and Stevens, O'Connor, and Kennedy, JJ., joined. Ginsburg, J. filed a dissenting opinion in which Breyer, J., joined, and in which Scalia and Souter, JJ., joined in part.

⁸⁹⁶ 544 U.S. 349, at 352 to 353.

⁸⁹⁷ 18 U.S.C. § 1343 (2000 ed. Supp. II).

9.44 The Supreme Court granted *certiorari* to resolve a conflict in the Court of Appeals over whether a scheme to defraud a foreign government of tax revenue violated the wire fraud statute. Referring to the divergent opinions in *United States v. Boots*⁸⁹⁸ and *United States v. Trapilo*,⁸⁹⁹ the Supreme Court held⁹⁰⁰ that it did and affirmed the decision of the Court of Appeals.

The Majority View

9.45 The Supreme Court stated⁹⁰¹ that it expressed no view on the related question of whether a foreign government, based on wire or mail fraud predicate offences, could bring a civil action under RICO for a scheme to defraud it of taxes.

9.46 The petitioners argued that to avoid reading § 1343 of the wire fraud statute so as to derogate from the common law revenue rule, the Court should construe the otherwise applicable language of the statute to exempt frauds directed at evading foreign taxes, relying on the canon of construction that statutes which invaded the common law were to be read with a presumption favouring the retention of long established and familiar principles except when a statutory purpose to the contrary was evident. The Supreme Court noted⁹⁰² however, that this presumption was no bar to a construction that conflicted with a common law rule if the statute spoke directly to the question addressed by the common law.

9.47 The Supreme Court stated⁹⁰³ that before it could conclude that Congress intended to exempt the prosecution in this case from the broad reach of the wire fraud statute, it must find that the common law Revenue Rule clearly barred such a prosecution. The Court held that the wire fraud statute derogated from no well-established Revenue Rule principle, it was aware of no common law Revenue Rule case, decided as of 1952, that held, or clearly implied, that the Rule barred the United States from prosecuting a

⁸⁹⁸ 80 F.3d 580 (1st Cir. 1996).

⁸⁹⁹ 130 F.3d 547 (2d. Cir. 1997).

⁹⁰⁰ 544 U.S. 349, at 355.

⁹⁰¹ 544 U.S. 349, at 355, fn. 1.

⁹⁰² 544 U.S. 349, at 359.

⁹⁰³ 544 U.S. 349, at 360.

fraudulent scheme to evade foreign taxes. The traditional rationales for the Rule, moreover, did not plainly suggest that it swept so broadly.

- 9.48** The Supreme Court observed⁹⁰⁴ that the prosecution at issue in this case was unlike the classic examples of actions traditionally barred by the Revenue Rule. It was not a suit that recovered a foreign tax liability, such as a suit to enforce a judgment. It was a criminal prosecution brought by the United States, in its sovereign capacity, to punish domestic criminal conduct.
- 9.49** The petitioners drew an analogy between these proceedings and several cases that had applied the Revenue Rule to bar the indirect enforcement of foreign revenue laws, in contrast to the direct collection of a tax obligation. The Court noted⁹⁰⁵ however, that many of the cases relied on by the petitioners were decided after 1952, too late for the Congress that passed the wire fraud statute to have relied on them, whilst others came from foreign courts. Drawing sure inferences regarding the intent of Congress from such foreign citations was perilous given that a number of them turned on particular features of their legal systems.
- 9.50** The Supreme Court stated⁹⁰⁶ that, more importantly, none of the cases relied on by the petitioners clearly established that the Revenue Rule barred prosecution in this case. None involved a domestic sovereign acting pursuant to authority conferred by a criminal statute. This difference was significant. An action by a domestic sovereign enforced the sovereign's own penal law. A prohibition on the enforcement of *foreign* penal law did not plainly prevent the Government from enforcing a *domestic* criminal law. Such an extension was unprecedented in the long history of either the Revenue Rule or the rule against enforcement of penal laws.
- 9.51** The Supreme Court went on to state that this case was not one in which the whole object of the suit was to collect tax for a foreign revenue which meant that the link between this prosecution and foreign tax collection was incidental and attenuated at best. The Court

⁹⁰⁴ 544 U.S. 349, at 362.

⁹⁰⁵ 544 U.S. 349, at 363.

⁹⁰⁶ 544 U.S. 349, at 364.

noted⁹⁰⁷ that even those courts, that as of 1952, had extended the Revenue Rule beyond its core prohibition, had not faced a case closely analogous to the case before the Court and, thus, the Court could not say, with any reasonable certainty, whether Congress in 1952, would have considered the prosecution at issue in this case within the Rule.

9.52 The petitioners answered that recovery of taxes was indeed the object of the suit because restitution of lost revenue to Canada was required under the Mandatory Victims Restitution Act of 1996.⁹⁰⁸ The Court held however, that it did not matter whether the provision of restitution was mandatory in this prosecution. The wire fraud statute advanced the Federal Government’s independent interest in punishing domestic criminal conduct, a significant feature absent from all the petitioners’ Revenue Rule cases. The purpose of awarding restitution in this action was not to collect a foreign tax but to mete out appropriate criminal punishment.

9.53 The petitioners sought to rely on the early English cases as demonstrating that indirect enforcement of revenue laws was at the very core of the common law Revenue Rule rather than at its margins. The Supreme Court noted⁹⁰⁹ that these cases had little to say about whether the wire fraud statute derogated from the Revenue Rule in its mid-20th century form.

9.54 The Supreme Court acknowledged that the criminal prosecution in this case “enforced” Canadian revenue law in an attenuated sense, but not in a sense that would contravene the Revenue Rule. From its earliest days the Rule never proscribed all enforcement of foreign revenue law. The Supreme Court noted⁹¹⁰ that at the same time that they were enforcing domestic contracts that had the purpose of violating foreign revenue law, the English courts also considered void foreign contracts that lacked the tax stamps required under foreign revenue law.⁹¹¹ The Court stated that the line the Rule draws between impermissible and permissible “enforcement” of foreign revenue law had therefore always been unclear.

⁹⁰⁷ 544 U.S. 349, at 364 to 365.

⁹⁰⁸ 18 U.S.C. §§ 3663A-3664 (2000 ed. and Supp. II).

⁹⁰⁹ 544 U.S. 349, at 366.

⁹¹⁰ 544 U.S. 349, at 366 to 367.

⁹¹¹ *Alves v. Hodgson* 7 Term Rep. 241 and *Clegg v. Levy* (1812) 3 Camp. N.P. 166.

- 9.55** The Supreme Court concluded⁹¹² that the extent to which the Revenue Rule barred indirect recognition of foreign revenue laws was unsettled as of 1952. The Supreme Court was also of the view that the purposes of the Rule, as articulated in the relevant authorities, did not suggest differently.
- 9.56** The prosecution at issue in this case created little risk of causing international friction through judicial evaluation of the policies of foreign sovereigns as it was brought by the Executive and the Court could assume that the Executive had assessed its impact on the United States' relationship with Canada and concluded that it posed little danger of causing international friction.
- 9.57** The Court held⁹¹³ that the prosecution in this case, if authorised by the wire fraud statute, embodied the policy choice of the two political branches of the United States Government to free the interstate wires from fraudulent use, irrespective of the object of the fraud. Such a reading gave effect to that considered policy choice and therefore posed no risk of advancing the policies of Canada illegitimately.
- 9.58** Finally, the petitioners argued that the courts lacked the competence to examine the validity of unfamiliar foreign tax schemes. The Supreme Court held that foreign law posed no unmanageable complexity in this case.
- 9.59** The Court concluded⁹¹⁴ by stating that its interpretation of the wire fraud statute did not give it extraterritorial effect. The petitioners had used the U.S. interstate wires to defraud a foreign sovereign of tax revenue. Their offence was complete the moment they executed the scheme inside the United States.

⁹¹² 544 U.S. 349, at 368.

⁹¹³ 544 U.S. 349, at 370.

⁹¹⁴ 544 U.S. 349, at 371.

The Dissent

- 9.60** Ginsburg J. stated⁹¹⁵ that in expansively interpreting the text of the wire fraud statute the Court had upheld the Government's deployment of § 1343 essentially to enforce foreign tax law. In construing the section to encompass violations of foreign revenue laws, the Court had ignored the absence of anything signalling an intent on the part of Congress to give the statute such an extraordinary extraterritorial effect. She further observed⁹¹⁶ that the presumption against extraterritoriality, which guided courts in the absence of congressional direction, provided ample cause to conclude that the section did not extend to the scheme in this case. Moreover, as to foreign customs and tax laws, there was scant room for doubt about Congress' general perspective: Congress had actively indicated through both domestic legislation and treaties that it intended to strictly limit the parameters of any assistance given to foreign nations.
- 9.61** *Firstly*, Congress had enacted a specific statute criminalising offences of the genre committed by the defendants in this case: 18 U.S.C. § 546 prohibited transporting goods into the territory of any foreign government in violation of the laws there in force. § 546's application, however, was expressly conditioned on the foreign government's enactment of reciprocal legislation prohibiting smuggling into the United States. Significantly, Canada had no statute criminalising smuggling into the United States, rendering § 546 inapplicable to schemes resembling the one at issue in this case.
- 9.62** *Secondly*,⁹¹⁷ the United States and Canada had negotiated, and the Senate had ratified, a comprehensive tax treaty, in which both nations had committed to providing collection assistance with respect to each other's tax claims. Significantly, neither nation was called upon to interpret or calculate liability under the other's tax statutes; it applied only to tax claims that had been fully and finally adjudicated under the law of the requesting nation. Further, assistance was barred in collecting any claim against a citizen or corporation of the requested state. These provisions would preclude Canada from obtaining United States assistance in enforcing its claims against the petitioners. Ginsburg J. stated that she would not assume that Congress understood § 1343 to provide that which the United

⁹¹⁵ 544 U.S. 349, at 377 to 378.

⁹¹⁶ 544 U.S. 349, at 379 to 380.

⁹¹⁷ 544 U.S. 349, at 381.

States, in the considered foreign policy judgment of both political branches, had specifically declined to promise.

9.63 Ginsburg J. noted that complementing the principle that courts ordinarily should await congressional instruction before giving United States laws extraterritorial effect, the common law Revenue Rule held that one nation generally did not enforce another's tax laws. The Government had argued, and the Court had accepted, that domestic wire fraud prosecutions premised on violations of foreign tax law did not implicate the Revenue Rule because the court, whilst it must recognise foreign revenue law to determine whether the defendant violated U.S. law, need only "enforce" foreign revenue law in an attenuated sense. However, Ginsburg J. stated,⁹¹⁸ the defendants' conduct arguably fell within the scope of § 1343 only because of their purpose to evade Canadian customs and tax laws; shorn of that purpose, no other aspect of their conduct was criminal in the United States. Ginsburg J. stated that it seemed unavoidably obvious that the prosecution in this case directly implicated the revenue rule and that it was equally plain that Congress did not endeavour, by enacting § 1343, to displace that rule.

9.64 Ginsburg J. went on to state that the application of the Mandatory Victims Restitution Act to wire fraud offences was an additional indicator that Congress did not envision foreign taxes to be the object of a scheme to defraud as, in that legislation, Congress had expressed, with notable clarity, a policy of mandatory restitution in *all* wire fraud prosecutions, whereas it had been quite ambiguous concerning § 1343's coverage of schemes to evade foreign taxes.

Commentary

9.65 Whilst the majority expressed no view in relation to the question of whether a foreign sovereign could bring a civil action under RICO for a scheme to defraud it of taxes, their position in relation to criminal proceedings under RICO is clear.

⁹¹⁸ 544 U.S. 349, at 381 to 383.

- 9.66** The approach of the majority in allowing the prosecution because the terms of the scheme at issue violated the wire fraud statute finds an echo in the views of Briggs,⁹¹⁹ who suggests that it may be more instructive to reformulate the prohibition on an English court enforcing a foreign penal or revenue law as providing that penal and revenue claims are governed by the *lex fori*: if the claim is a penal or revenue one, it must be founded on the domestic law of the court in which it is brought. Accordingly, liability for a crime may be enforceable under the English law of extradition, or under those rare English laws which criminalize conduct taking place overseas, or under those even rarer English laws which give effect in England to the criminal laws of another state.
- 9.67** *Prima facie*, this is an attractive proposition; however, on closer inspection it lacks explanatory power. In particular, whilst Briggs,⁹²⁰ in support of the proposition, cites a series of authorities⁹²¹ where the Court was directed by its choice of law rules to apply foreign law, then disallowed the claim on the basis that to do so would involve applying foreign *revenue* law, he acknowledges that in *United States v. Harden*,⁹²² where the US authorities had obtained a judgment for taxes against the defendant, that although, technically at least, the *lex causae* was the law of the forum, the Revenue Rule was still invoked.
- 9.68** Two key features lie at the heart of the dissent of Ginsburg J. Her contention that to allow the Government's case to succeed would; *firstly*, amount to the extra-territorial application of the wire fraud statute, and; *secondly*, constitute the enforcement of foreign tax law. As to the first issue, her objections seem unconvincing in light of the views expressed by the majority. However, even if her view were convincing, extra-territorial application would not, of itself, necessarily constitute a bar to the court finding in favour of the Government. As to the second issue, it is suggested that her grounds illustrate the difficulties inherent in the supposed *recognition/enforcement* dichotomy. The issue is not whether foreign revenue laws ought to be enforced – that point was conceded long

⁹¹⁹ Briggs, *The Conflict of Laws*, p. 47, (2nd ed.), Oxford University Press, (2008).

⁹²⁰ Briggs, *The Revenue Rule in the Conflict of Laws: Time for a Makeover*, (2001) Singapore Journal of Legal Studies, 280, at 287 *et seq.*

⁹²¹ Including *Municipal Council of Sydney v. Bull* [1909] 1 K.B. 7, *In re Visser*, *Queen of Holland v. Drucker* [1928] Ch. 877, *Buchanan v. McVey* [1954] I.R. 89, *Government of India v. Taylor* [1955] A.C. 491, and *QRS I ApS v. Fransden* [1999] 1 W.L.R. 2169.

⁹²² [1963] SCR 366. Discussed in **Chapter 5, paragraph 5.137, et seq.**

ago in the cases involving contracts by deed⁹²³ – but *who* is seeking such enforcement, if the answer is a foreign state, directly or indirectly, then the Revenue Rule, in its modern form, comes into operation. In rejecting the Government’s case it is arguable that Ginsburg J., was not only seeking, in effect, to usurp a decision of the executive and thus, to the extent that she justified her position by reference to international relations issues, playing diplomat from the bench,⁹²⁴ but was also disregarding the will of the legislature.

Second Circuit – Civil Proceedings post Pasquantino – RJR Nabisco

9.69 *European Community v. RJR Nabisco Inc.*⁹²⁵ came before the United States Court of Appeals, Second Circuit, following a remand by the United States Supreme Court. The Supreme Court vacated the Court of Appeals earlier decision⁹²⁶ and remanded for reconsideration in light of its decision in *Pasquantino*.⁹²⁷ Having considered the Supreme Court’s decision and the parties’ briefs, the Court of Appeals reinstated its original decision.

9.70 The plaintiff-appellants were the European Community, various of its member states as well as certain departments of the nation of Columbia. The appeal arose from three actions that were treated as related. The plaintiffs made substantially similar allegations, sought the same damages and relied on the same legal theories in their three complaints. They claimed that the defendants had participated in a smuggling enterprise within the meaning of RICO and committed various predicate acts of racketeering, including mail and wire fraud and money laundering. The plaintiffs had all sought to recover treble damages, pursuant to RICO, for duties and taxes not paid on the cigarettes. They had further sought to recover funds, which they had been required to expend to fight against cigarette smuggling.

⁹²³ See **Chapter 5, paragraph 5.39, et seq.**

⁹²⁴ In the words of the Court below - *Pasquantino v. United States* 336 F.3d 321, at 331 (4th Cir. 2003) cited by West, *Federal Fraud Prosecutions of Schemes to Defraud Foreign Sovereigns of Import Taxes*, 50 Wayne Law Review 1061, at 1071 (2004).

⁹²⁵ 424 F.3d 175 (2d. Cir. 2005).

⁹²⁶ 355 F.3d 123 (2d. Cir. 2004).

⁹²⁷ 544 U.S. 349, 125 S.Ct. 1766 (2004).

- 9.71** The Court noted⁹²⁸ that, in contrast to *Pasquantino*, the civil lawsuit in this case was brought by foreign governments, not by the United States. Further, the executive branch had given the Court no signal that it consented to this litigation (its failure to intervene in opposition to suit did not constitute an affirmative expression of consent). The Court stated that the factors that had led the Supreme Court to hold the Revenue Rule inapplicable to § 1343 smuggling operations were missing in this case.
- 9.72** The plaintiffs had argued that *Pasquantino* adopted a narrow version of the Revenue Rule, under which only suits whose “*whole object*” was the collection of foreign tax revenue were barred. The Court noted⁹²⁹ that the Supreme Court had also used the phrases “*main object*” and “*primary object*” implying that a suit that had secondary objects irrelevant to revenue collection might still be barred by the rule. In any event, the “*whole object*” of the suit before this court was to collect tax revenue and the costs associated with its collection. Accordingly, under any of the available formulations of the revenue rule the plaintiffs’ claims were barred.
- 9.73** The plaintiffs also argued that their suit sought to vindicate an interest of the United States government in the enforcement of its own laws rather than a foreign revenue interest. However, the Court held⁹³⁰ that what mattered was the *substance* of the claim, not the *form*, and in this case the substance of the claim was that the defendants had violated foreign tax laws.
- 9.74** In *Pasquantino* the concern that the judiciary risked being drawn into issues and disputes of foreign relations policy was alleviated by the direct participation of the political branches in the litigation. In *Nabisco*, however, there was no such assurance and the Court of Appeals saw no reason to disturb its conclusion that the Revenue Rule barred civil RICO suits by foreign governments against smugglers. The Court concluded that *Pasquantino* cast no doubt on the reasoning of the Court of Appeal in its original decision or on the result in the earlier case.

⁹²⁸ 424 F.3d 175, at 181.

⁹²⁹ 424 F.3d 175, at 181 to 182.

⁹³⁰ 424 F.3d 175, at 182.

9.75 The decision has been criticised by Rearden,⁹³¹ who states that the Second Circuit adopted an unnecessarily expansionist reading of the Revenue Rule. Whilst neither political branch expressly consented to the plaintiffs' claim, both branches had signaled their implied consent to civil RICO claims asserted by foreign governments against cigarette makers. In addition, the executive branch's consent should be presumed because the plaintiffs' claim would have furthered the international law enforcement policy of eradicating organized crime and terrorism. He further⁹³² argues that the Court ought to have characterized the plaintiffs' claim as the direct enforcement of a domestic statute that merely recognized foreign tax law.

New York – Civil Proceedings – Acts Jure Gestionis – Diageo

9.76 *Republic of Columbia v. Diageo North America Inc.*⁹³³ is a significant case in that it limits the scope of application of the doctrine of functional enforcement by making a distinction between proceedings in which a government claims damages in its sovereign capacity and proceedings in which it seeks damages suffered as a commercial actor.

9.77 The plaintiffs were various Columbian national and regional government agencies. The plaintiff departments of the Republic of Columbia possessed a constitutional monopoly on the domestic manufacture and sale of liquor products. The defendants manufactured, distilled and/or distributed liquor and other alcoholic beverages on an international scale. It was alleged that the defendants were members of a RICO enterprise composed, *inter alia*, of illegal narcotics traffickers, for the purpose of laundering the proceeds of illegal narcotics sales and illegally smuggling liquor into Columbia. Columbian taxes were also evaded as part of the scheme. The defendants moved to dismiss on a number of grounds, including the Revenue Rule.

⁹³¹ Rearden, "A Delicate Inquiry": *Foreign Policy Concerns Revive the Revenue Rule in the Second Circuit and Bar Foreign Governments from Suing Big Tobacco*, 51 Saint Louis University Law Journal, 203, at 228 (2006-2007).

⁹³² Rearden, "A Delicate Inquiry": *Foreign Policy Concerns Revive the Revenue Rule in the Second Circuit and Bar Foreign Governments from Suing Big Tobacco*, 51 Saint Louis University Law Journal, 203, at 232 (2006-2007).

⁹³³ 531 F.Supp.2d 365 (United States District Court, E.D. New York) (2007). The plaintiffs' claims were subsequently dismissed with prejudice, see *Republic of Columbia v. Diageo North America Inc.* 2011 WL 4828814 (E.D.N.Y.). In the subsequent proceedings the Court held, at fn. 1, that the only reason why the withdrawing plaintiffs' claims were not dismissed in the earlier proceedings was that there were arguably questions of fact about what types of claims – commercial or sovereign – the withdrawing plaintiffs possessed. In the later proceedings the withdrawing plaintiffs conceded that they had no viable claims.

Direct Enforcement

- 9.78** The United States District Court, Eastern District Court of New York, held,⁹³⁴ in relation to direct enforcement, that the plaintiffs' claims for lost revenues and profits sought redress for a harm that the plaintiffs allegedly suffered in a commercial as opposed to a sovereign capacity and, as a result, did not constitute the kind of direct enforcement of foreign revenue laws which fell foul of the Revenue Rule.
- 9.79** The Court⁹³⁵ held that tax laws were problematic because, in and of themselves, they embodied policy choices that were infused with moral and political judgments. The Revenue Rule was not triggered by every foreign law that caused a foreign sovereign to generate revenue; rather, it was targeted to those revenue-generating statutes that involved moral and political judgments. A sovereign's commercial activities did not involve the kind of moral and political judgments that tax or revenue laws typically involved; to read the Rule as prohibiting sovereigns from bringing damages claims irrespective of the nature of such claims would mean that a private plaintiff could sue a foreign sovereign in the United States courts for claims arising out of commercial activity but the foreign sovereign could not bring a counterclaim arising out of the same course of conduct. Such an outcome, the Court concluded, would be manifestly unjust.
- 9.80** Although the regulation of liquor distribution and sale was clearly a sovereign act, a sovereign's participation in a liquor manufacturing and distribution market was a purely commercial act and not within the class of acts that were *jure imperii*. Further,⁹³⁶ the fact that Columbian law appeared to provide that the plaintiffs' profits from the liquor business were to be used for the health and welfare of Columbian citizens in no way changed this conclusion. How the profits of a business were used was irrelevant in determining whether the act was an inherently sovereign act or an inherently commercial act.

⁹³⁴ 531 F.Supp.2d 365, at 392, (United States District Court, E.D. New York) (2007).

⁹³⁵ 531 F.Supp.2d 365, at 385 to 386, (United States District Court, E.D. New York) (2007).

⁹³⁶ 531 F.Supp.2d 365, at 392 to 393, (United States District Court, E.D. New York) (2007).

9.81 The Court also addressed⁹³⁷ the concern that under its reading of the Revenue Rule foreign sovereigns might be able to avoid the Rule by creating a state owned monopoly that sold a good or service as opposed to taxing it. This problem was more theoretical than real. The political and public policy issues surrounding a sovereign's decision as to whether to tax a good or service or simply create a state owned monopoly were typically of far greater importance than whether a foreign sovereign could bring claims related to that good or service in United States federal courts. It was the court opined, very hard to imagine a scenario in which a sovereign would create a state owned monopoly for the exclusive purpose of bringing an action concerning that business in federal court. Accordingly, an action seeking to recover lost revenues and profits suffered by the plaintiffs in their commercial capacity as participants in the liquor manufacture and distribution business did not seek the kind of direct enforcement of a foreign tax law that was prohibited by the Revenue Rule.

Indirect Enforcement

9.82 In relation to the question of indirect enforcement, the Court noted⁹³⁸ that the plaintiffs' claims for lost revenues arose from the fact that the defendants could charge lower prices because they benefited from both a tax evasion discount and a money laundering discount. Permitting a claim for that portion of the losses that arose from tax evasion would run contrary to the Revenue Rule, however the claim for losses arising from money laundering did not constitute an indirect claim for lost tax revenues.

9.83 The Court observed⁹³⁹ that, as the plaintiffs would only be able to recover for lost sales resulting from the defendants' money laundering, they would have every incentive to show that the defendants engaged in little or no tax evasion and/or tax evasion had little or no effect on the plaintiffs' sales. As the nature of the action required the plaintiffs to attempt to disprove the existence and effects of the defendants' tax evasion, the argument that the plaintiffs were using this action to indirectly enforce Columbian tax laws failed.

⁹³⁷ 531 F.Supp.2d 365, at 393, fn. 6, (United States District Court, E.D. New York) (2007).

⁹³⁸ 531 F.Supp.2d 365, at 394, (United States District Court, E.D. New York) (2007).

⁹³⁹ 531 F.Supp.2d 365, at 398 to 399, (United States District Court, E.D. New York) (2007).

9.84 The Court also stated⁹⁴⁰ that it was important to note one apparent inconsistency between its analysis of the direct and indirect enforcement components of the Revenue Rule. With respect to direct enforcement, the court had concluded that revenues the Columbian government had earned from its liquor monopoly were earned by it in a commercial as opposed to a sovereign capacity. In effect, the Court had concluded that revenue generated by the monopoly law was not “revenue” within the meaning of the Revenue Rule. With respect to indirect enforcement, however, the Court treated the law that authorized the liquor monopoly as a “revenue” law for the purposes of the Revenue Rule; the Court’s analysis strongly suggested that, if the plaintiffs’ claims required it to pass on the validity of the monopoly law, that the Revenue Rule would be violated. Despite appearances there was no inconsistency. The application of the Revenue Rule must be based on the policy purposes underlying the Rule. There were no policy concerns with allowing the foreign sovereign to bring a claim for damages suffered in its commercial capacity. There were, however, policy concerns with a federal court’s passing judgment on the validity of a foreign law that authorised a state owned monopoly.

International Application of RICO – Bank of New York

9.85 Brownstein⁹⁴¹ discusses what appears to be the first RICO claim filed in a foreign court. In May 2007 Russia’s Federal Customs Service, in proceedings instituted in the Arbitrazh Court of the City of Moscow, (the proceedings were ultimately settled) sought to recover customs duties that it allegedly should have collected on \$7.5 billion that a Bank of New York employee, along with accomplices, transferred out of Russia during the 1990s. The Federal Customs Service also sought treble damages of \$22.5 billion under RICO’s civil component as damages for the massive capital flight caused by the illegal wire transfers.

9.86 Brownstein makes the interesting observation⁹⁴² that the United States Supreme Court, in *Shearson/American Express v. McMahon* held that a foreign arbitrator may apply civil RICO in a foreign arbitral tribunal. That being said the Moscow court is a commercial

⁹⁴⁰ 531 F.Supp.2d 365, at 394, fn. 7, (United States District Court, E.D. New York) (2007).

⁹⁴¹ Brownstein, *Recognizing Civil RICO in Foreign Courts: Since They Came Should We Build It?* 35 Brooklyn Journal of International Law, 233, at 234 (2010).

⁹⁴² Brownstein, *Recognizing Civil RICO in Foreign Courts: Since They Came Should We Build It?* 35 Brooklyn Journal of International Law, 233, at 253 and fn. 152 (2010).

court not an arbitral tribunal.⁹⁴³ Further, notwithstanding Brownstein's view⁹⁴⁴ that the Revenue Rule should be re-evaluated, it seems most unlikely that a judgment given by a foreign court, in favour of a public plaintiff, pursuant to civil RICO proceedings, would be enforced by the United States courts.

- 9.87** Such a conclusion would appear to be consistent with Dodge's view⁹⁴⁵ that a private antitrust or securities suit for damages should lead a court to apply foreign law to the merits if it determines that such foreign law applies. Notwithstanding such a view however, Dodge would maintain the distinction between a private plaintiff and a public plaintiff (for example, a foreign government bringing a suit in its regulatory capacity) where, he argues, a lack of reciprocity should bar enforcement of public law.

The Trans-Atlantic Divide – When is a Tax Claim not a Tax Claim

- 9.88** An interesting contrast in approach is provided by the House of Lords in *Total Network SL v. Her Majesty's Revenue and Customs*,⁹⁴⁶ where one of the issues arising was whether the Commissioners could maintain a civil claim for damages, under the tort of unlawful means conspiracy,⁹⁴⁷ against a participant in VAT carousel fraud.⁹⁴⁸ A key difference between this case and the cases on functional enforcement is that, as proceedings had been commenced in the state whose taxes had not been paid, reliance was placed on the (non-tax) law of the UK rather than that of a foreign state. The House

⁹⁴³ Brownstein, *Recognizing Civil RICO in Foreign Courts: Since They Came Should We Build It?* 35 Brooklyn Journal of International Law, 233, at 257 (2010).

⁹⁴⁴ Brownstein, *Recognizing Civil RICO in Foreign Courts: Since They Came Should We Build It?* 35 Brooklyn Journal of International Law, 233, at 266 to 267 (2010).

⁹⁴⁵ Dodge, *The Public-Private Distinction in the Conflict of Laws*, 18 Duke Journal of Comparative and International Law 371, at 393 (2008).

⁹⁴⁶ [2008] UKHL 19.

⁹⁴⁷ Lord Walker holding, at paragraph 93, that “unlawful means, both in the intentional harm tort and in the tort of conspiracy, include both crimes and torts (whether or not they include conduct lower on the scale of blameworthiness) provided that they are indeed the means by which harm is intentionally inflicted on the claimant (rather than being merely incidental to it).”

⁹⁴⁸ A carousel fraud involves three VAT registered traders, selling goods subject to VAT, across Member State borders. A, who is outside the forum, sells goods to B who is within the forum. As the sale is between Member States it is zero rated. B sells the goods to C, who is within the forum. B charges the appropriate VAT on the sale to C. Thereafter, C sells the goods to A, the sale being zero rated as it is between Member States. C, having paid the VAT on the goods claims it as an input credit and obtains a refund from the revenue authorities of the forum. However, B disappears (the so-called missing trader) without accounting to the revenue authorities for the VAT that it has collected from C. It is the circularity of the transaction that gives rise to the description of the fraud as a carousel. The goods are no more than a token to give the transaction a semblance of reality. A has no genuine business motive in buying back what it has sold. In the case under discussion it was, in effect, alleged that Total was A.

of Lords held that, the Commissioners could maintain a cause of action in damages, at common law, as a means of recovering VAT from a person, Total, who had not been made accountable or otherwise liable for that tax by Parliament.⁹⁴⁹

- 9.89** By a majority, the House of Lords was satisfied that the claim was not for recovery of tax but for damages in tort.⁹⁵⁰ Lord Scott, in holding⁹⁵¹ that the claim was for damages, noted that, a tortious damages claim must bring into account benefits, as well as losses, that had accrued to the victim from wrongful conduct. In this case, the sum recoverable by the Commissioners, as damages, might well be less than the amount of VAT, in respect of which the missing trader should have accounted to the Revenue. There would be an assessment of the quantum of damages recoverable by the Commissioners, from Total, if the Commissioners succeeded in establishing the tort. This was not the levying of tax.
- 9.90** As the case involved the revenue authorities of the forum bringing proceedings in the forum, the Revenue Rule was not implicated and even if it had been, given that it involved VAT, European Union provisions on mutual assistance might well have come into play. That being said, the decision does appear to open up the possibility of a successful damages claim by a foreign revenue authority in the courts of the United Kingdom.
- 9.91** In Case C-49/12 *Revenue and Customs Commissioners v. Sunico ApS*,⁹⁵² a decision of the European Court of Justice, some of the facts were similar but a different legal question arose. Following an alleged carousel fraud, the UK Revenue and Customs Commissioners brought court proceedings in both the United Kingdom and in Denmark. The United Kingdom proceedings were initiated, before the Chancery Division of the High Court, against a number of natural and legal persons situated in Denmark, including

⁹⁴⁹ Total's argument being that the imposition of such liability was contrary, *inter alia*, to article 4 of the Bill of Rights 1688 which declares: "That levying money for or to the use of the Crown, by pretence of prerogative, without grant of Parliament for longer time, or in other manner than the same is or shall be granted, is illegal."

⁹⁵⁰ See paragraph 168 of Lord Neuberger's speech where he noted that the Commissioners accepted that Total was not liable for any VAT, indeed they went further and accepted that in order to succeed they had to establish that a claim in common law was made out. See also paragraphs 127 and 128 of Lord Mance's speech.

⁹⁵¹ See paragraph 59.

⁹⁵² [2014] Q.B. 391. European Court of Justice (Third Chamber).

Sunico. It was alleged that the defendants, who were not subject to VAT in the UK, had been the real beneficiaries of the fraud. Again, the Commissioners based their UK action on the tort of unlawful means conspiracy. The amount of damages claimed corresponded to the amount of VAT that ought to have been, but was not, paid in the UK.

- 9.92** Beforehand, the Danish tax authorities had, at the Commissioners' request, supplied the Commissioners with information, about non-residents who subsequently became the defendants in the UK proceedings. That information had been supplied on the basis of Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative co-operation in the field of value added tax.⁹⁵³
- 9.93** The day after the UK proceedings were initiated, the Commissioners brought proceedings, in Denmark, seeking attachment orders in respect of assets owned by Sunico and situated in Denmark, in order to secure payment of the Commissioners' claim for damages. It was the Danish proceedings that gave rise to the reference to the Court of Justice.
- 9.94** The question referred, which the Court of Justice answered in the affirmative, was whether the concept of "civil and commercial matters" within the meaning of article 1(1) of Regulation No 44/2001⁹⁵⁴ included an action whereby a public authority of one member state claimed, from natural and legal persons resident in another member state, damages in respect of loss caused by a conspiracy to commit VAT fraud in the first member state.⁹⁵⁵ The Court of Justice noted,⁹⁵⁶ that it followed, from settled case law of the Court, that the scope of the Regulation was defined essentially by the elements which characterised the nature of the legal relationships between the parties to the dispute or the subject matter thereof.

⁹⁵³ OJ L 264, 15.10.2003, p. 1, since replaced by Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combatting fraud in the field of value added tax (recast) OJ L268, 12.10.2010, p. 1.

⁹⁵⁴ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012, 16.01.2001, p. 1.

⁹⁵⁵ Article 1(1) defines the scope of the Regulation as follows: "*This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs, or administrative matters.*"

⁹⁵⁶ [2014] Q.B. 391, at pp. 409 to 410.

- 9.95** The Court also noted that the factual basis of the UK proceedings was the alleged fraudulent conduct of Sunico and the other defendants, who, it was alleged, had been the real beneficiaries of that fraud. So far as the legal basis of the Commissioners' claims was concerned, their action against Sunico was based not on United Kingdom VAT law, but on the tort law of that member state. It was clear that the defendants were not subject to VAT in the United Kingdom and not liable to pay VAT under the laws of that member state.
- 9.96** The Court held that the legal relationship between the Commissioners and Sunico was not one based on public law, they did not exercise any exceptional powers by comparison with the rules applicable to relationships between persons governed by private law. In particular, the Commissioners had to proceed through the normal legal channels such as in the Danish proceedings.
- 9.97** The Court further held that the fact that the amount of damages corresponded to the amount of VAT that had not been paid could not be taken as proof that the Commissioners' UK proceedings involved the exercise, by them, of public authority, since it was common ground that the legal relationship between the Commissioners and Sunico was governed by the tort law of that member state.
- 9.98** Finally, the Court of Justice stated that it was for the referring Court to ascertain whether the request for information, which the Commissioners had addressed to the Danish authorities, affected the nature of the legal relationship between the parties.

Conclusion

- 9.99** The differing outcomes, where functional enforcement is at issue, between cases involving criminal proceedings and those involving civil proceedings, is explicable by the fact that the objective of cases in the second category is to secure payment of damages in lieu of foreign taxes, an outcome inimical to the Revenue Rule.
- 9.100** The fact that the pursuit of criminal proceedings might result in the payment of restitution to a foreign state, a point of contention between the dissent and the majority

in *Pasquantino v. United States*,⁹⁵⁷ was held, by the majority, not to be sufficient to invoke the Revenue Rule. Such a conclusion is entirely consistent with *Buchanan v. McVey*⁹⁵⁸ where the Irish Supreme Court doubted the application of the Rule in circumstances where payment of a foreign revenue claim is only incidental. In *Pasquantino*, the US Supreme Court observed⁹⁵⁹ that, the action was not a suit to recover a foreign tax liability, it was a criminal prosecution brought to punish domestic criminal conduct.

9.101 The decision in *Total Network SL v. Her Majesty's Revenue and Customs*,⁹⁶⁰ although given in circumstances which did not involve the application of the Revenue Rule, appears to offer a hostage to fortune in that it would be difficult to see how the rejection of a similar tort claim, made by a foreign state in the UK, would be conceptually consistent with *Total*. Of course, were such proceedings to be instituted outside the forum, the question might not even arise, given the outcome in Case C-49/12 *Revenue and Customs Commissioners v. Sunico ApS*.⁹⁶¹ In conclusion, in terms of the approach to the questions raised by functional enforcement, there truly does appear to be a trans-Atlantic divide.

⁹⁵⁷ 544 U.S. 349, at 366 to 367.

⁹⁵⁸ [1954] I.R. 89, at 117.

⁹⁵⁹ 544 U.S. 349, at 362.

⁹⁶⁰ [2008] UKHL 19.

⁹⁶¹ [2014] Q.B. 391. European Court of Justice (Third Chamber).

Chapter 10 – Avoidance of the Revenue Rule

Introduction

- 10.1** The Revenue Rule has a broad reach when it comes to attempts by a foreign state to collect taxes in the courts of the forum, as evidenced by the extension of the prohibition on *direct* enforcement not only to *indirect* enforcement, but also to *functional* enforcement. This has given rise to a variety of attempts to circumvent the Revenue Rule. These attempts will be considered under three headings, *in personam*, *in rem*, and a proposed new category of *ad informandum*.⁹⁶²
- 10.2** It is invariably the case that tax evasion will give rise not only to civil liabilities but also to criminal penalties.⁹⁶³ Whilst the Revenue Rule has a wide ranging impact on attempts to impose civil liability, it is a strong feature of the jurisprudence relating to the Rule that different considerations (to be examined in this Chapter) come into play in the context of criminal proceedings.

In Personam

- 10.3** Given the difficulties attendant upon the enforcement of a tax claim, or a judgment in respect of such a claim, a foreign state may opt to apply for an order of extradition, in respect of a taxpayer who has relocated (along with his or her assets) to the jurisdiction of the forum.
- 10.4** A supposed difficulty with this approach, according to Leflar,⁹⁶⁴ is that although such a “*procedure is available in connection with the criminal law, the suggestion has never been seriously advanced that such procedure should be extended to include the return of evaders of revenue laws...*”. However, whatever the position was at the time of writing, it is now invariably the case that evasion of taxation will constitute a criminal offence which is, in principle, capable of coming within an extradition arrangement.

⁹⁶² *Ad informandum* – for information.

⁹⁶³ See **Chapter 4**.

⁹⁶⁴ Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, (1932) Harvard Law Review 193, at 219.

- 10.5** Before the foreign state embarks upon such a course it will be necessary to ascertain; *firstly*, whether provision for extradition exists between the foreign state and the forum, and; *secondly*, if so, whether provision has been made for extradition in respect of revenue offences.

What Provision is there for Extradition by the Forum?

- 10.6** The position in relation to whether a State is bound, as a matter of international law, to grant extradition, was considered by the Supreme Court in *The State (Duggan) v. Tapley*⁹⁶⁵ in which Maguire C.J. stated:⁹⁶⁶

“A study of the history of extradition shows that a change has come about in the attitude of States in regard to it. Grotius and other well-known writers took the view that according to the law and usage of civilised nations every sovereign state was obliged to grant extradition freely and without qualification or restriction. In the view of other jurists of high authority extradition was at most a duty of imperfect obligation.

The negative doctrine that independent of special compact no state is bound to grant extradition seems now to be generally accepted.”

- 10.7** The common law position in relation to extradition was set out in the speech of Lord Simon of Glaisdale in *Cheng v. Governor of Pentonville Prison*:⁹⁶⁷:

International lawyers were not unanimous as to whether comity required a state to extradite offenders against the criminal law of a foreign state, Grotius and Pufendorf being ranged on opposite sides of the same argument; but the overwhelming modern view is that any international obligation to extradite is imperfect, needing a treaty to perfect it (Wheaton’s International Law, 6th ed. (1929) p. 212). There can be no question, though, what answer the English common law returned: no English authority had the right to extradite (Clarke

⁹⁶⁵ [1952] I.R. 62.

⁹⁶⁶ [1952] I.R. 62, at 76 to 77.

⁹⁶⁷ [1973] A.C. 931, at 954 to 955.

upon Extradition, pp. 6-7, citing Coke [3 Inst., p. 180], 51, 126; Wheaton's International Law, 6th ed. (1929) p. 213-214, citing Lord Denman speaking in your Lordship's House). This was indeed the inevitable result of the following fundamental principles of English common law: (1) no one can be deprived of his liberty except for an offence against English law; (2) this liberty is vindicated by the writ of habeas corpus, statute in this respect merely embodying the common law; (3) criminal law being (other than exceptionally) territorial, an offence against a foreign criminal code is no offence against English law; (4) therefore anyone taken into custody for the purpose of delivery to a foreign state in respect of an offence against the criminal code of that foreign state could secure his release by habeas corpus proceedings.

A fugitive offender against the criminal law of a foreign state thus being protected by the common law from arrest for the purpose of extradition, the Extradition Act 1870 and the Orders in Council implementing it were necessarily in derogation from the common law.”

- 10.8** Notwithstanding this background however, Maguire C.J. in *The State (Duggan) v. Tapley*,⁹⁶⁸ noted that the 4th edition of Oppenheim's International Law asserted that although no universal rule of international law commanded it, extradition is an established fact based on international treaty.

What Provision is made for Extradition in respect of Revenue Offences?

- 10.9** Three scenarios arise in relation to extradition and revenue offences. *Firstly*, the extradition arrangements between the forum and a foreign state may be silent as to the position in relation to revenue offences. *Secondly*, the forum may explicitly prohibit extradition for revenue offences; this became the position in Ireland following the enactment of the Extradition Act 1965. *Thirdly*, extradition may be explicitly provided for; this has been the position in Ireland since the enactment of the Extradition (European Union Conventions) Act 2001.⁹⁶⁹

⁹⁶⁸ [1952] I.R. 62, at 79.

⁹⁶⁹ The current position in relation to extradition and revenue offences is set out in **Chapter 2**.

Extradition arrangements silent as respects Revenue Offences

- 10.10** *The State (Hully) v. Hynes*⁹⁷⁰ illustrates the common law restriction on extradition for revenue offences. A Mr. and Mrs. Moore, who, it was charged, had been defrauded by forgery and falsification of accounts by Hully, had, on affidavit, deposed that Hully's actions were done with their full knowledge and consent and that the common purpose was to reduce the tax liability of the partnership of which they were members.⁹⁷¹
- 10.11** Hully, in his affidavit, denied that he ever forged any books with intent to defraud any partners of his, and said that the extradition warrant was obtained with a view to making him amenable to the jurisdiction of the English revenue authorities, and that the charge was merely a cloak for this purpose and an attempt to use indirectly the laws and forces of the State in aid of the revenue laws of a foreign country.⁹⁷²
- 10.12** Kingsmill Moore J. noted⁹⁷³ that the evidence afforded by the documents produced and by the facts sworn to in affidavits that were not contradicted by other affidavits, nor sought to be shaken by cross-examination of the deponents, was such that in his opinion no court could come to any conclusion other than that Hully had made out a case that, so long as it remained unanswered, supported his contentions. He further noted that the warrant alleged that an information had been sworn charging Hully with forgery of a partnership book with intent to defraud the partners. It was not sworn by any partner or anyone purporting to act on their behalf nor was it sworn by a police authority. Rather, it had been sworn by a revenue officer who had already been assured by the partners that there had been no fraud.
- 10.13** Kingsmill Moore J. went on to state⁹⁷⁴ that one was tempted to ask why the revenue officer sought the issue of a warrant for an offence, which was no concern of his⁹⁷⁵ and which, if the evidence of Mr. & Mrs. Moore was to be believed, could never be

⁹⁷⁰ (1961) 100 I.L.T.R. 145.

⁹⁷¹ (1961) 100 I.L.T.R. 145, at 162.

⁹⁷² (1961) 100 I.L.T.R. 145, at 164.

⁹⁷³ (1961) 100 I.L.T.R. 145, at 164.

⁹⁷⁴ (1961) 100 I.L.T.R. 145, at 164 to 165.

⁹⁷⁵ The revenue officer was entitled, as a common informer, to make the information, but it was not an offence for which he could receive portion of a penalty.

substantiated. It was argued that the revenue officer's object was to ensure that Hully should be brought within the English jurisdiction on a charge never intended to be prosecuted, in order to make him available for arrest and prosecution for a revenue offence. Kingsmill Moore J. stated that, on the uncontradicted evidence, he could only come to the conclusion that this was so. He then turned to consider the consequences of this finding.

10.14 Kingsmill Moore J. stated⁹⁷⁶ that under the law at it stood at that point in time, the courts of England and Ireland would not lend their aid to the enforcement of the fiscal laws of another country, either directly or indirectly. That there might be grave reasons of policy, or even a recognised practice among civilised states, not to extradite persons for political or fiscal offences did not prevent an executive from doing so if authorised by law – the true view appeared to be that a sovereign state could derogate from its sovereignty. The effect of section 29 of the Petty Sessions (Ireland) Act 1851 was that the executive could deport a person to stand trial for a crime committed in another country.

10.15 Section 29⁹⁷⁷ conferred a discretion on the Assistant Commissioner of An Garda Síochana. Counsel for the Attorney General had informed the Court that the established practice was not to endorse warrants for fiscal offences. Accordingly, the Court was forced to assume that if the Assistant Commissioner were informed that a warrant, apparently for an offence not of a fiscal nature, had been issued not for the purpose of prosecution of the offence alleged but only in order to facilitate a prosecution for a fiscal offence, he would exercise his discretion by refusing to enforce it. As endorsement had been procured by non-disclosure of the true facts, so preventing the Assistant Commissioner from exercising his discretion along established lines, the Court must treat the endorsement as a nullity, hold that it was not satisfied that the prosecutor was being legally detained and order his release.

10.16 The extent of the restriction imposed by the Revenue Rule on extradition was considered by the Queen's Bench Division of the High Court in *Regina v. Chief Metropolitan*

⁹⁷⁶ (1961) 100 I.L.T.R. 145, at 166.

⁹⁷⁷ (1961) 100 I.L.T.R. 145, at 166.

*Stipendiary Magistrate, Ex parte Secretary of State for the Home Department.*⁹⁷⁸ Tore Kjell Nuland, a Norwegian national who was convicted and sentenced in respect of certain offences, subsequently escaped to England. The Norwegian government applied for his extradition under the Extradition Act 1870. A question arose as to whether he could be committed to custody to await extradition in respect of charges of false accounting, forgery and theft in circumstances where those offences were concerned with tax evasion.

10.17 It was argued,⁹⁷⁹ *inter alia; firstly*, that it was a rule of international custom and practice⁹⁸⁰ that states would not, directly or indirectly, enforce revenue or penal laws of another state and that this rule of international custom and practice had become part of the common law, and; *secondly*, that the relevant legislation, the Extradition Act 1870 did not specifically take away this limitation.

10.18 The Queen's Bench Division of the High Court stated⁹⁸¹ that it found considerable difficulty in determining the extent of the supposed rule of international custom and practice and went on to refer to Lord MacKay's *dictum* in *Williams & Humbert v. W & H Trade Marks*⁹⁸² that the existence of an unsatisfied claim, to the satisfaction of which the proceeds of the action would be applied, appeared to be an essential feature of the principle enunciated in *Buchanan v. McVey*⁹⁸³ for refusing to allow an action to succeed. The Queen's Bench Division went on to state⁹⁸⁴ that it was one thing to say that the English courts would not entertain a suit by a foreign state to recover a tax; it was another to say that criminal offences which stood independently of revenue offences, albeit in a revenue connection, were within the rule.

⁹⁷⁸ [1988] 1 W.L.R. 1204.

⁹⁷⁹ *Ibid*, at 1212.

⁹⁸⁰ As to whether the Revenue Rule forms part of public international law or private international law, see **Chapter 6.**

⁹⁸¹ *Ibid*, at 1214.

⁹⁸² [1986] 2 W.L.R. 24, at 42.

⁹⁸³ [1954] I.R. 89.

⁹⁸⁴ [1988] 1 W.L.R. 1204, at 1215.

10.19 The Court further stated that where Parliament had dealt with two of the alleged three common law restrictions regarding political offences⁹⁸⁵ and specialty,⁹⁸⁶ expressly in the Act, it was difficult to suppose that the third, relating to revenue offences, was left intact and unaffected. This would involve reading into the 1870 Act a provision similar to that found in the Irish Extradition Act of 1965, in which revenue offences were defined widely. The Court concluded that the language of the Act was clear and admitted of no ambiguity; it would be extremely surprising if Parliament had expressly incorporated into the statute two common law limitations but omitted a third, which was nevertheless intended to co-exist unabated.

Extradition for Revenue Offences Prohibited

10.20 In this jurisdiction, section 13 of the Extradition Act 1965⁹⁸⁷ provides that extradition shall not be granted for revenue offences.⁹⁸⁸ The courts have had occasion to consider both what constitutes a tax for the purposes of the 1965 Act and also what comes within the definition of a revenue offence.

The Statutory Definition of a Revenue Offence

10.21 Section 3 (1) 1965 Act, as amended by section 13 of the Extradition (European Union Conventions) Act 2001, defines a revenue offence in wide terms:

“‘revenue offence’, in relation to any country or place outside the State, means an offence in connection with taxes, duties, customs or exchange control but does not include an offence involving the use or threat of force or perjury or the forging of a document issued under statutory authority or an offence alleged to have been committed by an officer of the revenue of that country or place in his capacity as such officer or an offence within the scope of Article 3 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances done at Vienna on the 20th day of December 1988;”

⁹⁸⁵ No extradition of those whose offence is of a political character.

⁹⁸⁶ No extradition unless there is a provision in the law of the requesting state that the offender will not be tried for offences other than those in respect of which he/she has been extradited.

⁹⁸⁷ No. 17 of 1965.

⁹⁸⁸ The operation of section 13 has been restricted by the Extradition (European Union Conventions) Act 2001 (No. 49 of 2001) and the Criminal Justice (Theft and Fraud Offences) Act 2001. See **Chapter 2**.

Monetary Compensation Amounts Not Taxes for Purposes of the 1965 Act

- 10.22** In *Byrne v. Conroy*⁹⁸⁹ the extradition of the applicant to Northern Ireland was sought so that he could stand trial for the offence of conspiring to defraud the United Kingdom Intervention Board for Agricultural Produce of monetary compensation amounts. The Court was concerned with whether the offence constituted a revenue offence within the meaning of the Extradition Act 1965.
- 10.23** In delivering the judgment of the Supreme Court, Hamilton C.J. stated⁹⁹⁰ that the question that arose was what was the effect of the words “*in relation to any country or place outside the State*” on the definition of what constituted a revenue offence. He stated that it could only be that the taxes, duties or exchange control referred to related to those imposed in any country or place outside the State by the sovereign authority in such country or place and which were payable by the residents of such country or place and by residents of no other country or place. The monetary compensation amounts were payable, not in any one country or place and were not payable by virtue of the laws of any one country or place, but were payable throughout the Community by reason of the relevant laws of the Community. They applied with equal force and validity within the State and the benefits therefrom did not enure for the benefit of the collecting member state but for the benefit of the Community as a whole.
- 10.24** The Chief Justice continued by stating that even if the monetary compensation amounts were to be regarded as taxes, they were not taxes as envisaged by the Oireachtas in enacting the Act of 1965 and in defining a “revenue offence” for the purposes of that Act. The taxes therein referred to were taxes of the conventional nature being taxes imposed by the sovereign authority in any country or place outside the State for the purpose of collecting revenue for that country or place.
- 10.25** The Chief Justice concluded that he was satisfied that the monetary compensation amounts could not be regarded as tax and that he was in complete agreement with statement made by the High Court that the agricultural levy, although called a levy and

⁹⁸⁹ [1998] 3 I.R. 1.

⁹⁹⁰ *Ibid*, at 39 to 40.

although defined as being a tax under relevant United Kingdom regulations and legislation, was not a tax within any real meaning of that term. The principal object of a tax was to raise revenue but that was not the object of the levy. Rather, it was to implement the Common Agricultural Policy by facilitating the free movement of agricultural goods which fell within the ambit of that policy and any loss occasioned by the activity of the applicant was not that of the United Kingdom but of the Community. Furthermore, it was clear that monetary compensation amounts need not always be a charge on either exports or imports but could be a refund in either of these. Such was not a normal characteristic of a tax. Accordingly, the offence charged against the applicant was not a revenue offence.

- 10.26** Forde notes⁹⁹¹ that the legal position, as set out in *Byrne*, was subsequently entrenched in section 47 of the Criminal Justice (Theft and Fraud) Offences Act 2001, which provides that extradition for the offence of fraud against the European Communities' financial interests or money laundering shall not be refused, notwithstanding section 13 of the Extradition Act, 1965, solely on the ground that the offence constitutes a revenue offence as defined in that Act.

Offences in Connection with Taxes Distinguished from Offences with a Tax Connection

- 10.27** In *Newell v. O'Toole*⁹⁹² two warrants of arrest were issued in Northern Ireland in respect of the applicant, who had an address in the State. The first warrant recited that the Applicant had dishonestly procured an employee of Driver and Vehicle Licensing Northern Ireland to execute a cheque in the amount of £2,325 by deception, contrary to the section 19 (2) of the Theft Act (Northern Ireland) 1969. The second warrant recited that the applicant had dishonestly produced a document for the refund of a vehicle license, contrary to section 17 (1) (b) of the Theft Act (Northern Ireland) 1969.
- 10.28** It appeared that the applicant had found a tax disc lying on a street in Monaghan sometime in November, 1995. The licence was valid until September, 1996. In December, 1995 the applicant took it to the vehicle licensing centre in Coleraine, where

⁹⁹¹ *Extradition Law and Transnational Criminal Procedure*, Forde and Kelly, 4th ed., at paragraph 5-28.

⁹⁹² [2003] 1 I.L.R.M. 1.

he filled in a form seeking a rebate of the monies due on early surrender. In January of 1996, the applicant received a cheque for £2,325, which he duly cashed.

- 10.29** The applicant sought his release pursuant to the provisions of section 50 of the Extradition Act 1965 on the grounds that the offences specified in the warrants must be revenue offences as the entitlement to a refund arose in the context of statutory provisions dealing with vehicle excise duty and there was a loss to a foreign exchequer. Section 50 (2) (a) (iii) provided for direction by the High Court or the Minister that a person arrested under Part III (Endorsement and Execution of Certain Warrants) of the Act be released if either were of the opinion that the offence to which the warrant related was a revenue offence.
- 10.30** The High Court, in dealing with this issue,⁹⁹³ posed the following question: What claim, based on either taxes, duties or exchange control, did the requesting authority have, make or assert against the applicant? There was no question but that the applicant did not own or have an interest in or operate, or otherwise have possession or use of the motor vehicle identified, at any time or indeed have any vehicle which was in any way connected with the scheme devised and implemented by him in order to obtain the sum of £2,325 from the vehicle licensing office. The Court observed that he was involved, according to the evidence, with what a layperson would describe as the ‘theft of money’.
- 10.31** The Court went on to state that in charging the applicant as the Northern Ireland authorities had, they had not accused him of any offence under revenue legislation. It was not tenable to suggest that he had been charged with a breach of some revenue provision or that, if he was tried on either or both of the offences recited in the warrants, he would be facing any specific or indeed any ‘revenue offence’ known to Northern Ireland. The authorities would not, by such a prosecution, be attempting to enforce revenue law. The applicant quite simply was a person who found the property of another and who attempted, successfully, by using what he had found, to obtain for himself a monetary gain.

⁹⁹³ *Ibid*, at pages 10 to 11.

- 10.32** The Court went on to state that, there was no doubt that there was a connection and interaction between the revenue authority/exchequer and the applicant. This arose out of the ownership of the cheque that had been cashed and also from the method by which it was allegedly obtained. However, the Court held that these ‘connecting aspects’ fell far short of what would be required in order to constitute a revenue offence for the purposes of section 50 (2) (a) (iii) of the Extradition Act 1965.
- 10.33** The Court gave the example of a person who intercepted, in the post, a cheque or money order payable to or from the Revenue Commissioners, whether that was a return of income, VAT or the payment of a state pension, unemployment assistance or allowance or otherwise – could it be said that, the resulting offence was, within the statute, a revenue offence, of the requesting state? The examples of a post office robbery or a robbery from social security personnel might not altogether be identical with what had happened in this case but nevertheless, simply by way of analogy, it would be difficult to see how such a person could successfully defend extradition proceedings by raising the plea as raised in this case. The same analogy was used by Lord Walker of Gestingthorpe in *Total Network SL v. Her Majesty’s Revenue and Customs*⁹⁹⁴ when he stated that if an official vehicle carrying cash belonging to the Commissioners (cash representing collected taxes) were hijacked and the cash stolen, the Commissioners would undoubtedly have a civil remedy to reclaim it, if the robbers were apprehended and the proceeds of the robbery traced to a bank account. The Court in this case noted that what was alleged against the applicant had its basis in a claim falsely made by him and erroneously paid by the licensing authority and concluded that the resulting charges were not revenue offences under the 1965 Act.

In Rem

- 10.34** Rather than seeking to enforce a tax claim, or judgment in respect of such a claim, a foreign state may attempt to have the assets of the person liable to its taxes transferred to its jurisdiction.

⁹⁹⁴ [2008] UKHL 19, at paragraph 109.

- 10.35** An early, and unsuccessful, example of such an attempt arose in the case of *In re Bliss' Estate*.⁹⁹⁵ A motion was brought by executors before the Surrogate's Court in New York to dismiss the objections to their intermediate account, interposed by Vermont, through its Commissioner of Taxes. Two independent probate proceedings had been conducted, one in Vermont, the state of conceded domicile, and the other in New York, where the largest part of the estate was located at the time of death.
- 10.36** The decedent had died in New York, leaving property therein. Letters testamentary were issued out of the Surrogate's Court, to the executors, and transfer tax had been assessed and paid in New York. The Commissioner of Taxes sought the transfer of the assets of the estate, (after the payment of administration expenses, taxes due to the state of New York and debts due to New York creditors) to the executors appointed by the Vermont probate court or, in the alternative, no distribution be decreed until all taxes due to Vermont had been paid.
- 10.37** In refusing relief, the Surrogate's Court held⁹⁹⁶ that the contention that the Vermont inheritance tax was a claim against the estate that should be enforced by New York laws found a complete answer in the decision in *State of Colorado v. Harbeck*.⁹⁹⁷ The Court went on to note⁹⁹⁸ that, confronted by *Harbeck*, Vermont sought to escape its effect by compelling the remission to it of assets within New York. Its sole purpose was to bring within its territorial jurisdiction the property within New York in order to subject its transfer to a collateral inheritance tax. The Court stated:⁹⁹⁹

“The far-reaching consequence of the approval of such action must be apparent, even to those unfamiliar with the intricacies of transfer tax litigation. Such procedure far exceeds any question of comity, and would create a system whereby each state would become the busy collection agent of another state in gathering its taxes. The property might be directed to be transferred from state to state, and depleted to the vanishing point by successive taxation. No good

⁹⁹⁵ (1923) 121 Misc. 773, 202 N.Y.S. 185.

⁹⁹⁶ 121 Misc. 773, at 775.

⁹⁹⁷ (1921) 232 N.Y. 71, 133 N.E. 357.

⁹⁹⁸ 121 Misc. 773, at 776.

⁹⁹⁹ 121 Misc. 773, at 777.

reason exists, so far as the administration of this estate is concerned, for the transfer of the assets to Vermont.

- 10.38** In *King of the Hellenes v. Bostrom*,¹⁰⁰⁰ the Greek government was denied an injunction restraining the sale in England of a cargo of raisins that had been smuggled out of Greece. Rowlatt J. observed:¹⁰⁰¹

It is perfectly elementary that a foreign government cannot come here – nor will the Courts of other countries allow our Government to go there – and sue a person found in that jurisdiction for taxes levied and which he is declared to be liable to by the country to which he belongs; and if you cannot do it against a person I can see no reason at all why such a process should be allowed against goods. It seems to me to be a simple case of enforcing in the directest possible way the revenue provisions of a foreign state.”

- 10.39** Similarly, in *The Eva*¹⁰⁰² a Finnish ship was sold in England for the benefit of creditors, the claim of the Finnish government for the tax imposed by Finland on the sale of Finnish ships abroad was refused.¹⁰⁰³

- 10.40** In *Brokaw v. Seatrains U.K. Ltd.*¹⁰⁰⁴ the United States unsuccessfully sought possession in English proceedings on foot of a notice of lien. Goods, said to be household effects, were shipped in a United States ship from Baltimore, Maryland to London, via Southampton. Whilst the ship was on the high seas the United States Treasury served a notice on the shipowners in the United States demanding the surrender of all property in their possession belonging to two United States taxpayers. When the ship docked at Southampton, the United States Government claimed possession of the goods by virtue of the notice of levy. The plaintiffs, ultimate consignees of the goods, brought an action in *detinue* against the defendant shipowners for the return of the goods and for damages

¹⁰⁰⁰ (1923) Ll. L. Rep. 167, 190, referred to by Viscount Simonds in *Government of India v. Taylor* [1955] A.C. 491, at 503.

¹⁰⁰¹ *Ibid.*, at 193.

¹⁰⁰² [1921] P. 454.

¹⁰⁰³ Notes, 29 *Columbia Law Review* 782, at 783.

¹⁰⁰⁴ [1971] 2 Q.B. 476.

for their detention. On the shipowners' interpleader summons bringing in the United States Government as claimants, the Master ordered that the claimants be barred from the claim.

- 10.41** The United States Government argued¹⁰⁰⁵ before the Court of Appeal that the goods were in the possession of the shipowners, who were legally obligated under United States law to surrender the goods to the United States Government; that they were encumbered by a federal tax lien and were in the possession of the United States Government which had a possessory interest in them; and that the Government were therefore in constructive possession of the goods. The United States Government further argued that the Revenue Rule only applied to actions in the courts by which a foreign government was seeking to collect taxes and that it did not apply to the notice of levy procedure, which did not have recourse to the courts.
- 10.42** The Court of Appeal held¹⁰⁰⁶ that it could not accept this submission. If the notice of levy had been effective to reduce the goods into the possession of the United States Government, it would, thought the Court, have been enforced by the courts, because they would then be enforcing an actual possessory title. There would be no need for the United States Government to have recourse to its revenue law. The United States Government had simply relied on the notice of levy given to the shipowners; this was not sufficient to reduce the goods into their possession.
- 10.43** The Court of Appeal further held that apart from that point the United States Government was seeking the aid of the English courts. It had come as a claimant in the interpleader proceedings and by doing so, it was seeking the aid of the English courts to collect tax. It was not a direct enforcement (as it would be by action for tax in a court of law), but it was certainly indirect enforcement, by seizure of goods. It came within the prohibition of English law whereby the English courts did not enforce, directly or indirectly, the revenue law of another country.

¹⁰⁰⁵ *Ibid*, at 482.

¹⁰⁰⁶ *Ibid*, at 482 to 483.

- 10.44** In *Van deMark v. Toronto-Dominion Bank*¹⁰⁰⁷ the applicant had placed funds on deposit in accounts with the respondent in two of its branches in Canada. The respondent froze the funds because of levies served on its offices in New York by the United States Internal Revenue Service. It was stated that the Internal Revenue Service had alleged that the applicant held the funds as nominee for his parents and that they owed arrears of tax to the United States. The notice of levy purported to attach to any assets of the parents held by the respondent in or out of the United States and purported to attach to any assets in the possession of the respondent, of which the applicant held title as nominee for his parents.
- 10.45** The Court noted¹⁰⁰⁸ that no evidence that such relationship existed had been placed before it or, apparently, furnished to the respondent. The Court further noted that the applicant was a Canadian citizen, a business man who had never carried on business in the United States. It was stated that if the respondent did not deliver the funds that it would be liable to pay the United States government approximately 200% of the value of the assets claimed.
- 10.46** The Court noted¹⁰⁰⁹ that the effect of what had occurred was that a Canadian citizen had placed assets, in a branch in Canada, of a Canadian chartered bank. The bank also did business in the United States and was being threatened by the Internal Revenue Service. The Court stated that whilst one must sympathise with the position of the bank that position was the result of its election to carry on business in more than one country and that fact could not influence the application of Canadian law. The Court observed that the applicant had sworn, in an affidavit, that he did not now act and had never acted as a nominee for anyone, that he was not a taxpayer of the United States and that he had never been served with any assessment or notices of assessment with respect to taxes owed to the United States.

¹⁰⁰⁷ 1988 CarswellOnt 1446, 68 O.R. (2d) 379.

¹⁰⁰⁸ 1988 CarswellOnt 1446, 68 O.R. (2d) 379, at paragraphs 10 to 13.

¹⁰⁰⁹ 1988 CarswellOnt 1446, 68 O.R. (2d) 379, at paragraphs 15 to 17.

10.47 The Court noted¹⁰¹⁰ that the respondent had argued that to forgive its indebtedness to the applicant was not to enforce indirectly a foreign judgment, but only to recognise the respondent's right of restitution based on principles of unjust enrichment. The Court held that there could be no question of unjust enrichment, at least at this stage, because there was no evidence that the respondent had paid anything to the United States. The Court went on to hold that, in any event, whilst acceptance, by the respondent, of a penalty imposed in the United States might seem to be a hardship, the effect of permitting the Ontario branches to defend the applicant's claim on the basis of the respondent's liability in the United States would be to enforce indirectly a claim for taxes by a foreign state and one that had, so far as the evidence disclosed, not even given rise to a New York or Federal court judgment.

10.48 However, a striking contrast is provided by the decision in *Bullen v. Her Majesty's Government of the United Kingdom*,¹⁰¹¹ a case that came before the District Court of Appeal of Florida. The appellants were convicted in the United Kingdom of conspiracy to contravene section 38(1) of the Finance Act 1972 by fraudulent evasion of value added tax. Each was sentenced to a term of imprisonment and fined. The offences had caused loss and damage to Her Majesty's Customs and Excise in amounts approximating that which was due for value added tax – approximately £1.9m. The appellants were declared criminally bankrupt and British officials filed creditor's petitions for receiving orders against the appellants. The receiving orders were entered and an official receiver of the estates of the debtors was designated. These proceedings were an appeal from the trial court's entry of a final judgment in favour of the United Kingdom. In doing so, the trial court domesticated and enforced judgments rendered by that sovereign and invested it with title to property, real and personal, located in Florida.

10.49 The appellants attacked the entry of the final summary judgment on a number of grounds including, *inter alia*, that the orders were entered by the United Kingdom because the appellants owed taxes to that country and an American court could not enforce a foreign country's judgment for taxes. The Court held¹⁰¹² that the fact that the funds came into

¹⁰¹⁰ 1988 CarswellOnt 1446, 68 O.R. (2d) 379, at paragraphs 28 to 30.

¹⁰¹¹ 553 So. 2d 1344 (Fla. App. 1989).

¹⁰¹² 553 So. 2d 1344, at 1345 to 1346.

the appellants' hands through a governmental taxing policy did not mean that such funds forever retained the mantle of 'taxes.' The source of the money became irrelevant upon defalcation and the United Kingdom simply became a judgment creditor of the funds illicitly held by the appellants. Illegal conversion of the funds to the appellants' personal use rendered them as susceptible to recapture through a judicial decree as would be the case with any asset within the appellants' possession.

- 10.50** In *Her Majesty's Revenue & Customs v. Shahdadpuri*¹⁰¹³ the applicants, by concurrent originating summons, had commenced proceedings for the grant of a *Mareva* injunction over the assets of the first and second named respondents, in Hong Kong, in aid of proceedings commenced in England. The English proceedings concerned what was known as a "missing trader intra-community fraud" and more particularly, in this case, a carousel fraud.¹⁰¹⁴ In essence, the scheme involved an original importer acquiring goods from an overseas supplier and a failure, by the importer, to account for output tax charged on the sale, in the United Kingdom, of the imported goods, thus resulting in a loss for the applicants. It was because such goods could end up with the original overseas supplier that the designation "carousel" was used.
- 10.51** The first respondent had applied to strike out the concurrent originating summons on the basis that the English proceedings were not capable of giving rise to a judgment that could be enforced in Hong Kong because the Court did not have jurisdiction to entertain an action for enforcement, directly or indirectly, of a revenue law of a foreign state.
- 10.52** The Hong Kong Court of Appeal noted¹⁰¹⁵ that there were authorities, outside of England, which had questioned the scope of the prohibition against indirect enforcement. In particular, in *Ayres v. Evans*¹⁰¹⁶ Fox J. had stated that the rule did not apply where a liquidator or an official assignee sought to recover property which would, in a due course of administration, benefit ordinary creditors as well as Revenue. Further, in *Priestley v. Clegg*,¹⁰¹⁷ where 94% of all claims in the estate related to a tax liability to the United

¹⁰¹³ [2012] 1 HKLRD 223.

¹⁰¹⁴ See **Chapter 9, paragraph 9.88** and associated footnote for description of what constitutes a carousel fraud.

¹⁰¹⁵ [2012] 1 HKLRD 223, at 242.

¹⁰¹⁶ (1981) 39 A.L.R. 129, at 131.

¹⁰¹⁷ 1985 (3) S.A. 955.

Kingdom Inland Revenue, the decision of Eloff J. was to similar effect. Finally, in *Re Tucker, ex p Bird*,¹⁰¹⁸ a decision of the High Court of the Isle of Man, Hytner J.A. indicated that the Court regarded the decision in *Buchanan v. McVey*¹⁰¹⁹ as one decided on its unusual and particular facts and was leaving open the question of whether the decision would be followed in the Manx courts.

10.53 The Hong Kong Court took the view that the carousel fraud was essentially the same as a robbery of the applicants' cash. Given that a robber would be subject to extradition, the Court found it difficult to accept that enforcement of a judgment to recover the "loot" should fail on the ground that it amounted to an indirect enforcement of a foreign revenue law. The Court concluded¹⁰²⁰ that it was inappropriate and unnecessary, at this juncture, to say more than this was not a case where the claim ought to be struck out. Whether any judgment in the English action would be enforced would depend on the actual basis of the decision and a determination by the Courts of the scope of the revenue rule.

10.54 However, in related proceedings in Singapore, *Her Majesty's Revenue & Customs v. Shahdadpuri & Anor.*¹⁰²¹ the Court of Appeal held the plaintiff's claim to be, in substance and in effect, an attempt to recover uncollected value added tax. The cause of action, which was pleaded as a claim based on the tort of conspiracy¹⁰²² for which a remedy in damages was sought, was, in substance, an attempt to recover value added tax extraterritorially. The plaintiff's claim was struck out, the Court finding it contrary to public policy. The Court also rejected the argument that the *Mareva* injunction was simply the rendering of assistance to the on-going proceedings in the United Kingdom, stating that the plaintiff could not explain how the existence of such an injunction in Singapore could render assistance to such proceedings other than by the subsequent enforcement of a United Kingdom judgment in Singapore, in the event that the plaintiff was successful in the United Kingdom proceedings.

¹⁰¹⁸ [1988] L.R.C. (Comm) 995, at 1007.

¹⁰¹⁹ [1954] I.R. 89.

¹⁰²⁰ [2012] 1 HKLRD 223, at 243.

¹⁰²¹ [2012] 1 LRC 564.

¹⁰²² The Court, whilst holding that the characterization of the claim was a matter for the forum, distinguished this case from *Total Network SL v. Her Majesty's Revenue and Customs* [2008] UKHL 19 on the facts.

Ad Informandum

- 10.55** This section proposes a new term *ad informandum*,¹⁰²³ to stand alongside the terminology of *in personam* and *in rem*. This category will encompass the existing procedures for letters rogatory, or letters of request, and will allow for any new procedures, for the eliciting of information by a foreign state, with the assistance of the courts of the forum, to be subsumed into the proposed category. It is considered appropriate to propose such a term given the pervasive importance of information, and information technology, in contemporary society.¹⁰²⁴ It seems likely that this category will continue to increase in significance, and that the electronic era will replace the paper chases that lawyers previously had to engage in. Indeed, the very accessibility of information in electronic form, is likely to encourage more requests for such information.
- 10.56** In any event, regardless of terminology, it is clear that the Revenue Rule does not prohibit a foreign state, acting either through its executive, or its courts, from seeking the assistance of the forum in procuring evidence, even if such evidence will assist it in enforcing its tax claims.
- 10.57** In the case of *In re Norway's Application (Nos. 1 & 2)*¹⁰²⁵ the House of Lords confirmed that there was no extraterritorial exercise of authority where the assistance of the English courts was sought in procuring evidence for the purpose of enforcing foreign revenue law in a foreign jurisdiction. The case concerned an application by Norway, by way of letters of request, pursuant to the Evidence (Proceedings in Other Jurisdictions) Act 1975, for the oral examination of a certain witness resident in England, in connection with a Norwegian tax assessment.

¹⁰²³ *Ad informandum* – for information. I am indebted to Dr. Martine Cuypers, Department of Classics, School of Histories and Humanities, Trinity College, Dublin, for her assistance in identifying an appropriate Latin phrase to describe this category. Of course, as always, responsibility lies with the author of this thesis in the case of any errors.

¹⁰²⁴ For example, the central thesis of Negroponte, *Being Digital*, New York: Alfred A. Knopf (1995) is that economies are moving from transferring atoms to transferring bits.

¹⁰²⁵ [1990] 1 A.C. 723.

- 10.58** Lord Goff stated¹⁰²⁶ that he did not see how such letters of request, or their execution, could amount to the enforcement, direct or indirect, of a foreign revenue law. In the case of an application by a taxpayer, he did not consider that the Rule required the court to decline to exercise its jurisdiction. It was true that in this case the application was made by both the state and the taxpayer, but in such a case the English court could, if necessary, accede to the application of the taxpayer whilst rejecting that of the state.
- 10.59** However, Lord Goff noted, since the state, as well as the taxpayer, had applied for the assistance of the English courts, it was necessary to consider, in relation to the application of the state, the broader question of whether the execution of letters of request in relation to foreign civil proceedings in a fiscal matter should, if the request was made on the application not of the taxpayer but of the taxing authority, be refused by an English court on this ground.
- 10.60** Lord Goff stated¹⁰²⁷ that it was important to observe that the Rule was limited to cases of direct or indirect enforcement of the revenue laws of a foreign state. It was plain that the case before the Court was not concerned with the direct enforcement of the revenue laws of the State of Norway, nor was Lord Goff of the view that it was concerned with their indirect enforcement.
- 10.61** He noted that it was stated in *Dicey* that indirect enforcement occurred; *firstly*, where the foreign state (or its nominee) in *form* sought a remedy which in *substance* was designed to give the foreign law extraterritorial effect, or; *secondly*, where a private party raised a defence based on the foreign law in order to vindicate or assert the right of the foreign state. Lord Goff stated that he had been unable to discover any case of indirect enforcement which went beyond those two propositions. Lord Goff concluded that he could not see any extraterritorial exercise of sovereign authority, in seeking the assistance of the English courts, in obtaining evidence, which would be used for the enforcement of the revenue laws of Norway, in Norway itself.

¹⁰²⁶ [1990] 1 A.C. 723, at 808.

¹⁰²⁷ [1990] 1 A.C. 723, at 809.

- 10.62** *In re Request for Judicial Assistance*¹⁰²⁸ involved a request from a United States court, to a Canadian court, for the production of evidence by way of letters rogatory. It was argued that a Canadian court should not get involved in a proceeding which was designed to enforce the collection of income tax by a foreign jurisdiction. It was also pointed out that a conviction for tax evasion estopped a taxpayer from disputing the amount owed in income taxes in any subsequent civil proceedings by the United States Internal Revenue Service.
- 10.63** However, Miller J. held¹⁰²⁹ that whilst it was perhaps true that the ultimate consequences of guilty findings in the tax evasion charges against the defendants would be a civil liability to pay additional income tax, the pith and substance of the charges were criminal in nature and the assistance of the Court was sought primarily to enable a full hearing to be held on the criminal charges rather than to help the United States to collect alleged arrears of income tax.
- 10.64** Miller J. continued that he did not think that it was relevant that most of the charges arose out of alleged offences under the Internal Revenue Code in the United States. The fact was that they were charges that were criminal in nature and that could attract severe monetary and incarceration penalties. In any event, the conspiracy charges against two of the defendants did not fall within the impediment regarding tax collections in a foreign jurisdiction. He concluded that he did not feel that any compliance with the request in the case ran contrary to the rule against assisting a foreign jurisdiction to collect taxes owing.
- 10.65** Subsequently, in *District Court of the United States, Middle District of Florida v. Royal American Shows Inc. et. al. United States of America v. Royal American Shows Inc. et. al. sub nom. Re Request for Int'l Judicial Assistance*,¹⁰³⁰ the Supreme Court of Canada noted¹⁰³¹ that it had been submitted before Miller J. that the application was designed to enforce American revenue laws because a conviction for tax evasion (criminal charges

¹⁰²⁸ (1979) 102 D.L.R. (3d) 18.

¹⁰²⁹ *Ibid*, at 38.

¹⁰³⁰ (1982) 134 D.L.R. (3d) 32, reversing 120 D.L.R. (3d) 732, reversing 102 D.L.R. (3d) 18.

¹⁰³¹ *Ibid*, at 49.

of that kind were involved here) estopped a taxpayer from disputing his tax liability in any subsequent civil proceedings. The Supreme Court stated that since what was involved in the application before him were criminal charges, Miller J. had rightly concluded that there was no question of assisting in the collection of taxes by a foreign country.

Conclusion

- 10.66** This Chapter has considered attempts to avoid the operation of the Revenue Rule under three categories, *in personam*, *in rem* and *ad informandum*.
- 10.67** Insofar as the *in personam* remedy, extradition, is concerned, historically three phases are distinguishable. Initially, extradition arrangements, where they existed, were silent as to revenue offences. Whilst *The State (Hully) v. Hynes*¹⁰³² is consistent with *Buchanan* decided just a few years before, as has been seen, *Regina v. Chief Metropolitan Stipendiary Magistrate, Ex parte Secretary of State for the Home Department*¹⁰³³ introduced a degree of uncertainty into this area of the law by casting doubt on whether criminal offences which stood independently of revenue offences, albeit in a revenue connection, were within the Revenue Rule.
- 10.68** Subsequently, in Ireland, extradition in respect of revenue offences, as defined in the Extradition Act, 1965, was expressly prohibited. However, notwithstanding that this appeared to be a case of the legislature giving statutory imprimatur to the Revenue Rule, the perhaps surprising consequence was that the courts, in engaging in the process of statutory interpretation, found that there were circumstances in which extradition could be granted where arguably it might not have been in the absence of the statutory prohibition. This again contributed to uncertainty in the law. Of course it is now the case that extradition may be granted for revenue offences in specified situations.
- 10.69** When it comes to *in rem* remedies the courts have been consistent, in a civil context, in refusing attempts to have assets transferred from the forum to the foreign state for the purposes of allowing taxation to be imposed. However, in the context of criminal

¹⁰³² (1961) 100 I.L.T.R. 145.

¹⁰³³ [1988] 1 W.L.R. 1204.

proceedings, the picture has been mixed. The *Shahdarpuri* litigation in both Hong Kong and Singapore has been particularly striking in this regard, with the courts in the two jurisdictions reaching opposing conclusions. Needless to say, such an outcome does nothing to advance certainty of the law in this area.

10.70 Perhaps the most surprising decisions have come in the context of *ad informandum* remedies, especially Lord Goff's observation, in the *Norway* case, that he could not see any extraterritorial exercise of sovereign authority, in seeking the assistance of the English courts, in obtaining evidence, which would be used for the enforcement of the revenue laws of Norway, in Norway itself.

10.71 There are two significant problems with this observation. *Firstly*, it begins to look a lot less compelling when it is realised that one could be afflicted with a similar myopia, in not seeing any extraterritorial exercise of sovereign authority, in seeking the assistance of the English courts, to obtain assets, which would be used for the enforcement of the revenue laws of a foreign state, in the foreign state itself. *Secondly*, one is tempted to wonder, when confronted with a judge of such obvious and many talents, whether there isn't a slightly mischievous sleight of hand at play in framing the issue in this way; after all, it can hardly be said that, in coming to seek the assistance of the courts of the forum, a foreign state is engaged in an extraterritorial exercise of sovereign authority.¹⁰³⁴

10.72 The position adopted by the Canadian courts is also surprising, although perhaps less so, when it is realised that assistance was being given in a criminal context, for, as has been seen in the context of extradition, the courts do seem more willing to take a narrow view of the Revenue Rule. Why this should be the case is not immediately apparent from the case law and again it is a contributor to uncertainty in the law.

¹⁰³⁴ As to which see the discussion in **Chapter 6**.

Chapter 11 – The Revenue Rule: Probate and Trusts

Introduction

- 11.1** Probate and trusts litigation, particularly *State of Colorado v. Harbeck*,¹⁰³⁵ *In re Bliss’ Estate*,¹⁰³⁶ *In re Visser*¹⁰³⁷ and *Moore v. Mitchell*,¹⁰³⁸ has produced some of the seminal jurisprudence in the development of the Revenue Rule. This Chapter will further examine the application of the Revenue Rule in this area and the extent to which its application has been modified to protect the interests of private parties.
- 11.2** In terms of the structure of the Chapter, cases involving questions of testamentary intention will first be examined. The jurisprudence demonstrates that the courts will strive to give effect to the wishes of the testator¹⁰³⁹ although, in so doing, they will apply a general rule of construction¹⁰⁴⁰ that a direction in a will for payment of taxes, duties or similar levies shall be construed as referring only to domestic taxes and duties.
- 11.3** The Chapter then examines cases involving the question of whether assets should be “exported” to meet foreign tax claims; where, for example, a testator or decedent dies domiciled in a foreign jurisdiction whilst having significant assets and beneficiaries in the forum. The Chapter moves on to consider whether foreign procedures designed to ensure tax collection will be upheld, and also examines the operation of the Revenue Rule, in circumstances involving the interaction of forum trust law and foreign tax law.
- 11.4** The Chapter engages in an extensive review of the sometimes conflicting decisions, on the extent to which the courts are willing to modify the operation of the Revenue Rule, to protect the interests of beneficiaries and fiduciaries, before offering some concluding observations.

¹⁰³⁵ (1921) 232 N.Y. 71, 133 N.E. 357. See **Chapter 7**.

¹⁰³⁶ (1923) 121 Misc. 773, 202 N.Y.S. 185. See **Chapter 10**.

¹⁰³⁷ *In re Visser H.M. The Queen of Holland (Married Woman) v. Drukker and Others* [1928] 1 Ch. 877. See **Chapter 4**.

¹⁰³⁸ 30 F 2d 600, at 604 (1929). See **Chapter 8**.

¹⁰³⁹ See *Jones v. Borland* [1969 (4)] S.A. 29 [W.L.D.], which is discussed subsequently.

¹⁰⁴⁰ See *Re Fudger* 1984 CarwellsOnt 566, 18 E.T.R. 12, again discussed subsequently.

Testamentary Intention

11.5 In *Re Fudger*¹⁰⁴¹ the Court placed emphasis not only upon the Revenue Rule but also upon the intentions of the testatrix. She had died domiciled in Scotland in 1980 leaving property in Canada valued at \$817,821 and property in Scotland valued at approximately £160,000. Her Canadian property was disposed of by a Canadian will and codicil to friends and relatives residing in North America, and these testamentary documents expressed the fact that they were disposing of property in Canada. Her Scottish property was disposed of by Scottish instruments to a United Kingdom charity. These documents recorded the fact that they were disposing of property in the United Kingdom and that their terms were not to affect any property outside of the United Kingdom.

11.6 A clause in the Canadian will, paragraph 2 (b), directed the executor

“to pay out of and charge to the capital of my general estate my just debts, funeral and testamentary expenses and all estate, inheritance and succession duties or taxes which may be payable in connection with any property passing under this my will or any codicil thereto or in connection with any insurance on my life ...”.

11.7 The United Kingdom Inland Revenue claimed transfer tax in respect of all of the assets of the testatrix’s estate. Under United Kingdom tax law both the Canadian and Scottish executors would be liable to pay the assessed capital transfer tax. The claim for tax far exceeded the value of the Scottish property so that if full payment was not made by the executors the United Kingdom Inland Revenue could take the entire Scottish property in partial satisfaction of its claim. The Canadian executor sought the Court’s direction as to the effect of paragraph 2 (b) of the Canadian will. All parties to the application conceded that Ontario law governed the construction of the aforementioned paragraph.

11.8 The Court stated¹⁰⁴² that it was a general rule of construction that where a will contained a direction for payment of taxes, duties or similar levies, such direction was to be

¹⁰⁴¹ 1984 CarwellsOnt 566, 18 E.T.R. 12.

¹⁰⁴² 1984 CarwellsOnt 566, 18 E.T.R. 12, at paragraph 18.

construed as referring only to taxes and duties payable in the domestic jurisdiction unless the attendant circumstances were sufficiently compelling to warrant the extension of the primary meaning of that direction so as to include taxes and duties imposed by the laws of a foreign jurisdiction.

- 11.9** The Court noted¹⁰⁴³ that the testatrix clearly demonstrated an intention that each set of assets and liabilities should be dealt with separately and distinctly. She made separate wills in Canada and the United Kingdom. The assets disposed of in each will were limited to those which lay in each respective jurisdiction. Different executors were appointed for each. Different individuals or entities benefited in each.
- 11.10** The Court held¹⁰⁴⁴ that the testatrix intended to restrict the direction to pay estate, inheritance and succession duties or taxes in the Canadian will to property passing under the Canadian will. Such direction could not be construed to include a direction to pay a tax imposed under a foreign tax statute. The Court went on to hold that the testatrix clearly intended to divorce the testamentary administration of her Canadian assets from that of her Scottish assets.
- 11.11** The Court went on to note¹⁰⁴⁵ that there was another reason to reject the position put forward on behalf of the Scottish executors; to do so would offend the well settled rule of law that the Canadian courts would not entertain an action for the enforcement of the revenue laws of a foreign state. The Court held¹⁰⁴⁶ that any claim made by the United Kingdom Inland Revenue for payment of tax against the Canadian executor was not provable or enforceable in Ontario. To construe the Canadian will in such a way as to require the Canadian executor to pay foreign taxes simply because a foreign beneficiary under a foreign will might otherwise be exposed to the payment of taxes imposed in the foreign jurisdiction, would be an indirect method of enforcing the revenue laws of a foreign jurisdiction.

¹⁰⁴³ 1984 CarwellsOnt 566, 18 E.T.R. 12, at paragraph 27.

¹⁰⁴⁴ 1984 CarwellsOnt 566, 18 E.T.R. 12, at paragraph 28.

¹⁰⁴⁵ 1984 CarwellsOnt 566, 18 E.T.R. 12, at paragraph 29.

¹⁰⁴⁶ 1984 CarwellsOnt 566, 18 E.T.R. 12, at paragraph 30.

- 11.12** In *Jones v. Borland*¹⁰⁴⁷ the Court was also concerned to give effect to the intentions of the testatrix. She died in 1963, in Scotland, where she was domiciled, leaving two wills, executed by her in Scotland in 1961. One will dealt with her assets in the United Kingdom, the second with her assets in South Africa. At the time the wills were executed estate duty was not payable in the United Kingdom on any immovable property, which had been owned by the deceased domiciled in the United Kingdom but which was situated abroad; however, the position was changed in 1962. In consequence the net assets of the non-South African estate were insufficient to pay all the estate duty levied in the United Kingdom whilst the final liquidation and distribution account of the South African estate showed a net amount available for distribution.
- 11.13** The question raised in the proceedings by the testamentary executors of the South African estate was whether any part of the surplus must be transferred to the domiciliary executors in Scotland for payment of the remaining estate duty or whether they, as ancillary executors, should ignore the claim for foreign estate duty and distribute the surplus direct to the testamentary beneficiaries.
- 11.14** The Court did not accept the applicants' argument that it was endowed, by common law, with a discretion to allow or disallow such transfer, but stated that if it had been so satisfied, that it would have directed the applicants not to transfer any part of the surplus to the domiciliary executors.¹⁰⁴⁸ The Court went on to state¹⁰⁴⁹ that it could only approach the problem as being one to be resolved by law and not by judicial discretion. The relevant statute was the Administration of Estates Act, 1913. Section 68 of that Act provided that every executor administer and distribute the estate in respect of which he had been appointed, according to law and the provisions of any valid will relating to that estate. Section 46 of the Act provided that all claims, capable of proof, in the case of the insolvency of the estate were provable in the estate for payment. That would include the claims of foreign creditors. The executor was obliged to pay only those creditors who had duly proved their claims and appeared in his account.

¹⁰⁴⁷ [1969 (4)] S.A. 29 [W.L.D.].

¹⁰⁴⁸ [1969 (4)] S.A. 29, at 30 to 31 [W.L.D.].

¹⁰⁴⁹ [1969 (4)] S.A. 29, at 31 to 32 [W.L.D.].

- 11.15** It followed that if foreign creditors did not prove their claims in the ancillary estate, the executor of that estate would not be obliged or entitled, in administering it, to transmit any funds to them, or to the domiciliary executor, specifically for the payment of their claims.
- 11.16** The Court went on to state that this did not conclude the matter for the ancillary executor, after completing his local administration of the estate, might still be obliged in law to transmit the final surplus to the domiciliary executor for distribution. This would depend primarily on the testator's intention as contained in the express or implied terms of the will. If he intended that the surplus should be distributed or, conversely, transmitted by the ancillary executor, effect would have to be given thereto. If the will contained such directions, the Court had the greatest difficulty in seeing how it could nevertheless have the discretion to order otherwise.
- 11.17** The Court added¹⁰⁵⁰ that its observations about proving foreign claims related only to those which, if necessary, could be enforced by proceedings against the ancillary estate in the South African courts. Claims unenforceable in the South African courts could not, therefore, be proved against the ancillary estate and that would apply to the claim by the revenue authorities in Scotland for the estate duty in this case.
- 11.18** The Court noted that this was probably why the revenue authorities in Scotland had decided not to lodge their claim with the ancillary executors and not to object to the omission of the claim from the final liquidation and distribution account. Consequently, as that claim was not provable and had not been proved in the South African estate, the applicants, as the ancillary executors, were not obliged or entitled to pay, or provide for the payment of, that claim, and were correct in omitting it from their account.
- 11.19** The Court further noted¹⁰⁵¹ that from the wills it was manifestly clear that the testatrix did not intend that any of the surplus remaining on the due administration of the South African estate should be transmitted to the executors in Scotland; on the contrary, she

¹⁰⁵⁰ [1969] (4) S.A. 29, at 33 [W.L.D.].

¹⁰⁵¹ [1969] (4) S.A. 29, at 34 [W.L.D.].

intended that the entire surplus should be distributed by the applicants direct to the beneficiaries. According to South African law effect must be given to that intention – the Court had no discretion to order otherwise.

Court will not require “Export” of Assets Solely to Pay Foreign Taxes

11.20 There are a large number of authorities from across a range of jurisdictions that make it clear that the courts will not require the “export” or transmission of assets out of the jurisdiction *solely* for the purpose of paying foreign taxes. In the case of *In re McNeel’s Estate*,¹⁰⁵² the deceased left assets in both the United States and England. There was a deficiency in the funds available in England to meet British death duties. The question presented was whether the executor was under any duty to transmit to a representative of the estate, if one was appointed in England, the amount required to discharge the taxes payable to the British government. The Surrogate’s Court noted¹⁰⁵³ that it was fundamental that no state or nation had the power,¹⁰⁵⁴ in the absence of reciprocal agreement, to enforce the revenue laws of another jurisdiction. There was no treaty or convention between Great Britain and the United States that would require any court in either jurisdiction to aid in the collection of taxes owing to the other. The Court stated that, under the circumstances, it would not require the executor to transmit sufficient funds to the representative of the estate in England to discharge the British death duties.

11.21 The Surrogate’s Court arrived at a similar result in the case of *In re Lamar’s Estate*,¹⁰⁵⁵ where it held that there was no obligation in respect of death duties that might be due and unpaid to the taxing authorities in the Republic of Cuba; as did the New York Supreme Court in the case of *In re Matthew’s Trust*,¹⁰⁵⁶ where it held that a trustee was not required to comply with requests and demands by representatives of deceased life annuitants, or others, for payment of British estate duties imposed on such deceased annuitants out of the principal of the trust.

¹⁰⁵² (1957) 10 Misc.2d 359, 170 N.Y.S.2d 893 (Sur. Ct.) (Cox J.).

¹⁰⁵³ (1957) 10 Misc.2d 359, at 361.

¹⁰⁵⁴ The assertion that no state or nation has power to enforce the revenue laws of another jurisdiction has been the subject of criticism which is discussed subsequently.

¹⁰⁵⁵ (1958) 15 Misc.2d 544, 182 N.Y.S.2d 512 (Sur. Ct.) (Cox J.).

¹⁰⁵⁶ (1959) 21 Misc.2d 356, 191 N.Y.S.2d 994.

- 11.22** In the case of *In re the Estate of Robinson*,¹⁰⁵⁷ the decedent left assets in both the United States and Switzerland. The larger part of her estate was situated in the United States. The question arising was whether the executor was under a duty to transmit to a representative of the estate the amount required to discharge the taxes payable to the Swiss Government. In holding that the executor would not be required to so act, the Court noted that no state or nation had the power, in the absence of reciprocal agreement, to enforce the revenue laws of another jurisdiction.
- 11.23** In the case of *In re the Estate of Jandorf*,¹⁰⁵⁸ the issue arising was whether a direction in a will against the apportionment of estate taxes required the residuary estate to bear the burden of an ‘acquirer’ tax assessed by the German Federal Republic against a legatee residing in West Germany. The Court held that it was not to be assumed that the tax clause in the testator’s will was prepared with foreign taxes in mind. The Court went on to observe that the ‘acquirer’ tax did not appear to be an ‘estate, inheritance, succession and other death tax’ either as understood by the testator or as understood and defined by the New York courts. The Court again stated that it was a principle universally recognised that the revenue laws of one country had no force in another. Accordingly, distribution could be made to the residuary legatees without retention of any reserve for foreign taxes.
- 11.24** However, Cohen¹⁰⁵⁹ criticises the reasoning in the cases discussed in the preceding paragraphs. He argues that these decisions, almost all by the Surrogate Court of New York and all but one decided by the same judge, do not represent full consideration of the international aspects of the Revenue Rule. He goes on to state that:

“Not only was the interested foreign sovereign not a party to any of the suits, but it appears that in none of these proceedings was there any argument made on behalf of the foreign state’s interest. All the interested parties were domestic claimants, who naturally were opposed to the recognition of foreign tax claims

¹⁰⁵⁷ (1960) 25 Misc.2d. 9, 206 N.Y.S.2d 459 (Sur. Ct.) (Cox J.).

¹⁰⁵⁸ (1964) 41 Misc.2d. 712, 246 N.Y.S.2d 378 (Sur. Ct.) (Cox J.).

¹⁰⁵⁹ Cohen, *Nonenforcement of Foreign Tax Laws and the Act of State Doctrine: A Conflict in Judicial Foreign Policy*, 11 Harvard International Law Journal, 1, at 11 (1970), [Internal citations from the passage cited have been omitted].

which would have reduced the value of the estate; and the administrators themselves had no interest in having assets set aside for payment of the foreign levies. Moreover, the New York courts are not representative generally of United States courts in the application of the nonenforcement rule; New York is one of the few states that have recently reaffirmed the doctrine of nonenforcement even in the sister-state context.”

11.25 The ‘recent reaffirmation’ is a reference to the decision in *City of Philadelphia v. Cohen*.¹⁰⁶⁰ He notes¹⁰⁶¹ that the decisions were all summary decisions in which the settled rule was stated without any discussion and goes on to state that:

*“In fact, the earliest of the decisions, cited as controlling authority in all the subsequent cases, in laying down the ostensibly settled law, itself misstates the rule. The court says: “It is, of course, fundamental that no State or Nation **has the power**, in the absence of a reciprocal agreement, to enforce the revenue laws of another jurisdiction.” Estate of McNeil [sic] ... The Supreme Court over twenty years before had expressly declared that this assertion of lack of power was incorrect. Milwaukee County v. M.E. White Co.”*

11.26 However cogent Cohen’s observations may be, it is clear that overwhelming weight of authority is in favour of the outcome arrived at in those cases.

11.27 A further example is the case of *In re Bliss’ Trust*,¹⁰⁶² which concerned the termination of a trust. Two parties, who later married, entered into a trust agreement in London. Although subsequently the married couple moved to New York, the assets were brought to New York and the trust was administered in New York, the New York Supreme Court held that all questions concerning the validity, interpretation and effect, of the trust, should be governed by English law.

¹⁰⁶⁰ 11 N.Y.2d. 401, 184 N.E.2d 167, 230 N.Y.S.2d 188 (1962).

¹⁰⁶¹ Cohen, *Nonenforcement of Foreign Tax Laws and the Act of State Doctrine: A Conflict in Judicial Foreign Policy*, 11 Harvard International Law Journal, 1, at 11, fn. 55, (1970), [Internal citations from the passage cited have been omitted].

¹⁰⁶² (1960) 26 Misc.2d 969, 208 N.Y.S.2d 725.

11.28 On the facts before it, the Court was satisfied that the trust had been terminated under English law. Following a request by the trustee for a ruling as to whether it must retain any reserve for possible United Kingdom estate duties which might be assessed against the trust, the Court noted¹⁰⁶³ that it had been consistently held that, in the absence of a treaty or reciprocal agreement, the courts of New York would not enforce the revenue laws of other jurisdictions. Accordingly, the trustee was not obligated to retain any part of the fund for the payment of such duty.

11.29 Baker¹⁰⁶⁴ refers to the decision of the Supreme Court of New South Wales in *Bath v. British and Malayan Trustees Ltd.*,¹⁰⁶⁵ in which it refused an application to grant letters of administration to a trustee where the purpose of the appointment was to transfer assets from New South Wales to Singapore to meet an estate duty claim. The deceased died domiciled in Singapore with assets in several jurisdictions; the assets in Singapore were insufficient to meet the estate duty claim and the executor in Singapore had given an undertaking to remit assets from abroad as a condition of the grant of administration. Because of this, the Court refused to appoint the administrator favoured by the executor and instead granted letters of administration to one of the beneficiaries resident in New South Wales.

Foreign Procedures Designed to Ensure Tax Collection will not be Upheld

11.30 It is apparent from a series of decisions that the courts, at least in the United States, will, consistent with the Revenue Rule, not uphold foreign procedural requirements which are designed to ensure foreign tax collection. This issue has arisen in a number of United States cases.

11.31 In the case of *In re Spitzer's Estate*,¹⁰⁶⁶ the sole question arising was whether, as a condition of delivery of property, the petitioner must furnish to the respondent a so-called '*envoi en possession*' from a French tribunal. This document was required in certain circumstances by the Republic of France under its tax laws. The New York

¹⁰⁶³ 208 N.Y.S.2d 725, at 728.

¹⁰⁶⁴ Baker, *The Transnational Enforcement of Tax Liabilities*, British Tax Review, 313 at 317 (1993).

¹⁰⁶⁵ (1969) 90 W.N. (N.S.W.) 44.

¹⁰⁶⁶ (1939) 170 Misc. 160, 9 N.Y.S.2d 868.

Surrogate's Court held that there was no reason why discretion, if it resided at all in the Court, should be exercised in favour of the enforcement of the tax law of a foreign nation. Accordingly, delivery of the property would be ordered despite any requirement of the foreign tax law. The Surrogate's Court arrived at the same conclusion in the cases of *In re Daltroff's Estate*,¹⁰⁶⁷ *In re Bloch's Estate*,¹⁰⁶⁸ *In re D'Ursel's Estate*¹⁰⁶⁹ and *In the matter of Tahtabourounian*,¹⁰⁷⁰ as did the Supreme Court of New York in the case of *In re Guaranty Trust Co. of New York*.¹⁰⁷¹

11.32 *In the matter of Blumenthal*¹⁰⁷² was a case in which the respondent in discovery proceedings admitted possession of property belonging to the decedent's estate. The sole objection to the demand for a turning over of the property rested in the respondent's contention that, Dutch taxing authorities having issued an 'attachment' against the property in question, the Surrogate's Court must pass judgment upon the validity of the attachment or await a release thereof before directing a turning over.

11.33 The Court held that it was not the appropriate tribunal in which to test the validity of a tax decree by a foreign taxing authority and, that, assuming the validity of the tax, the courts of New York would not enforce taxes assessed by foreign sovereigns, nor condition their decrees upon compliance with procedures prescribed in those jurisdictions, especially where such taxes were levied against property located in New York. The Court concluded¹⁰⁷³ that the revenue laws of one country had no force in another and the respondent had no right to insist upon compliance with Dutch tax laws as a pre-condition to delivery of the property to the personal representative of the decedent.

¹⁰⁶⁷ (1943) 43 N.Y.S.2d 75.

¹⁰⁶⁸ (1944) 48 N.Y.S.2d 823.

¹⁰⁶⁹ (1947) 74 N.Y.S.2d 558.

¹⁰⁷⁰ (1950) 198 Misc. 553, 102 N.Y.S.2d 198.

¹⁰⁷¹ (1947) 74 N.Y.S.2d 559.

¹⁰⁷² (1949) 195 Misc. 463, 90 N.Y.S.2d 540.

¹⁰⁷³ (1949) 195 Misc. 463, at 463 to 464.

Foreign Tax Law and Forum Trust Law

- 11.34** In *Damberg v. Damberg & Ors.*,¹⁰⁷⁴ a question arose as to whether a father had given certain properties in Germany to his children as an outright gift or whether the properties in question were held on resulting trusts by the children. On the evidence before it, the New South Wales Court of Appeal was satisfied that, in entering the arrangements at issue, the father's intention had been to save on German capital gains taxation on a subsequent sale of the properties and that he had rebutted the presumption of advancement from parent to child of equitable interest along with legal title.
- 11.35** The children attempted to escape the consequences of the findings of resulting trusts by arguing¹⁰⁷⁵ that since German law must be assumed to be the same as Australian law, and since the policy of Australian law was that taxpayers must declare the whole of their income in tax returns with a view to accurate assessments being formulated, the failure of their father to declare the capital gain on the subsequent sale of the properties in his returns was illegal. The resulting trusts were thus illegal because they were associated with, or in furtherance of, a purpose that was contrary to the policy of the law.
- 11.36** The children went on to argue that the policy of the legislation would not be defeated by the court enforcing the resulting trusts provided¹⁰⁷⁶ the amounts of tax evaded, together with interest and penalties, were paid to the German government. However, if those terms were not appropriate (and they were not because the court could not calculate the amount of tax not paid), then the father's equitable claims to resulting trusts should be refused.
- 11.37** The Court of Appeal held¹⁰⁷⁷ that it should not be assumed that German law in relation to the avoidance or evasion of capital gains tax was the same as Australian law, but that even if that assumption was correct the resulting trusts in favour of the father must still be recognised.¹⁰⁷⁸

¹⁰⁷⁴ [2001] NSWCA 87.

¹⁰⁷⁵ [2001] NSWCA 87, at paragraph 108.

¹⁰⁷⁶ Relying on *Nelson v. Nelson* (1995) 184 CLR 538.

¹⁰⁷⁷ [2001] NSWCA 87, at paragraph 162.

¹⁰⁷⁸ [2001] NSWCA 87, at paragraph 165.

11.38 The Court noted that if the transactions had all occurred in Australia then *Nelson v. Nelson*¹⁰⁷⁹ would have required that Australian tax law be complied with in that the father would have been obliged to pay the amount of tax owing; however,¹⁰⁸⁰ the transactions had not occurred in Australia and any entitlement to unpaid tax lay with the German tax authorities. For the Court to impose a condition that any outstanding tax be paid would amount to an impermissible indirect enforcement of a foreign revenue law. The Court, referring to *Buchanan v. McVey*,¹⁰⁸¹ held¹⁰⁸² that the relevant principle did not turn on whether the foreign state was actually suing for a tax debt. Accordingly, German capital gains tax law could not be relied upon to defeat the resulting trusts.

The Revenue Rule: Beneficiaries and Fiduciaries

11.39 It is clear however that there are circumstances in which the courts are willing to modify the application of the Revenue Rule where a failure to do so would impact adversely on a beneficiary or a fiduciary.

11.40 In the case of *In re Hollins*,¹⁰⁸³ the testatrix at the time of her death was a British subject, domiciled in England, where her last will and a codicil thereto were duly probated in 1909. Subsequently, the same testamentary instruments were proved *de novo* in New York and letters testamentary were thereupon granted by this court to American executors. The testamentary instruments designated executors for the English estate and separate executors, domiciled in New York, for the American estates.

11.41 The accounts of the American executors were filed for settlement in the Surrogate's Court in New York. A legatee under the will objected to that part of the decree which, in substance, provided that the American executors and trustees deduct, from the annuity coming to the legatee, a certain amount in satisfaction of the legacy duty payable thereon under English law. A sum sufficient to pay such duty had been remitted by the American executors to the English executors. The legatee, an Austrian citizen, domiciled in

¹⁰⁷⁹ (1995) 184 CLR 538.

¹⁰⁸⁰ [2001] NSWCA 87, at paragraph 166.

¹⁰⁸¹ [1954] I.R. 89.

¹⁰⁸² [2001] NSWCA 87, at paragraph 167.

¹⁰⁸³ (1913) 79 Misc. 200, 139 N.Y.S. 713.

Austria, claimed that the American executors should have ignored English law and paid over the annuity given to her by the testatrix free of the English duty or tax. The only question before the Court was whether the American executors were justified in remitting to the English executors a sum sufficient to discharge the legacy duty imposed by English law on the legatee.

- 11.42** The Court held¹⁰⁸⁴ that as the testatrix had become an English woman and was domiciled in England at the time of her death, the devolution and disposition of her personal property was primarily governed by the law of her English domicile. That law provided for a legacy duty upon every bequest of personal property contained in the will of the testatrix. The annuity to the legatee was clearly, in the abstract, subject to the payment of such legacy duty. The Court stated that as New York tax law imposed a similar succession tax or duty upon the personal property, wherever situate, of a resident of the state, the right of a foreign state to impose a tax in similar terms ought not to be questioned.
- 11.43** The Court held that although the will of the testatrix was proved *de novo* in New York, nevertheless England was the principal place of administration and the administration in New York was an ancillary one only. The possession of the American executors was to be regarded in this instance, there being no claims of American creditors interposed, to some proper extent as a possession of an English estate. The Court went on to hold¹⁰⁸⁵ that it could be assumed that the testatrix contemplated that her executors, wherever they might be, would, in respect of her estate, comply with the law of her domicile in so far as possible. The Court went on to hold that, there being no local interposition, the American executors did precisely what they should have done.
- 11.44** The Court stated that it was generally true that the courts of New York would not go out of their way to aid a foreign state in the enforcement of its peculiar revenue laws. The legatee contended that whilst England might impose a tax on her annuity or legacy, the

¹⁰⁸⁴ 79 Misc. 200, at 205.

¹⁰⁸⁵ 79 Misc. 200, at 206.

English authorities could not collect it as the property out of which the annuity was payable was not in England and the legatee was not within the English jurisdiction.

- 11.45** The Court observed¹⁰⁸⁶ that when the legatee became a recipient of a legacy given by the will of an English woman and payable out of an English estate, wherever situated, the legacy itself was burdened with certain implied conditions, which bound the legatee, whether in, or out, of English jurisdiction. The legatee must be taken to receive such legacy subject to any burdens which the sovereign of the donor lawfully imposed on the gifts of its subjects. The fact that the American executors had a right to recognise the claims of local creditors was not paramount.
- 11.46** The legatee argued that the legacy duty was payable only out of the particular legacy on which it was imposed, and that the English executors were liable for payment of the duty on her legacy only in the event that property came into their hands applicable to the discharge or payment of the particular legacy to the legatee. As such property had not, and would not, come directly into the hands or possession of the English executors, legacy duty should not be deducted by the American executors.
- 11.47** The Court held¹⁰⁸⁷ that as the English courts would, no doubt, enforce payment of the legacy duty in question from any property of the estate of the testatrix located in England or forwarded to England by the American executors for the purpose of being applied to the payment of other legacies, the other legatees would, in that event, be compelled to pay the duty properly payable by the legatee in these proceedings, but unenforceable against her because of a lack of jurisdiction over her by the English courts. The Court held that this would result in an injustice which the New York courts should not sanction.
- 11.48** The Court concluded that whilst it was undoubtedly true that this court would not aid a foreign government in the enforcement of its revenue laws, it would 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. The Court

¹⁰⁸⁶ 79 Misc. 200, at 206 to 207.

¹⁰⁸⁷ 79 Misc. 200, at 206.

should favour such an administration of the estate here as would be in conformity with the intention of the testatrix. It was certainly not the intention of the testatrix that the bequests made by her to the English legatees should be partly confiscated in the payment of death duties imposed upon the bequests to foreign legatees. The orderly and equitable administration of the estate required that the legacy duty imposed by English law upon the annuity given to the legatee by the will of the testatrix should be paid out of the property set apart by the American executors for the production of such annuity.

- 11.49** In the case of *In re Harding's Estate*,¹⁰⁸⁸ the testatrix died domiciled in, and a citizen of, Great Britain, having left two mutually exclusive wills, one relating solely to her estate in England, the other solely to her estate in Pennsylvania. The question arising was whether the Court would lend its aid in the enforcement of a British legacy duty statute by requiring the executors of the American will to remit, to the executors of the English will, from the American estate, the amount of British legacy duty which had been assessed by the British taxing authorities against the legacies and residuary shares payable to the pecuniary and residuary legatees from the American estate under the American will.
- 11.50** Stearne J. noted¹⁰⁸⁹ that the entire estate was that of a British subject and that all American federal and state taxes had been assessed and paid. Although the estate was British, it was being distributed by an American court instead of undergoing the expense and delay of transmitting it to England and then returning it to the United States. The Court observed that it would seem unfair in principle, unless the will provided otherwise, to exempt this part of the estate from British inheritance taxes. All of the burden would be thus cast upon the British legatees whilst the American legatees would take their legacies free from British tax. Yet this was exactly what the American legatees requested of the Court.
- 11.51** On appeal from the decision that the American legatees should pay the British legacy duty, Lamorelle P.J. held¹⁰⁹⁰ that no testator could get rid of his debts by making a series

¹⁰⁸⁸ 15 Pa. D. & C. 515 (Pa. Orph. 1927).

¹⁰⁸⁹ 15 Pa. D. & C. 515, at 516.

¹⁰⁹⁰ 15 Pa. D. & C. 515, at 518 to 519.

of wills, simply because at the time of his death he happened to have personal property in various states and countries. All assets, no matter where located at the time he died, were supposed to be drawn to the domicile for the purposes of administration. Debts, administration expenses and taxes were a charge on the common fund, at least technically, at the domicile, and legatees were without standing to seek distribution unless the net balance for distribution was ascertained. It was only as a matter of courtesy and convenience that the entire fund before the Court was not sent to England; but by keeping it in New York and making direct distribution the Court must not lose sight of the fact that England was the domicile and that until all claims on the estate, as a unit, were liquidated, the United States legatees would get nothing.

11.52 However, this ringing statement of principle has found conspicuously little support in other cases and it is important to recall that it was made in circumstances where the American legatees were seeking, in effect, to disadvantage the British legatees.

11.53 In *Scottish National Orchestra Society Limited v. Thomson's Executor*,¹⁰⁹¹ residuary legatees brought an action against the Scottish executor of an estate contending that there had been a breach of trust by the latter. The Court noted¹⁰⁹² that the unusual, if not unique, circumstances of this case, involving the succession to the estate of a Canadian citizen, domiciled in Sweden, and leaving a trust disposition and settlement in Scottish form in which she made over to Scottish executors her substantial estate, most of which was in Scotland, raised complicated questions of private international law and succession.

11.54 The facts appearing from the head note were that the testatrix, who was born in Scotland in 1892, in 1922 married a Canadian domiciled in Saskatchewan. She lived there until 1934 at which time she separated from her husband and went to live in Stockholm where she continued to reside until her death in 1962. Her husband predeceased her in 1959. In 1951 she executed the aforementioned trust disposition and settlement. The deed was registered in the Books of Council and Session in Scotland and confirmation granted to

¹⁰⁹¹ (1969) S.L.T. 325.

¹⁰⁹² *Ibid*, at 327.

the executors from a Scottish Commissariat in 1963. At her death, the deceased's estate in the United Kingdom amounted, on realisation, to approximately £31,186. She also left gross estate in Canada of in or about £5,255 and in Sweden of in or about £2,306.¹⁰⁹³

11.55 According to Swedish law the deceased was regarded as permanently resident in Sweden and a Swedish court appointed an administrator of her estate. After obtaining confirmation and probate of the estate in Great Britain, the executors proceeded to administer it in terms of the trust disposition and settlement, of which one of the purposes was to pay certain pecuniary legacies "all free of Government duties" to legatees, three of whom were resident in Sweden. United Kingdom estate duty was paid on the property situated in Great Britain. The debts and administration expenses and the pecuniary legacies in Great Britain were paid and thereafter £16,000 was remitted to the Swedish administrator to enable him to meet Swedish death duties.

11.56 The Court noted¹⁰⁹⁴ that out of the deceased's estate there was paid as duty to the Swedish fiscal authority over £19,000 and to the British Inland Revenue some £5,350 – over £24,000 on an estate totalling some £39,000. The effect was to reduce substantially the sums that would otherwise have been payable to the residuary legatees. The residuary legatees brought an action against the surviving executor, arguing that the executors were in breach of trust in paying the £16,000 to the Swedish administrator to enable him to pay the Swedish inheritance tax.

11.57 For the purposes of Scottish law, the deceased was domiciled in Sweden at the date of her death although, the Court observed,¹⁰⁹⁵ the concept of domicile, as known to Scottish law, apparently did not exist in Sweden. Under Swedish law the deceased was regarded as permanently resident in Sweden.

11.58 In considering whether the amount at issue was a proper debt which the executors were entitled to pay, the Court considered the situation which would have arisen if there had been no Swedish property and no Swedish legacies and no purpose to be fulfilled in

¹⁰⁹³ *Ibid*, at 326.

¹⁰⁹⁴ *Ibid*, at 327.

¹⁰⁹⁵ *Ibid*, at 326.

Sweden apart from paying Swedish inheritance tax. The Court was of the view¹⁰⁹⁶ that the executors could not have properly paid over the money to the Swedish administrator – it was not a claim that could have been enforced by him against them in Scotland.

11.59 The Court accepted,¹⁰⁹⁷ on the basis of expert evidence, that as a matter of common practice, if a situation arose in which the Swedish administrator had in his hands a sum of money to pay the Swedish legacies and inheritance tax levied on the estate was unpaid, his legal duty would be to pay the tax before the legacies. Similarly, in like circumstances, he would have to take steps to recover the legacies from the Swedish legatees if they were paid direct to them by the Scottish executors. The Court was satisfied that, in the circumstances, the executors could not successfully pay the legacies to the Swedish legatees without first arranging for payment of the Swedish inheritance tax on the estate. Accordingly, they had properly sent the £16,000 to the Swedish administrator and the proceedings against them must fail.

11.60 *In re Lord Cable, decd (Ch. D.) Garratt & Ors. v. Waters & Ors.*¹⁰⁹⁸ the plaintiffs in the proceedings, who were beneficiaries of a share in a will trust, sought by motion, an interlocutory injunction, to restrain the will trustees and an Indian company, Union Trust, which had been incorporated by the trustees in 1931, from taking any steps to transmit certain monies out of the jurisdiction of the English court.

11.61 The only business of Union Trust was to invest money, invested in it or lent to it, by the will trustees. Such money had been mainly invested in British Government securities but after 1947, when exchange control legislation came into force in India, no further funds were remitted to England for such investment. However, certain re-investments were authorised under the exchange control legislation on the condition that the permission of the Reserve Bank of India would be obtained for the sale or disposal of the securities. As certain securities were sold or redeemed, the moneys were remitted to Union Trust in India and used to reduce the company's indebtedness to the will trustees. The will trustees, who were jointly and severally accountable under Indian law for estate

¹⁰⁹⁶ *Ibid*, at 330.

¹⁰⁹⁷ *Ibid*, at 333.

¹⁰⁹⁸ [1977] 1 W.L.R. 7.

duty payable on the deaths of former life tenants, used the moneys so redeemed in part payment of that duty.

- 11.62** A substantial amount of duty was still outstanding when, in August 1975, a holding of securities was redeemed. The Reserve Bank refused permission for the redemption monies to be retained in the U.K. and ordered them to be returned to India. Failure to comply with the order would involve a breach of exchange control legislation and would expose Union Trust and its directors to serious penal consequences. The Union of India applied to be joined as a defendant as it was directly interested in the action in order to protect its exchange control legislation.
- 11.63** The Court first gave judgment on the motion of the Union of India. Two main arguments¹⁰⁹⁹ were advanced in support of the motion. *Firstly*, if the court were to grant the injunction sought by the plaintiffs this would inevitably involve Union Trust in a breach of Indian exchange control law. *Secondly*, in any such case, where there was an attempt, by an action in England, to prevent an Indian citizen from complying with Indian exchange control law, or to compel him to break it, then the Union of India had such a direct interest in the action that, on its application, the court should, in the exercise of its discretion, join it as a party to the proceedings.
- 11.64** The Court observed¹¹⁰⁰ that the general rule was that an English court had no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a revenue law of a foreign state. If the Union of India were to bring an action in an English court, even against an Indian citizen, for the explicit purposes of enforcing payment of the claims for estate duty, an English court could not and would not entertain it. For similar reasons, if the application by the Union of India were expressly based upon the desire to enforce the rights possessed by it under Indian estate duty law, the court would necessarily have to reject the application. To do otherwise would be to assist a claim for the enforcement of a revenue law of India. Further, it would make no difference that, as a matter of form,

¹⁰⁹⁹ *Ibid*, at 12.

¹¹⁰⁰ *Ibid*, at 13.

the Union of India, if joined, would become a defendant rather than a plaintiff in the proceedings.

- 11.65** The Court went on to note that Counsel for the Union of India had submitted that a very different situation arose in this case in that the Union of India was not relying on any claim or charge for estate duty which it might have; rather it was concerned to protect its position under its exchange control legislation.
- 11.66** The Court stated,¹¹⁰¹ however, that it could not shut its eyes to the fact that here, no matter how Counsel for the Union of India presented the case, in pecuniary terms the substantial interest of the Union of India in getting the proceeds of the securities remitted to India was to enable it to obtain payment of the liabilities to estate duty, the assets available in India for this purpose not being sufficient to meet these claims. This was not a pecuniary interest that the Court was entitled to assist the Union of India in protecting.
- 11.67** In refusing to grant the plaintiffs an interlocutory injunction, the Court noted¹¹⁰² that the plaintiffs had contended that whilst, in the course of executing the will trusts, an English court would permit the will trustees to indemnify themselves for any Indian estate duty which they had actually had to pay, it would not give them leave to remit assets situated in the United Kingdom for the purpose of paying such duty. The Court stated that some superficial support for that contention was to be found in the Scottish decision of *Scottish National Orchestra Society Ltd. v. Thomson's Executor*,¹¹⁰³ in which Lord Robertson held that executors in Scotland could not properly have paid moneys over to a domiciliary administrator of a testatrix in Sweden if the *only* purpose had been to pay inheritance duty properly chargeable in Sweden, because it was a claim that could not have been enforced against the executors in Scotland. The Court went on to note, however, that Lord Robertson, on the particular facts of that case, held that the payment by the executors had been properly made because the payment of Swedish duty had not been the only purpose of the payment; it had served the additional purpose of relieving those beneficially entitled to the assets in Sweden from having the value of their interests

¹¹⁰¹ *Ibid*, at 14.

¹¹⁰² *Ibid*, at 25 to 26.

¹¹⁰³ 1969 S.L.T. 325, at 330.

diminished by payment of the Swedish duty in respect of assets subject to the Swedish jurisdiction.

- 11.68** The Court stated that, particularly bearing in mind that, if the Indian duty was not paid, the will trustees could be exposed to penalties in India of an amount representing double the amount of duty and that all the trust assets situated in England might not suffice to cover that amount, it strongly inclined to the view that an English court, in executing these foreign trusts, would regard the personal protection of the will trustees as affording sufficient justification for permitting a prompt remittance of trust assets to India, for the explicit purpose of paying Indian estate duty chargeable under the law of India, being the proper law governing the trusts of such assets.
- 11.69** Correspondingly, the Court strongly inclined to the view that, even if Indian exchange control legislation did not exist, it would not be appropriate for the court, on the interlocutory motion, to intervene for the purpose of preventing the will trustees from permitting or procuring the remittance to India of the redemption moneys, even though the sole or dominant purpose of such remittance was to enable the will trustees to pay Indian estate duty. The Court went on to state, however, that it did not need to express any concluded view on this point as its decision turned on the Indian exchange control legislation and the consequences flowing therefrom.
- 11.70** In *Goodrich v. Rochester Trust & Safe Deposit Co.*,¹¹⁰⁴ one James M. Seely, a resident of Rochester, New York, died on the 4th of April, 1900, leaving a last will and testament, which was admitted to probate by the surrogate of Monroe County, and letters testamentary were issued to the defendant, Rochester Trust & Safe Deposit Company, named as executor in the will, and also trustee of certain trusts which it created. Amongst the assets of the estate were bonds and mortgages upon real property in the city of Detroit, Michigan. On the 5th of February, 1901, the plaintiff was appointed administrator with the will annexed in Wayne County, Michigan. The bonds and mortgages were, at the time of his death, in the possession of Mr. Seely at Rochester,

¹¹⁰⁴ (1916) 173 A.D. 577, 160 N.Y.S. 454.

and came into the possession of his executor, the Rochester Trust & Safe Deposit Company, at the time letters testamentary were issued to it on the 4th of May, 1900.

- 11.71** These mortgages were, from time to time, as they became due and payable, transmitted by the Rochester Trust & Safe Deposit Company to the plaintiff at Detroit, Michigan, where he resided, and were by him collected as such administrator with the will annexed, and discharges of mortgage executed by him, whereupon, after deducting his fees and expenses, he immediately remitted the proceeds of each mortgage so collected to the defendant Rochester Trust & Safe Deposit Company as executor.
- 11.72** Shortly after the last of the mortgages was so collected, and the proceeds remitted, the plaintiff applied to the Probate Court of Wayne County to be discharged as administrator, whereupon he was informed, for the first time, that a transfer tax upon that part of the estate which he had so handled was payable to the State of Michigan. Soon afterwards he took up the matter with the Rochester Trust & Safe Deposit Company only to learn that it had previously been discharged as executor by the surrogate of Monroe County, though it had retained as trustee, under the terms of the will, the shares of certain of the children of the testator. Subsequently, the plaintiff, on foot of a Michigan court order, paid the transfer tax and accrued interest out of his own funds and instituted proceedings to recover the amount so paid.
- 11.73** The New York Supreme Court held¹¹⁰⁵ that the Michigan statute imposing the transfer tax (and a lien upon the property transferred) clearly applied to executors and administrators in Michigan, but that it could not operate beyond the borders of that state to fix a personal liability upon an executor in the State of New York. The Supreme Court went on to note that the Michigan transfer tax statute was the same, in substance, as the New York statute. It undertook to fix a lien for the transfer tax upon the property transferred, as did the New York statute. The Supreme Court held that the New York courts should assist in enforcing the Michigan statute in New York in so far as it could be done consistently with the general principles of law prevailing in New York. The Supreme Court concluded that it was just and right that the individual defendants, who

¹¹⁰⁵ (1916) 173 A.D. 577, at 581 to 582.

had received the proceeds of the Michigan mortgages should pay the tax due to the State of Michigan. Accordingly, the Court directed recovery by the plaintiff against the defendants.

11.74 In *Re Reid*,¹¹⁰⁶ the testatrix died in 1919, domiciled in England and leaving property in both England and Canada. By her will the testatrix appointed executors, made some specific devises and bequeathed the income of the rest of her estate, in equal shares, between her two daughters and the survivor of them for life, with remainder in equal shares to her two grandsons, who were the sons of one of the testatrix's daughters and one of whom was the appellant in the proceedings. In 1940 one of the two life tenants died; in 1963 one of the two remaindermen died, naming the appellant his sole executor and trustee; in 1964 the surviving life tenant died. The appellant then became entitled to one half of the testatrix's estate in his own right and to the other half in his capacity as executor of his brother. At the time of the proceedings the respondent was the trustee of the testatrix's will.

11.75 Following the death of the last surviving life tenant, the United Kingdom revenue authorities claimed estate duty for a sum in excess of \$10,000. This placed the respondent, which was incorporated in England and which did business and had assets in both England and British Columbia, in a difficult position as, under the relevant British legislation, it was accountable for the estate duty in respect of all personal property wheresoever situate of which the testatrix was competent to dispose at her death. The value of the assets in the United Kingdom was only \$3,000 whilst the value of the assets in British Columbia was in excess of \$60,000.

11.76 The appellant argued that if the respondent paid the estate duty in the United Kingdom it would be entitled to recoup itself only to the extent of the assets there and could not be indemnified to the extent of the difference out of the assets in British Columbia. The respondent's position was that it was entitled to be indemnified, in respect of the estate duty that it had paid, out of the assets of the estate, wherever situate. The proceedings came before the Court in circumstances where the respondent had declined to comply

¹¹⁰⁶ 17 D.L.R. (3d) 199, 1970 CLB 293, [1971] 2 W.W.R. 121 affirming 2 D.L.R. (3d) 155.

with demands made by the appellant that it distribute all the assets in British Columbia to him.

- 11.77** Relying on the authority of *Hardoon v. Belilios*,¹¹⁰⁷ the British Columbia Court of Appeal held¹¹⁰⁸ that it was clear that the respondent was entitled to be indemnified out of the estate, and any part thereof, against the estate duties it had had to pay, unless the appellant could show some good reason why the respondent, as trustee, should bear the cost of the duties itself. The appellant advanced as good reason the proposition, stated in *United States of America v. Harden*,¹¹⁰⁹ that in no circumstances will the courts directly or indirectly enforce the revenue laws of another country.
- 11.78** The Court noted¹¹¹⁰ that the British estate duty office was not seeking to lay its hands on any property in British Columbia or otherwise to enforce its tax claims in British Columbia. Acting in accordance with the applicable British legislation, it was seeking to gain, from an English company, the payment of duty for which the legislation provided that the company should be accountable. It was not a case in which a foreign government, having obtained a judgment for taxes in its own jurisdiction, was suing upon that judgment in a British Columbia court. The Court went on to state¹¹¹¹ that whether or not the respondent was indemnified could not affect to the slightest degree the amount of estate duty collected in England.
- 11.79** The Court concluded¹¹¹² that there was no assertion of sovereign authority by the United Kingdom in British Columbia nor did the case require a scrutiny¹¹¹³ of the liability to see whether it ran counter to the settled public policy of British Columbia. Accordingly, the appellant had failed to show that the Revenue Rule applied to this case and had

¹¹⁰⁷ [1901] A.C. 118. In this case it was held that the plaintiff, who held partly paid shares on trust for the defendant as beneficial owner, was entitled to be indemnified by the defendant in respect of calls made on the shares.

¹¹⁰⁸ 17 D.L.R. (3d) 199, at 202.

¹¹⁰⁹ (1963) 41 D.L.R. (2d) 721, affirming (1962) 36 D.L.R. (2d) 602, affirming (1961) 30 D.L.R. (2d) 566.

¹¹¹⁰ 17 D.L.R. (3d) 199, at 204.

¹¹¹¹ 17 D.L.R. (3d) 199, at 205.

¹¹¹² 17 D.L.R. (3d) 199, at 205 to 206.

¹¹¹³ Citing the test set out by Learned Hand J. in *Moore v. Mitchell* (1929) 30 F. 2d. 600.

consequently failed to show any good reason why the respondent trustee should bear any part of the estate duty itself.¹¹¹⁴

- 11.80** In *Stringam v. Dubois*¹¹¹⁵ an issue arose as to whether, on the facts of the case, the Revenue Rule applied so as to allow the transfer of Canadian realty to the devisee of that realty rather than requiring that the property be sold and the proceeds used firstly to pay United States estate taxes.
- 11.81** The testatrix, a United States resident, had died domiciled in the state of Arizona. Under her will she named the Valley National Bank of Oregon her executor and she expressly devised to the respondent her Alberta wheat farm. Probate issued out of the Superior Court of Arizona and letters of administration, with will and codicils annexed, were granted to the appellant, by the Surrogate Court of Alberta, pursuant to a power of attorney granted to him by the executor.
- 11.82** The estate consisted of probate and non-probate assets. The probate assets included the Canadian wheat farm. The non-probate assets comprised, in the main, two U.S. trusts. The U.S. executor applied to the Arizona Court, which ordered that 36.85% of the total estate taxes be paid out of the probate assets. At the time of the proceedings the U.S. probate assets were insufficient to pay the apportioned share of taxes and the U.S. executor looked to the Canadian real estate to meet the deficiency.
- 11.83** The Alberta Court of Appeal upheld the trial judge's decision; *firstly*, to dismiss the application of the appellant seeking an order directing that the farm be sold and payment of U.S. estate taxes be made from the net proceeds of sale, and; *secondly*, ordering the appellant to transfer the farm to the respondent. In so doing, the Court of Appeal noted¹¹¹⁶ that there were three cases critical to the issue arising before the Court.

¹¹¹⁴ *In re Lord Cable, decd (Ch. D.) Garratt & Ors. v. Waters & Ors.* [1977] 1 W.L.R. 7.

¹¹¹⁵ 1992 CarswellAlta 205, 7 Alta L.R. (3d) 120, [1993] 3 W.W.R. 273, 135 A.R. 64, 33 W.A.C. 64, 48 E.T.R. 248.

¹¹¹⁶ 1992 CarswellAlta 205, at paragraph 19.

- 11.84** The *first* of the cases was *Hardoon v. Belilios*¹¹¹⁷ which established the proposition that the *cestui que trust* who got all the benefit of the property should bear its burden unless he could show some good reason why the trustee should bear the burden.
- 11.85** The *second* of the cases was *United States of America v. Harden*,¹¹¹⁸ in which the Supreme Court of Canada had unconditionally endorsed the proposition that in no circumstances would the courts directly or indirectly enforce the revenue laws of another country. The Court of Appeal in particular noted¹¹¹⁹ that the Supreme Court had stressed two points, namely that an indirect attempt at enforcement was as offensive as a direct attempt and that one must look at the substance of the claim to determine its nature for the purposes of the application of the rule.
- 11.86** The Court of Appeal rejected¹¹²⁰ an argument by the appellant that indirect enforcement should be limited to a factual situation similar to that obtaining in *Harden*. The Court also rejected¹¹²¹ the suggestion that a further important distinction was that in *Harden* it was the foreign government that was the entity seeking enforcement of the claim. In this regard, the Court of Appeal noted that the Supreme Court had stated that the courts would not entertain an action *brought by an individual* which would indirectly have the effect of enforcing the revenue laws of a foreign country.
- 11.87** The *third* of the cases was *Re Reid*,¹¹²² in which the Alberta Court of Appeal noted¹¹²³ that the British Columbia Court of Appeal had refused to apply the rule in *Harden* by seeking to distinguish the case before it from *Harden* on two grounds. *Firstly*, the Court had stated that whether or not the respondent trustee was indemnified could not, unlike in other cases, affect to the slightest degree the amount of estate duty collected in England. The Alberta Court stated¹¹²⁴ that it did not consider this to be a proper basis for distinguishing *Harden* as the act of a trustee in first paying the foreign levy and then

¹¹¹⁷ [1901] A.C. 118.

¹¹¹⁸ (1963) 41 D.L.R. (2d) 721, affirming (1962) 36 D.L.R. (2d) 602, affirming (1961) 30 D.L.R. (2d) 566.

¹¹¹⁹ 1992 CarswellAlta 205, at paragraph 30.

¹¹²⁰ 1992 CarswellAlta 205, at paragraph 31.

¹¹²¹ 1992 CarswellAlta 205, at paragraph 32.

¹¹²² 17 D.L.R. (3d) 199, 1970 CLB 293, [1971] 2 W.W.R. 121 affirming 2 D.L.R. (3d) 155.

¹¹²³ 1992 CarswellAlta 205, at paragraph 34.

¹¹²⁴ 1992 CarswellAlta 205, at paragraph 37.

seeking reimbursement would emasculate the *Harden* rule. In any event the Court stated, it was clear that success in this case would have the immediate effect of enriching the U.S. Treasury. This criticism of *Reid* however, overlooks the statement¹¹²⁵ by the British Columbia Court of Appeal that the fact that the respondent had paid made no difference to the Court's decision.

- 11.88** *Secondly*, the British Columbia Court had stated that, unlike in other cases, where the foreign state was the plaintiff, claimant or instigator of the proceedings, in the case before it the United Kingdom had nothing whatever to do with the respondent's claim to be indemnified. The Alberta Court held¹¹²⁶ that this implied that only where the foreign state was involved as an active party to the proceedings would the *Harden* rule have an effect. To accept that conclusion would ignore the indirect aspect of the rule.
- 11.89** The Alberta Court stated¹¹²⁷ that until it was changed by the Supreme Court, statute, treaty or convention, the rule in *Harden* was valid and binding. The major difficulty was to determine under what circumstances the rule was to be applied. The authorities seemed to be in agreement on the key question, namely what was the nature or substance of the proceedings placed in issue. In this case the nature or substance of the proceedings was the indirect enforcement of the tax laws of the United States and as such the rule in *Harden* should be applied. The Court also noted¹¹²⁸ that the U.S. taxing authority had recourse for unpaid taxes against the respondent, who was a U.S. resident, and therefore it need not pursue either the appellant or the executor.
- 11.90** In justifying the application of the Revenue Rule, the Alberta Court noted¹¹²⁹ that the disposition of the bulk of the estate of the testatrix, the treatment of the trusts in light of the instructions in the will, the reason for taxes to remain outstanding notwithstanding a substantial U.S. estate, and the apportionment of estate taxes between probate and non-probate assets all left questions as to whether the estate tax claimed would be, in the words of Learned Hand J., "*in accord with the policy*" of Canada.

¹¹²⁵ 69 W.W.R. 212, at paragraph 12.

¹¹²⁶ 1992 CarswellAlta 205, at paragraph 39.

¹¹²⁷ 1992 CarswellAlta 205, at paragraphs 40 to 41.

¹¹²⁸ 1992 CarswellAlta 205, at paragraph 42.

¹¹²⁹ 1992 CarswellAlta 205, at paragraph 44.

Conclusion

- 11.91** The jurisprudence supports the view that the courts will strive to give effect to testamentary intention, although the general rule of construction leans against the payment of foreign taxes and duties. Consistent with that approach, the courts will not require the transmission of the estate outside of the jurisdiction solely for the purpose of paying foreign taxes, although if that is a consequence of fulfilling the testator's intentions, treating legatees fairly or protecting executors or trustees, they will not hesitate to do so. However, the jurisprudence demonstrates that the courts' flexibility in relation to the operation of the Revenue Rule in this area does not extend to invalidating a forum trust on the basis of foreign tax law.
- 11.92** Whilst it is fair to say that there is perhaps a greater degree of consistency in the decisions of the courts in the area of probate and trusts, a degree of uncertainty remains, at least in the Canadian jurisprudence, in relation to the extent to which the courts are willing to modify the operation of the Revenue Rule to protect the interests of the fiduciaries.

Chapter 12 – The Revenue Rule and Transnational Insolvencies

Introduction

- 12.1** This Chapter examines the operation of the Revenue Rule in the context of corporate and personal transnational¹¹³⁰ insolvencies. It is appropriate to devote a separate chapter to this area, given that the two leading modern decisions on the Rule, *Buchanan v. McVey*¹¹³¹ and *Government of India v. Taylor*,¹¹³² were both insolvency cases.
- 12.2** However, notwithstanding that much of the jurisprudence in this area is of recent origin, already issues have begun to arise in relation to the circumstances in which the operation of the Revenue Rule may be modified. Indeed, the seeds of this uncertainty were sown in the earlier of the two leading modern cases, *Buchanan*, when Maguire C.J. noted¹¹³³ that if the payment of the revenue claim in that case had only been incidental and there had been other claims to be met, it would have been difficult for the courts to refuse to lend assistance.
- 12.3** Whilst this uncertainty constitutes evidence in support of the central thesis advanced herein, the jurisprudence, and the academic commentary thereon, also suggests a means of recasting the Revenue Rule in such a way that continues to meet the core rationale, *self-interest*,¹¹³⁴ which underpins the Rule.
- 12.4** In terms of structure this Chapter will, in dealing with corporate insolvencies, first identify the issues arising in transnational insolvencies, and will then move on to examine both the EU response in this area and the proposals from UNICTRAL.¹¹³⁵ The Chapter will consider territorialism and the extent to which the recent jurisprudence evidences a willingness on the part of courts to engage in a greater degree of co-

¹¹³⁰ A transnational insolvency arises where assets and liabilities are located in more than one jurisdiction. The Revenue Rule is implicated where there are assets situate in the forum and an unsatisfied tax claim originating in a foreign state.

¹¹³¹ [1954] I.R. 89.

¹¹³² [1955] A.C. 491.

¹¹³³ [1954] I.R. 89, at 117.

¹¹³⁴ See **Chapter 8**.

¹¹³⁵ United Nations Commission on International Trade Law.

operation. The Chapter will also consider some of the case law on personal insolvencies before offering some concluding observations.

Transnational Insolvencies – The Issues Arising

- 12.5** When a company with assets and liabilities located in more than one jurisdiction becomes the subject of insolvency proceedings, a ‘transnational’ insolvency, a question arises as to which country’s bankruptcy laws and priorities should govern. Weiss¹¹³⁶ summarises the alternative approaches that can be taken to such insolvencies:

“Pure universalism maintains that all of a multinational corporation’s assets, wherever they may be located, must be pooled together. Those assets are then administered by one court in a single proceeding in the debtor corporation’s home country, with the rulings being effective everywhere. Modified universalism, an outgrowth of pure universalism, is similar to it in that the assets of the debtor, wherever situated, are pooled together and administered by one court, but the individual countries are allowed to evaluate the fairness of that proceeding, and to open local proceedings if necessary.

Territorialism, on the other hand, is a “land-grab” approach. It argues that each nation should exercise control over the assets within its borders. Under this approach, no foreign deference is required: each country applies its own laws to the assets within its jurisdiction. Territorialism has also sprouted a less extreme version, cooperative territorialism, through which cooperation is encouraged between nations using protocols “on an as needed basis,” and resolving some matters by the use of “international conventions.”

- 12.6** Weiss¹¹³⁷ notes that the European Union has adopted universalist rules to govern the transnational insolvencies in its member states,¹¹³⁸ that the United Nations Committee charged with dealing with this issue likewise proposed a Model Law of universalist

¹¹³⁶ Weiss, *Tax Claims in Transnational Insolvencies: A “Revenue Rule” Approach*, 30 Virginia Tax Review 261, at 264 (2010).

¹¹³⁷ Weiss, *Tax Claims in Transnational Insolvencies: A “Revenue Rule” Approach*, 30 Virginia Tax Review 261, at 265 to 266 (2010).

¹¹³⁸ Council Regulation 1346/2000, Insolvency Proceedings, 2000 O.J. (L160) 1 (EC).

guidelines to govern transnational insolvencies,¹¹³⁹ and that in 2005 the United States adopted the Model Law as Chapter 15 of its Bankruptcy Code.¹¹⁴⁰ As a further indication of the dominance of universalism, at least in its modified form, Weiss¹¹⁴¹ also points to the American Law Institute's Transnational Insolvency Project for Cooperation in Transnational Bankruptcy Cases Among Members of NAFTA.¹¹⁴²

- 12.7** Weiss¹¹⁴³ notes that whilst the quandary of transnational insolvencies would seem to be settled, either a country adopts universalism or it adopts territorialism, the various approaches work well only with private law claims. He goes on to state that the approaches, which mandate acquiescence to foreign authority, do not work well with public law claims, in particular tax claims by a foreign government; such claims have been denied enforcement under the Revenue Rule, thus posing a major problem for the universalist model.¹¹⁴⁴
- 12.8** Smart¹¹⁴⁵ observes that a modern insolvency case will, almost without exception, involve a demand by revenue authorities for unpaid taxes, yet most systems of private international law established rules governing the recognition of foreign bankruptcies many years ago, when taxation had little importance in international commercial activity. However, he continues, it would seem that, given the Revenue Rule, only a minority of foreign adjudications could be recognised for, although countries adopt different approaches to questions of jurisdiction and recognition, there is a seemingly universally accepted principle that the courts of one country cannot be used as tax collecting agent for another.

¹¹³⁹ U.N. Commission on International Trade Law, UNICTRAL Model Law on Cross-Border Insolvency with Guide to Enactment, U.N. Doc. A/52/17, U.N. Sales No. E.99.V.3 (1997).

¹¹⁴⁰ 11 U.S.C. §§ 1501-32 (2006).

¹¹⁴¹ Weiss, *Tax Claims in Transnational Insolvencies: A "Revenue Rule" Approach*, 30 Virginia Tax Review 261, at 287 (2010).

¹¹⁴² North American Free Trade Agreement.

¹¹⁴³ Weiss, *Tax Claims in Transnational Insolvencies: A "Revenue Rule" Approach*, 30 Virginia Tax Review 261, at 266 (2010).

¹¹⁴⁴ See Westbrook, *Priority Conflicts as a Barrier to Cooperation in Multinational Insolvencies*, 27 Penn State International Law Review, 869, at 870, (2009) ("Yet the clash of priority systems presents a serious obstacle to the universalist project."), cited in Weiss, *Tax Claims in Transnational Insolvencies: A "Revenue Rule" Approach*, 30 Virginia Tax Review 261, at 301, fn. 226 (2010).

¹¹⁴⁵ Smart, *International Insolvency and the Enforcement of Foreign Revenue Laws*, 35 International & Comparative Law Quarterly 704, at 704 to 705 (1986).

Council Regulation 1346/2000 on Insolvency Proceedings

- 12.9** Article 39 of Council Regulation 1346/2000¹¹⁴⁶ deals with this issue by providing that any creditor (including the tax authorities and social security authorities of member states) who has his habitual residence, domicile or registered office in a member state other than the state of the opening of the proceedings, shall have the right to lodge claims in the insolvency proceedings in writing. However, Fletcher¹¹⁴⁷ notes that although the Revenue Rule must be abrogated with respect to claims by the public authorities of Member States, there is no requirement that the Rule be abandoned in respect of the claims of non-European Union states. Moreover, he notes, Article 39 stops short of requiring that other Member State fiscal claims be accorded a priority of ranking equal to that enjoyed by the domestic authorities of the State in which the proceedings are taking place. He concludes that it would seemingly suffice if such claims are included among the ordinary, unsecured debts under the distributional process.
- 12.10** Burbidge¹¹⁴⁸ refers to Article 26, which preserves the right to refuse to recognize foreign insolvency procedures on public policy grounds, and speculates that it might still be wide enough to refuse recognition to such proceedings where they are brought solely to enable a local revenue debt to be paid out of assets in another jurisdiction.

Re Cedarlease

- 12.11** However, in the case of *Re Cedarlease Ltd.*¹¹⁴⁹ the Commissioners of Customs & Excise for the United Kingdom petitioned the High Court for a winding up order in respect of Cedarlease Ltd., an Irish registered company; it having been established that the company had failed to comply with a demand pursuant to section 214 of the Companies Act 1963 so that it was deemed to be unable to pay its debts. No creditor or contributory of the company appeared on the hearing of the petition other than the petitioner.

¹¹⁴⁶ Council Regulation 1346/2000, Insolvency Proceedings, 2000 O.J. (L160) 1 (EC).

¹¹⁴⁷ Fletcher, *A New Age of International Insolvency – The Countdown has Begun: Part 1*, 13 *Insolvency Intelligence* 57, at 61 (2000).

¹¹⁴⁸ Burbidge, *Cross Border Insolvency with the European Union; Dawn of a New Era*, 27 *European Law Review* 589, at 608 (2002).

¹¹⁴⁹ [2005] 1 I.R. 470.

12.12 The Court noted¹¹⁵⁰ that a public policy issue might arise under Article 26 of Council Regulation (E.C.) 1346/2000 on Insolvency Proceedings in the context of giving recognition to, and enforcement of, the judgment of another Member State, but not in the context of the jurisdiction of the forum state. The Court went on to hold that it was clear beyond doubt that if proceedings to wind up the company which had been initiated on the petition of a third party were pending before the Court, the petitioner, in these proceedings, would be entitled to prove for its debt in the winding-up proceedings by virtue of Article 39, notwithstanding that it was a tax authority of a foreign state. The Court noted¹¹⁵¹ that Council Regulation 1346/2000 did not expressly provide that a creditor located in another Member State had the right to initiate winding-up proceedings. However, the Court held that it would defeat the purpose of Council Regulation 1346/2000 if that were not the case. Accordingly, the Court concluded that the Regulation did confer jurisdiction on it to wind up the company on the petition of the Commissioners of Customs & Excise for the United Kingdom and that, in effect, the Revenue Rule was rendered inapplicable by the Regulation.

The UNICTRAL Model Law on Cross-Border Insolvency

12.13 Article 13 of the UNICTRAL Model Law on Cross-Border Insolvency¹¹⁵² makes provision for access by foreign creditors to insolvency proceedings. The accompanying Guide to Enactment and Interpretation provides an alternative wording for Article 13, paragraph 2, for States that refuse to recognise foreign tax and social security claims to continue to discriminate against such claims.

12.14 Writing from a United States perspective, Weiss¹¹⁵³ advocates the unilateral mandating of universal cross-priority of foreign tax claims with a narrow public policy exception as the preferred solution. A less attractive solution in his view would be to mandate universal cross-priority of tax claims but to allow for wide judicial discretion to disallow any claim even remotely in contrast to United States policy. The third approach

¹¹⁵⁰ [2005] 1 I.R. 470, at 476.

¹¹⁵¹ [2005] 1 I.R. 470, at 477.

¹¹⁵² U.N. Commission on International Trade Law, UNICTRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, U.N. Sales No. E.14.V.2 (2014).

¹¹⁵³ Weiss, *Tax Claims in Transnational Insolvencies: A "Revenue Rule" Approach*, 30 Virginia Tax Review 261, at 316 *et seq.* (2010).

suggested by Weiss would be to mandate universal cross-priority of tax claims with a narrow public policy exception but to require reciprocity.

- 12.15** Independently of such proposals, it is apparent, from an examination of the some of the recent jurisprudence, that the courts have begun to allow the enforcement of foreign tax claims in a corporate insolvency context.

Territorialism

- 12.16** Many cases already considered, including *Buchanan v. McVey*,¹¹⁵⁴ *Government of India v. Taylor*,¹¹⁵⁵ *QRS I ApS v. Fransden*¹¹⁵⁶ and *Relfo Ltd. (in liquidation) v. Varsani*,¹¹⁵⁷ involving a consideration of the Revenue Rule in a corporate insolvency context, have displayed a territorial approach.

- 12.17** An early United States case displaying a territorial approach in a sister state context is *Franklin Trust Co. v. State of New Jersey, In re Stewart*.¹¹⁵⁸ The question before the Circuit Court of Appeals, First Circuit, was whether the franchise tax of New Jersey should be enforced and given preference in Massachusetts. Whilst the defendant corporation was organised under the laws of New Jersey, its business office, plant and the larger part of its other property were in Milford, Massachusetts. It never had any property or transacted any business within the State of New Jersey. Further, no proceedings were taken in New Jersey, no receiver of the assets of the corporation was appointed in New Jersey and the receivership, to which the proceedings before this Court related, was primary, not ancillary. In a majority decision, the Court, holding that the case before it was a proceeding under the general rules of equity and not a bankruptcy case,¹¹⁵⁹ also held that giving extraterritorial enforcement and priority to a franchise tax would be contrary both to the decisions of Massachusetts and to principles of equity.¹¹⁶⁰

¹¹⁵⁴ [1954] I.R. 89.

¹¹⁵⁵ [1955] A.C. 491.

¹¹⁵⁶ [1999] 1 W.L.R. 2169.

¹¹⁵⁷ (2008) 11 ITLR 783.

¹¹⁵⁸ (1910) 181 F. 769.

¹¹⁵⁹ Thus distinguishing it from *New Jersey v. Anderson* 203 U.S. 483, 27 Sup.Ct. 137, 51 L.Ed. 284, in which the United States Supreme Court upheld a claim for tax based on the relevant section of the applicable Bankruptcy Act.

¹¹⁶⁰ (1910) 181 F. 769, at 771.

- 12.18** However, a somewhat more accommodating approach is evident in *New York Trust Co. v. Island Oil & Transport Corporation*.¹¹⁶¹ Receivers for the Island Oil & Transport Corporation petitioned the court for instructions as to whether or not they should pay an annual franchise tax due to the state of Virginia. The District Court held that the tax should be paid. However, the Circuit Court of Appeals, Second Circuit, held that if the receivers, in the exercise of their business discretion, deemed it expedient to pay the tax claimed, they were authorised to do so; but they were not required to pay the tax because the state of Virginia had no legal right to demand payment from them.
- 12.19** Further evidence of a more flexible approach is the case of *In re Pressed Steel Car Company*¹¹⁶² where the Court, in rejecting the Revenue Rule, held that equity would compel payment for the benefits conferred by reason of the grant of a corporate franchise. New Jersey sought to recover franchise taxes, for the years 1933 to 1935 inclusive, imposed upon Pressed Steel Car Company, a corporation of New Jersey, all of the tangible assets of which were within Pennsylvania. Receivers were appointed to the corporation in 1933 and they carried on the business of the corporation, as they were so authorized, until 1934, at which time a voluntary petition was filed pursuant to Section 77B of the Bankruptcy Act, 11 U.S.C.A. § 207. The franchise taxes for 1933 arose prior to the receivership, those for 1934 arose after the inception of the receivership and the 1935 taxes arose after the commencement of the section 77B proceedings.
- 12.20** The Court held¹¹⁶³ that the 1934 taxes were an expense of administration of the receivership estate. The exercise of the franchise and its preservation were benefits from which the receivers and the corporation had profited. Equity would therefore compel payment for the benefits conferred. The Court also held that the fact that the defence asserted that such a result gave extra-territorial effect to the taxing statutes of a foreign state was immaterial; since the receivers had availed themselves of the benefit of a franchise which had transcended state lines, and were required by the order of their appointment to preserve that franchise, neither the receivers, their successors, the trustees, nor the debtor could now be heard to say that it would not be paid.

¹¹⁶¹ (1926) 11 F.2d 698.

¹¹⁶² (1938) 100 F.2d 147 (Circuit Court of Appeals, Third Circuit).

¹¹⁶³ (1938) 100 F.2d 147, at 151 (Circuit Court of Appeals, Third Circuit).

12.21 In relation to the 1935 taxes the Court found¹¹⁶⁴ that the trustees were required to incur the obligation essential to the preservation of the franchise. Being so obligated, equity would treat them as though they had incurred the obligation and it thereby became one of the expenses of administration incurred by the trustees. As regards the 1933 taxes the Court held that the definitions of a creditor and a claim, as contained in the bankruptcy legislation, included New Jersey as a creditor and its demand for the 1933 franchise taxes as a claim.

Moving Beyond Territorialism

12.22 Notwithstanding the continuing vitality of *Buchanan*, it is apparent that the courts are in some instances willing to countenance the enforcement of foreign tax claims.

The Sefel Case

12.23 *Re Sefel Geophysical Ltd.*¹¹⁶⁵ concerned a company, Sefel, which carried on business in Canada, the United States and the United Kingdom. The company got into severe financial difficulty, proposed a plan of arrangement under Canadian company legislation and obtained an order staying all proceedings by creditors. Sefel subsequently applied to the United States Bankruptcy Court for an order to stay proceedings by United States creditors, to preserve its assets there, which order was granted in the belief that those United States creditors who had preferred status under United States law would receive similar standing in the Canadian proceedings. Creditors in the United Kingdom voluntarily refrained from bringing proceedings. Sefel's plan of arrangement failed and the company was petitioned into bankruptcy in Canada. Of the proceeds available for distribution, more than 90% had been obtained from the sale of unsecured assets in the United States while the remainder had come from Canadian assets. The trustee applied for advice and directions. Two issues arose before the Court; *firstly*, whether the claims of foreign creditors should be recognised, and; *secondly*, whether such claims should be afforded priority.

¹¹⁶⁴ (1938) 100 F.2d 147, at 152 (Circuit Court of Appeals, Third Circuit).

¹¹⁶⁵ 1988 CarswellAlta 303, 70 C.B.R. (N.S.) 97, 62 Alta L.R. (2d) 193, 92 A.R. 51, 1989 1 W.W.R. 251, 54 D.L.R. (4th) 117.

12.24 It was argued that foreign creditors should be granted preferred status in the Canadian bankruptcy on the basis of general principles of international comity and on the basis that, on the facts of the particular case, equity demanded the recognition of foreign preferred creditors. In opposition to this position it was argued that under the plain wording of the Bankruptcy Act, most of the foreign creditors claiming preferred status were clearly excluded and, in any event, Canadian law did not recognise foreign tax judgments. The Court held¹¹⁶⁶ that the relevant provisions of the Bankruptcy Act dealt only with preferences for Canadian entities in addition to which there were authorities that held the courts would not enforce foreign revenue claims. The Court noted¹¹⁶⁷ that there was no doubt that some of the claims asserted in these proceedings were revenue claims.

12.25 The Court observed¹¹⁶⁸ that *Government of India v. Taylor* was specific authority for the proposition that foreign revenue claims were not provable in a liquidation setting. However, given the present trends of international comity in the recognition of foreign proceedings, the Court was not certain that the House of Lords decision was compatible with the current judicial climate. If the goal was to deal with liquidations in an orderly fashion in one country by virtue of deference shown by competing nations, surely some claims should at least be recognised. Comity was about respecting foreign judgments, proceedings and acts of state. If Canadian bankruptcy proceedings were respected and deferred to, as they had been in this case, the Court was of the opinion that the claims of foreign states should be respected in Canadian proceedings as long as they were of a type that accorded with general Canadian concepts of fairness and decency in state-imposed burdens.

12.26 The Court stated¹¹⁶⁹ that it was specifically restricting its opinion to the special case of liquidation proceedings. The underlying considerations in a liquidation setting were

¹¹⁶⁶ 1988 CarswellAlta 303, 70 C.B.R. (N.S.) 97, 62 Alta L.R. (2d) 193, 92 A.R. 51, 1989 1 W.W.R. 251, 54 D.L.R. (4th) 117, at paragraph 24.

¹¹⁶⁷ 1988 CarswellAlta 303, 70 C.B.R. (N.S.) 97, 62 Alta L.R. (2d) 193, 92 A.R. 51, 1989 1 W.W.R. 251, 54 D.L.R. (4th) 117, at paragraph 25.

¹¹⁶⁸ 1988 CarswellAlta 303, 70 C.B.R. (N.S.) 97, 62 Alta L.R. (2d) 193, 92 A.R. 51, 1989 1 W.W.R. 251, 54 D.L.R. (4th) 117, at paragraph 26.

¹¹⁶⁹ 1988 CarswellAlta 303, 70 C.B.R. (N.S.) 97, 62 Alta L.R. (2d) 193, 92 A.R. 51, 1989 1 W.W.R. 251, 54 D.L.R. (4th) 117, at paragraph 27.

significantly different from those in a setting where the action was simply one on a tax judgment as in *U.S.A. v. Harden*. The Court stated that it could find no authority within Canada that bound it with respect to the holding in *Government of India v. Taylor*. The Court further observed that comity did not allow it to alter the priorities set out in the Bankruptcy Act but it did dictate the recognition of foreign sovereigns and governments to some extent in liquidation proceedings.

12.27 The Court noted¹¹⁷⁰ that it appeared to be the case that, under the United States legislation, pursuant to which the American court had deferred to the Canadian courts, all governments were treated equally in liquidation proceedings. The Canadian Bankruptcy Act did not allow foreign creditors preferred status in the case before the Court. However, the judge-made policy rule with respect to the mere recognition of those claims was an entirely different matter. Policy in the international trade context in the year 1988 suggested that there might well be occasions when some foreign revenue claims should be recognised in a liquidation setting. The Court went on to hold that, the claims of the United Kingdom and United States creditors, were provable in this bankruptcy, because they were claims much like those that were often made by Canadian governmental bodies. A mere comity analysis, however, was not sufficient ground to provide those claims preferred status.

12.28 The Court went on to note¹¹⁷¹ that the second major line of argument of the foreign creditors focused on equitable principles and in particular the case of *Re Condon; Ex parte James*.¹¹⁷² In that case money was paid to the trustee under a mistake of law. Notwithstanding the normal principle that money paid under a mistake of law was not recoverable, the court ordered that the trustee return the money to avoid a situation whereby the bankrupt's estate would be unjustly enriched.

¹¹⁷⁰ 1988 CarswellAlta 303, 70 C.B.R. (N.S.) 97, 62 Alta L.R. (2d) 193, 92 A.R. 51, 1989 1 W.W.R. 251, 54 D.L.R. (4th) 117, at paragraphs 30 to 32.

¹¹⁷¹ 1988 CarswellAlta 303, 70 C.B.R. (N.S.) 97, 62 Alta L.R. (2d) 193, 92 A.R. 51, 1989 1 W.W.R. 251, 54 D.L.R. (4th) 117, at paragraph 33.

¹¹⁷² 9 Ch. App. 609, [1874-80] All E.R. 388 (C.A.).

12.29 The Court stated¹¹⁷³ that the facts of the case before it appeared to lend themselves to the application of the rule in *Ex parte James*. Approximately 90% of the assets available for distribution to unsecured creditors originated from United States sources. These assets were largely available for distribution by the trustee as a result of the American court staying proceedings in the United States. To now turn around and prevent the parties that were entitled to priority with respect to those assets from asserting a similar priority in the proceedings before the Court seemed manifestly unjust. In addition, the evidence indicated that, in granting the stay, the American court was under the impression that Canadian law would treat similar creditors in a like fashion without regard to nationality. The Court concluded that the rule in *Ex parte James* was applicable to the American creditors. The estate of the bankrupt had been enriched at their expense and accordingly equity demanded that they be treated fairly. The Court stated that it so held notwithstanding that it was dealing with revenue based claims of a foreign state. The Court was considering the equities of the situation alone. When money became available at the expense of the United States creditors, equity allowed the Court to focus on the unjust enrichment aspect of the situation. Canadian creditors should not be afforded a windfall to the bankrupt's estate, on the basis of a public policy rule against the enforcement of foreign revenue statutes, in a fact situation such as this one.

12.30 The Court went on to state¹¹⁷⁴ that an alternative analysis could likely be framed on remedial constructive trust principles. The Court noted that in *Pettkus v. Becker*¹¹⁷⁵ it had been held that there were three requirements to be satisfied before an unjust enrichment could be said to exist; an enrichment; a corresponding deprivation, and; absence of any juristic reason for the enrichment. Applying these requirements to the fact situation before the Court, there was no doubt that, under current Canadian bankruptcy law, Canadian creditors had been enriched. In addition, there was a corresponding deprivation of the American creditors as a result of the American court ordering a stay on proceedings. Finally, the Court could find no juristic reason for benefiting Canadian creditors at the expense of United States creditors.

¹¹⁷³ 1988 CarswellAlta 303, 70 C.B.R. (N.S.) 97, 62 Alta L.R. (2d) 193, 92 A.R. 51, 1989 1 W.W.R. 251, 54 D.L.R. (4th) 117, at paragraphs 35 to 38.

¹¹⁷⁴ 1988 CarswellAlta 303, 70 C.B.R. (N.S.) 97, 62 Alta L.R. (2d) 193, 92 A.R. 51, 1989 1 W.W.R. 251, 54 D.L.R. (4th) 117, at paragraphs 39 to 42.

¹¹⁷⁵ [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257, 34 n.r. 384 [Ont.].

- 12.31** The Court noted¹¹⁷⁶ that the position of the United Kingdom creditors was markedly different in two respects. Firstly, and most importantly, no proceeds were realised from the sale of United Kingdom assets for distribution to unsecured creditors. Secondly, the United Kingdom creditors were not barred from proceeding by any order of a court, their recognition of the Canadian proceedings was strictly a voluntary one.
- 12.32** The Court stated that with regard to the first point, it appeared that the United Kingdom creditors were in no way prejudiced by their forbearance. All the assets in the United Kingdom were secured, so no funds became available for general distribution by the trustee as a result of inaction by British creditors. For that reason, the first branches of both the *Ex parte James* and constructive trust analyses were not met. There was no enrichment of the bankrupt's estate at the expense of the United Kingdom creditors.
- 12.33** With regard to the second point, the Court stated that the question of whether there was forbearance by creditors on a voluntary or a court-imposed basis was irrelevant. The Court was concerned with treating all creditors fairly in bankruptcy proceedings. Creditors, the Court stated, should not be penalised for displaying a comatose attitude on a purely voluntary basis.
- 12.34** The Court concluded¹¹⁷⁷ that both the United States and the United Kingdom creditors' claims were provable in the Canadian bankruptcy. In addition, the United States creditors were to be afforded a preference on distribution similar to the entitlement of a Canadian creditor of the same type.
- 12.35** Strebel¹¹⁷⁸ notes that the Court expressly restricted its opinion to the special case of liquidation proceedings, where the underlying considerations are significantly different from those where the action is simply based on a tax judgment. However, he argues that

¹¹⁷⁶ 1988 CarswellAlta 303, 70 C.B.R. (N.S.) 97, 62 Alta L.R. (2d) 193, 92 A.R. 51, 1989 1 W.W.R. 251, 54 D.L.R. (4th) 117, at paragraphs 44 to 46.

¹¹⁷⁷ 1988 CarswellAlta 303, 70 C.B.R. (N.S.) 97, 62 Alta L.R. (2d) 193, 92 A.R. 51, 1989 1 W.W.R. 251, 54 D.L.R. (4th) 117, at paragraph 47.

¹¹⁷⁸ Strebel, *The Enforcement of Foreign Judgments and Foreign Public Law*, 21 Loyola Los Angeles International & Comparative Law Journal 55, at 78 (1999).

the opinion neglected to explain the basis for this distinction. Strelbel asserts that there is no clear basis for a less stringent application of the Revenue Rule in liquidation proceedings.

The Oygevault Case

- 12.36** *Re Oygevault International BV (in liq)*¹¹⁷⁹ concerned a company, OIBV, that was incorporated in the Netherlands in 1987, registered as a foreign company in Australia in 1990 and made the subject of a winding up order by the Supreme Court of New South Wales in 1991. The company was one of a group of companies, the Litner Group, most of which were incorporated in Australia and were in liquidation.
- 12.37** The company had liabilities of over \$1,300m as guarantor (along with various members of the Litner Group) of certain principal liabilities, of other members of the Litner Group, to banks and to United States bond holders. It also owed approximately \$6,000 plus interest to the Dutch tax authorities and \$20,000 to other creditors in the Netherlands in respect of foreign administration debts. OIBV also owed \$23m to another group member. The liquidators in New South Wales had realised approximately \$16m in assets.
- 12.38** OIBV and most of the other companies in the Litner Group were parties to complex litigation pending in the Australian courts relating to the aforementioned debts to banks and U.S. bond holders and guarantees, for the determination of the relative rights of the banks and bond holders in the respective liquidations.
- 12.39** The Court noted¹¹⁸⁰ that unless the foreign tax debt and the foreign administration debts were paid in full by the liquidators, it was likely that steps would be taken to have OIBV wound up in the Netherlands. If that were to occur, the Dutch winding up would become the principal winding up and the Australian winding up would be ancillary thereto. *Prima facie*, the Australian liquidators would be obliged to transfer the monies held by them, representing the assets of OIBV, to a Dutch liquidator, for distribution in

¹¹⁷⁹ (1994) 14 ACSR 245.

¹¹⁸⁰ (1994) 14 ACSR 245, at 247.

accordance with Dutch law. Under that law the foreign tax debt would have priority over all other claims.

- 12.40** The Court observed that the liquidators took the view, and the evidence satisfied the Court that this view was correct, that payment in full of the foreign tax debt and the foreign administration debts would be insignificant compared with the damaging financial and practical effect upon the assets and the interests of the creditors generally of OIBV that would result from a winding up of OIBV taking place in the Netherlands, bearing in mind, amongst other things, the disruption to the pending litigation and the real possibility of much of the very substantial effort and expense undertaken and incurred up to that point in time in the Australian winding up having to be duplicated by the Dutch liquidator. It was in these circumstances that the liquidators sought directions from the Court, in effect, to give them authority to pay in full from the assets of OIBV both the foreign tax debt and the foreign administration debts.
- 12.41** The Court noted¹¹⁸¹ that the foreign tax debt, being unenforceable in Australia, was not admissible to proof in the winding up; and the foreign administration debts, being liabilities incurred after the winding up order, were also not admissible to proof in the winding up.
- 12.42** The Court went on to note however, that the principle that precluded a foreign revenue debt from being enforceable in Australia, or admissible to proof in an Australian winding up, did not involve the consequence that the existence of such a debt could not influence an administration governed by Australian law, for example where the enforceability of the debt in the relevant foreign jurisdiction might have significant consequences for the Australian administration or in relation to persons interested in that administration.
- 12.43** The Court stated that it had power to authorise a liquidator to make a payment out of the assets of the company which he would otherwise not be bound or entitled to make, where that payment was shown to be necessary for the purpose of preserving the assets of the company, analogous to the Court's inherent power to authorise trustees to take action

¹¹⁸¹ (1994) 14 ACSR 245, at 248.

not otherwise permissible for the purpose of preserving trust assets. Since a liquidator was an officer of the court and had functions of a public nature, the powers of the Court in this regard, *vis-à-vis* a liquidator were more extensive than its analogous powers *vis-à-vis* trustees and extended to authorising acts which it considered to be justified not only by necessity, but by expediency, in the interests of those concerned in the winding up. The circumstances of this case were such that it was proper for the Court to exercise that power, by authorising the liquidator to pay in full, not only the foreign tax debt, but if, and to the extent that they would not otherwise have power to pay in full the foreign administration debts, those debts also. The Court concluded that the payments of the foreign tax debt and the foreign administration debts should in any event be treated as expenses of the winding up.

The Matol Case

- 12.44** In *Re Matol Botanical International Ltd.*¹¹⁸² the debtor company, Matol, applied pursuant to corporate insolvency legislation, to the Cour supérieure du Québec, for a judgment declaring that the claim of the respondent, the State Board of Equalisation for the State of California, for interest and penalties in respect of certain taxes, was covered by a plan of arrangement that had been previously ratified by the Court.
- 12.45** The respondent contested the application on the question of the Court's jurisdiction, as the claim was for interest and penalties pursuant to a taxing state of California; the courts of Canada must decline jurisdiction to deal in any way with such matters. The consequence of the grant of the declaration sought by Matol would be to exempt it, at least so far as the courts of Québec were concerned, from payment of the amounts claimed.
- 12.46** The debtor company, prior to its insolvency, carried on business in a number of jurisdictions, including Québec, where it had its head office, and in California. In 1995 it proposed a complex plan of arrangement as a compromise with its creditors. At the time there were pending bankruptcy proceedings against the company in the United

¹¹⁸² 2001 CarswellQue 2369, [2001] R.J.Q. 2333, REJB 2001-26394. J.E. 2001-1743.

States Bankruptcy Court for the District of Nevada, which the latter agreed to hold in abeyance, pending the outcome of the proposed plan.

- 12.47** The plan was accepted by the company's creditors and in 1996 it was ratified by the Cour supérieure du Québec, which court was also dealing with this more recent set of proceedings. In the same year the United States Bankruptcy Court, finding the case appropriate for the exercise of comity, also approved the plan, although the court in the latest set of proceedings acknowledged that there might be some doubt as to the extent to which the respondent, which was not a party to the United States bankruptcy proceedings, should be bound by that decision. In 1998 the order of the United States Bankruptcy Court was confirmed on appeal.
- 12.48** The Court noted¹¹⁸³ that, in the interest of settling the claims of all categories of creditors, the claims of the respondent had been included in the plan of arrangement, which had received the approval not only of this Court but also of courts in the United States. No objection to such inclusion was registered by the respondent. The Court held¹¹⁸⁴ that, an exception to the rule in *Government of India v. Taylor*¹¹⁸⁵ should be made in the case of an international insolvency, where the courts of the countries concerned had already made an effort to coordinate their decisions so as to permit the settlement of claims in both jurisdictions, with a view to the continuation of the insolvent's business.
- 12.49** The Court went on to state¹¹⁸⁶ that to say that comity and international cooperation should apply to all claims, except those arising from a taxing statute, would effectively deprive debtors and creditors alike of the opportunity of concluding compromises of their claims in a comprehensive manner, which was a prime objective of the corporate insolvency legislation. In any event, the Court continued,¹¹⁸⁷ the Revenue Rule applied only to attempts by a government to enforce its taxing statutes in a foreign court; here the respondent was not initiating a procedure to recover what it claimed to be due to it,

¹¹⁸³ 2001 CarswellQue 2369, [2001] R.J.Q. 2333, REJB 2001-26394. J.E. 2001-1743, at para. 13.

¹¹⁸⁴ 2001 CarswellQue 2369, [2001] R.J.Q. 2333, REJB 2001-26394. J.E. 2001-1743, at para. 14.

¹¹⁸⁵ [1955] A.C. 491.

¹¹⁸⁶ 2001 CarswellQue 2369, [2001] R.J.Q. 2333, REJB 2001-26394. J.E. 2001-1743, at para. 15.

¹¹⁸⁷ 2001 CarswellQue 2369, [2001] R.J.Q. 2333, REJB 2001-26394. J.E. 2001-1743, at para. 16.

it was the debtor company, as applicant, which sought clarification of the interpretation to be given to the plan of arrangement.

Personal Insolvencies

- 12.50** *In re Gibbons*¹¹⁸⁸ provides an example of the territorial approach. The case concerned an attempt by an official receiver and trustee, to rely upon the provisions of section 71 of the Bankruptcy (Ireland) Amendment Act, 1872.
- 12.51** The monies in respect of which the order was sought were monies due to the English revenue authorities and the English bankruptcy proceedings had been brought for the purpose of collecting the revenue debt. Section 71 enabled the bankruptcy court in Ireland to act in aid of, and auxiliary to, the English bankruptcy court, when requested to do so. There is no suggestion, in the report of the case, that there existed creditors, other than the English revenue authorities, who would benefit from the proceedings.
- 12.52** Walsh J. noted that section 71 conferred a discretion upon the court and that it would be quite wrong to exercise that discretion in a way contrary to the established policy of the courts, which policy had been clearly stated in *Buchanan v. McVey*.¹¹⁸⁹ The Court observed that Ireland and England constituted one fiscal system at the time the legislation was passed, but that the position (at the time of judgment) was completely different in that two fiscal systems now existed.
- 12.53** In *Ayres v. Evans*¹¹⁹⁰ the appellant was a resident of New Zealand where he had been declared bankrupt. He was entitled to the unadministered residuary estate of his father, which was being administered in New South Wales. The High Court of New Zealand, by letter of request, sought the aid, of the Federal Court of Australia, in getting the appellant's interest in his father's estate and remitting the proceeds to the official assignee in bankruptcy in New Zealand, to be administered in accordance with New Zealand law.

¹¹⁸⁸ *In re Austin Gibbons, A Bankrupt in England, Ex parte Arthur Aaron Walter, Official Receiver and Trustee, Applicant* [1960] Ir. Jur. Rep. 60.

¹¹⁸⁹ [1954] I.R. 89.

¹¹⁹⁰ (1981) 56 FLR 235.

- 12.54** The appellant contended that since the greatest part of his debts in New Zealand, in or about 56%, comprised moneys owing to the revenue authorities there, the Federal Court should decline the request for aid since to grant it would be directly or indirectly enforcing the revenue laws of New Zealand and that would be contrary to public policy.
- 12.55** Fox J., having referred to *Buchanan v. McVey*,¹¹⁹¹ observed¹¹⁹² that there was no case which decided that when a person in a representative position comparable to that of an official assignee, or liquidator, being a person who was appointed in a foreign state, claimed property or moneys *part only* of which would go to satisfy foreign revenue claims, the claim, if otherwise competent, should be denied. He went on to hold,¹¹⁹³ Northrop J. agreeing,¹¹⁹⁴ that the revenue rule did not apply where a liquidator or an official assignee sought to gather in property which would, in a due course of administration, benefit ordinary creditors as well as the revenue. He further noted that legislation provided for bankruptcy co-operation between Australia and New Zealand in terms similar to the legislation considered by Walsh J. in the case of *In re Gibbons*,¹¹⁹⁵ however, he preferred¹¹⁹⁶ not to express a final conclusion on the question of whether the use of the word “shall” necessarily overcame the application of the principle concerning revenue debts in a case where recovery was only for the purpose of satisfying such a debt.
- 12.56** Northrop J. was of the view¹¹⁹⁷ that the relevant legislation prevented the application of the Revenue Rule in this case and that a request for assistance under such legislation was different in nature from an action seeking to enforce a claim based upon a cause of action and left no room for the application of the Rule.

¹¹⁹¹ [1954] I.R. 89.

¹¹⁹² 56 FLR 235, at 237.

¹¹⁹³ 56 FLR 235, at 238.

¹¹⁹⁴ 56 FLR 235, at 249.

¹¹⁹⁵ *In re Austin Gibbons, A Bankrupt in England, Ex parte Arthur Aaron Walter, Official Receiver and Trustee, Applicant* [1960] Ir. Jur. Rep. 60.

¹¹⁹⁶ 56 FLR 235, at 241.

¹¹⁹⁷ 56 FLR 235, at 248 to 249.

12.57 McGregor J., in agreeing with his brethren, stated¹¹⁹⁸ that in this case the action was one whose function was to implement the laws of bankruptcy in New Zealand to gather in the bankrupt's estate for distribution amongst creditors, and not to enforce revenue laws; even if, in the process, the Revenue should benefit.

Conclusion

12.58 The jurisprudence on the Revenue Rule, in the context of transnational insolvencies, evidences an evolution of the Rule, away from a pre-occupation with territorialism and towards a concept of universalism. These developments challenge the positivist conception of sovereignty, demonstrate the fallacy of the contention that the Revenue Rule goes to jurisdiction and are consistent with the core rationale for the Rule, *self-interest*. Notwithstanding the uncertainties that surround it, for as long as it is perceived to serve the interests of the forum, and absent legislative intervention, the Revenue Rule is likely to continue to prosper.

¹¹⁹⁸ 56 FLR 235, at 253.

PART V – CONCLUSION

Chapter 13 – The Future of the Revenue Rule

- 13.1** This thesis rejects the orthodox formulation of the Revenue Rule, which seeks to make a distinction, unsustainable, either in principle or in precedent, between recognition and enforcement, of foreign revenue law.
- 13.2** The thesis advances a revised statement of the Revenue Rule, specifically that a forum court will not, absent evidence of reciprocity on the part of the courts of a foreign state, enforce a revenue claim of that state, except where, not to do so would adversely affect the interests of private parties, even when, as a consequence of so doing, such enforcement advances the interests of that foreign state.
- 13.3** This revised statement, in discarding the *recognition/enforcement dichotomy*, reflects the evolution of the Revenue Rule into a doctrine that is concerned primarily not with foreign tax laws *per se*, but with foreign tax claims, as indicated by the development of the concepts of *direct*, *indirect* and, more recently, *functional* enforcement. Corroborating evidence for this change in the focus of the Rule is apparent from the evolving attitude of the courts to the breach, by private parties, of the revenue laws of a foreign and friendly state; although they will not impose sanctions for the breach of a foreign revenue law, except where forum law makes provision for penalties for such act or omission, neither will they sanction such breach.
- 13.4** Indeed, although the Revenue Rule has undergone considerable change since Lord Mansfield's seminal *dictum* that no country takes notice of the revenue laws of another, as the early cases on stamp duties demonstrate, it is open to question as to whether the *recognition/enforcement dichotomy* ever possessed significantly explanatory power. Further, there is an historical irony in the fact that the Rule came to be seen to express a deeply insular view of relations between states given the reality that Lord Mansfield's approach was resolutely internationalist in outlook.

- 13.5** This thesis advances the proposition that, the Revenue Rule, although clearly a doctrine of private international law, also has a public international law dimension, which arguably merits its recognition as customary international law, a position supported by the fact that the Rule appears to be an invariable feature of both common and civil law jurisdictions. The proposition that the Revenue Rule has a dual nature is consistent with the developing literature on the emerging confluence of public and private international law.
- 13.6** Sovereignty has been advanced in academic commentary, and suggested in jurisprudence, to be the best explanation for the Revenue Rule. However, although it has been contended that a departure from the Rule would constitute a derogation from sovereignty, the continued operation of the Rule, even in circumstances of constrained sovereignty, supports the proposition that there are other reasons for the existence of the Rule. In any event, there are difficulties with the sovereignty rationale from both a public and a private international law perspective.
- 13.7** The thesis takes the view that the ultimate rationale for the Revenue Rule should be acknowledged to be *self-interest*; it is only when that reality is recognised that a debate can truly begin as to whether the forum's best interests are served by treating the enforcement of foreign tax claims as a zero-sum game or whether the forum would derive greater benefit from co-operation.
- 13.8** Notwithstanding the continued vitality of the Revenue Rule, that steps towards co-operation have commenced is apparent from recent jurisprudence in transnational insolvencies, where there have been some signs of a move from *territorialism* towards *modified universalism*. However, it would be rash to predict the imminent demise of the Rule arising from what, at the moment, are best classified as isolated developments. It is only if, at some point in the future, the benefits of co-operation are seen to outweigh the attractions of competition, that the Revenue Rule is likely to become a thing of the past.

GLOSSARY

acta jure gestionis – acts of a commercial nature

acta jure imperii – acts of government

ad informandum – for information

ceteris paribus – other things being equal

ex dolo malo non oritur actio – no right of action can have its right in fraud

lex domicilii – the law of the person's domicile

lex fori – the law of the court in which the case is tried

lex loci celebrationis – the law of a place where the marriage is celebrated

lex loci contractus – the law of the place where the contract is made

lex loci solutionis – the law of the place of performance

lex situs – the law of the place where the property is situated

BIBLIOGRAPHY

- Akehurst, *Jurisdiction in International Law*, (1974) 46 Brit. Y.B. Int'l L. 145.
- Albrecht, *The Enforcement of Taxation under International Law*, (1953) 31 Brit. Y.B. Int'l L. 453.
- Atik, *The Problem of Reciprocity in Transnational Enforcement of Tax Judgments*, (1981) 8 The Yale Journal of World Public Order 156.
- Baade, *The Operation of Foreign Public Law*, 30 Texas International Law Journal, 429, (1995).
- Baker, *The Transnational Enforcement of Tax Liabilities*, British Tax Review, 313, (1993).
- Buxbaum, *Transnational Regulatory Litigation*, 46 Virginia Journal of International Law 251, (2006).
- Beale, *Jurisdiction to Tax*, 32 Harvard Law Review, 587, (1918-1919).
- Binchy, *Irish Conflicts of Law*, Butterworth.
- Black, *Old and in the Way? The Revenue Rule and Big Tobacco*, (2003) 38 Canadian Business Law Journal 1.
- Briggs, *The Revenue Rule in the Conflict of Laws: Time for a Makeover*, (2001) Singapore Journal of Legal Studies, 280.
- Briggs, *The Conflict of Laws*, pp. (2nd ed.), Oxford University Press, (2008).
- Brownlie, *Principles of Public International Law*, (7th ed. 2008) Oxford University Press.
- Brownstein, *Recognizing Civil RICO in Foreign Courts: Since They Came Should We Build It?* 35 Brooklyn Journal of International Law, 233, (2010).
- Burbidge, *Cross Border Insolvency with the European Union; Dawn of a New Era*, 27 European Law Review 589, (2002).
- Carter, *Transnational Recognition and Enforcement of Foreign Public Laws*, [1989] Cambridge Law Journal, 417.
- Cheshire, Fifoot & Furmston, *Law of Contract*, (11th ed., 1986), Butterworths.
- Cheshire, North & Fawcett, *Private International Law*, (14th ed.) Oxford University Press.
- Cohen, *Nonenforcement of Foreign Tax Laws and the Act of State Doctrine: A Conflict in Judicial Foreign Policy*, 11 Harvard International Law Journal, 1 (1970).
- Dicey, Morris & Collins, *The Conflict of Laws* (14th ed.).
- Dodge, *Breaking the Public Law Taboo*, Harvard International Law Journal, 164, (2002).
- Dodge, *The Public-Private Distinction in the Conflict of Laws*, 18 Duke Journal of Comparative and International Law, 371, (2008).
- Farnam, *Racketeering, RICO and the Revenue Rule in Attorney General of Canada v. R.J. Reynolds: Civil RICO Claims for Foreign Tax Law Violations*, 77 Washington Law Review, 843.
- Fletcher, *A New Age of International Insolvency – The Countdown has Begun: Part 1*, 13 Insolvency Intelligence 57, (2000).
- Forde and Kelly, *Extradition Law and Transnational Criminal Procedure*, 4th ed.
- Freeze, *Extraterritorial Enforcement of Revenue Laws*, (1937 – 1938) 23 Washington University Law Quarterly, 321.
- Friedman, *Whiskey and the Wires: The Inadvisable Application of the Wire Fraud Statute to Alcohol Smuggling and Foreign Tax Evasion*, 96 Journal of Criminal Law and Criminology 911, (2006).
- Hogan and Whyte, *The Irish Constitution*, (3rd ed.).
- Holmes (Oliver Wendell), *The Path of the Law*, 10 Harvard Law Review 457, at 469 (1897).
- Kovatch, *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, (1999 – 2000) 22 Houston Journal of International Law, 265.

Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, (1932) Harvard Law Review 193.

McBain, *Modernising the Common Law Offence of Cheating the Public Revenue*, 8 Journal of Politics and Law, 40, (2015).

F.A. Mann, (1954) 40 *Papers of the Grotius Society* 25.

F.A. Mann, *The International Enforcement of Public Rights*, (1987) 19 N.Y.U.J. Int'l L. & Pol. 603.

Michael Mann, *Foreign Revenue Laws and the English Conflict of Laws*, [1954] 3 International and Comparative Law Quarterly 465.

Mills, *The Confluence of Public and Private International Law*, Cambridge University Press, (2009).

Munroe and Nock, *The Law of Stamp Duties*, Release 58: September 2015.

Murdoch & Hunt, *Dictionary of Irish Law*, (6th ed.), Bloomsbury, (2016).

Norr, *Jurisdiction to Tax and International Income*, 17 Tax Law Review, 431 (1961 – 1962).

Sack, *(Non-) Enforcement of Foreign Revenue Laws*, In *International Law and Practice*, 81 U. Pa. L. Rev. 559.

Note: 29 *Columbia Law Review* 782.

Note: *Conflict of Laws – Revenue Law – Action on Tax Claim by Municipal Corporation of Another State*, (1950 – 1951) 25 St. John's L. Rev. 341.

Note: *Conflict of Laws: Extraterritorial Enforcement of Tax Claims*, (1958) Washington University Law Quarterly, 283.

Note: *Separation of Powers – Foreign Affairs – Second Circuit holds that the Revenue Rule bars a Foreign Sovereign's Civil RICO suit for Tax Revenue - Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001), 115 Harvard Law Review 2333, (2002).

Palmer, *Extrastate Enforcement of Tax Claims*, (1949) 18 U. Cin. L. Rev. 498.

Rearden, "A Delicate Inquiry": *Foreign Policy Concerns Revive the Revenue Rule in the Second Circuit and Bar Foreign Governments from Suing Big Tobacco*, 51 Saint Louis University Law Journal, 203, (2006-2007).

Silver, *Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments*, (1992) 22 Ga. J. Int'l & Comp. L. 609.

Smart, *International Insolvency and the Enforcement of Foreign Revenue Laws*, 35 International & Comparative Law Quarterly 704, (1986).

Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*.

Smith, *The Nonrecognition of Foreign Tax Judgments: International Tax Evasion*, (1981) University of Illinois Law Review.

Strebel, *The Enforcement of Foreign Judgments and Foreign Public Law*, 21 Loyola Los Angeles International & Comparative Law Journal 55, (1999).

Walden, *Enforcement by State Courts of Tax Claims of Sister States – Ohio v. Arnett*, (1951 – 1952) 39 Kentucky Law Journal, 472.

Weiss, *Tax Claims in Transnational Insolvencies: A "Revenue Rule" Approach*, 30 Virginia Tax Review 261, (2010).

West, *Federal Fraud Prosecutions of Schemes to Defraud Foreign Sovereigns of Import Taxes*, 50 Wayne Law Review 1061, (2004).

Westbrook, *Priority Conflicts as a Barrier to Cooperation in Multinational Insolvencies*, 27 Penn State International Law Review, 869, (2009).

Wilson, *Subtle Indiscretions? International Smuggling, Federal Criminal Law, and the Revenue Rule*, 89 Cornell Law Review, 231, (2003).

TABLE OF CASES

Australia

<i>Ayres v. Evans</i> (1981) 39 A.L.R. 129.....	10.52, 12.53
<i>Bath v. British and Malayan Trustees Ltd.</i> (1969) 90 W.N. (N.S.W.) 44.....	11.29
<i>Broken Hill South Ltd. v. Commissioner of Taxation (N.S.W.)</i> (1937) 56 C.L.R. 337....	3.17, 7.65
<i>Damberg v. Damberg & Ors.</i> [2001] NSWCA 87.....	11.34
<i>Gilchrist v. Davidson</i> (1849) 1 Legge (N.S.W.) 539, accessed at https://archive.org/stream/cu31924024528568/cu31924024528568_djvu.txt on the 15 th of November, 2015.....	5.47, 7.77
<i>Nelson v. Nelson</i> (1995) 184 CLR 538.....	11.36, 11.38
<i>Re Oygevault International BV (in liq)</i> (1994) 14 ACSR 245.....	12.36
<i>O’Sullivan v. Dejneko</i> (1964) 110 C.L.R. 498.....	7.63
<i>Permanent Trustee Company (Canberra) Ltd. v. Finlayson</i> (1967) 9 FLR 424	1.5, 6.34, 7.66
<i>Rothwells Ltd. (In Liq.) v. Connell</i> (1993) 119 ALR 538.....	5.51, 5.69, 6.36, 7.71

Canada

<i>Deutsche Nemectron GmbH v. Dolker</i> 1984 CarswellBC 31, 51 B.C.L.R. 162, 41 C.P.C. 269.....	4.26
<i>Re Dwelle Estate</i> (1969) 69 W.W.R. 212 (Alta.).....	6.41
<i>Re Fudger</i> 1984 CarwellsOnt 566, 18 E.T.R. 12.....	11.2, 11.5
<i>Laane and Balster v. Estonian State Cargo & Passenger SS. Line</i> [1949] 2 D.L.R. 641, 1949 CLB 479, [1949] S.C.R. 530, [1949] RCS 530, reversing [1948] 4 D.L.R. 247.....	6.14, 6.15
<i>Re Matol Botanical International Ltd.</i> 2001 CarswellQue 2369, [2001] R.J.Q. 2333, REJB 2001-26394. J.E. 2001-1743.....	12.44
<i>Pettkus v. Becker</i> [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257, 34 n.r. 384 [Ont.].....	12.30
<i>City of Regina v. McVey</i> (1922) 23 O.W.N. 32.....	7.61
<i>Re Reid</i> 17 D.L.R. (3d) 199, 1970 CLB 293, [1971] 2 W.W.R. 121 affirming 2 D.L.R. (3d) 155.....	11.74, 11.87
<i>Reid v. Diebel</i> 1909 CarswellOnt 347, 14 O.W.R. 77.....	5.36
<i>Rex v. National Trust Co.</i> [1953] S.C.R. 670, affirming 54 Que. K.B. 351.....	6.42

<i>Re Sefel Geophysical Ltd.</i> 1988 CarswellAlta 303, 70 C.B.R. (N.S.) 97, 62 Alta L.R. (2d) 193, 92 A.R. 51, 1989 1 W.W.R. 251, 54 D.L.R. (4 th) 117.....	12.23
<i>Stringam v. Dubois</i> 1992 CarswellAlta 205, 7 Alta L.R. (3d) 120, [1993] 3 W.W.R. 273, 135 A.R. 64, 33 W.A.C. 64, 48 E.T.R. 248.....	11.80
<i>United States of America v. Harden</i> 41 D.L.R. (2d) 721.....	1.5, 5.137, 5.146, 8.172, 9.67, 11.77, 11.85 – 11.89, 12.26
<i>United States v. Ivey</i> (1995) 130 D.L.R. (4 th) 674, affirmed (1996) 139 D.L.R. (4 th) 570.....	4.27
<i>District Court of the United States, Middle District of Florida v. Royal American Shows Inc. et. al. United States of America v. Royal American Shows Inc. et. al. sub nom. Re Request for Int’l Judicial Assistance</i> (1982) 134 D.L.R. (3d) 32, reversing 120 D.L.R. (3d) 732, reversing 102 D.L.R. (3d) 18.....	10.65
<i>Van deMark v. Toronto-Dominion Bank</i> 1988 CarswellOnt 1446, 68 O.R. (2d) 379.....	10.44
<i>Weir v. Lohr; All State Insurance Co. of Canada, Third Party</i> (1967) 65 D.L.R. (2d) 717... 7.61	4.20,

New Zealand

<i>Controller and Auditor-General v. Davison</i> [1996] 2 NZLR 278.....	3.28, 3.29, 5.92, 6.16, 6.52, 8.114, 8.115
<i>Connor v. Connor</i> [1974] 1 NZLR 632.....	1.5, 4.24

Hong Kong

<i>Her Majesty’s Revenue & Customs v. Shahdadpuri</i> [2012] 1 HKLRD 223.....	1.5, 10.50, 10.69
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India

<i>Viswanathan v. Wajid</i> 1963 AIR 1, 1963 SCR (3) 22.....	1.5
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Ireland

<i>Buchanan v. McVey</i> [1954] I.R. 89.....	1.7, 1.16, 2.6, 2.7, 2.14, 2.16, 4.58, 4.62, 5.4, 5.5, 5.73, 5.81, 5.83, 5.113, 5.119, 5.147, 5.150, 5.154, 5.155, 5.161, 6.6, 6.8, 6.9, 6.10, 7.85, 7.86, 7.91, 7.94, 8.11, 8.15, 8.29, 8.82, 8.93, 8.163, 8.169, 9.17, 9.67, 9.100, 10.18, 10.52, 10.67, 11.38, 12.1, 12.2, 12.16, 12.22, 12.52, 12.55
<i>Re Cedarlease Ltd.</i> [2005] 1 I.R. 470.....	12.11

<i>Byrne v. Conroy</i> [1998] 3 I.R. 1.....	10.22
<i>The State (Duggan) v. Tapley</i> [1952] I.R. 62.....	10.6, 10.8
<i>In re Austin Gibbons, A Bankrupt in England, Ex parte Arthur Aaron Walter, Official Receiver and Trustee, Applicant</i> [1960] Ir. Jur. Rep. 60.....	8.75, 12.50, 12.55
<i>The State (Hully) v. Hynes</i> (1961) 100 I.L.T.R. 145.....	2.18, 4.63, 8.74, 10.10, 10.67
<i>Bank of Ireland v. Meenaghan</i> [1994] 3 I.R. 111.....	4.4, 4.6
<i>Newell v. O'Toole</i> [2003] 1 I.L.R.M. 1.....	10.27
<i>Transports Tyrelsen v. Ryanair Ltd.</i> [2012] IEHC 226.....	4.28

Isle of Mann

<i>Re Tucker, ex p Bird</i> [1988] L.R.C. (Comm) 995.....	10.52
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Pakistan

<i>Imperial Tobacco Co. of India v. Commissioners of Income Tax</i> (1958) I.L.R., vol. 27. P. 103.....	3.12
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South Africa

<i>Commissioner of Taxes v. McFarland</i> 27 SATC 15, 1965 (1) SA 470 (W).....	1.5, 3.9, 7.2, 5.142, 6.50, 8.46, 8.98, 8.155, 8.167
<i>Jones v. Borland</i> [1969 (4)] S.A. 29 [W.L.D.].....	11.2, 11.12
<i>Priestley v. Clegg</i> 1985 (3) S.A. 955.....	10.52

Singapore

<i>Her Majesty's Revenue and Customs v. Hashu Dhalomal Shahdadpur & Anor.</i> 2012 I LRC 564.....	10.54, 10.69
<i>Relfo Ltd. (in liquidation) v. Varsani</i> (2008) 11 ITLR 783.....	1.5, 5.151, 12.16

United Kingdom

<i>Alves v. Hodgson</i> (1797) 7 Term Rep. 241.....	5.47, 5.73 7.79
<i>Attorney-General v. Lutwydge</i> (1729) Bunb. 280.....	5.120
<i>Emperor of Austria v. Day & Kossuth</i> (1861) 3 De G. F. & J. 217.....	5.121
<i>Belhaj & Anor. v. Straw & Ors.</i> [2017] UKSC 3.....	6.14

<i>Bernard v. Reed</i> (1794) 1 Esp. 91.....	5.25
<i>Biggs. v. Lawrence</i> (1789) 3 Term Rep. 454.....	5.18
<i>Boucher v. Lawson</i> (1734) Cas. T. Hard. 85.....	5.28, 5.29, 8.8, 8.17, 8.20, 8.21
<i>Bristow v. Sequeville</i> (1850) 5 Exch. 275.....	5.48, 5.67, 5.73, 6.40, 7.79
<i>Brokaw v. Seatrain</i> [1971] 2 Q.B. 476.....	6.9, 10.40
<i>Attorney General for Canada v. Schulze</i> (1901) 9 Sc. L.T. 4.....	4.58, 4.62, 5.132, 7.79, 8.28
<i>In re Lord Cable, decd (Ch. D.) Garratt & Ors. v. Waters & Ors.</i> [1977] 1 W.L.R. 7.....	11.60, 11.79
<i>Cheng v. Governor of Pentonville Prison</i> [1973] A.C. 931.....	10.7
<i>Clegg v. Levy</i> (1812) 3 Camp. 166.....	5.47, 5.61, 5.73, 7.79, 9.54
<i>Clugas v. Penaluna</i> (1791) 4 Term Rep. 466.....	5.25
<i>Re Cohen (A Bankrupt)</i> [1950] 2 All E.R. 36.....	5.127
<i>Colquhoun v. Brooks</i> (1889) 14 App. Cas. 493.....	3.24
<i>Re Condon; Ex parte James</i> 9 Ch. App. 609, [1874-80] All E.R. 388 (C.A.).....	12.28
<i>Cotton v. Rex</i> [1914] A.C. 176.....	5.124
<i>Re Emery's Investment Trusts</i> [1959] Ch. 410.....	5.98
<i>In Euro-Diam Ltd. v. Bathurst</i> [1990] 1 Q.B. 1.....	5.101
<i>The Eva</i> [1921] P. 454.....	10.39
<i>Foster v. Driscoll</i> [1929] 1 K.B. 470.....	5.74, 5.91, 5.159, 8.20
<i>King of the Hellenes v. Bostrom</i> (1923) Ll. L. Rep. 167.....	4.43, 4.44, 10.38
<i>Hardoon v. Belilios</i> [1901] A.C. 118.....	11.77, 11.84
<i>Holman v. Johnson</i> (1775) 1 Cowp. 341, 98 E.R. 1120.....	1.4, 1.10, 1.11, 5.3, 5.16, 5.19, 5.20, 5.21, 5.25, 5.27, 5.158
<i>Huntington v. Atrill</i> [1893] A.C. 150.....	4.4, 4.48, 4.50, 4.51, 5.114, 5.132, 5.134
<i>Government of India v. Taylor</i> [1955] AC 491 <i>sub nom. In re Delhi Electric Supply and Traction Co. Ltd.</i> [1954] 1 Ch. 131.....	1.5, 5.31, 5.52, 5.128, 6.1, 6.9, 6.13, 7.1, 7.61, 7.81, 7.82, 7.89, 8.41, 8.145, 8.164, 9.67, 10.38, 12.1, 12.16, 12.25, 12.26, 12.48
<i>Indian and General Investment Trust Ltd. v. Borax Consolidated Ltd</i> [1920] 1 K.B. 539.....	5.76, 5.124
<i>Iran v. Barakat Galleries</i> [2007] EWCA Civ 1374; [2008] 3 WLR 486.....	6.14
<i>James v. Catherwood</i> (1823) 3 Dowl. 7 Ry. 190.....	5.48, 7.79
<i>Kahler v. Midland Bank Ltd.</i> [1948] 1 All E.R. 811.....	4.40, 4.41, 4.44, 5.127

<i>Lever v. Fletcher</i> (1780) Unreported, <i>Park on Marine Insurance</i> , 8 th ed., Vol. 1, pp. 506 to 507.....	5.31, 5.129
<i>London and South American Investment Trust Limited v. British Tobacco Company (Australia), Limited</i> [1927] 1 Ch. 107.....	5.76, 5.124
<i>Luther v. Sagor</i> [1921] 3 K.B. 532.....	6.12
<i>Metal Industries (Salvage) Limited v. Owners of the S.T. "Harle"</i> 1962 S.L.T. 114.....	1.5, 4.15
<i>Miller v. Karlinski</i> (1945) 62 T.L.R. 85; <i>Napier v. National Business Agency Ltd.</i> [1951] 2 All E.R. 264, 67 L.Q.R. 449.....	5.13, 5.18
<i>Re Mirams</i> [1891] 1 Q.B. 594.....	5.13
<i>Attorney General of New Zealand v. Ortiz</i> [1984] A.C. 1 (H.L.).....	8.49, 8.66
<i>National Bank of Greece v. Westminster Bank</i> [1971] A.C. 945.....	3.24
<i>Nichols v. Gibson</i> [1996] S.T.C. 1008.....	3.25
<i>In re Norway's Application (Nos. 1 & 2)</i> [1990] 1 A.C. 723	2.20, 6.18, 8.42, 8.90, 8.165, 9.28, 10.57
<i>Pellecat v. Angell</i> (1835) 2 Cr. & M. 311.....	5.27
<i>Planché v. Fletcher</i> (1779) 1 Doug. 251.....	5.30, 5.31, 5.129
<i>The Playla Larga</i> [1983] 2 Lloyd's Reports 171.....	6.14
<i>Pye Ltd. v. B & G Transport Service Ltd</i> [1966] 2 Lloyd's Rep. 300.....	5.100
<i>QRS 1 ApS v. Frandsen</i> [1999] 1 W.L.R. 2169.....	1.5, 2.11, 5.150, 7.83, 7.94, 9.67, 12.16
<i>Ralli Bros. v. Compañia Naviera Sota y. Aznar</i> [1920] 2 K.B. 287.....	5.74, 5.75, 5.76, 5.124
<i>Raulin v. Fischer</i> [1911] 2 K.B. 93.....	5.115
<i>Regina v. Chief Metropolitan Stipendiary Magistrate, Ex parte Secretary of State for the Home Department</i> [1988] 1 W.L.R. 1204.....	10.16, 10.67
<i>Reggazzoni v. K C Sethia (1944) Ltd</i> [1956] 2 Q.B. 490, [1958] AC 301....	1.16, 2.7, 5.93, 5.161
<i>Commissioners for Her Majesty's Revenue and Customs v. Ben Nevis (Holdings) Ltd.</i> [2012] EWHC 1807 (Ch), [2013] EWCA Civ 578.....	1.1, 8.14
<i>Rossano v. Manufacturers' Life Insurance Co.</i> [1963] 2 Q.B. 352.....	5.78, 6.9
<i>Scottish National Orchestra Society Limited v. Thomson's Executor</i> (1969) S.L.T. 325.....	11.53, 11.67
<i>Sharp v. Taylor</i> (1848) 2 Ph. 801, 41 E.R. 1153.....	5.34
<i>Spiller v. Turner</i> [1897] 1 Ch. 911.....	5.76, 5.124
<i>Stewart v. Gelot</i> (1871) 9 M. 1057.....	5.43, 8.143

<i>Municipal Council of Sydney v. Bull</i> [1909] 1 K.B. 7.....	4.14, 4.18, 5.123, 7.61, 7.80, 8.29, 9.67
<i>Total Network SL v. Her Majesty's Revenue and Customs</i> [2008] UKHL 19.....	9.88, 9.101, 10.33, 10.54
<i>United States of America v. Inkley</i> [1989] Q.B. 255.....	4.4, 4.5, 4.6
<i>In re Visser H.M. The Queen of Holland (Married Woman) v. Drukker and Others</i> [1928] 1 Ch. 877.....	5.73, 5.126, 9.67, 11.1
<i>Banco de Vizcaya v. Don Alfonso de Borbon y Austria</i> [1935] 1 K.B. 140.....	5.116
<i>Waymell v. Reed</i> (1794) 5 Term Rep. 599.....	5.26
<i>Williams & Humbert v. W & H Trade Marks</i> [1986] 2 W.L.R. 24.....	6.4, 6.19, 7.92, 10.18

United States

<i>Ætna Insurance Co. v. Robertson</i> (1921) 127 Miss. 440, 90 So. 120.....	5.125
<i>The Anne</i> 1 Mason 508. 1 F.Cas 955, (1818).....	5.129, 8.3
<i>The Antelope</i> 23 U.S. (1 Wheat.) 66, 123 (1825).....	5.158, 8.32, 8.33
<i>Armendiaz v. De La Serna</i> 40 Tex. 291, 1874 WL 7932 (Tex.).....	8.67
<i>Arkansas v. Bowen</i> 3 App. D.C. 537, 1894 WL 11939 (App. D.C.).....	5.110
<i>Augusta v. Kimball</i> 91 Me. 605, 40 Alt. 666 (1898).....	3.7
<i>Banco do Brasil S.A. v. A.C. Israel Commodity Co.</i> 12 N.Y.2d 371, 239 N.Y.S.2d 235 (App. 1963).....	4.44
<i>Banco Frances e Brasileiro S.A. v. Doe</i> 36 N.Y.2D 592, 331 N.E.2d 502, 370 N.Y.S.2D 534 (App. 1975).....	4.46
<i>Banco Nacional de Cuba v. Sabbatino</i> (1964) 376 U.S 398, 84 S. Ct. 923.....	6.11, 9.16, 9.17
<i>Beadall v. Moore</i> (1922) 199 A.D. 531, 191 N.Y.S. 826.....	5.44
<i>In re Bliss' Estate</i> (1923) 121 Misc. 773, 202 N.Y.S. 185.....	10.35, 11.1
<i>In re Bliss' Trust</i> (1960) 26 Misc.2d 969, 208 N.Y.S.2d 725.....	11.27
<i>In re Bloch's Estate</i> (1944) 48 N.Y.S.2d 823.....	11.31
<i>In the matter of Blumenthal</i> (1949) 195 Misc. 463, 90 N.Y.S.2d 540.....	11.32
<i>Bowles v. Barde Steel Co.</i> (1945) 177 Or. 421, 164 P.2d 692.....	9.22
<i>Boyd v. Dillman</i> (1938) 9 W. W. Harr. 231, 197 A. 830.....	7.54
<i>Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson</i> 433 F.Supp. 410 (D. Or. 1977), <i>aff'd</i> , 597 F.2d 1161 (9 th Cir. 1979).....	1.1, 1.5, 1.16, 5.143, 5.161, 8.172

<i>Buckley v. Huston</i> (1972) 60 N.J. 472, 291 A.2d. 129.....	7.60
<i>Bullen v. Her Majesty's Government of the United Kingdom</i> 553 So. 2d 1344 (Fla. App. 1989).....	2.3, 10.48
<i>State of California ex rel. Houser v. St. Louis Union Trust Co.</i> (1953) 260 S.W. 2d 821.....	8.149
<i>Attorney General of Canada v. R.J. Reynolds Tobacco Holdings Inc.</i> (2001) 268 F. 3d 103.....	1.1, 5.125, 8.49, 8.66, 8.87, 9.1, 9.14, 9.33
<i>Cermak v. Bata Akciova Spolecnost</i> (1948) 80 N.Y.S.2d 782 (N.Y. Sup. Ct.).....	9.22
<i>In re CINAR Corporation Securities Litigation v. Carson</i> 186 F.Supp.2d 279, (E.D.N.Y.) (2002).....	5.88
<i>State of Colorado v. Harbeck</i> (1921) 232 N.Y. 71, 133 N.E. 357.....	7.19, 7.28, 10.37, 11.1
<i>Republic of Columbia v. Diageo North America Inc.</i> 531 F.Supp.2d 365 (United States District Court, E.D. New York) (2007), plaintiffs' claims subsequently dismissed with prejudice, 2011 WL 4828814 (E.D.N.Y.).....	4.9, 5.10, 9.1, 9.5, 9.76
<i>In re Daltroff's Estate</i> (1943) 43 N.Y.S.2d 75.....	11.31
<i>City of Detroit v. Gould</i> (1957) 12 Ill. 2d 297, 146 N.E. 2d 61.....	7.18, 7.48
<i>City of Detroit v. Proctor</i> (1948) 5 Terry 193, at 196, 44 Del. 193, 61 A. 2d 412.....	7.32, 7.54, 7.55, 8.92, 8.144
<i>Dewey v. City of Des Moines</i> (1899) 173 U.S. 193, 19 S. Ct. 379.....	6.26, 6.27, 6.29
<i>European Community v. RJR Nabisco Inc.</i> 355 F.3d 123 (2d. Cir. 2004), 424 F.3d 175 (2d. Cir. 2005).....	9.69
<i>Fant v. Miller & Mayhew</i> 17 Gratt. 47, 58 Va. 47 (Va.), 1866 WL 2416 (Va.).....	5.49
<i>Franklin Trust Co. v. State of New Jersey, In re Stewart</i> (1910) 181 F. 769.....	12.17
<i>Goodrich v. Rochester Trust & Safe Deposit Co.</i> (1916) 173 A.D. 577, 160 N.Y.S. 454... 11.70	
<i>In re Guaranty Trust Co. of New York</i> (1947) 74 N.Y.S.2d 559.....	11.31
<i>Gulledge Bros. Lumber Co. v. Wenatchee Land Co.</i> (1913) 122 Minn. 266, 142 N.W. 305.....	4.65, 5.42
<i>In re Gyfteas' Estate</i> 36 A.D.2d 380, 320 N.Y.S.2d 540.....	6.44
<i>Hamilton County Treasurer v. Hartzell</i> (1945) 61 Montg. 329, 55 Pa. D. & C. 100 (Pa.Com.Pl.), 1946 WL 2450 (Pa.Com.Pl.).....	7.53
<i>Hamm v. Berrey</i> (1967) 419 S.W.2d 401.....	7.59
<i>Hanson v. Denckla</i> 357 U.S. 235 (1958).....	8.103
<i>In re Harding's Estate</i> 15 Pa. D. & C. 515 (Pa. Orph. 1927).....	11.49

<i>Henry v. Sargeant</i> (1843) 13 New Hamp. 323.....	6.3
<i>In re Hollins</i> (1913) 79 Misc. 200, 139 N.Y.S. 713.....	11.40
<i>Holshouser v. Gold Hill Copper Co.</i> (1905) 70 L.R.A. 183, 50 S.E. 650.....	7.31, 7.41
<i>Republic of Honduras v. Philip Morris Companies, Inc.</i> 341 F.3d 1253 (2003, 11 th Cir.).....	9.34
<i>Huntington v. Atrill</i> (1892) 146 U.S. 657, 13 S. Ct. 224.....	4.4, 4.48, 4.68, 8.35
<i>International Shoe</i> 326 U.S. 310, 66 S. Ct. 154 (1945).....	8.103
<i>Ivey v. Lalland</i> 42 Miss. 444, 1869 WL 2706 (Miss. Err. & App.).....	5.38
<i>In re the Estate of Jandorf</i> (1964) 41 Misc.2d. 712, 246 N.Y.S.2d 378 (Sur. Ct.) (Cox J.)....	11.23
<i>Kohn v. Renaissance</i> (1850) 5 La. Ann. 25, 1850 WL 3925 (La.), 52 Am. Dec. 577.....	1.5, 5.32
<i>Korthinos v. Niarchos</i> (1950) 184 F.2d 716 at 719 (United States Court of Appeals, Fourth Circuit).....	5.9
<i>In re Lamar's Estate</i> (1958) 15 Misc.2d 544, 182 N.Y.S.2d 512 (Sur. Ct.) (Cox J.).....	11.21
<i>Ludlow et al., Trustees for Creditors of Randall v. Van Rensselaer</i> (1806) 1 Johns. N.Y. 94...	5.40
<i>M'Culloch v. Maryland</i> 4 Wheat. (U.S.) 316, (1819).....	3.5
<i>In re McNeel's Estate</i> (1957) 10 Misc.2d 359, 170 N.Y.S.2d 893 (Sur. Ct.) (Cox J.).....	11.20
<i>In re Maltbie</i> (1918) 223 N.Y. 227, 119 N.E. 389.....	6.28
<i>Marshall v. Sherman</i> (1895) 2 E. H. Smith 9, 148 N.Y. 9, 42 N.E. 419.....	5.122
<i>In re Martin's Estate</i> (1930) 136 Misc. 51, 240 N.Y.S. 393, upheld by the Court of Appeals at 255 N.Y. 359, 174 N.E. 753.....	7.27
<i>State of Maryland v. Turner</i> (1911) 75 Misc. 9, 132 N.Y.S. 173.....	7.18
<i>In re Matthew's Trust</i> (1959) 21 Misc.2d 356, 191 N.Y.S.2d 994.....	11.21
<i>Milwaukee County v. M. E. White Co.</i> (1935) 296 U.S. 268, 56 S. Ct. 229 ...	4.2, 4.56, 5.105, 6.18, 7.8 – 7.12, 7.32, 7.37, 7.38, 7.42, 7.54, 7.60, 7.96, 8.31, 8.32, 8.36, 8.37, 8.83, 8.90, 8.163, 8.165, 8.167, 9.11
<i>State of Minnesota v. Karp</i> (1948) 84 Ohio App. 51, 84 N.E. 2d 76, 52 Ohio Law Abs, 513...	7.37
<i>Moore v. Mitchell</i> (1929) 30 F.2d. 600, affirmed on different grounds by the United States Supreme Court at 281 U.S. 18, 50 S. Ct.	2.6, 3.41, 7.24, 7.39, 8.9, 8.64, 8.91, 8.94, 8.148, 11.1, 11.79
<i>Nelson v. Minnesota Income Tax Division</i> (1967) 429 P. 2d 324.....	4.65
<i>New Jersey v. Anderson</i> 203 U.S. 483, 27 Sup.Ct. 137, 51 L.Ed. 284.....	12.17
<i>People of the State of New York v. Coe Mfg. Co.</i> (1934) 112 N.J.L. 536, 172 A. 198....	7.33, 7.39
<i>City of New York v. McLean</i> (1902) 8 Bedell 374, 170 N.Y. 374, 63 N.E. 380.....	6.27, 6.28

<i>Newcomb v. Commissioner of Internal Revenue</i> (1955) 23 T.C. 954 (U.S. Tax Court).....	9.22
<i>City of New York v. Shapiro</i> (1954) 129 F.Supp. 149.....	7.47
<i>New York Trust Co. v. Island Oil & Transport Corporation</i> (1926) 11 F.2d 698.....	12.18
<i>State of Ohio ex rel. Duffy v. Arnett</i> (1950) 314 Ky. 403, 234 S.W. 2d 722.....	7.44, 8.155
<i>State of Ohio, Department of Taxation v. Kleitch Bros. Inc.</i> (1959) 357 Mich. 504, 98 N.W.2d 636.....	7.49
<i>Oklahoma v. Gulf, Colorado & Santa Fe Rly. Co.</i> (1911) 220 U.S. 290, 31 S. Ct. 437.....	9.16
<i>State of Oklahoma ex rel. Oklahoma Tax Commission v. F. S. Neely</i> (1955) 225 Ark. 230, 282 S.W. 2d 150.....	7.13, 7.19, 7.45, 7.61, 8.5
<i>State ex rel. Oklahoma Tax Commission v. Rodgers</i> (1946) 238 Mo. App. 1115, 193 S.W. 2d 919.....	4.2, 4.56, 4.77, 5.40, 7.12, 7.14, 7.32, 7.43, 7.54, 7.55, 7.61, 8.22, 8.37, 8.105, 8.135, 8.150, 8.151, 8.154, 8.163
<i>Pasquantino v. United States</i> 336 F.3d 321 (4 th Cir. 2003), 544 U.S. 349, 125 S.Ct. 1766 (2004).....	1.16, 5.5, 5.61, 5.161, 9.9, 9.42, 9.68, 9.69, 9.71, 9.72, 9.74, 9.100
<i>Pennhurst State School v. Goodhartz' Estate</i> (1964) 42 N.J. 266, 200 A. 2d 112.....	7.50
<i>City of Philadelphia v. Austin</i> (1981) 86 N.J. 55, 429 A.2d. 568.....	8.32
<i>City of Philadelphia v. Cohen</i> (1962) 11 N.Y. 2d 401, 184 N.E. 2d 167, 230 N.Y.S. 2d 188.....	4.45, 7.58, 11.25
<i>City of Philadelphia v. Smith</i> (1980) 82 N.J. 429, 413 A.2d. 952.....	4.66
<i>In re Pressed Steel Car Company</i> (1938) 100 F.2d 147 (Circuit Court of Appeals, 3 rd Circuit).....	12.19
<i>In re the Estate of Robinson</i> (1960) 25 Misc.2d. 9, 206 N.Y.S.2d 459 (Sur. Ct.) (Cox J.).....	11.22
<i>Satterthwaite v. Doughty Busb.</i> 44 N.C. 314 (N.C.), 1853 WL 1333 (N.C.).....	7.79
<i>De Sayve v. De La Valdene</i> (1953) 124 N.Y.S.2d 143 (N.Y. Sup. Ct.).....	9.22
<i>Shaffer v. Carter</i> (1920) 252 U.S. 37, 40 S. Ct. 221.....	3.15
<i>In re Spitzer's Estate</i> (1939) 170 Misc. 160, 9 N.Y.S.2d 868.....	11.31
<i>Standard Embossing Plate Mfg. Co. v. American Salpa Corporation</i> (1933) 12 Backes 468, 113 N.J. 468, 167 A. 755.....	4.29
<i>State Tax on Foreign Held Bonds</i> 15 Wall. (U.S.) 300 (1872).....	3.6
<i>Sun Oil Co. v. Wortman</i> (1988) 486 U.S. 717, 108 S. Ct. 2117.....	9.16
<i>In the matter of Tahtabourounian</i> (1950) 198 Misc. 553, 102 N.Y.S.2d 198.....	11.31
<i>Underhill v. Hernandez</i> 168 U.S. 250, at 252 (1897).....	6.12

<i>United States v. Boots</i> 80 F.3d 580 (1 st Cir. 1996).....	9.4, 9.7, 9.10, 9.12, 9.44
<i>In re United States Car Co.</i> (1899) 60 N.J. Eq. 514, 43 A. 673.....	4.30
<i>United States v. First National City Bank</i> 321 F.2d 14 (2d. Cir. 1963), (1965) 379 U.S. 378, 85 S.Ct. 528.....	6.51
<i>United States v. Pierce</i> 224 F.3d 158 (2d. Cir. 2000).....	9.16
<i>United States v. Trapilo</i> 130 F.3d 547 (2d. Cir. 1997).....	9.12, 9.14, 9.16, 9.44
<i>In re D’Ursel’s Estate</i> (1947) 74 N.Y.S.2d 558.....	11.31
<i>State Tax Commission of Utah v. Cord</i> (1965) 81 Nev. 403, 404 P. 2d 422.....	6.30, 7.51
<i>Wayne County v. American Steel Export Co.</i> (1950) 277 A.D. 585, 101 N.Y.S. 2d 522.....	7.56
<i>Wayne County v. Foster & Reynolds Co.</i> (1950) 277 A.D. 1105, 101 N.Y.S. 2d 526.....	7.57
<i>State of Wisconsin v. Pelican Insurance Company of New Orleans</i> (1888) 127 U.S. 265, 8 S. Ct. 1370.....	4.57, 5.105, 5.110, 5.112, 5.138, 8.12, 8.27, 8.28, 8.34, 8.36
<i>State of Yucatan v. Argumedo</i> (1915) 92 Misc. 547, 157 N.Y.S. 219.....	4.34
<i>Carl Zeiss Stiftung v. V.E.B. Carl Jena</i> (1968) 293 F. Supp. 892 (S.D.N.Y.).....	9.22

Permanent Court of International Justice

<i>SS ‘Lotus’ (France v. Turkey)</i> (1927) PCIJ Ser A, No. 10 253.....	3.9, 3.10, 8.46
---	------------------------

United States – Mexican Claims Commission

<i>George Cook (US) v. United Mexican States</i> UN Rep Vol IV 593.....	1.17, 3.3, 8.56
---	------------------------

TABLE OF CONSTITUTIONAL PROVISIONS

Australia

Section 118.....**6.35/6.39/6.40/7.67**

Ireland

Article 15.2.....**3.21**

Article 17.....**3.20/3.21**

Article 21.....**3.20/3.21**

Article 22..... **3.19/3.20/3.21**

Article 29.3.....**3.13/3.26**

United States

Article IV.....**7.8/7.39-7.60**

TABLE OF LEGISLATION

Australia

Stamp Act 1898 (Queensland)	
Section 22(5).....	5.70/5.72
State and Territorial Laws and Records Recognition Act 1901-1964 (Commonwealth)	
Section 18.....	6.35/7.67
Stamp Act 1921 (Western Australia)	
Section 27(1).....	5.69/5.70/5.71/5.72/6.36
Road Maintenance (Contribution) Act 1958 (New South Wales).....	7.63/7.65

Canada

Saskatchewan Hospitalization Act RSS 1965	
Section 22.....	4.20/4.23

Ireland

Petty Sessions (Ireland) Act 1851	
Section 29.....	10.14/10.15
Bankruptcy (Ireland) Amendment Act 1872	
Section 71.....	8.75/12.50-12.52
Taxes and Duties (Special Circumstances) Act 1942.....	3.22
Imposition of Duties Act 1957.....	3.21
Companies Act 1963	
Section 214.....	12.11
Extradition Act 1965.....	2.19/10.9/10.19/10.22/10.24/10.26
Section 3(1).....	10.21
Section 13.....	10.20/10.26
Section 50 (2) (a) (iii).....	10.29/10.32
Criminal Law (Jurisdiction) Act 1976.....	3.26
Taxes Consolidation Act 1997	
Section 18 (1) (b).....	3.23
Section 891E.....	2.24

Schedule 24, Part 3.....	2.24
Extradition (European Union Conventions) Act 2001.....	2.19
Section 13.....	10.21
Criminal Justice (Theft and Fraud) Offences Act 2001.....	2.19/10.19
Section 47.....	10.26
European Arrest Warrant Act 2003	
Section 38.....	2.19
Criminal Justice (Mutual Assistance) Act 2008.....	2.19

South Africa

Administration of Estates Act, 1913	
Section 46.....	11.14
Section 68.....	11.14

United Kingdom

Bill of Rights 1688	
Article 4.....	9.88
Extradition Act 1870.....	10.16/10.19
Income Tax Act 1952	
Section 122 (1) (b).....	3.24
Theft Act (Northern Ireland) 1969	
Section 17 (1) (b).....	10.27
Section 19 (2).....	10.27
Finance Act 1972	
Section 38(1).....	10.48
Evidence (Proceedings in Other Jurisdictions) Act 1975.....	10.57

United States

Wire Fraud Statute	
§ 1343.....	9.46/9.60/9.62-9.64/9.71
Racketeer Influenced and Corrupt Organizations Act.....	9.14
Comprehensive Environmental Response, Compensation and Liability Act.....	4.27

Mandatory Victims Restitution Act.....	9.52
Foreign Account Tax Compliance Act.....	2.24
18 U.S.C. § 546.....	9.61

TABLE OF DELEGATED LEGISLATION

Statutory Instrument No. 643 of 2011 European Union (Mutual Assistance for the Recovery of Claims relating to Taxes, Duties and Other Measures) Regulations 2011.....**2.11**

Statutory Instrument No. 33 of 2013 Agreement to Improve Tax Compliance and Provide for Reporting and Exchange of Information concerning Tax Matters (United States of America) Order 2013.....**2.24**

Statutory Instrument No. 292 of 2014 Financial Accounts Reporting (United States of America) Regulations 2014.....**2.24**

Statutory Instrument No. 501 of 2015 Financial Accounts Reporting (United States of America) Regulations 2014.....**2.24**

Statutory Instrument No. 609 of 2015 Mandatory Automatic Exchange of Information in the Field of Taxation Regulations 2015.....**2.23**

TABLE OF EUROPEAN UNION MEASURES

Treaty of Rome	
Article 59.....	7.87
Article 177.....	7.93
Council Regulation (EC) No.1346/2000	
Article 26.....	12.10/12.12
Article 39.....	12.9/12.12
Council Regulation (EC) No. 2320/2002.....	4.28
Council Regulation (EC) No 1798/2003.....	9.92/9.94
Article 1(1).....	9.94
Council Regulation (EC) No 2073/2004.....	2.23
Council Regulation (EU) No 904/2010.....	2.23
Council Directive 2003/48/EC.....	2.23
Council Directive 2004/106/EC.....	2.23
Council Directive 2010/24/EU.....	2.11
Council Directive 2014/107/EU.....	2.23
Commission Implementing Regulation (EU) No 1189/2011.....	2.11

TABLE OF INTERNATIONAL CONVENTIONS

Bretton Woods Agreement	
Article VIII.....	4.44
Organisation for Economic Co-Operation and Development Model Convention with respect to Taxes on Income and Capital	
Article 27.....	2.9
Article 26.....	2.21
Organisation for Economic Co-Operation and Development and Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters.....	2.10, 2.22
Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.....	2.11
Article 1.....	2.12
UNICTRAL Model Law on Cross-Border Insolvency	
Article 13.....	12.13