

FOREIGN TAX CLAIMS AND JUDGMENTS IN CANADIAN COURTS

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Introduction

In the last thirty years the general trend in most countries of the world has been towards a substantial increase in tax rates to enable governments to face up to new economic and social commitments. In many instances the income, estate or sales levy will consume more than half of the property or profit taxed providing a strong incentive for tax avoidance. A tax dodger will convert an inherited fortune into cash and move to another country, State or province, or owing income taxes will abandon his domicile or residence without leaving any property that can be seized in satisfaction of the tax claim, or also remove his earnings from the place in which they accrue before the taxing authority has any opportunity to attach them or remove the property subject to tax to another jurisdiction. Other similar examples come readily to mind. In other words in the typical situation a State levies a valid tax and then finds itself unable to collect it within its own borders because the prospective taxpayer has physically removed himself and his attachable property therefrom either innocently or with the avowed purpose of avoiding payment of the tax. If the State that imposed the tax sues him in the State or province of his new residence, the action is likely to be met with the defence that "no country ever takes notice of the revenue laws of another". These words, uttered by way of dictum by Lord Mansfield in 1775¹ in an era of virulent commercial rivalry, political nationalism and international suspicion have been responsible in great part for the success of modern international tax evasion or avoidance, a recognized evil from both a moral and economic point of view. As evidenced by a recent decision of the Supreme Court of Canada² this judicial doctrine is still

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

² *United States of America v. Harden*, [1963] S.C.R. 366, (1963), 44 W.W.R. 630, (1964), 41 D.L.R. (2d) 721.

vigorous in this country in spite of the modern spirit of international co-operation in the field of taxation. In the absence of specific treaty provisions, no matter how conscious and deliberate the tax evasion, there are no judicial or administrative remedies available to the defrauded State or province outside its territorial jurisdiction.

Although the dogmatic rule did not originate with cases involving attempts to collect a tax, but had its inception in cases raising the question whether a contract that did not comply with the revenue laws of the place where made was enforceable in the forum, today a foreign tax claim will not be recognized and enforced directly or indirectly in Canadian courts.

The judicial protection afforded tax dodgers that enables them to escape from tax liabilities lawfully imposed is highly immoral as the tax burden is a tolerable thing only when it is fairly distributed. Complete evasion or avoidance by some increases the burden of others. Furthermore the attitude of the courts casts disrespect upon the law. 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? There can only be one concept of public policy in this respect. Why not consider an obligation to pay taxes validly imposed as binding as the obligation to pay a private debt voluntarily undertaken?

It is comforting to note that many American States as well as the Province of Quebec have tried to plug this legal loophole by passing statutes that provide for the reciprocal enforcement of tax claims.³ Even if a certain amount of caution should be exercised with respect to the recognition and enforcement of tax claims of foreign countries, at least on the interprovincial level, the rule laid down by Lord Mansfield should be rejected. There is no reason why special conflict rules could not be devised to deal with the international recognition and enforcement of tax claims. Resort to international treaties is not the only available method to correct the evils stemming from the application of Lord Mansfield's dictum.

I. *United States of America v. Harden.*

Only recently and for the first time in Canadian legal history, a foreign government sought to resort to Canadian courts to obtain payment of taxes lawfully imposed. In *United States of America v. Harden*,⁴ the plaintiff sued the defendant in British Columbia upon

³ See section IV *infra*.

⁴ *Supra*, footnote 1.

a money judgment of the United States District Court of the Southern District of California. The defendant in moving to set aside the writ of summons and subsequent garnishee proceedings alleged that the judgment was founded upon her indebtedness for United States taxes assessed upon her income and that the British Columbia courts have no jurisdiction to entertain a claim to enforce either directly or indirectly the revenue laws of a foreign State. The plaintiff sought to escape the application of the rule to the case by submitting that despite Lord Mansfield's dictum, a foreign judgment for payment of such taxes should be enforced as it constitutes a new obligation in which the original cause of action is merged. The plaintiff also submitted that Canadian courts will 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 argument was that since the original judgment in the case was obtained by "stipulation" of counsel at a pre-trial conference in California, it converted the original cause of action for taxes into one of contract. The original claim for income tax had disappeared in the judgment, giving rise to a promise to pay, and in the result the action was not one to enforce directly or indirectly the revenue laws of a foreign State.

In the British Columbia Supreme Court,⁵ Maclean J. relying upon *Wisconsin v. Pelican Ins. Co.*⁶ was of the opinion that:

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 nature that the court is authorized to enforce it.

His view was that enforcement must not depend merely upon 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 scrutinized, 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. Furthermore it is an elementary principle of the law of recognition and enforcement of foreign judgments in Canada that a foreign judgment does not merge the original cause of action. The plaintiff may always disregard a foreign

⁵ (1961), 30 D.L.R. (2d) 566, (1961), 35 W.W.R. 654 (B.C.S.C.).

⁶ (1888), 127 U.S. 265, at pp. 292-293.

judgment rendered in his favour and sue on the original cause of action.⁷

Macleay J. concluded that since in his opinion the substance of the claim was foreign taxes, it followed that the fact that the claim appeared in the form of a judgment did not entitle it to any different consideration it would have received in the form of a foreign tax assessment.

The judge also rejected the plaintiff's submission that a foreign judgment for taxes obtained on a "stipulation" by the defendant's attorney converted what was a cause of action for taxes into one of contract. He said:⁸

Here the defendant, a California resident, was faced with a large claim for United States taxes. Her attorney at first denied liability but on a pre-trial hearing successfully convinced the judge and apparently the counsel for the Government that the whole amount claimed was not in fact owing, and by stipulation judgment was entered for the lesser sum. I fail to see how it can be said that the resulting judgment is other than a judgment for taxes. All that the defendant did in the circumstances was to resist the claim as far as she could with a view to minimizing the resulting judgment, a tactic that is commonly employed both at pre-trial conferences and at trials. To use the words of Moore J., in *Peter Buchanan Ltd. & Machary v. McVey*, [1955] A.C. 516, at p. 529: "In every case the substance of the claim must be scrutinized, 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." I do not think that it can be said that the judgment obtained by stipulation brought into being any cause of action for anything other than foreign taxes.

This judgment was affirmed by the British Columbia Court of Appeal.⁹ Sheppard J.A., who delivered the unanimous decision of the court restated the principle that, as a matter of public policy, the British Columbia courts will not entertain an action brought by an individual or a public authority or the representative of such authority which directly or indirectly has the effect of enforcing the revenue laws of a foreign country. However he was willing to admit that difficulties have arisen from time to time in applying the rule to cover new circumstances. He also aptly remarked that:¹⁰

If the plaintiff's submission is sound a foreign State having recovered judgment in its own courts for taxes that it could not recover directly

⁷ See *Industrial Acceptance Corp. Ltd. v. Stevenson* (1963), 43 W.W.R. 126 (Sask.); Read, *Recognition and Enforcement of Foreign Judgments* (1938), p. 111; Castel, *The Recognition and Enforcement of Foreign Money Judgments or Decrees in the Anglo-American Common Law System and in the French Civil Law System* (1958), p. 110.

⁸ *Supra*, footnote 5, at p. 571 (D.L.R.).

⁹ (1962), 36 D.L.R. (2d) 602, (1962-63), 40 W.W.R. 428.

¹⁰ *Ibid.*, at p. 606 (D.L.R.).

in Canadian courts, could then sue and recover in Canadian courts on that judgment no matter how offensive the tax might be to Canadian sovereignty or how injurious to Canadian economy. The reasons which require Canadian courts to reject claims by or on behalf of foreign States for taxes due under their revenue laws likewise require Canadian courts to reject claims of foreign States upon judgments recovered in their courts for such taxes. It is the duty of our courts to go behind the foreign judgment to see if in substance it is one for foreign taxes.

This reasoning does not mean that the foreign judgment is not conclusive on the merits. We are concerned here with a preliminary question: is this a type of judgment susceptible of enforcement in Canadian courts? Actually, if the rule prohibiting the enforcement of revenue laws is based on public policy, it would seem that even in the absence of such a rule, a judgment for taxes could be refused enforcement when contrary to the public policy of the forum as the defence of public policy is always available in conflict of laws cases to prevent the application of the law normally applicable.

Initially the forum must determine the substance of the right sought to be enforced; and whether its enforcement would, either directly or indirectly involve the execution of a revenue law of another State.¹¹ The court at this preliminary stage of the proceedings must go behind the foreign judgment to ascertain not the validity of the claim on which it is based, but whether the judgment involves a type of claim that should not be enforced in the forum. In fact the enquiry is directed to the jurisdiction *rationae materiae* of the enforcing court. The court is dealing indirectly with a preliminary objection to its jurisdiction to entertain a suit for the enforcement of foreign taxes. The rule adopted in most Canadian provinces that foreign judgments are conclusive on the merits neither supports nor detracts from the principle that foreign revenue laws are unenforceable in the courts of the provinces.¹² It was therefore not necessary for the Court of Appeal to cite *Walker v. Witter*¹³ for the proposition that "Foreign judgments are a ground of action everywhere, but they are examinable . . .". Equally irrelevant is the non-merger rule.

In British Columbia a foreign judgment operates neither by merger nor by satisfaction. The original cause of action remains to be enforced by action equally as if there were no foreign judgment,

¹¹ See *Huntington v. Attrill*, [1893] A.C. 150, at p. 155, 62 L.J.P.C. 44, 68 L.T. 326 (P.C.), see also (1892), 146 U.S. 657, 13 S. Ct. 224 (U.S. S. Ct.).

¹² Castel, *Private International Law* (1960), p. 270.

¹³ (1778), 1 Doug. 1, 99 E.R. 1, at p. 6.

and on that original cause of action the foreign judgment is merely evidence of an implied promise to pay. Thus the court was of the opinion that the enforcement of the California judgment would amount to the enforcement of the original cause of action namely a claim on behalf of a foreign State to recover taxes due under its law.¹⁴

The judgment of the Court of Appeal was upheld by a unanimous Supreme Court of Canada. Cartwright J. who wrote the judgment of the court, said in part:¹⁵

In my opinion, a foreign State cannot escape the application of this rule, [that foreign States cannot directly or indirectly enforce their tax claims here] which is one of public policy, by taking a judgment in its own courts and bringing suit here on that judgment. The claim asserted remains a claim for taxes. It has not, in our courts, merged in the judgment; enforcement of the judgment would be enforcement of the tax claim.

Similarly, in my opinion, the argument that the claim asserted is simply for the performance of an agreement, made for good consideration, to pay a stated sum of money must also fail. We are concerned not with form but with substance, and if it can 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 she was obligated to pay.

Neither the foreign judgment nor the agreement does more than make certain the fact and the amount of the respondent's liability to the appellant. The nature of the liability is not altered. It is a liability to pay income tax.

He concluded by approving Sheppard J.A.'s view that it is the duty of the courts to go behind the judgment to ascertain the substance or nature of the claim on which it is based. At last in Canada the plea of "foreign revenue law" has been heard at the highest judicial level and the principle affirmed that foreign States cannot *directly* or *indirectly* enforce their tax claims here.

There is little that can be said with respect to the decisions of the various courts in *United States of America v. Harden* except that they accord with English judicial tradition. It must also be emphasized that the decision of the Supreme Court applies only to tax judgments obtained in foreign countries. Whether the court would be prepared to extend Lord Mansfield's rule to the enforce-

¹⁴ *Supra*, footnote 9, at p. 608 (D.L.R.).

¹⁵ *Supra*, footnote 2, at p. 635 (W.W.R.). An interesting point is whether the Supreme Court feels bound by the decision of the House of Lords in *Government of India, Ministry of Finance (Revenue Division) v. Taylor*, [1955] A.C. 491 affirming *re Delhi Electric Supply and Traction Co. Ltd.*, [1954] Ch. 131, [1953] 2 All E.R. 1452. Although the court relied on the case to reach its decision, it did not refer to the doctrine of *stare decisis*. Cartwright J. merely said: "For the reasons given by Sheppard J.A. and those I have stated above I would [dismiss the appeal] . . .", at p. 636 (W.W.R.).

ment of provincial claims or judgments for taxes remains an open question.

The only other instance where a Canadian court was faced with a problem of direct enforcement of foreign taxes is *City of Regina v. McVey*.¹⁶ In an action brought against a person resident in Ontario to recover income taxes due to the municipality before he left Saskatchewan the plaintiff was non suited.

II. Historical Background.

From a refusal, for reasons of commercial expediency, to take cognizance of foreign revenue laws as affecting contractual obligations, the courts in England, the United States and Canada have gone to the extent of refusing to help foreign States or provinces collect lawfully imposed taxes.

The history and origin of the rule—if it be a rule—are not easy to ascertain and there is on the whole remarkably little direct authority upon the subject. One must go back to 1775 when a resident of Dunkirk in France brought an action for the purchase price of a quantity of tea sold and delivered to the defendant in France which to his knowledge was to be smuggled into England. In giving judgment for the plaintiff on the ground that mere knowledge of the illegal purpose of the contract did not debar him from recovery so long as he did not participate in it, Lord Mansfield C.J. remarked that:¹⁷

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

¹⁶ (1922), 23 O.W.N. 32, noted (1923), 1 Can. Bar Rev. 293.

¹⁷ *Supra*, footnote 1, at p. 343. The proper law of the contract was that in force in Dunkirk. See also *Lever v. Fletcher* (1780), unreported. It is sometimes said that in *Boucher v. Lawson* 1734, Cases Temp. Hardwicke 85, 95 E. R. 53, Lord Hardwicke was the first to apply the rule that "one State will not enforce the revenue measures of another". In this case the plaintiff shipped gold from Portugal to England in the defendant's ship. Under the law of Portugal, the exporting of gold was prohibited. When the ship arrived in London, the master of the vessel refused to deliver the cargo to the plaintiff, and the latter brought an action against the owner. The defence interposed was that since it was illegal to export gold under the laws of Portugal, the parties were *participes criminis*, and English courts should refuse a remedy. The defense was denied on the ground that to allow it would "cut off all benefit of such trade from this Kingdom, which would be of very bad consequences to the principal and most beneficial branches of our trade."

The word revenue was not used by Lord Hardwicke and thus the case cannot be considered as first enunciating the rule. His Lordship did not base his opinion on the nature of the invalidating foreign law but rather on the ground that to give effect to Portuguese law would be detrimental to British commerce. As Holdsworth pointed out in his *History of English Law* (1938), Vol. II, pp. 270-271 the case is a manifestation of contemporary national policy.

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.¹⁸

Four years later in *Planche v. Fletcher*¹⁹ the Chief Justice repeated his view as to the non-recognition of the revenue laws of a foreign country. It must be emphasized here that none of these cases involved a foreign power suing in an English court to recover revenue. In *Holman v. Johnson* Lord Mansfield uses the words cited in considering the *lex loci contractus*. Stating that the courts of Dunkirk would in no circumstances have regard to any illegality arising under the revenue laws of another country, he then proceeded to consider the alleged illegality under English law. In fact the basis for the denial of the defense was harm to British commerce. The question whether today the courts would as between the parties enforce a contract to break the revenue laws of another country is a separate problem that has been dealt with by the courts on several occasions in the last fifty years.

In *James v. Catherwood*,²⁰ Abbott C.J., with whom Holroyd and Best JJ. concurred said: "This point is too plain for argument. It has been settled, or at least considered as settled, ever since the time of Lord Hardwicke, that in a British court we cannot take notice of the revenue laws of a foreign State." Lord Kenyon C.J.

¹⁸ Lord Mansfield also said at p. 344: "Is there any law of England transgressed by a person making a complete sale of a parcel of goods at Dunkirk, and giving credit for them? The seller indeed, knows what the buyer is going to do with the goods but has no concern in the transaction itself." Note that today mere knowledge of the ulterior purpose is fatal to the action: *Pearce v. Brooks* (1866), L.R. 1 Ex. 213, see however *Pellecatt v. Angell* (1835), 2 Cr. M. & R. 311 where Abinger C.B. said at p. 313: "It is . . . 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. . . . 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." This case was approved by Sankey L.J. in *Foster v. Driscoll*, [1929] 1 K.B. 470, at p. 518 and Scrutton L.J. at p. 498. Dicta are to be found in *James v. Catherwood* (1823), 3 Dowl & Ry. 190, at p. 191; *Sharp v. Taylor* (1849), 2 Ph. 801, at p. 816; *Emperor of Austria v. Day* (1861), 3 De G.F. & J. 217, at pp. 241-242; *Kahler v. Midland Bank*, [1950] A.C. 24, at p. 57 (H.L.).

Note also that a number of cases involve the admissibility of documents made in a foreign country and not stamped according to the law of that country. In *Holman v. Johnson* the English revenue law was not part of the proper law of the contract although ultimately it was to be broken. Cf. *Biggs v. Lawrence* (1789), 3 Term. Rep. 454, 100 E.R. 673; *Clugas v. Penalva* (1791), 4 Term. Rep. 466; and *Waymell v. Reed* (1794), 5 Term. Rep. 599, where *Holmes v. Johnson* was distinguished.

¹⁹ (1779), 1 Doug 251, at p. 258, 99 E.R. 164. In this case the statement was pure *obiter dictum*.

²⁰ (1823), 3 Dowl & Ry K.B. 190, at p. 191; see also *Sharp v. Taylor supra*, footnote 18.

also accepted without qualification the broad rule which Lord Mansfield had formulated.²¹

It was not until 1901 that the question of direct or indirect enforcement of taxes came before the courts of the United Kingdom. The first specific decision seems to have been given by Lord Stormonth Darling in *Attorney-General for Canada v. William Schulze & Co.*²² The defenders had imported into Canada tweeds which had been seized by the customs for alleged infringement of revenue laws. On an appeal to the Exchequer Court of Canada against the validity of the seizure, costs were awarded against the defenders. The Attorney General for Canada sued subsequently in the Scottish courts on the Canadian judgment for costs. Lord Stormonth Darling dismissed the action, saying: "It is a well-established rule of international law that the courts of one country will not execute or enforce the penal laws of another; and this rule applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of its statutes for the protection of its revenue or other municipal laws and to all judgments for such penalties 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 is to say, in the sense of the international rule, it was a penal suit. The only question, therefore, is whether the costs of this penal suit can be dissociated from the suit itself as to fall outside the rule of international law".²³ His Lordship held that the costs could not be so dissociated.

In *Sydney Municipal Council v. Bull*,²⁴ the council sued the defendant in England for municipal improvement rates in respect of land in Australia. The court dismissed the action saying: "Some limit must be placed upon the available means of enforcing the sumptuary laws enacted by foreign States for their own municipal purposes . . . the action is in the nature of an action for a penalty to recover a tax; it is analogous to an action brought in one country to enforce the revenue laws of another. In such cases it has always been held that an action will not lie outside the confines of the last-mentioned State."²⁵

²¹ *Clugas v. Penaluya*, *supra*, footnote 18.

²² (1901), 9 S.L.T. 4.

²³ *Ibid.* Note that his Lordship assimilates a revenue suit to a penal suit. For a rationale see *infra*, section III, footnote 49.

²⁴ [1909] 1 K.B. 7, 25 T.L.R. 6, 78 L.J.K.B. 45, 99 L.T. 805.

²⁵ *Ibid.*, at p. 12 (K.B.).

In *re Visser, Queen of Holland v. Drukker*,²⁶ the Dutch Government sued in England the administrator of the estate of a Dutch subject, who died domiciled in Holland, to recover Dutch death duties. Tomlin J. dismissed the suit on the authority of the last-mentioned case and said: "It seems to be plain that, at any rate for somewhere about 200 years, since the time of Lord Hardwicke, the judges have had present to their minds the motion, and have repeatedly said that the courts of this country do not take notice of revenue laws of foreign States."²⁷

While admitting that there was no actual reported English decision on the point till 1909 he went on to say:²⁸ "My own opinion is that there is a well-recognized rule, which has been enforced for at least 200 years or thereabouts; under which those courts will not collect the taxes of foreign States for the benefit of sovereigns of those foreign States; and this is one of those actions which those courts will not entertain."

Several dicta are also worth mentioning as they occur in cases that are not themselves direct authorities. In *Indian and General Investment Trust Ltd. v. Borax Consolidated Ltd.* Sankey J. stated: "Whilst it is the duty of an English court to enforce an English Taxing Act, it is no part of its duty to enforce the Taxing Act of another country."²⁹ Lord Moulton, delivering the judgment of the Privy Council in *Cotton v. Rex*³⁰ said: "There is no accepted principle in international law to the effect that nations should recognize or enforce the fiscal laws of foreign countries."

More recently *Peter Buchanan Ltd. & Machary v. McVey*,³¹ a case decided by Kingsmill Moore J. of the High Court of Justice of Eire which was affirmed on appeal by the Supreme Court of

²⁶ [1928] Ch. 877, 97 L. J. Ch. 488, 44 T.L.R. 692, 139 L.T. 658, noted (1928), 6 Can. Bar Rev. 631.

²⁷ *Ibid.*, at p. 884 (Ch.). The words "take notice" if applied without discrimination could lead to a too wide an application of the rule, as there are cases in which the courts, although they do not enforce foreign revenue laws, are bound to recognize some of their effects.

²⁸ *Ibid.*, at p. 884.

²⁹ [1920] 1 K.B. 539, at p. 550, 36 T.L.R. 125, 122 L.T. 547, 89 L.J.K.B. 252.

³⁰ [1914] A.C. 176, at p. 195, 15 D.L.R. 283, at p. 293. See also *Receiver General of New Brunswick v. Rosborough* (1915), 24 D.L.R. 354, at p. 364 (N.B. S.C.); *The Eva*, [1921] P. 454. In *re Cohen*, [1945] Ch. 5, Evershed M. R. said: "As is well known, it is not the practice of civilized countries, such as France and England, to enforce the revenue laws of the other of them" and in *King of the Hellenes v. Bostrom* (1923), 16 Ll. L. Rep. 190, at p. 193 one finds a statement of Rowlatt J. to the effect that "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 in the country to which he belongs."

³¹ [1955] A.C. 516, noted Donaldson, (1954), 3 Int. & Comp. L.Q. 161.

Eire, made it clear that although there may be circumstances in which the courts will have regard to the revenue laws of another country, in no instance will they directly or indirectly enforce such revenue laws.

The Buchanan Company was a company registered in Scotland which had been put in liquidation by the revenue authorities in Scotland under a compulsory winding up order in respect of a very large claim for excess profits tax and income tax. The defendant held ninety-nine shares of the capital of the company and the remaining share was held by another person as trustee for him. These two sole shareholders were also sole directors. The defendant having realized the whole assets of the company in his capacity as a director and having satisfied substantially the whole of the company indebtedness, other than that due to the revenue, had the balance transferred to himself to his credit with an Irish bank and decamped to Ireland. The liquidator then sued the defendant in Ireland on the ground of his breach of trust in taking this balance from the company. The defendant contended that as he had received the money from the company in his capacity as a shareholder in pursuance of an agreement between all the corporators, the company could not now ask to have it back. Kingsmill Moore J. held that the transaction was a dishonest transaction designed to defeat the claim of the revenue in Scotland as a creditor and was ultra vires the company and accordingly rejected the defendant's submission. On the other hand, he held that although the action was in form an action by the company to recover these assets it was in substance an attempt to enforce indirectly a claim to tax by the revenue authorities of another State. He accordingly dismissed the action. The judge considered the effect of the various decisions cited above and said:³²

These decisions establish that the courts of our country will not enforce the revenue claims of a foreign country in a suit brought for the purpose by a foreign public authority or the representative of such an authority, and that, even if a judgment for a foreign penalty or debt be obtained in the country in which it is incurred, it is not possible successfully to sue in this country on such judgment. They do not expressly go further, though some of the dicta suggest that there may be a principle that our courts will not lend themselves indirectly to the collection of a foreign tax and will not entertain a suit which is brought for that object. Such a wide extension is also suggested by the authorities which establish that our courts will not entertain an action for the enforcement of a penalty imposed by the laws of a foreign State, a

³² *Ibid.*, at pp. 526-530.

principle which seems to have been the parent of the rule as to not enforcing foreign revenue claims. . . .

Those cases on penalties would seem to establish that it is not the form of the action or the nature of the plaintiff 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. I cannot see why the same rule should not prevail where it appears that the enforcement of the right claimed would indirectly involve the execution of the revenue law of another State, and serve a revenue demand. . . . In deciding cases between private persons in which there is present such a foreign element as would ordinarily induce the application of the principles of a foreign law, courts have always exercised the right to reject such law on the ground that it conflicted with public policy or affronted the accepted morality of the domestic forum. Contracts valid according to what would normally be considered "the proper law" of the contract will not be enforced if in the view of the court they are tainted with immorality of one kind and another. Delicts committed abroad are not actionable here unless they are torts by our law. Slavery, or any other status involving penal or private disabilities, is not recognized. If, then, in disputes between private citizens, it has 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 similar option where an attempt was made to enforce the governmental claims (including revenue claims) of a foreign State. But 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 complication. Neither common morality nor "settled public policy" would have sufficed to cover the area of necessary rejection; for the nature and incidence of governmental and revenue claims are not dictated by any moral principles but are the offspring of political considerations and political necessity. Taxation originally expressed only the will of the despot, enforceable by torture, slavery and death. Though it may be conceded that in modern times it is more often designed to further a benevolent social policy, and that the civil servant has usurped the position of the executioner as the agent of enforcement, yet in essence taxation is still arbitrary and depends for its effectiveness only on the executive power of the State. Nor is modern history 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 discriminations, 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. Such a principle appears to me to be fundamental and of supreme importance.

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 scrutinized, 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. Mr. Wilson has pressed upon me the difficulty of deciding such a question of fact and has relied on "ratio ruentis acervi". For the purpose of this case it is sufficient to say that when it appears to the court that the whole object of the suit is to collect tax for a foreign revenue, and that this will be the sole result of a decision in favour of the plaintiff, then a court is entitled to reject the claim by refusing jurisdiction.

This case was approved by Lord Keith of Avonholm in *Government of India, Ministry of Finance (Revenue Division) v. Taylor*.³³ The issue was whether a foreign government's claim for unpaid taxes is a provable debt in an English liquidation. The Delhi Electric Supply and Traction Co. Ltd., a company registered in England but carrying on business in India, sold its business to the Indian Government for a sum of money which was remitted to England as soon as received. After the company had gone into voluntary liquidation, the Government of India sought to prove for a sum due in respect of Indian income tax including capital gains tax derived from the sale of the business. The claim was rejected by the liquidator, and his decision was upheld by Vaisey J., the Court of Appeal and the House of Lords. Their Lordships were unanimous in holding that claims on behalf of a foreign State to recover taxes due under its laws are unenforceable in English courts and that there is no valid distinction for this purpose between foreign States and States adhering to the British Commonwealth.

Lord Mansfield's rule has also been recognized by Parliament on both sides of the Atlantic Ocean. In the United Kingdom the Foreign Judgments (Reciprocal Enforcement) Act, 1933, excludes from the advantages of the Act a judgment for "a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty".³⁴

In Canada, the Uniform Foreign Judgments Act as approved by the Conference of Commissioners on Uniformity of Legisla-

³³ *Supra*, footnote 15, at p. 510. See Comment by Mann, *Foreign Revenue Laws and the English Conflict of Laws* (1954), 3 Int. & Comp. L.Q. 465 and (1955), 4 Int. & Comp. L.Q. 564.

³⁴ 23 Geo. 5, c. 13, s. 1 (2) (b).

tion in Canada in August 1933, states that "where an action is brought in this province upon a foreign judgment, it shall be a sufficient defence, that the judgment is for the payment of a penalty or a sum of money due under the revenue laws of the foreign country".³⁵

English precedents have been followed in the United States of America. In an early case involving the enforceability in New York of a promissory note made in France, allegedly invalid because of noncompliance with a French stamp requirement, the court said it was not required to take notice of French revenue laws.³⁶ In 1843 Parker C.J. when giving judgment in *Henry v. Sargeant*³⁷ said *obiter* that one of the American States will not enforce the revenue laws of another. There was no direct adjudication until 1911 when in *State of Maryland v. Turner*³⁸ the court refused to entertain an action in New York by the State of Maryland to recover personal property taxes assessed on the defendant while he was resident of Maryland. This case was followed by *Colorado v. Harbeck*³⁹ in which the deceased was domiciled in Colorado but all his property was in New York. He died en route to Europe. After the will had been admitted to probate and taxes paid in New York and the property distributed, the State of Colorado instituted assessment proceedings in Colorado to compute the tax on the intangible personal property of the deceased. Notice by mail was given of the assessment and then Colorado began a suit in New York against the legatees, executrix and trustees under the will (none of whom were resident in Colorado) to recover the inheritance tax supposedly due to Colorado. The complaint was dismissed.

In *City of Detroit v. Proctor*,⁴⁰ the Delaware court also dismissed an action brought by the City of Detroit to enforce personal property taxes against a resident of Michigan. On the other hand the rule was disregarded in a few cases such as *Holhouser Co. v. Gold Hill Copper Co.*⁴¹ where North Carolina abandoned precedent to

³⁵ S. 6 (f), (1933), 18 Proc. of Can. Bar Assoc. 310; see also An Act to Facilitate the Reciprocal Enforcement of Judgments, 1958, [1958] Proceedings of 40th Annual Meeting of Conference of Commissioners on Uniformity of Legislation in Canada 90, ss. 2(1) (a), 3 (6) (f) and (g).

³⁶ *Ludlow et al v. Van Rensselaer* (1806), 1 Johns Sup. Ct. Rep. (3 N.Y.) 94.

³⁷ (1843), 13 N.H. 321, at p. 332.

³⁸ (1911), 75 Misc. 9, 132 N.Y. Supp. 173 (Sup. Ct.), noted (1912), 12 Col. L. Rev. 60.

³⁹ (1921), 232 N.Y. 71, 133 N.E. 357. See also in *re Bliss* (1923), 121 Misc. 773, 202 N.Y. Supp. 185; in *re Martin Estate* (1930), 136 Misc. 51, 240 N.Y.S. 393; *Moore v. Mitchell* (1929), 30 F. 2d. 600.

⁴⁰ (1948), 61 A 2d 412, noted (1949), 47 Mich. L. Rev. 796.

⁴¹ (1905), 138 N.C. 248, 50 S.E. 650, 70 L.R.A. 183.

the extent of permitting New Jersey to prove a tax claim in an insolvency proceeding. The court may have considered the doctrine not to have been involved, for the opinion did not mention it.

In *Milwaukee County v. M. E. White & Co.*⁴² a municipal corporation in Wisconsin assessed taxes against an Illinois corporation for income earned in Wisconsin. Judgment was recovered in Wisconsin on the assessment. When satisfaction could not be obtained action was brought on this judgment in a federal court in Illinois. The suit was dismissed on the ground that it was brought to enforce a revenue law of Wisconsin. The Court of Appeals certified to the United States Supreme Court the question whether a federal district court in Illinois should entertain the action. The Supreme Court held that it should and that by virtue of section 1 of article IV of the American Constitution one State must give full faith and credit to another State's judgment for taxes. In doing so the second State is not required to go into the relationship between the first State and its citizens as that has already been decided. The court said: "The objection that the courts in one State will not entertain suit to recover taxes due to another or upon a judgment for such taxes, is not rightly addressed to any want of judicial power in courts which are authorized to entertain civil suits at law. It goes not to the jurisdiction but to the merits, and raises a question which district courts are competent to decide".⁴³ The Supreme Court left open the question of enforceability of mere tax assessments of sister States. The inference from the above language would be that enforcement is to be granted unless the case involves peculiar tax claims clearly contrary to the public policy of the forum.

Although a revenue judgment does not change the nature of the obligation, the full faith and credit clause compels such a result. If the tax is collectible after being reduced to judgment, there is no reason it should not be collectible before taking the form of a judgment. The *Milwaukee County* case was not followed in *Government of India v. Taylor* where Lord Simonds said:⁴⁴

I am ever willing to get help from seeing how the law which is our common heritage, has developed on the other side of the Atlantic, but a development which is not universal, and is in any case confined to relations between State and State within the Union can have no weight in determining what the law is in this country.

MacLean J. in *United States of America v. Harden* also pointed

⁴² (1935), 296 U.S. 268, 56 S. Ct. 229, 80 L. Ed. 220, noted (1935), 84 U. of Pa. L. Rev. 526.

⁴³ *Ibid.*, at p. 272.

⁴⁴ *Supra*, footnote 15, at p. 507.

out that the case was based upon considerations of constitutional law peculiar to the United States of America.⁴⁵

In the more recent case of *State ex rel Oklahoma Tax Commission v. Rodgers*,⁴⁶ the State of Oklahoma brought a suit in Missouri against a former resident for unpaid income taxes. Upon review, the St. Louis Court of Appeals, after a detailed examination of the rule, rejected it as inapplicable to claims of sister States. The court decided that a tax is of a quasi contractual nature and that its enforcement contravenes no policy of the forum. Simple principles of comity and justice require Missouri to take notice of the Oklahoma statutes. A similar approach was adopted by the Supreme Court of Arkansas in *State of Oklahoma ex rel Oklahoma Tax Commission v. Neeley*.⁴⁷ George Rose Smith A.J. said: ⁴⁸ "In our opinion the oft-repeated dogma, that one sovereign does not enforce the revenue laws of another is rapidly approaching a deserved extinction in these instances in which the dispute is not international but merely interstate".

From the foregoing historical survey, it may be concluded that in the Anglo-American legal system, the rule against the enforcement of tax laws rests largely on judicial tradition as applied to situations far beyond the probable anticipation of Lord Mansfield. Although supported by precedent, it is precedent that arose from a misapplication of the doctrine as originally developed. In spite of the attempts that have been made to rationalize the rule its application remains an excellent illustration of the evils of mechanical jurisprudence. It is the duty of the courts to re examine the foundations of rules that no longer correspond to modern conditions. The courts have merely repeated the time-worn axiom, without considering whether the reasons that made it desirable to apply in the early cases are still valid today. A rule is never so well established as to preclude inquiry into its justification or to preclude its abandonment if justice is promoted by so doing.

III. Legal Foundation for the Rule.

Although historically tax laws have been assimilated to penal laws, they are in fact difficult to classify. Tax claims should be considered civil as to the tax and criminal as to any penalty for non payment or late payment of the tax. Broadly speaking they are government claims for which no conflict rules exist.

⁴⁵ *Supra*, footnote 5, at p. 570.

⁴⁶ (1946), 238 Mo App. 1115, 193 S.W. 2d 919, noted (1946), 41 Ill. L. Rev. 439, (1946), 25 Tex. L. Rev. 88; *State of Ohio ex re Duffy v. Arnett* (1950), 314 Ky 403, 234 S.W. 2d 722.

⁴⁷ (1955), 282 S.W. 2d 150.

⁴⁸ *Ibid.*, at p. 151.

A survey of the cases indicates that a revenue law is one imposing a non contractual involuntary monetary imposition in favour of the State or some department or subdivision thereof. Characterization is generally given by the *lex fori*. Revenue laws embrace income taxes, custom duties, stamp duties, succession duties, capital gain taxes, profit taxes, municipal taxes.

Various arguments have been advanced in support of the ancient rule. As pointed out above it has been maintained that a revenue law and a penal law are similar in the sense that they are both governmental regulations of a civic duty. The right under each accrues in favour of the State without the consent of the citizen involved and it is a well-established principle of law universally admitted that the courts of one State will not enforce the penal laws of another.⁴⁹ There are however basic differences between a penal and a revenue law. A penal law is one that imposes an obligation as a punishment for a designated act or omission to act without regard to residence, ownership of property or amount of income whereas a tax law defines the extent of the citizen's pecuniary obligation to the government and provides a means for its collection without regard to the commission of a wrong. The purpose of tax laws is to enable the State to provide essential public and welfare services for its citizens. Furthermore, where a breach of criminal law occurs, the aggrieved State may have recourse to extradition proceedings. This remedy is not available with respect to tax claims.

Although it could be argued that a person living in a State or doing business there impliedly consents to pay lawful taxes as a matter of law, the courts have rejected the view that a tax is in the nature of a contractual obligation and hence a transitory cause of action that may be sued upon in any foreign jurisdiction. In *State of Colorado v. Harbeck*,⁵⁰ Pound J. stated: "no contractual or quasi contractual obligation to pay arises out of the assessment of a tax. . . . The enforcement of revenue laws rests, not on consent, but on force and authority".

In his speech in *Government of India, Ministry of Finance (Revenue Division) v. Taylor*,⁵¹ Lord Keith of Avonholm suggested two explanations for the rule that in no circumstances will the courts directly or indirectly enforce the revenue laws of another country:

⁴⁹ *Huntington v. Attrill*, *supra*, footnote 11. See also Leflar, *Extrastate Enforcement of Penal and Governmental Claims* (1932), 46 Harv. L. Rev. 193.

⁵⁰ *Supra*, footnote 39, at p. 82 (N.Y.).

⁵¹ *Supra*, footnote 15, at p. 511.

One explanation of the rule thus illustrated 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 claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties. Another explanation has been given by an eminent American judge, Judge Learned Hand, in the case of *Moore v. Mitchell* (1929), 30 F 2d 600, 604, in a passage, quoted also by Kingsmill Moore J. in the case of *Peter Buchanan Ltd. and Machary v. McVey*, [1955] A.C. 516 as follows: "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 recognize 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 the court; it involves the relations between the States themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic State to a position which would seriously embarrass its neighbour. 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".

On either of the explanations which I have just stated I find a solid basis of principle for a rule which has long been recognized and which has been applied by a consistent train of decisions. It may be possible to find reasons for modifying the rule as between States of a federal union. But that consideration, in my opinion, has no relevance to this case.

And in *United States of America v. Harden*⁵² Cartwright J. relying upon the same case said:

The views (i) That the application of the rule that foreign States cannot directly or indirectly enforce their tax claims in our courts is not affected by the taking of a judgment in the foreign State; and (ii) That the liability to pay tax does not become converted into a contractual obligation, both appear to me to be supported by the following passage in the speech of Lord Somervell of Harrow in *Government of India, Ministry of Finance v. Taylor*, [1955] A.C. at pp. 514 and 515:

"If one State could collect its taxes through the courts of another, it would have arisen through what is described, vaguely perhaps,

⁵² *Supra*, footnote 2, at p. 635 (W.W.R.).

as comity or the general practice of nations *inter se*. The appellant was therefore in a difficulty from the outset in that 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. Apart from the comparatively recent English, Scotch and Irish cases there is no authority. There are, however, many propositions for which no express authority can be found because they have been regarded as self-evident to all concerned. There must have been many potential defendants.

Tax gathering is an administrative act, though in settling the quantum as well as in the final act of collection judicial process may be involved. Our courts will apply foreign law if it is 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 Lordships' 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 gatherers of State A. Once a judgment has been obtained and it is a question only of its enforcement the factor of time and expense will normally have disappeared. The principle remains. The claim is one for a tax.

That fact, I think, itself justifies what has been clearly the practice of States. They have not in the past thought it appropriate to seek to use legal process abroad against debtor taxpayers. They assumed, rightly, that the courts would object to being so used. The position in the United States of America has been referred to, and I agree that the position as between member States of a federation, wherever the reserve of sovereignty may be, does not help".⁵³

Thus, revenue laws, as an extension of the sovereign power, are deemed to be strictly territorial in their nature and application. They have no effect outside the jurisdiction that enacted them and therefore it is not necessary to devise conflict rules to deal with the recognition and enforcement of foreign tax laws or judgments. It is a fact, however, that there are many foreign territorial laws that are recognized or applied in our courts every day.

In the ordinary conflict of laws situation it is well established that a foreign law normally applicable that conflicts with local public policy must be set aside. If the recovery of a foreign revenue debt were allowed, the courts would of necessity be forced to con-

⁵³ Lord Somervell of Harrow also cited a passage written by Pillet, *Traité de droit international privé* (1924), para. 674, where the author declares: "Les jugements rendus en matière criminelle ne sont pas les seuls qui soient soumis à la loi de la territorialité absolue. Les jugements rendus en matière fiscale ne sont eux non plus susceptibles d'aucune exécution à l'étranger et l'on n'a même jamais songé à la possibilité de faire exécuter sur le territoire de l'un d'eux une sentence relative aux droits fiscaux de l'Etat qui aurait été rendue sur le territoire d'un autre?" See also Niboyet, *Traité de droit international privé français*, vol. VI (1949), p. 15.

sider whether the foreign policy leading to the creation of the debt offended the local public policy. Since an inquiry into the complexities of the foreign revenue system and the relations of the State imposing the tax to its citizens is delicate and might cause political embarrassment it is better to refuse to enforce all revenue claims. This rationalization by Judge Learned Hand is not very helpful. All statutes to some degree reflect the public order of the State that enacted them and in most conflict of laws cases the forum applies foreign statutes.

The possibility of holding that a given foreign tax statute is invalid, or not applicable to the thing or person to be taxed, is just as offensive to the taxing State as a flat refusal to permit any action at all, thus affording sanctuary to delinquent tax payers. The fact that local courts might be unfamiliar with the technicalities of foreign revenue laws is no more an obstacle to their enforcement than in the ordinary conflict case where some other foreign law is applicable.⁵⁴ Jurisdiction should be refused only in those cases where some real obstacle to enforcement is present. Mere difficulty in applying the law is not a sufficient reason for refusing to deal with a situation where the taxing State has no remedy in its own courts due to its inability to secure jurisdiction over a non-resident taxpayer. Of course, the foreign State being responsible for bringing the action must accept the forum's interpretation and cannot be heard to complain if it loses the case. Why should the forum be more embarrassed when it renders a judgment in favour of the defendant in the case of a tax claim than where any other claim is brought by a foreign sovereign? The often repeated justification, that of one sovereign's reluctance to inquire into another's system of law or to risk affront by the denial of a sovereign's demand, obviously does not apply in litigation originating in and confined to Canada. As far as the inconvenience to the defendant in being compelled to conduct his defence outside the jurisdiction where the acts giving rise to the claim for taxes took place, and the difficulty of proving facts at a distance from the place of their origin are concerned, it is sufficient to remark that he will usually have brought these upon himself by removing his person or property from the taxing State. Such practical inconveniences are common to all transitory civil actions and have never been considered as a

⁵⁴ For instance, Professor Beale, in *Conflict of Laws*, vol. 3 (1935), p. 1638 suggests that the forum "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".

reason to bar them. Why should a different rule obtain in a tax action than in any other civil action? If it should appear however that relief could be obtained in the foreign State, the enforcing court would perhaps be justified in applying the doctrine of *forum non conveniens* to exclude the action.

There is no doubt that some types of foreign taxes must be disregarded when they are discriminatory or contrary to the strong public policy of the forum, but the possibility of rejection in some cases should not be urged in favour of total disregard of all revenue laws. As between the Canadian provinces where tax laws are fairly well standardized there is no reason to invoke public policy as a bar to their recognition and enforcement. The Province of Ontario has no local public policy opposed to the imposition of an income, succession or sales tax that would prompt its courts to refuse enforcement of a similar Quebec tax. Public policy is a defence to be invoked only in extreme cases where the basis for taxation is unjust and completely foreign to local concepts, otherwise to deny recognition and enforcement of foreign tax laws would seem to imply that the levying of taxes is fundamentally unjust, a conclusion entirely at variance with modern concepts of taxation.

Why not consider, as the St. Louis Court of Appeals did in *State of Oklahoma v. Rodgers*, that a tax claim is quasi contractual in nature and apply the ordinary conflict rules in that area to its enforcement? If the claim brought by a foreign State is quasi contractual there seems to be no logical justification for making a distinction between private claims and those made by a foreign State. The same conflict rules of the forum will govern both.⁵⁵

Another approach is to devise a set of conflict rules designed to deal specifically with the recognition and enforcement of foreign taxes without attempting to assimilate tax claims to contractual or quasi contractual claims. Once a valid tax claim is created by virtue of the taxing statute of Ontario, the Government of the Province should be able to enforce it against the taxpayer wherever he goes. There is no fundamental objection to holding that Quebec may impose upon the delinquent taxpayer a duty to pay the taxes levied under the laws of Ontario. It could be argued however that in some jurisdictions the statutory method of collecting taxes is an exclusive territorial remedy and short of an express or implied

⁵⁵ *Supra*, footnote 46. In *Milwaukee County v. M. E. White Co.*, *supra*, footnote 42, Mr. Justice Stone said: "... still the obligation to pay taxes is not penal. It is a statutory liability, quasi contractual in nature, enforceable if there is no exclusive statutory remedy, in the civil courts by the common-law action of debt or indebitatus assumpsit."

legislative intent no common-law action is available. Consequently when the courts of one jurisdiction are asked to enforce the tax laws of another, they may well hold that no method for collecting the taxes in another State is provided for in the statutes of the taxing State; or should a common-law action have been available, this may be construed as confined also to the courts of the taxing State. It seems that methods of enforcement must be characterized as procedural matters governed exclusively by the *lex fori*. When the right to bring an action under the taxing statute or at common law is given to the collecting agency of the State that imposed the tax, the extraterritorial enforcement of such claim should be governed by the law of the enforcing State. A tax claim, unlike a penalty, is transitory and not local. One should be able to sue upon it in any court having jurisdiction over the person of the defendant regardless of where the facts creating the cause of action chance to occur. In most countries the form of the tax collecting action will be the customary suit for a money judgment directed against a person or a *res*. Whatever the remedy available in the enforcing State for the collection of local taxes it should also be used in the case of foreign taxes.

In *re Bliss*,⁵⁶ the New York court maintained that allowing collection of foreign taxes is a matter which "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". In this case the court failed however to explain why it believed the abrogation of the revenue rule would force each State to become a "busy collection agent" and why in any event aiding in the collection of other States' taxes is such an intolerable burden. Experience shows that in States that have allowed suits for the recovery of foreign taxes the courts have not been overburdened with added expenses. Furthermore the *net* cost of such suits to the enforcing State could be charged entirely to the losing party.

It must be noted that despite the wide terminology of Lord Mansfield's formula the courts from early times have not followed it to the full extent of its meaning in the contractual field. In *Alves v. Hodgson*,⁵⁷ it was recognized that a contract that was void in the foreign country where it was made by reason of the absence of a stamp would be treated as void by the English courts even though the requirements of a stamp was a foreign revenue provision. In

⁵⁶ *Supra*, footnote 39, at p. 777 (Misc.).

⁵⁷ (1797), 7 Term Rep. 241, 101 E.R. 953; Also *Clegg v. Levy* (1812), 3 Camp. 166; *Bristow v. Sequeville* (1850), 5 Ex. 275, 155 E.R. 118.

other words, there are certain cases in which, although the courts do not enforce the foreign revenue law involved, they are bound to recognize some of the consequences of that law. It can be seriously doubted whether Lord Mansfield intended his remarks to preclude a court from informing itself as to the provisions of a revenue law of a foreign country in order to determine the question whether a foreign transaction was or was not fraudulent and void according to the law of that country.⁵⁸

Lord Mansfield's pronouncement has also been subject to criticism by judges and textbook writers.⁵⁹ Sankey L.J., in *Foster v. Driscoll*⁶⁰ clearly considered the statement too wide, and in *Ralli Brothers v. Compania Naviera Sota y Aznar*,⁶¹ Scrutton L.J. reserved the right to consider it in view of the obligation of international comity as it is now understood. In the House of Lords, Viscount Simonds in *Regazzoni v. K.C. Sethia Ltd.* said: "It does not follow from the fact that today the court will not enforce a revenue law at the suit of a foreign State that today it will enforce a contract which requires the doing of an act in a foreign country which violates the revenue laws of that country. . . . It is sufficient, however, for the purposes of the present 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 is no ground for making an exception in regard to any other law." Lord Keith also remarked that: "I agree with the view entertained by some of your Lordships and by all the Lords Justices in the Court of Appeal that the proposition that 'no country ever takes notice of the revenue laws of another' is too widely expressed."⁶² As the editors of Dicey point out: "It is therefore conceived that the old authorities would not now be followed; and that a contract which violated (e.g.) the customs regulations of either the proper law or possibly the *lex loci solutionis* would be treated as invalid in England."⁶³

⁵⁸ See *Republica de Guatemala v. Nunez*, [1927] 1 K.B. 669, at p. 691.

⁵⁹ Anson, *Law of Contracts* (21st ed., 1959), pp. 293-295; Dicey, *Conflict of Laws* (6th ed., 1958), p. 607 and rule 21, p. 161.

⁶⁰ *Supra*, footnote 18, at p. 516 *et seq.*

⁶¹ [1920] 2 K.B. 287, at p. 300. See also Evershed M.R. in *Kahler v. Midland Bank*, [1948] 1 All E.R. 811, at p. 819 (C.A.); *Re Delhi Electric Supply and Traction Co. Ltd.*, [1954] Ch. 131, at p. 151 and Lord Simonds in the same case in the House of Lords, *sub nom Government of India v. Taylor*, *supra*, footnote 15, at p. 505; Denning and Parker L.J.J. in *Regazzoni v. K. C. Sethia (1944) Ltd.*, [1956] 2 Q.B. 490, at pp. 515, 524, [1956] 1 All E.R. 229, *aff'd* [1956] 2 All E.R. 487 (C.A.), at pp. 490, 496, *aff'd* [1957] 3 W.L.R. 752, [1957] 3 All E.R. 286 (H.L.); Falconbridge, *Essays on the Conflict of Laws* (2nd ed., 1954), p. 385 *et seq.*

⁶² *Ibid.*, at pp. 760 and 765 (W.L.R.).

⁶³ *Op. cit.*, footnote 59, rule 21 and *Regazzoni v. K. C. Sethia (1944) Ltd.*, *ibid.*

In Canada, however, the old English cases seem to have been followed. Where a contract of sale was completed aboard, it was held that an action upon it will be upheld though one of the parties to the knowledge of the other intended to violate the laws of Canada. Recovery is barred only where the seller knew of the fraudulent intention of the buyer and also participated in the fraud.⁶⁴

In *Reid v. Diebel*⁶⁵ the plaintiff sued to cancel a contract for the purchase of stock-in-trade and to recover a cash deposit on the main ground that the defendant had permitted persons in his employment to smuggle goods from his store into the United States in violation of the revenue laws of that country. The court held that contracts having for their object the violation of these laws may be enforced in Ontario.⁶⁶ Actually there is no logical justification for the indiscriminate exclusion of all categories of foreign revenue laws.

As Lord Denning pointed out in *Regazzoni v. K.C. Sethia (1944) Ltd.*⁶⁷: "It seems to me that we should take notice of the laws of a friendly country, even if there 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."

This was also Parker L.J.'s opinion in the same case⁶⁸ when he said: "I do not see why in principle this court should not also inform itself of the provisions of a penal or revenue law in order to see whether or not the parties to an English contract had in effect agreed to break that law." For instance an Ontario contract the object of which is to infringe the revenue laws of a friendly power should be void as contrary to the local public policy since otherwise as Lawrence L.J. pointed out in *Foster v. Driscoll*:⁶⁹

⁶⁴ Johnson, *Conflict of Laws* (2nd ed., 1962), p. 599; *Leboeuf v. Lavallée* (1898), 15 S.C. 520, (1899), 5 R. de J. 382 *obiter*, where the Court of Review cited *Holman v. Johnson*, *supra*, footnote 1, *Biggs v. Lawrence*, *supra*, footnote 18, *Hodgson v. Temple* (1813), 5 Taunt 181 and *Pellecat v. Angell*, *supra*, footnote 18.

⁶⁵ (1909), 14 O.W.R. 77.

⁶⁶ See also *Walkerville Brewing Co. v. Mayrand* (1928), 63 O.L.R. 5, [1928] 4 D.L.R. 500, *rev'd* (1929), 63 O.L.R. 573, 2 D.L.R. 945 to be compared to *Foster v. Driscoll*, *supra*, footnote 18, *Biggs v. Lawrence*, *supra*, footnote 18, and *Harwood & Cooper v. Wilkinson* (1929), 64 O.L.R. 392, [1929] 4 D.L.R. 734, *rev'd* (1929), 64 O.L.R. 658, [1930] 2 D.L.R. 199, *conf.* [1931] S.C.R. 141, [1931] 2 D.L.R. 479 and *Westgate v. Harris*, [1929] 4 D.L.R. 643, 64 O.L.R. 358 (C.A.).

⁶⁷ [1956] 2 All E.R. 487, at p. 490.

⁶⁸ *Ibid.*, at p. 496.

⁶⁹ *Supra*, footnote 18, at p. 510.

"Recognition by our courts [of such agreements] would furnish a just cause for complaint by the [foreign] Government against our Government . . . and would be contrary to our obligations of international comity as now understood and recognized and therefore would offend against our notions of public morality."

In sum no adequate justification has been offered for refusing to enforce foreign tax laws directly or indirectly. The solution lies either in devising adequate conflict of laws rules for this purpose, using public policy as a safety valve in extreme cases or, in adopting statutes providing for instance that:

Any Province of Canada [or foreign State] or any political subdivision thereof shall have the right to sue in the courts [of Ontario] to recover any lawful tax that may be owing to it when the like right is accorded to the province [of Ontario] and its political subdivisions by such Province [or foreign State], whether such right is granted by statutory authority or as a matter of comity.

Modern conditions demand the availability of extraterritorial techniques of tax collection especially as between the provinces of Canada. The rule enunciated by Lord Mansfield was the product of an era of fierce commercial nationalism that has no place in a Union of provinces such as Canada. It should not be used to encourage wilful and dishonest tax evasion. There is also little justification for treating differently tax assessments matured into court judgments and those merely imposed by the administrative authorities, provided the imposition is final.⁷⁰

IV. *New Trends in Quebec.*

Last year the Quebec Legislature made a progressive move when it added the following paragraph to article 79 of the Code of Civil Procedure:⁷¹

The courts in the Province shall recognize and enforce the obligations resulting from the taxation laws of another Canadian Province in which the obligations resulting from the taxation laws of the Province are recognized and enforced.

The explanatory notes to the bill state that the object of this amendment is to permit the recovery of taxes due by persons who do not reside in the taxing province and have no property there. For such purpose, a right of action before Quebec courts is given to any other Canadian province that grants the same right to the Province of Quebec. The action must be brought by the sister province in its own name. This reform has a direct utilitarian purpose and must

⁷⁰ See Ehrenzweig, *Conflict of Laws* (1962), pp. 170, 174.

⁷¹ S.Q., 1963, c. 63.

be read in connection with An Act to Amend the Provincial Income Tax Act⁷² which provides in section 3 that:

A tax shall be paid as hereinafter required for each taxation year, upon his taxable income by

- a) every person resident in the province on the last day in the taxation year concerned;
- b) every person not taxable under paragraph (a) but who carried on a business in the province at any time in the taxation year concerned;
- c) every person resident outside Canada who was employed in the province at any time in the taxation year concerned.⁷³

and section 3(a) of An Act to Amend the Retail Sales Tax Act which states that:⁷⁴

No retailer shall ship, deliver or cause to be delivered any movable property to a person ordinarily residing in this province or carrying on business therein, for consumption or use by such person in this province, unless, upon his application, a registration certificate has been delivered to him under this Act and is in force at the time of shipment or delivery.

The vendor or retailer acts as the agent of the Minister and he must account for and remit to him the Quebec sales tax collected on goods purchased outside the province for consumption or use within the province, on or before the fifteenth day of each month for the preceding calendar month.⁷⁵ Revenue officers are empowered to enter the premises of the manufacturer, importer, retailer or vendor during reasonable hours to examine his books and documents and establish the correctness of the reports made.⁷⁶ The purchaser need not report and remit himself the tax on goods bought outside the Province of Quebec when such a tax is collected by the retailer. Article 16(a) authorizes the exchange of information so obtained with other provinces on a reciprocal basis. Fines and, in default, imprisonment, are provided for persons who sell or

⁷² S.Q., 1963, c. 25.

⁷³ See also s. 166 providing for the exchange of information on a reciprocal basis.

⁷⁴ Retail Sales Tax Act, R.S.Q., 1941, c. 88, as am. S.Q., 1944, c. 20, 1960-61, cc. 32, 40, 43, 1963, c. 27, 3(a) (1). According to s. 2 (13) "retailer" means a person whose establishment is outside the Province but who solicits therein, through a representative or by the distribution of catalogues or other means of publicity, orders for moveable property from persons ordinarily residing or carrying on business in this Province, for consumption or use by them in this Province.

"Retailer" also includes a person who, acting as representative of a business house outside the Province, solicits, receives or accepts from persons ordinarily residing or carrying on business in this Province, orders for moveable property for delivery in this Province, for use and consumption by them in this Province, when the business house which he represents is not registered as a retailer in this Province."

⁷⁵ *Ibid.*, s. 10. See also ss. 4, 5, 6.

⁷⁶ *Ibid.*, s. 14 (1).

deliver movable property in Quebec without a registration certificate.⁷⁷ As the authors of the bill indicated in their explanatory notes, the object of most of the provisions of the Act is to improve the collection of the sales tax payable on movable property that is not sold in Quebec but is delivered there to a consumer or user.⁷⁸

Today a tax on retail sales is a major element in the tax structures of most Canadian provinces. When interprovincial transactions are involved the provinces find it difficult to enforce payment of the tax "thus they lose revenue, and incentive is given to buy outside the province to the detriment of in-province merchants. One effect is to limit the potential tax rate which can be employed to meet expenditure needs. On the other hand, since each province has developed its sales tax without regard to the taxes of other provinces, some discriminatory double taxation occurs, when two or more provinces tax the same purchaser".⁷⁹

The Quebec legislation by requiring registration of firms that solicit business by catalogues sent into the province or accept orders for delivery in the province will render the enforcement of the sales tax much more effective. However there is no teeth in the law as long as there is no way of forcing out of province merchants to register. The passage of the reciprocal enforcement legislation is designed, if acted upon by other provinces, indirectly to compel them to register and collect the tax or face a suit in the local courts of the jurisdictions where they are established.

The new amendment to article 79 of the Quebec Code of Civil Procedure is based on American precedent. As early as 1928 there existed in New York a law providing for the reciprocal collection of succession duties.⁸⁰ In 1951 the State of Arkansas adopted a statute for the enforcement of any sister State tax on a reciprocal basis.⁸¹ Most American States now have similar statutes.

It must be emphasized that the Quebec legislation applies only to taxes levied by the provinces.⁸² The recognition and enforcement

⁷⁷ *Ibid.*, s. 17.

⁷⁸ From a constitutional law point of view it may be outside Quebec jurisdiction to require an Ontario merchant to act as tax collector or agent for the Province of Quebec or to require him to open his books to Quebec inspectors unless he has an agent there who can make enforceable sales contracts in Quebec. See Beck, Report of 1963 Conference of Tax Foundation, p. 307.

⁷⁹ In general see John F. Due, *The Provincial Sales Taxes and Their Relationship to the Federal Sales Tax* (1963), 11 Can. Tax J. 523, at p. 528. In Ontario see *An Act to Impose a Tax on Retail Sales*, S.O., 1960-61, c. 91, as am. 1961-62, c. 126, 1962-63, c. 127, esp. ss. 1(3), 1(8), 2(7) 6(1).

⁸⁰ N.Y. Laws of 1928, c. 330, art. 1-A, par. 248-p.

⁸¹ Ark. Act 73 of 1951.

⁸² What happens when as in Ontario, provincial taxes are collected by the Federal Government? See art. 10 of the agreement between Ontario and the Federal Government.

of provincial taxes or judgments for taxes depends upon the existence of reciprocity which it is assumed could be judicial or legislative. We have here a case of *reciproca utilitas*. Such reciprocity applies to the right of action and not the type of tax sought to be enforced. It would have been better, it seems to me, for the Government of the Province of Quebec to have negotiated directly with other provincial governments on this touchy subject in order to determine the exact conditions of reciprocity as well as the types of tax claims to be enforced. Should Ontario become sufficiently interested in collecting its sales tax on interprovincial transactions it might agree to enforce the Quebec sales tax on a reciprocal basis. Until such time the traditional rule is likely to remain in force particularly if it is felt that the out of province enforcement of the Quebec sales tax will foster Quebec business. So far no other province of Canada has passed a similar statute. Only through the development of specific arrangements among the provinces can a satisfactory solution be reached to avoid possible tax evasion.

An alternative to the Quebec approach would be for each province to agree to act as agent for all other provinces levying sales or other taxes. For instance retailers in Ontario would collect sales taxes on merchandise bought in Ontario for delivery in other provinces. The amount would depend upon the tax of the province involved. The tax would then be remitted to the Ontario Government which in turn would pass it along to this province on a reciprocal basis.

A comprehensive type of agreement could be as follows:

The contracting provinces undertake to lend assistance and support to each other in the collection of taxes that are the subject of the present agreement together with interest, costs and fines not of a penal character.

A schedule annexed to the agreement would list the taxes to which it applies. The forum should also be allowed to refuse to comply with the request for enforcement for reasons of strong public policy. Of course a foreign judgment for taxes should have the same effect as an administrative assessment and be conclusive on the merits. Assuming that a province under such a reciprocal agreement holds a valid tax claim, various problems arise in determining what procedural devices are available as a means of enforcement. The agreement could provide that claims presented thereunder will be enforced in accordance with the laws applicable to the enforcement and collection of the taxes of the forum and that neither province shall be obligated to carry out administrative

measures at variance with its own regulations and practice. This approach would acknowledge the traditional rule that the *lex fori* applies to procedural matters, and enable the applying province to benefit from the full array of procedural weapons available in the enforcing province for the collection of its own taxes. The agreement could also state that out of province tax claims can only be enforced by a judicial suit in the courts of the enforcing province in which a money judgment is sought. This is the most obvious but not necessarily the most efficacious method of enforcing foreign tax claims.⁸³ It is the one that will be applied in Quebec once reciprocity is established.

Still another method would be to allow the enforcing province itself to maintain proceedings for the benefit of the province seeking to collect its taxes.

V. International Conventions.

Tax agreements between Canada and other nations which apply to federal income taxes and succession duties exclusively, deal mainly with the avoidance of double taxation and only incidentally with the prevention of fiscal evasion.⁸⁴ For instance in the Canada-United States income tax agreement, provision is made for the exchange of information and for consultation between the revenue authorities of both States.⁸⁵ Such information includes periodic annual returns as well as specific information regarding any tax-laws.⁸⁶ Although the information provisions of these agreements have been supplemented by extensive regulations they do not contain mutual enforcement sections with the result that the machinations of artful tax delinquents are still for the most part left unim-

⁸³ Note that s. 118 of the Federal Income Tax Act, R.S.C., 1952, c. 148, as am., provides that "All taxes, interest, penalties, costs and other amounts payable under the Act are debts due to Her Majesty and recoverable as such in the Exchequer Court of Canada or any other Court of competent jurisdiction or in any other manner provided by this Act". One of the several remedies made available for the recovery of taxes by this section is the action of debt against the delinquent taxpayer.

⁸⁴ Canada — U.S.A. Income Tax Convention, S.C., 1943-44, c. 21, as am. 1944-45, c. 31, 1950, c. 27, 1951 (2nd sess.) c. 5, 1956, c. 35, arts. XVIII, XIX, XX (also succession duties, S.C., 1960-61, c. 19); For other income tax conventions see France, S.C., 1951 (1st sess.) c. 40, as'am. 1952, c. 18, art. 19; United Kingdom, S.C., 1946, c. 38, as am. 1950, c. 50, s. 10, art. XIV; Sweden, S.C., 1951 (1st sess.), c. 42, art. 18; New Zealand, S.C., 1947-48, c. 34, as am. 1950, c. 50, s. 10, art. 14; Ireland, S.C., 1955, c. 10, art. 14; Denmark, S.C., 1956, c. 5, art. 14; Germany, S.C., 1956, c. 33, art. 17; South Africa, S.C., 1957, c. 18, art. 10; Netherlands, S.C., 1957, c. 16 as am., 1960, c. 18, art. 19; Australia, S.C., 1957-58, c. 24, art. 14; Belgium, S.C., 1958, c. 12, art. 14 (not yet proclaimed in force); Congo, S.C., 1958, c. 13 (not yet proclaimed in force); Finland, S.C., 1959, c. 20, art. 15; Norway, (not yet proclaimed in force), art. 23.

⁸⁵ *Ibid.*, arts. XVIII, XIX.

⁸⁶ *Ibid.*, art. XX.

peded. It is to be hoped that in future negotiations *United States of America v. Harden* will induce the federal government to change its approach to the problem of tax evasion or avoidance and press for the inclusion in any new treaty of provisions for the reciprocal enforcement of tax claims.⁸⁷

Conclusion

The time has come to relegate to history the rule enunciated by Lord Mansfield almost two centuries ago. Present conditions are such that full co-operation should exist in the field of taxation particularly on the interprovincial level.

Although the enforcement of tax claims in favour of foreign nations may present problems that are more delicate than when provincial taxes are involved, due to differences in the taxing systems prevailing in the world which could perhaps be solved by international treaties, it still seems that a formulation of general conflict rules dealing with the problem of recognition and enforcement of foreign taxes irrespective of reciprocity is the best solution. For instance any foreign judgment or claim for taxes based upon the residence (income), domicile (succession) of the taxpayer, or sales or the earning of income or the existence of property within the taxing jurisdiction, should be enforced in Canadian courts provided such taxes are not offensive to our notions of public policy as applied to revenue matters and personal jurisdiction is obtained over the defendant.

With the tax burden becoming increasingly heavy due to the tremendous responsibilities incurred by modern States in all areas of human activity and in the light of prevalent conceptions with respect to the justice of taxation, it is absolutely necessary to eliminate all possibilities of tax evasion or avoidance. Within Canada the need is for effective extra-provincial enforcement of all legitimate tax liabilities. In view of the attitude of Canadian courts in *United States of America v. Harden* and the possible extension of the revenue rule to cover extra-provincial collection, the legislatures of the various provinces should act quickly to prevent Canada from continuing to offer a legally respectable asylum to the itinerant tax dodger.

⁸⁷ In general see *International Enforcement of Tax Claims* (1950), 50 Col. L. Rev. 490.