

(NON-)ENFORCEMENT OF FOREIGN REVENUE LAWS, IN
INTERNATIONAL LAW AND PRACTICE

A. N. SACK †

"There is a well recognized rule, which has been enforced for at least two hundred years or thereabouts, under which these Courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States." So it was declared by Tomlin, J., in *In re Visser, Queen of Holland v. Drukker*, decided in 1928.¹ And the following rule was stated in the fourth edition of *Dicey, Conflict of Laws*, by A. B. Keith:²

"The Court has no jurisdiction to entertain an action . . . for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign state. . . .³ The Courts, in refusing, as a matter of principle, to enforce any revenue legislation, may be deemed to be observing a doctrine of public importance."⁴

The question of "enforcement" of foreign "revenue" laws relates to several matters different one from another, in their legal nature. One main group is that of cases of private law relationships, between private persons, and of the effect, which, directly or indirectly, foreign revenue laws have on them.⁵ Another group is that of cases relating to the "enforcement" of tax claims of foreign states. The purpose of the following analysis is to review the actual practice of several nations, and to ascertain the legal basis of the same, in these different matters, which by courts and by writers were often treated as relating to one and the same rule of "non-enforcement of foreign revenue laws."

I

CASES OF PRIVATE LAW CONTRACTS

(I) *Cases Relating to Performance of Contracts*

The case, in which the rule concerning non-enforcement of foreign revenue laws is supposed to have been laid down, two hundred years ago, by

† Professor of Law, Faculty of Law, Petrograd University, 1917-1921; Institut des Hautes Etudes Internationales, Paris, 1927; Academy of International Law, The Hague, 1928; Visiting Professor of International Law, Northwestern University School of Law, 1930-1932; New York University School of Law, 1932; author of two volumes on STATE SUCCESSION, and of other works on International Law and related subjects, in French, German and Russian; contributor to legal periodicals in the United States, England, France, and Germany.

¹ [1928] 1 Ch. 877, 884.

² In the first edition (1896) at 220, and the second edition (1908) at 207, the rule was limited to "penal laws"; in the third edition (1922) at 230, the word "revenue" was added, and in the fourth edition (1927) at 224, the word "political" was also added.

³ (4th ed. 1927) 224.

⁴ *Op. cit. supra* note 3, at 226.

⁵ Only this part of the problem is discussed in this article.

Lord Hardwicke,⁶ is that of *Boucher v. Lawson*.⁷ It was a suit for breach of a contract made between Englishmen, to ship gold out of Portugal. A Portuguese law forbade export of gold. The suit was upheld. The questions involved in the 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 a foreign revenue law, should be enforced in England.⁸ 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.

One hundred and eighty-five years later, a case arose, in which the question was again one of performance of a contract, this time, in a foreign state, and, this time, governed by the foreign *lex loci solutionis*. In this case the contract was to be performed, and the final payment to be made, in Spain. By a decree of Spain, enacted after the contract was made, the payment for 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 English sterling. It was a suit for the balance unpaid.⁹ The claim was denied. The decree was held applicable and, in an *obiter dictum*, the court referred to the rule of non-enforcement of foreign revenue laws and suggested that the same required reconsideration.¹⁰

It is submitted that, the performance of the contract being governed by the *lex loci solutionis*, the real problem in this case was that of "qualification" of the decree above: *i. e.*, whether this decree was, or was not, part of the applicable Spanish law on performance of contracts.¹¹ The decree, evidently, was promulgated for reasons of economic and currency policy of Spain, being a "fiscal" or "revenue" measure. But the sole fact that a foreign law had such fiscal or revenue aspects would seem to be of no

⁶ Cf. *James v. Catherwood*, 3 Dow. & Ry. 190 (K. B. 1823), *per* Abbot, C. J., at 191: "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."

⁷ Cas. t. H. 85 (Eng. 1734).

⁸ Said Lord Hardwicke, *supra* note 7, at 89, ". . . 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 the benefit of such trade from this kingdom, which would be of very bad consequence to the principal and most beneficial branches of our trade; nor does it ever seem to have been admitted."

⁹ *Ralli Bros. v. Compañía Naviera Sota y Aznar*, [1920] 2 K. B. 287, *aff'g* [1920] 1 K. B. 614.

¹⁰ Scrutton, L. J., in *Ralli Bros. v. Compañía Naviera Sota y Aznar*, *supra* note 9, at 300: ". . . and I reserve liberty to consider whether it is any longer 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. . . . This country should not in my opinion assist or sanction the breach of the laws of other independent States."

¹¹ Cf. *infra* notes 19, 42, 43, and 44.

importance, if the law was part of the foreign substantive law governing the given private law relationships before the court; such law would have to be applied.¹² On the other hand such law would not be applied, for whatever reasons it may have been promulgated, if it were not part of the applicable foreign substantive law.¹³

(2) *Cases Relating to Validity and Enforceability of Contracts*

(a) *Contracts Governed by Foreign Law, but Relating to Acts in Contravention of the Local Revenue Law*

Cases of such contracts have, of course, nothing to do with foreign revenue laws. The leading case will, however, be mentioned because in it the "rule" was, as will be seen, "declared". In *Holman et al. v. Johnson, alias Newland*,¹⁴ "the plaintiff who was resident at, and an inhabitant of, Dunkirk, together with his partner, a native of that place, sold and delivered a quantity of tea, for the price of which the action was brought, to the order of the defendant, knowing it was intended to be smuggled by him into England: they had, however, no concern in the smuggling scheme itself, but merely sold this tea to him, as they would have done to any other person in the common and ordinary course of their trade."

Counsel for the defendant argued that, "the contract for the sale of this tea being founded upon an intention to make an illicit use of it, which intention and purpose was with the privity and knowledge of the plaintiff, he was not entitled to the assistance of the laws of this country to recover the value of it."

The action was upheld on the ground that the contract was complete at Dunkirk, had no concern in the smuggling scheme, and violated no law of England. Thus the case had nothing to do with foreign revenue laws. But Lord Mansfield began his judgment with the following discussion, in which he made reference to "revenue laws":

"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.* . . ." ¹⁵

The only revenue law involved being the English law, it would seem that this famous *dictum* (the last sentence in the quotation above) has no

¹² See text I, (2), (c).

¹³ See text I, (2), (b).

¹⁴ 1 Cowp. 341 (K. B. 1775).

¹⁵ *Supra* note 14, at 344.

application to the case, unless the discussion above by Mansfield meant that the contract in question should be enforced by English courts because it was governed by the foreign *lex loci contractus* and because the contract was not unlawful under this foreign law, since the foreign law does not take notice of English revenue law.¹⁶ But Lord Mansfield himself pointed out that "the contract was complete" at Dunkirk and "had no concern in the smuggling scheme."

(b) *Contracts Relating to Acts in Contravention of Foreign Revenue Laws*
 ("Foreign Contraband" Cases)

In this group of cases foreign—revenue and other—laws come into play, first, because the contract contemplates violation of a foreign revenue law, and secondly, because the question may arise of "application" to such a contract of certain provisions of the law of that foreign country. So far as such "application" of that foreign law is concerned, the important distinction should be noted between the substantive validity of a contract, contemplating violation of revenue laws of a foreign country, and its enforceability in the courts of this or that country. The validity of a contract would depend upon the substantive law of this or that country, governing such a given contract, while the enforceability of a valid contract would be always a question of the *lex fori* only.

In case a contract, which contemplates violation of revenue laws of a country, is *not* governed by the law of that country, no question would arise of "application" or "enforcement" of any laws of that country.¹⁷ In case, however, the contract *is* governed by the law of that country, it is governed only by those rules which are part of the substantive *lex contractus* or, respectively, *lex solutionis* of that country. A rule of law of that country to the effect that contracts contemplating violation of local revenue (or other) laws shall not be enforced, being a rule of local adjective law, would therefore be inapplicable. Again, a rule of law of that country to the effect that such contracts shall be deemed null and void, would eventually be disregarded by courts in another country on the ground that such a rule,

¹⁶ *Biggs v. Lawrence*, 3 T. R. 454 (Eng. 1789) which was an action by several partners for goods sold by one of them living in Guernsey and packed by him in a particular manner for the purpose of smuggling them to England, though the other partners, who resided in England, knew nothing of the sale. It was held that the action could not be maintained. Said Buller, J., at 457, "None of the cases cited apply to the present. That of *Holman v. Johnson*, went on the ground of the plaintiffs being foreigners, which materially distinguishes it from this; because the subjects of one country residing there are not bound to take notice of the revenue laws of any other. . . . But this is the case of one of the King's subjects making a contract directly against the statute laws of this country."

¹⁷ In 53 *Hans. A.* 730 (Kammergericht, Oct. 10, 1928) 57 *Journal Du Droit International* (hereinafter referred to as *Clunet*) 436 (1930), an insurance contract, made in violation of the law of Switzerland which prohibited companies not registered in Switzerland to insure local risks, was upheld. The ground taken was that this contract happened to be governed by the German law and was not governed by the Swiss law. For a substantially similar case, see I *Rabel* 28 (Berlin Landgericht 1923).

being purely penal in its character, is not part of the applicable substantive *lex contractus* or *lex solutionis* of that country.¹⁸

The question, in all such cases, will be that of "qualification" of the given rules of the foreign law.¹⁹ 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 or are not "revenue" measures.

In England contracts contemplating violation of foreign revenue laws have been held valid and enforceable²⁰ and it was declared in this connection that "one nation does not take notice of the revenue laws of another."²¹ A similar rule has been applied in the United States.²² The great majority of cases in France also validates these foreign contraband contracts.²³

In some countries such "foreign contraband" contracts are not enforced on the ground that they are against good morals. Such is the case in Germany,²⁴ and a similar doctrine was applied in Austria²⁵ and in

¹⁸ Cf. *Ivey v. Lalland*, 42 Miss. 444, 448 (1869): "Where a contract which violates the revenue laws of the country where it was made comes before the courts of another country, those courts will not take notice of the foreign revenue laws." Cf. also *infra* note 49.

¹⁹ Cf. text I, (1), and *supra* note 11, and *infra* notes 42, 43, and 44.

²⁰ *Boucher v. Lawson*, *supra* note 7. Cf. also *Planche v. Fletcher*, 1 Doug. 251 (K. B. 1779); 7 PARK, MARINE INSURANCE (8th ed. 1842) 506; *Simeon v. Bazett*, 2 M. & S. 94 (K. B. 1813), *aff'd* in *Bazett v. Meyer*, 5 Taunt. 824 (1814); *Sharp v. Taylor*, 2 Phill. 801, 816 (Ecc. 1848); *Clements v. Macauley*, 4 Macph. 583 (Scot. 1866); *Stewart v. Gelot*, 9 Macph. 1057 (Scot. 1871); *Fracis v. Sea Ins. Co.*, 3 Com. Cas. 229 (Eng. 1898). Cf., however, *Foster v. Driscoll*, [1929] 1 K. B. 470. See also *infra* note 37.

²¹ See *Planche v. Fletcher*, *supra* note 20, at 253, *per* Lord Mansfield.

²² *Kohn v. Schooner Renaissance*, 5 La. Ann. 25 (1850), where the plaintiff, resident in New Orleans, shipped at Tampico, Republic of Mexico, on the schooner, six bags with 3000 Mexican dollars, to be delivered in New Orleans. This shipment was made in violation of the revenue laws of Mexico. On the arrival the specie was demanded, but no delivery was made. Judgment was given for the plaintiff, and it was declared that in accordance with the established jurisprudence of the leading commercial nations, agreements in violation of foreign revenue laws may be enforced. Cf. *Ivey v. Lalland*, *supra* note 18, at 448; *Armendiaz v. De La Serna*, 40 Tex. 291, 305 (1874).

²³ In 1758 the French Admiralty of Marseilles sustained and enforced a contract of insurance in favor of a French merchant who attempted to export silks from Spain contrary to the law of that country, and whose vessel was in consequence thereof seized and the cargo confiscated. This decision was affirmed by the Parlement d'Aix, June 30, 1759. Cf. POTHIER, TRAITÉ DES ASSURANCES (1810) no. 58.

Cf. also *Pau*, July 11, 1834, and *Cour de Cass.*, March 25, 1835, *Sirey* 1, 673 and 804 (1835); *Paris*, Dec. 16, 1880, 7 *Clunet* 82 (1880); *Aix*, Jan. 2, 1899, 26 *Clunet* 989 (1899). See also *Société La Morue Française et Pêcherie de Fecamp c. Compagnie Méditer. et Comp. San Giorgio*, Tribunal de commerce, Marseilles, May 20, 1925, *Gazette du Palais* 2, 421 (1925); *Cour d'Aix*, Feb. 2, 1926, *Gazette du Palais*, 1, 431 (1926), *Sirey* 2, 105 (1926) with note by Professor Pillet (also in 2 *Mélanges Pillet* 299 *et seq.*); *Cour de Cass.*, ch. des. reg., March 28, 1928, *Gazette du Palais* 1, 812 (1928), 56 *Clunet* 333 (1923), *Sirey* 1, 812 (1928) with note by Professor Niboyet.

²⁴ Cf. *Court of Appeal, Cassel*, Dec. 13, 1828, quoted by R. VON MOHL, 1 STAATSRECHT, VÖLKERRECHT UND POLITIK (1860) 724. The recent decisions of the Reichsgericht are based on § 138 of the GERMAN CIVIL CODE ("Ein Rechtsgeschäft, das gegen die guten Sitten verstösst, ist nichtig.") Cf. decisions, February 9, 1926 (charter-party), (1926) JURISTISCHE WOCHENSCHRIFT 2169, RABEL, ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT (1926-27) no. 16, 57 *Clunet* 430 (1930); March 10, 1927 (contract of loan), (1927) JURISTISCHE WOCHENSCHRIFT 2287, RABEL, (1926-27) no. 17, 57 *Clunet* 431 (1930);

Belgium.²⁶ There are also some French decisions which denied recovery on such contracts on the ground of their immorality,²⁷ but the prevailing judicial doctrine in France does not consider the foreign contraband business to be immoral,²⁸ but holds such contracts valid and enforceable on the ground that foreign contraband is not prohibited by French law.²⁹

The doctrine of good morals was advocated by many authoritative writers in England,³⁰ United States,³¹ France,³² Germany,³³ Switzerland,³⁴ and Belgium.³⁵ It was also said that foreign contraband contracts should be denied judicial protection because it is an International Law duty of states not to tolerate or protect acts tending to damage other states. This theory³⁶ was adopted in several recent cases on the continent and in England.³⁷

Oct. 26, 1928, RABEL, (1928) no. 20, 57 Clunet 432 (1930). Cf. to the same effect Landgericht III, Berlin, Nov. 2, 1928, RABEL, (1929) no. 13, 27. *Contra*: Oberlandesgericht, Hamburg, Oct. 21, 1927, RABEL, (1927) no. 19 (insurance).

²⁶ Supreme Court of Vienna, June 5, 1928, 2 Ob. 402-28, *Rechtssprechung*, no. 253 (1928), WAHLE, *RECHTSSPRECHUNG* 122 (1928); March 3, 1931, 4 Ob. 9931, *Rechtssprechung* 70 (1931), 58 Clunet 1180 (1931) (contract to procure false proof of origin of goods to be imported into a foreign country).

²⁷ Cour de Bruxelles (1886) 29 *REV. DR. INT.* 277.

²⁸ Cf. Cour de Rennes, December 1, 1826, cited in 5 LAPRADELLE-NIBOYET, *REP. DR. INT. PRIVÉ* 228 (1929); Cour de Pau, July 2, 1886, 14 Clunet 57 (1887) (contract of freight for the transportation of merchandise destined for contraband); Cour de Douai, November 11, 1907, Sirey 2.308 (1907), 35 Clunet 138 (1908), 4 Darras 237 (1908).

²⁹ Cour d'Aix, August 30, 1833, Sirey 2.161 (1834).

³⁰ Cf. Admiralty Court in Marseilles, 1758, confirmed by the Parlement d'Aix, (1835); Cour de Cass., August 25, 1835, Sirey 1.673 (1835); Dalloz, *Rep.*, Société, no. 151. In the case Société La Morue, *supra* note 23, the Tribunal de Commerce laid stress on the point that delivery of liquors in neutral waters to bootleggers is not unlawful under the Volstead Act; Cour d'Aix declared simply that it was not prohibited by French law; Cour de Cass. took into consideration both points.

³¹ Cf. particularly POLLOCK, *CONTRACTS* (9th ed. 1921) 391; WESTLAKE, *PRIVATE INTERNATIONAL LAW* (7th ed. 1925) 305.

³² 3 KENT, *COMMENTARIES* (14th ed. 1896) *266-267: "It is certainly matter of surprise and regret, that in such countries as France, England, and the United States, distinguished for a correct and enlightened administration of justice, smuggling voyages, made on purpose to elude the laws, and seduce the subjects of foreign states, should be countenanced, and even encouraged by the courts of justice. The principle does no credit to the commercial jurisprudence of the age." Cf. also STORY, *CONFLICT OF LAWS* (7th ed. 1872) 282, 291. 2 WHEARTON, *CONFLICT OF LAWS* (3d ed. 1905) 1139.

³³ Cf. POTHIER, *loc. cit. supra* note 23; 1 FOELIX—DEMANGEAT, *DR. INTERNAT. PRIVÉ* (4th ed. 1866) 235; DESPAGNET, *DR. INTERNAT. PRIVÉ* (3d ed. 1899) 607; SURVILLE ET ARTHUYS, *DR. INTERNAT. PRIVÉ* (3d ed. 1900) 263, § 250; 4 WEISS, *DR. INTERNAT. PRIVÉ* (2d ed. 1912) 363; VALÉRY, *DR. INTERNAT. PRIVÉ* (1914) no. 669; Niboyet, note in Sirey 1.305 (1928), 10 *Répert. de Dr. Internat.*, no. 413, and no. 448. Cf. also 2 BAUDRY-LACANTINIERE, *DR. CIVIL* (3d ed. 1907) no. 77; 2 LYON-CAEN ET RENAULT, *TRAITÉ DE DROIT COMMERCIAL* (4th ed. 1908) no. 70. But cf. *Bartin* in 4 AUBRY ET RAU, *COURS DE DR. CIVIL FRANÇAIS* (5th ed. 1922) § 378, page 18, note 6 bis and 7; 4 PARDESSUS, *COURS DE DROIT COMMERCIAL* (6th ed. 1857) no. 1492.

³⁴ Cf. R. VON MOHL, *supra* note 24, at 1724; HEFFTER (Goeffcken), *VOELKERRECHT* (5th ed. 1867) no. 32, n. 61-62; L. VON BAR, *THEORIE UND PRAXIS DES INTERNATIONALE PRIVATRECHTS* (2d. ed. 1889) 246; cf. also 1 FRANKENSTEIN, *INTERNATIONALES PRIVATRECHT* (1927) 201, 229. *Contra*: TITZE, *JURISTISCHE WOCHENSCHRIFT* (1927) 2287.

³⁵ 1 BROCHER, *DR. INTERNAT. PRIVÉ* (1882) 236, 2 *id.* at 92; MEILL, *INTERNATIONAL CIVIL AND COMMERCIAL LAW* (Kuhn's translation 1905) 307.

³⁶ 8 LAURENT, *DR. CIVIL INTERNAT.* (1881) 174-185.

³⁷ Pillet, *Dr. Internat. Privé, Essai d'un système général de solution des conflits de lois* 23 Clunet 1, 8 (1896); cf. 2 PILLET, *TRAITÉ PRATIQUE DE DR. INTERNAT. PRIVÉ* (1924) 238, no. 513, and note under Aix, February 2, 1926, Sirey (1926) 2.105, and 2 *Mélanges Pillet* (1929) 299 sq.; 1 FIORE, *DR. INTERNAT. PRIVÉ* (2d. ed. 1890) no. 173, 2 *id.* 610 *et seq.*

³⁸ Cour Alger, Feb. 20, 1925, Garau v. Lambert, 53 Clunet 701 (1926); Cour Bruxelles, Feb. 17, 1886, 14 Clunet 214 (1887).

(c) *Contracts Governed by the Law of a Foreign Country and not Stamped there as Required by that Law. ("Foreign Stamp" Cases)*

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 contract would not be enforced by the *forum*,³⁸ because there is no valid contract in existence.³⁹

Second, the stamp formality is, under the foreign *lex loci celebrati contractus*, preliminary only to the enforcement of the 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.⁴⁰

For England *cf.* *Ralli Bros. v. Compañía Naviera Sota y Aznar*, *supra* note 10, at 300. In *Foster v. Driscoll*, *supra* note 20, contracts contemplating the introduction of whiskey into the United States in violation of the prohibition laws were held invalid; Lawrence, L. J., laid stress on considerations of comity towards the United States; Sankey, L. J., laid stress on public morals, quoting Kent and Story. Scrutton, L. J., dissented on the ground that the sale in the case at bar had to be made in Canada, and not in the United States, and he pointed out that the British government was giving permits to export whiskey to Canada, Bermuda, and the Ile de St. Pierre. But see *Walkerville Brewing Co. Ltd. v. Mayrand*, [1929] 63 Ont. L. R. 573, where the court held that such contracts are not *malum in se*, and that it should not be left at large to each tribunal to find whether a particular contract is against public policy.

³⁸ In *Alves v. Hodgson*, 7 T. R. 241 (Eng. 1797), it was held that a note made in Jamaica being by the laws of that island void for want of a stamp, cannot be recovered upon in England. See also *Clegg v. Levy*, 3 Camp. 166 (Eng. 1812); *infra* notes 47 and 48.

A similar doctrine seems to prevail also in France. *Cf.* BOULLENOIS, DISSERTATION SUR LES STATUTS, quest. 3; BOUHIER, COUTUME DE BOURGOGNE, ch. 28. *Contra:* FROLAND, MEM. SUR LES STATUTS, part 1, ch. 6, no. 8, page 143.

Cf. for Germany, Oberlandesgericht, Dresden, June 20, 1913, and for Austria, O. L. G., Vienna, August 25, 1930. NUSSBAUM, DEUTSCHES INTERNAT. PRIVATRECHT 319 (1932).

Cf. for France, 4 WEISS, TRAITÉ DE DR. INTERNAT. PRIVÉ (1913) 453; VALERY, *supra* note 32 at no. 923; 4 LYON-CAEN ET RENAULT, *op. cit. supra* note 32 at no. 639; Brocher, *La lettre de change dans ses rapports avec le dr. internat. privé*, (1874) REVUE DE DR. INTERNAT. 199; VINCENT ET PENNAUD, DICTIONNAIRE DU DR. INTERNAT. PRIVÉ, v-0 EFFETS DE COMMERCE, no. 15, p. 339.

³⁹ *Alves v. Hodgson*, *supra* note 38, at 243, *per* Lord Kenyon: ". . . it is said that we cannot take notice of the revenue laws of a foreign country: but I think we must resort to the laws of the country in which the note was made: and unless it be good there, it is not obligatory in a Court of Law here."

⁴⁰ In *Bristow v. Sequeville*, 5 Ex. 275 (Eng. 1850), the question arose on certain receipts which were not properly stamped in the foreign country. It was contended that they were not admissible in evidence and reference was made to *Alves v. Hodgson*, *supra* note 38. The receipts were held admissible in evidence.

Alderson, B., declared, at 278: "It is very different, whether the law makes a stamp necessary to the validity of an instrument, or to its admissibility in evidence. An unstamped deed is a valid contract here, although it cannot be given in evidence. If, by the law of a foreign country, a document is only admissible for want of a stamp, it is a valid contract, and receivable in evidence in another country."

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.⁴¹

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*.⁴² This is one of the numerous cases when it is necessary,

In *Satterthwaite v. Doughty*, 44 N. C. 314 (1853), it was held that a bond executed and payable in Maryland which was void under the laws of Maryland because not written on stamped paper, was void and could not be enforced in the courts of North Carolina. In a later case, *Fant v. Miller*, 17 Gratt. 47 (Va. 1866), the same law of Maryland was given judicial consideration. Recovery was granted. The ground taken by Joynes, J., was that the law of Maryland related to matters of procedure only, and was, therefore, inapplicable. Cf. also *Reilly v. Steinhart*, 217 N. Y. 549, 112 N. E. 468 (1916), where it was held that an action could be brought on an agreement made in Cuba, and valid there, but which had to be "protocolized" there before it could be sued upon in the Cuban courts. The requirement of registration at the place of contracting was treated in the same manner in *Ex parte Melbourn*, L. R. 6 Ch. App. 64 (1870). See also *Guepratte v. Young*, 4 De G. & S. 217 (Eng. 1851); cf. *Beadall v. Moore*, 199 App. Div. 531, 191 N. Y. Supp. 826 (1922).

⁴¹ In *Fant v. Miller*, *supra* note 40, at 75, *per Joynes, J.*: ". . . the statute of Maryland requiring certain instruments to be stamped is nothing more, as its title imports, than a measure for raising revenue for the benefit of that state. As a means of securing the payment of the duty, and for that purpose only, the payment of the duty is 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 here, would be lending the courts of Virginia to enforce the payment of revenue to the state of Maryland, contrary to the settled doctrine that the courts of one state will not enforce the revenue laws of another."

In *Craig v. Dimock*, 47 Ill. 308, 316 (1868), it was held that while Congress has power to require instruments created and valid under state laws, to be stamped, and punish by fine any intentional evasion of the power, Congress has no power to require that such a stamp is to be prerequisite to their validity and binding force, for admissibility in evidence in state courts.

⁴² Cf. *Wahl, Les jeux de course en droit international* (1898) 25 *Clunet* 234, 249; "Il ne s'agit plus ici d'une solennité édictée dans l'intérêt des parties; on ne peut plus dire, comme on le fait pour justifier la règle *locus regit actum*, que cette règle a été imposée par la nécessité, qu'elle a pour but de suppléer à l'emploi, généralement impossible, des formalités édictées par la loi nationale des parties, que toute législation enfin est apte à déterminer les formes destinées à garantir, sur le territoire soumis à son empire, la liberté et la sécurité des parties. Le droit de timbre n'est exigé que dans un intérêt fiscal, dans l'intérêt privé, si l'on peut ainsi dire, du pays qui l'a établi, et les pays étrangers n'ont pas à se préoccuper de cet intérêt." (At 251): ". . . la règle *locus regit actum* n'a rien à faire en matière de lois fiscales, et qu'elle se restreint aux formalités qui touchent à la solennité des actes."

But cf. for Italy, *Diena*, (1899) 3 *DR. INT. PRIV.* 13, and *Quelques mots encore sur les jeux de bourse en droit international* (1899) 26 *Clunet* 326, 338: ". . . l'emploi du papier timbré constitue, . . . en Italie, une condition essentielle pour la validité des lettres de change et les tribunaux de chaque État doivent apprécier la validité, quant à la forme, des actes passés en pays étranger, en se rapportant à la loi du lieu où ces actes sont passés, quel que soit le but pour lequel la *lex loci actus* exige certaines conditions de forme." Cf. also

in matters of the choice of the applicable foreign law, to decide the question of qualifications of different provisions of that foreign law.⁴³ Should the *forum* accept the qualifications of such provisions by the law of that foreign country itself, or can it decide independently what is the character of such provisions? In the latter case, what tests should it apply in deciding the question?⁴⁴

It should be noted in this connection, that an English act of 1882⁴⁵ expressly provided, that "where a bill of exchange is issued out of the United Kingdom, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue," and that the Hague Convention of 1912, and the Geneva Conventions of 1930 and 1931⁴⁶ obligated the parties to alter, if necessary, their laws so that the validity of obligations arising out of a bill of exchange or a promissory note, or a check, or the exercise of the rights that flow therefrom shall not be subordinated to the observance of the provisions concerning the stamp.

If an unstamped contract is, under the *lex contractus* of the *loci celebrati contractus*, invalid, as a matter of substantive law, a distinction should be made between invalidity of the contract and the denial of any relief to the parties to such an invalid contract.

Esperson, *La législation fiscale italienne dans ses rapports avec le droit international*, (1893) REV. DE DR. INTERNAT. 304.

Cf. generally DUGUIT, *DES CONFLITS DE LEGISLATION RELATIFS À LA FORME DES ACTES CIVILS* (1882); Despagnet, *La Règle Locus Regit Actum et l'Ordre Public*, (1890) 1 REVUE PRATIQUE DE DR. INTERNAT. PRIVÉ, 52 *et seq.*; RENÉ DE BEVOTTE, *DE LA RÈGLE LOCUS REGIT ACTUM* (1895).

⁴³ Cf. on the continental theory of "qualifications", Martin, *ETUDES DE DR. INTERNAT. PRIVÉ* I (1899) 1-82; Lorenzen, *The Theory of Qualifications and the Conflict of Laws* (1920) 20 COL. L. REV. 247. Cf. also examples of provisions having the character of "political" incapacities, as distinguished from provisions of private law character relating to personal status, in NIBOYET, *DR. INTERNAT. PRIVÉ* (1928) 504 *et seq.*

⁴⁴ Theoretically speaking, *lex actus* are rules concerning the proper way of making binding contracts, established in the interests and for the security of the parties to the contract and generally of private economic turnovers. Thus a rule prescribing registration of certain important acts, with payment of a moderate fee, would seem to be a rule of *lex actus*, and a rule prescribing stamps to be pasted to some instrument would be a revenue measure. Suppose, however, a rule prescribing registration, with payment of a substantial tax, of not very important acts, and another rule prescribing that bills of exchange and promissory notes, in order to have the force of such bills and notes, should be written on a special kind of paper with different type for different amounts, prepared for and sold by the government for a very moderate price, different for different types, on which sale the government received a small profit. Would the first rule be one of *lex actus*, and the second a revenue measure?

⁴⁵ The BILLS OF EXCHANGE ACT, 45 & 46 VICT. c. 61 § 72 (a) (1882). To the same effect see Court of Appeals, Naples, December 29, 1926, (1927) 6 RIV. DI DIRITTO INTERNAZIONALE 268. There are similar provisions in the BILLS OF EXCHANGE LAW of Costa Rica, Article 159, II. Cf. MEYER, *WELTWECHSELRECHT* (1909) 653.

⁴⁶ Convention of July 23, 1912, on the Unification of the Law Relating to Bills of Exchange and Promissory Notes, art. 193; cf. SEN. DOC. No. 768, 61st Cong. 3d Sess., and No. 739, 64th Cong. 2d Sess.; Convention of June 7, 1930, on the Stamp Laws in Connection with Bills of Exchange and Promissory Notes, LEAGUE OF NATIONS DOCUMENT, C. 348, M. 144 (1930) II, Art. 1; Convention of March 19, 1931, on the Stamp Laws in Connection with Checks, LEAGUE OF NATIONS DOCUMENT, C. 194, M. 77 (1931) IIB § 3, Art. 1. See also Hudson and Feller, *The International Unification of Laws Concerning Bills of Exchange* (1931) 44 HARV. L. REV. 333; Feller, *The International Unification of Laws Concerning Checks* (1932) 45 HARV. L. REV. 668.

If the contract was, for example, one of partnership, then, the contract being invalid, there is no partnership and the parties are not partners. Therefore, if one person gave to another certain goods, which that other person sold, but no payment was ever received from the buyer, it would follow that the sale was not by the partnership, because there is no valid partnership in existence between the two persons. But it would not follow that the person who gave to the other person goods would have no relief in connection with these goods. Quite on the contrary, precisely because there is no partnership, he will have the right to claim from the other person the value of the goods he delivered to him.⁴⁷

Similarly if the contract is one of loan, and the holder of the unstamped note actually loaned money to the signer of the note, it would not follow from the fact that the note is invalid, that the person who had and received the money would not be liable to pay it back to his creditor. To relieve him from restitution of the money would be equivalent to a punishment of the creditor⁴⁸ and to unjustified enrichment of the debtor. The contract may be invalid, but money had and received should be restored.

In several decisions, in England and the United States, it was held, in such cases, that the foreign law in question is a "revenue" law and, therefore, is to be disregarded,⁴⁹ recovery being granted on such unstamped

⁴⁷ Cf. *Clegg v. Levy*, *supra* note 38.

⁴⁸ In cases relating to domestic contraband, as well as in those cases of foreign contraband where the contract or business was held to be against good morals and public policy, all relief was denied to parties to the same. Cf. also text I. 2. (a).

But in these cases the ground for such a decision was not at all the "nude" fact of invalidity of the contract, but the "odious" character of the contract or business. The denial of any relief in such cases was like a penal measure, based upon considerations of public policy.

There is of course nothing immoral in the fact that a document was not duly stamped in a foreign country. Cf. Champcommunal, *La lettre de change en droit international privé*, (1894) 2 ANNALES DE DROIT COMMERCIAL 292: "La contrebande est immorale et contraire à l'intérêt bien entendu des États entre lesquels elle s'exerce. Les contraventions fiscales au contraire peuvent être commises de bonne foi. . . ." From this point of view *Alves v. Hodgson*, *supra* note 38, where recovery was denied upon an unstamped note made in Jamaica, seems to be unjustifiably harsh, if the case does mean that the creditor was denied *any* relief. It should be noted that in this case the question was of the law of a British colony. In *Satterthwaite v. Doughty*, *supra* note 40, the law in question was of a sister state, and certain stress was laid on this point.

⁴⁹ In *James v. Catherwood*, *supra* note 6, an action was brought for money lent in France, and unstamped receipts were produced in proof of the loan. Evidence of the law of France was offered by the defendant "to show that by the law of France, such receipts required a stamp."

The following colloquy took place during the argument of the counsel for the defendant, at 190: "Chitty . . . contended, that as every contract must be entered into in conformity with the *lex loci*, it was competent to the defendant to show that this contract had not so been entered into. (*Best*, J. Can we take notice of the revenue laws of France? *Abbott*, C. J. That is the question. In the time of Lord *Hardwicke*, it became a maxim, that the Courts of this country will not take notice of the revenue laws of a foreign state. There is no reciprocity between nations in this respect. Foreign states do not take any notice of our stamp laws, and why should we be so courteous to them, when they do not give effect to ours?)"

Reference to Lord *Hardwicke* appears to relate to *Boucher v. Lawson*, *supra* note 7. No reference is made to either *Alves v. Hodgson*, or *Clegg v. Levy*, both *supra* note 38.

For the United States cf. *Ludlow v. Van Rensselaer*, 1 Johns. 93 (N. Y. 1806), where it was held that a note made in France but payable to a person in the United States is valid and enforceable in New York, though not stamped according to the laws of France. Said

contracts.⁵⁰ While these decisions, in their results are, it is believed, sound, the theory, on which they were decided seems to be wrong,⁵¹ as the proper ground for recovery would have been, not enforcement of the unstamped contract in a supposed disregard of foreign "revenue" law and in actual disregard of foreign *lex contractus*, but restitution of money had and received.⁵²

II

CASES OF FOREIGN TAXES PAID BY ONE PERSON ON ACCOUNT OF ANOTHER PERSON OR WITHHELD OR DEDUCTED BY ONE PERSON FROM PROPERTY OR MONEY OF ANOTHER PERSON

Here two main situations have to be considered. The first is when one person has paid a tax for another person out of his own money. The second is when the person who paid the tax used for such payment property or funds of the tax debtor which he had at his disposal, or retained the amount of the tax out of such property or money due to the tax debtor.

In the first situation the question is whether he could recover *abroad* from the tax debtor his expense; in the second—whether he could be sued *abroad* by the tax debtor for the recovery of property or funds used or retained by him in connection with the payment of the tax.

(1) *Cases of Persons Having Paid a Tax on Another Person (or the Latter's Property or Business) out of their own Money, and Claiming, in Another State, from the Tax-Debtor, the Reimbursement of their Expenses*

The tax laws of several countries provide that certain persons in certain circumstances⁵³ shall pay taxes on other persons (or their property or

Livingstone, J., at 95: ". . . we do not sit here to enforce the revenue laws of other countries, it is perfectly immaterial, in a suit before us, whether or not the note was stamped according to the laws of France." *Accord*: Skinner v. Tinker, 34 Barb. 333 (N. Y. 1861).

Cf. also Ivey v. Lalland, *supra* note 18, at 448, where it was said, by way of an *obiter dictum*, that there is perhaps an exception to the general rule of *lex loci contractus*, namely, that courts will not take notice of foreign revenue laws when dealing with contracts violating such laws. See Armendiaz v. De La Serna, *supra* note 22, at 305, where it was said, also by way of an *obiter dictum*, that states do not ordinarily consider themselves bound to decide the effect of revenue laws of another state upon validity of contracts.

⁵⁰Wynne v. Jackson, 2 Russ. & M. 351 (Eng. 1826); Leach, V. C., was of opinion that ". . . the circumstance of the bills being drawn in such a form that the holder could not recover on them in France, was no objection to his recovering on them in an English court."

⁵¹STORY, *op. cit.* *supra* note 31, at 297-298, where the author declares that the doctrine of James v. Catherwood, *supra* note 6, and Wynne v. Jackson, *supra* note 50, is wholly irreconcilable with that of Alves v. Hodgson and Clegg v. Levy, both *supra* note 38.

⁵²WESTLAKE, *op. cit.* *supra* note 30 at 296, states that the case of Wynne v. Jackson, *supra* note 50, has been ultimately decided both by the vice-chancellor, and by Lord Eldon on appeal, "on the ground of the consideration for which the bills had been given."

⁵³"Having the direction, control or management of the property" of other persons, "trustee, guardian, tutor, curator or committee, or factor, agent, receiver or manager" of another person: INCOME TAX ACT, 8 & 9 GEO. V, c. 40, Sched. I, Gen. Rules §§ 4, 5, 6 (1918); "who collects or receives, or is in any way in possession or control of income for or on

business). Such representative taxpayers are required to retain out of property or funds of such other persons, which they may have at their disposal, amounts necessary for the payment of the tax and are made responsible for the payment of the tax out of such funds. Sometimes such representative taxpayers are made personally liable to pay the tax even if they have no money or property of the tax debtors at their disposal.⁵⁴ They are, of course, given by the taxing state, the right to recover the amount they had to pay out of their own pocket from the person on whose behalf the tax was paid. If the tax-debtor has, in the taxing state, no property or money, the representative taxpayer will have to seek recovery abroad. Such claims outside the taxing state were upheld.⁵⁵

behalf of" other persons: INCOME WAR TAX, CAN. REV. STAT. (1927) ch. 97 § 38; "who has the control, receipt or disposal of any money belonging to" other persons: INCOME TAX ASSESSMENT, 20 COMMONWEALTH ACTS (Australia 1922) 161 §§ 4, 89.

⁵⁴ In England, under the Income Tax Act of 1842, 5 & 6 VICT. c. 35, § XLI (1842), any person not resident in the United Kingdom was liable to be assessed and charged in the name of any factor, agent, or receiver, having the receipt of any "profits or gains". By arranging that all sums due to the foreign principal in respect of trade carried on in the United Kingdom should be remitted direct to the principal abroad instead of through the agent in the United Kingdom, it was possible for a nonresident to escape the effective assessment and collection of tax, as there would have been no funds or person on which to execute it.

By the Finance Act of 1915, No. 2, 5 & 6 GEO. V, c. 89, § 31, corresponding to General Rule 5 of the INCOME TAX ACT of 1918, 8 & 9 GEO. V, c. 40, it was provided that "a person not resident in the United Kingdom, whether a British subject or not, shall be assessable and chargeable in the name of any such trustee, guardian, tutor, curator, or committee, or of any factor, agent, receiver, branch, or manager, whether such factor, agent, receiver, branch, or manager has the receipt of the profits or gains or not, in like manner and to the like amount as such nonresident person would be assessed and charged if he were resident in the United Kingdom and in the actual receipt of such profits or gains."

Cf. Tarn v. Scanlon *et al.*, [1928] A. C. 34; Belfour v. Mace, 133 L. T. R. 385 (Eng. 1925).

In England, brokers are excluded from liability to assessments. *Cf.* FINANCE ACT of 1915, § 31 (6), re-enacted with an amendment by General Rule 10 of INCOME TAX ACT of 1918. *Cf.* also further modification in Finance Act of 1925, 15 & 16 GEO. V, c. 36, § 17; Wilcock v. Pinto, [1925] 1 K. B. 30, and Maclaine v. Eccott, [1926] A. C. 424 at 435, *per* Lord Cave: ". . . the proceeds of the transaction would not normally pass through the hands of the broker . . . who would therefore have no direct means of protecting himself against the charge of income tax. . . ."

⁵⁵ *In re Hollins et al.*, 79 Misc. 200, 139 N. Y. Supp. 713 (1913), *aff'd*, 212 N. Y. 567, 106 N. E. 1034 (1914). The Dowager Duchess of Manchester at the time of her death was a British subject, domiciled in England. Her last will and a codicil thereto were probated in England. These instruments designated executors for the English estate, and separate executors, domiciled in New York, for the American estates. The Countess Zichy, an Austrian subject domiciled in Austria, was a legatee under the will and a certain annuity was payable to her. The American executors filed their accounts for settlement in the New York court, and the proposed decree provided that the American executors and trustees shall deduct from the annuity coming to her a certain amount in satisfaction of the legacy duty payable thereon to the English crown. A sum sufficient to pay such legacy duty has been remitted by the American executors to the English executors. The Countess Zichy claimed that the American executors should have ignored the laws of England and are bound to pay over to her the annuity free of the English duty. It was held that the American executors were justified in remitting to the English executors a sum sufficient to discharge the legacy duty imposed by the laws of England on the annuity of the Countess Zichy. *Cf. infra* notes 57 and 58.

In *Goodrich v. Rochester Trust & Safe Co. et al.*, 173 App. Div. 577, 160 N. Y. Supp. 454 (1916), a resident of New York died in 1900, leaving a will which was admitted to probate in New York. Among the assets of the estate were bonds and mortgages upon real property in Michigan. These mortgages were from time to time, as they became due and payable, transmitted to the plaintiff in Michigan where he resided. He was appointed in Michigan administrator and as such collected these mortgages and immediately remitted the proceeds to New York. The last mortgage was collected and the proceeds remitted in 1911. Shortly thereafter the plaintiff was informed that a transfer tax is payable upon the mortgages he

They could be granted, it is submitted, on the ground of rules of law relating to *mandatum*, the agency relationship existing between the representative taxpayer and the tax-debtor. If a person requests his agent to buy abroad and to bring into the country a piece of cloth, or a diamond ring, the agent has the implied authority to pay, on account of the principal, the custom duty on these goods. If a person authorizes his agent to make a contract abroad, the agent has the implied authority to incur the expense on payment of proper registration fees or stamp duties. The reason is clear. It is a necessary implication that, whatever the agent is requested or authorized by his principal to do, he shall and he will do in accordance with, and subject to, the laws of the country where he is executing his duties.

Similarly, it is believed, when a person has under his control and management property or funds of, or does acts or business for, and on account of, another person, it is implied that he will act in accordance with, and subject to, the laws of the country where he is executing his duties of trustee, executor, administrator, agent, factor, etc., and that he has the implied authority to incur, on account of his principal, the expense on payment of lawful taxes relating to property, acts, or business, the subject matter of his duties towards the principal.⁵⁸

had handled. Having been threatened with proceedings on behalf of the State of Michigan to compel him to pay the transfer tax, the plaintiff paid the tax with interest out of his own funds. It was held that the plaintiff could recover from each of the legatees a proportionate part of the sum he paid. *Cf. infra* note 61.

But *cf.* in France, *Vogt v. Feltin*, (1929) 56 *Clunet* 385, where two persons were owners of shares in a mining company in Germany; Feltin was domiciled in France, Vogt in Germany. In 1911 they sold their shares at a substantial profit. A tax became payable by them to the German Empire on the profits they made. In 1918 the German authorities seized certain property of Vogt, and having sold the same, applied the proceeds for the satisfaction of the tax due from both Feltin and Vogt. The heirs of Vogt instituted in France a suit against Feltin to recover the amount which was paid out of the property of Vogt on account of Feltin. The claim was denied by the Tribunal de Belfort, by the Court of Appeal and the Cour de Cassation. *Cf.* comments on this case, *infra* notes 59 and 61.

⁵⁸ Thus, in case of death duties, the executors and administrators have the implied authority to pay taxes on the estate and on successions, on account of the residue or of the legacies. Testator might direct to have such taxes paid out of or be borne by some other funds or interests than those which under the law are supposed to bear the same, but in the absence of such directions the expense will burden the funds and interests in accordance with the law. In both cases it may be said that an actual or implied authority is given by the testator to pay taxes on account of the residue or of the legacies. *Cf. In re Hollins, supra* note 55, at 207, 139 N. Y. Supp. at 717: "The court should favor such an administration of the estate here as will be in conformity with the intention of the testatrix. It certainly was not the intention of the late Duchess 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 seems in this instance to require that the legacy duty imposed by English law upon the annuity given to the Countess Zichy by the will of the late Dowager Duchess of Manchester should be paid out of the property set apart by the executors in this country for the production of such annuity . . ."

It should be noted that the English tax in this case was a *legacy duty, payable, according to the English law, out of legacies.*

There are other kinds of death duties which are payable out of the residue as expenses of the estate. In *Peter v. Stirling*, 10 Ch. D. 279 (1878), it was held that a certain duty of Victoria, which "is much more like probate duty than legacy duty", levied on property in Victoria of the decedent who was domiciled in England, is payable out of his general estate,

The agent would be indemnified for all liability and has the right to be reimbursed for his lawful expenses relating to the execution by him of his duties towards the principal. The taxes he paid on his principal's property in his control, or with reference to acts or business he was doing for, and on account, of his principal, are expenses of the agency and, as such, would be recoverable everywhere, on the ground that private law rights are protected and enforced everywhere. The matter will be, it is submitted, not only one of justice,⁵⁷ but of strict law. There will be no question, in such a case, of any "enforcement" of foreign revenue law.⁵⁸

If a man, who is agent for another man's property or business, but who is not in the taxing state, is made liable to pay a tax on this other man (or his property or business), then his expense is not an expense of the agency, because there is no agency relationship between him and the tax-debtor in the taxing state,⁵⁹ and then, the only ground on which he could claim from the tax-debtor the money he paid, would be that of *subrogation* into the public law claim of the taxing state. In such a case, and *on such a ground*,⁶⁰ his claim would not be enforced abroad.⁶¹

and that the legatees are entitled to their legacies free of this duty. Cf. also a similar decision in *In re Maurice*, 75 L. T. 415 (1896).

In *In re Brewster*, [1908] 2 Ch. 365, where an English testatrix devised property in Victoria to colonial trustees to sell and to remit proceeds to English trustees to be held under certain specific trusts, it was held that the death duty in Victoria fell on that property and not on the residue.

Cf. also *In re De Sommers*, [1912] 2 Ch. 622; *In re Scott*, [1915] 1 Ch. 592, where it was held, upon construction of the will, that the foreign death duty was payable out of the foreign property.

In the United States Federal Estate Tax, 39 STAT. 156, c. 463 (1916), was held to be a tax on the transfer of the estate, and not upon separate successions to property of each legatee or distributee, *New York Trust Co. v. Eisner*, 256 U. S. 345, 41 Sup. Ct. 506 (1921); and payable out of the residue, *In re Hamlin*, 226 N. Y. 407, 124 N. E. 4 (1919); *Plunkett v. Old Colony Trust Co.*, 233 Mass. 471, 112 N. E. 95 (1919); *Taylor v. Jones*, 242 Mass. 210, 136 N. E. 383 (1922). Cf., however, *Williams v. State*, 81 N. H. 341, 125 Atl. 661 (1925), holding that whether the Federal Estate Tax comes out of the residue or diminishes *pro rata* the legacies is a matter of local law. Some of the state death duties were held to be taxes on inheritance or legacies, *Blodgett v. Silberman*, 277 U. S. 1, 48 Sup. Ct. 410 (1928); *Leach v. Nichols*, 285 U. S. 165, 52 Sup. Ct. 338 (1932) (Mass.); *U. S. v. Kombst*, 52 Sup. Ct. 616 (1932) (California); while death duties of other states were held to be taxes on the estate, *Prentiss v. Eisner*, 267 Fed. 16 (S. D. N. Y. 1919), *certiorari* denied, 254 U. S. 647, 41 Sup. Ct. 15 (1920); *Northern Trust Co. v. Lederer*, 257 Fed. 812 (E. D. Pa. 1919), *aff'd* 262 Fed. 52 (C. C. A. 3d, 1920), *certiorari* denied 253 U. S. 487, 40 Sup. Ct. 483 (1920); *etc.*

⁵⁷ *In re Hollins*, *supra* note 55, at 207, 139 N. Y. Supp. at 717; *Goodrich v. Rochester Trust and Safe Co.*, *supra* note 55, at 581, 160 N. Y. Supp. at 458.

⁵⁸ *In re Hollins*, *supra* note 55, at 207, 139 N. Y. Supp. at 717, per Fowler, J.: "While it is doubtless true that this court will not aid a foreign country in the enforcement of its revenue laws, it will not refuse to direct a just and equitable administration of that part of an estate within its jurisdiction merely because such direction would result in the enforcement of such revenue laws."

⁵⁹ *In Vogt v. Feltin*, *supra* note 55, it is not clear on what ground Feltin was made liable to pay the tax on account of Vogt.

⁶⁰ Courts do not lend their assistance to foreign states for the collection of taxes of such states. Cf. *Municipal Council of Sydney v. Bull*, [1909] 1 K. B. 7; *The Eva*, [1921] P. 454; *King of the Hellenes v. Bostrom*, 58 L. J. 306 (1923); *In re Visser*, *Queen of Holland v. Drukker*, [1928] 1 Ch. 877. See also *Colorado v. Harbeck*, 232 N. Y. 71, 133 N. E. 357 (1921); *Moore v. Mitchell et al.*, 28 F. (2d) 997 (S. D. N. Y. 1928), *aff'd* 30 F. (2d) 600 (C. C. A. 2d, 1929), and 281 U. S. 18, 50 Sup. Ct. 175 (1930). Cf., however, *New York v. Latrobe*, 279 U. S. 421, 49 Sup. Ct. 377 (1929), *rev'g*, *In re Thermodyne Radio Corp.*, 26 F. (2d) 713 (D. C. Del. 1928).

(2) *Cases of Representative Taxpayers Having Retained out of Property or Money of the Tax-Debtor in their Possession, or Deducted from Payments to the Tax-Debtor, the Amount of the Tax to be Paid, or of their Expense on the Tax they Already Paid*

The tax laws of several countries require the representative taxpayers to retain out of property or funds of the tax debtors which they may have at their disposal, amounts necessary for the payment of the tax,⁶² or authorize these taxpayers to do so,⁶³ for the purpose of using these retained funds for the payment of the tax, or for recovery by the representative taxpayer of his expense on the tax he already paid. Several countries also use in collecting taxes the method of "stoppage at the source." Debtors and payers of dividends, interest, wages, rents, royalties, etc., are required, when paying out these incomes, to deduct a certain amount on account of the tax due from the receivers of such payments with reference to these receipts,⁶⁴ and turn over the amounts so deducted to the treasury of the

Cf. for France, Tribunal de la Seine, March 16, 1864, Journal de l'Enregistr., art. 17,798; Tribunal Civil Charleroi, 57 Journal du Droit International 1097 (1930). For Switzerland see Tribunal Federal, September 12, 1923, 10 Bull. de l'Inst. Interméd. Internat., no. 3628, p. 372 (1924); for Germany, Kammergericht, November 19, 1908, 20 Zeitschr. fuer Internat. Recht. 97 (1910). These cases will be discussed in the second part of this study.

⁶² In the French case *Vogt. v. Feltin*, *supra* note 55, in the tribunal of first instance, the action was construed as based on Art. 426, § 2 of the German Civil Code, according to which a joint debtor, who paid the debt, becomes subrogated, as against other debtors, to the rights of the creditor. The tribunal, it is submitted, correctly held, that the subrogation in the case at bar was one of public law character and therefore the claim could not be enforced in France.

See *Goodrich v. Rochester Trust Co.*, *supra* note 55, where the defendant company was named as executor in the will and also trustee of certain trusts which it created. The plaintiff remitted the proceeds of the Michigan mortgages to the defendant company, which after all the estate was distributed to the legatees (with the exception of shares of some of the defendants, children of the testator, which the company retained as testamentary trustee), had been, in 1910, discharged as executor by the Surrogate in New York. The plaintiff was informed that a tax is payable upon the mortgages he handled in 1911 only. His action was against the defendant company *alone*, both individually, and as executor and trustee under the will. The Special Term held that the plaintiff is entitled to recover in the first instance from the defendant company the full amount of the tax paid by him and that the company is entitled to recover from each of the legatees a proportionate part of this sum. This judgment was unanimously modified, so as to direct a recovery by plaintiff of a proportionate part of the sum from each of the legatees (respectively from the company as testamentary trustee for some of the legatees). This last decision was based on considerations of equity; the legatees and not the trust company have beneficially received the money and the company was not guilty of any negligence towards the plaintiff. 160 N. Y. Supp. 454, 456. But the court seems also to infer that, while Michigan could not prosecute in New York the defendant company personally on a tax claim, it could recover its tax in New York out of the trust funds of the deceased, and that plaintiff became *subrogated* to the rights of Michigan to so recover in New York out of the fund. 160 N. Y. Supp. 458. It is submitted that if the theory of "subrogation" be taken as the basis of the claim, then the plaintiff has as "good" a subrogated right against the trust company as against the legatees, or, rather, a "bad" right against both: a public law right, created by the State of Michigan, and, therefore, not enforceable outside Michigan. *Cf. supra* note 60.

⁶³ *Cf. supra* note 53.

⁶⁴ *Cf.* England, INCOME TAX ACT OF 1918, 8 & 9 GEO. V, c. 40, General Rule 14: "Any person who has been charged under this act in respect of any incapacitated or nonresident person as aforesaid may retain, out of money coming into his hands on behalf of any such person, so much thereof from time to time as is sufficient to pay the tax charged, and shall be indemnified for all such payments made in pursuance of this act."

⁶⁴ England, INCOME TAX ACT OF 1918, *supra* note 63, Schedule C, Rule 1, *et seq.*, and also Schedule D, Rules, Cases III and IV, General Rules, Rule 11; France, Law of March 29, 1914; Belgium, Law of April 20, 1927, art. 16; Germany, INCOME TAX, August 10, 1925, § 83, art. 23, *etc.*

state. Of course such representative taxpayers and collectors⁶⁵ are indemnified, by the taxing state, for all they do, in conformity with the requirements and provisions of the tax law.⁶⁶

The question, in such cases, is whether these persons will be protected in other states from suits for the property so retained, or money so deducted. A distinction should be made, it is believed, between the case (a) when property or funds of the tax-debtor, in the taxing state, are, by order of that state, retained and used in a certain manner, and the case (b) when deductions are made, again by order of the taxing state, by the debtors or payers from payments to the creditor—the tax-debtor.

(a) In the first case the question relates to certain *res*, within jurisdiction of the taxing state, owned by the tax-debtor and in the possession of the representative taxpayer. A state has the right to do with a *res* within its jurisdiction whatever it chooses, and if it transfers the title to the *res* from the tax-debtor to the representative taxpayer, or to itself, this new title will be recognized everywhere.⁶⁷ The validity of acts done by a sovereign within his jurisdiction is not subject to judicial inquiry in foreign courts.⁶⁸ If a sovereign, in the exercise of his sovereign rights, ordered to have certain property or funds, within his jurisdiction, retained and turned over to himself, the person who, in accordance with such orders, did so retain and turn over such property or funds, would not be responsible

In the United States the principle of collection at the source was adopted in the laws of 1913 and 1916. As, however, the withholding provisions of these two laws proved difficult of efficient administration and burdensome, the law of 1917 substituted a system of "information at the source" and withholding was abolished with the exception of "free-covenant clause" bonds and nonresident aliens. Cf. REVENUE ACT, § 144 (b), 45 STAT. 834 (1928), 26 U. S. C. A. § 2144 (1928): "All persons . . . having the control, receipt, custody, disposal or payment of interest . . . rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, of any nonresident alien . . . shall . . . deduct and withhold from such annual or periodical gains, profits, and income a tax equal to five percentum thereof. . . ." Cf. REVENUE ACT (1932) § 143 (c) (8 *percentum*).

⁶⁵ Cf. *Ashton Gas. Co. v. Attorney General*, [1906] A. C. 10, 11, *per* Lord Halsbury: ". . . machinery which makes the officers of the company officers of the Financial Department of the Government for the purpose of collecting the tax. . . ."

⁶⁶ Cf. *England, INCOME TAX ACT, supra* note 63, Schedule C, Rule as to interest, etc., § 3; United States, REVENUE ACT § 221 (c) 44 STAT. 35 (1926), 26 U. S. C. A. § 962 (1928); § 144 (c), 45 STAT. 834 (1928), 26 U. S. C. A. § 2144 (1928); REVENUE ACT (1932) § 143 (c).

⁶⁷ *Luther v. Sagor*, [1921] 3 K. B. 532, 545, *per* Banks, L. J.: "The question before the court is as to the title to goods lying in a foreign country which a subject of that country, being the owner of them by the law of that country, has sold under a f. o. b. contract for export to this country. The court is asked to ignore the law of the foreign country under which the vendor acquired his title, and to lend its assistance to prevent the purchaser dealing with the goods. I do not think that any authority can be produced to support the contention. . . ."

The effect of proceedings *in rem* upon property within the jurisdiction of the court will be recognized in other countries to which such property is subsequently removed. *Castrica v. Imrie*, L. R. 4 H. L. 414 (1870). See also *Rose v. Himely*, 4 Cranch. 241 (U. S. 1808).

⁶⁸ *Oetjen v. Central Leather Co.*, 246 U. S. 297, 38 Sup. Ct. 309 (1918); *Ricaud v. American Metal Co.*, 246 U. S. 304, 38 Sup. Ct. 312 (1918); *Monte Blanco Real Estate Corp. v. Wolvin Line*, 147 La. 563, 85 So. 242 (1920); *Wulfson v. Russian S. F. S. R.*, 202 App. Div. 421, 195 N. Y. Supp. 472 (1922), *rev'd* in 234 N. Y. 372, 138 N. E. 24 (1923); *Compania Minera Ygnacio Rodriguez Ramos v. Bartlesville Zinc Co.*, 115 Tex. 21, 275 S. W. 388 (1925); *Terrazas v. Donohue*, 115 Tex. 46, 275 S. W. 396 (1925).

before the owner for such acts. This person will be protected in other states from suits on account of such property or funds not because of any theory of "enforcement" of foreign revenue law, but because he is not guilty of negligence or of any unlawful act, the property or funds of the owner having been retained and turned over in accordance with the law of the state within whose jurisdiction the property is. He is as little responsible to the owner in this case, as in case of any private attachment and execution.

(b) The situation is different in the case of deductions from payments made to the tax-debtor. In such a case the funds out of which, and the actual currency with which, such payments are made, are not property of the tax-debtor. The claim of the tax-debtor, his chose in action, may have, it is true, its legal *situs* in the taxing state, but its *situs* may as well not be in the state where the payment of interest, etc., is made. Supposing a foreign debtor instructs a local person or institution to pay out, in the state, to persons who will present coupons of bonds issued by him, certain amounts of money and the state orders the payer to deduct, when paying interest to persons subject to the tax jurisdiction of the state, the amount of the tax; in such a case there will be no question of any *res* owned by the tax-debtor, and in possession of the taxpayer, on which the state can lay its hands. There is a debt due by the debtor to the creditor, and the question will be whether, internationally, the debt is discharged in full, while, as a matter of fact, part of the payment due was deducted or withheld.

A Connecticut corporation doing business in New York was required, by the law of New York, to deduct the New York income tax from salaries of its employees occupied in New York, but who were not residents of New York. The company's principal place of business was in Connecticut. The company complained that if it did withhold the taxes as required it would be subjected to many actions by its employees for reimbursement of the sums so withheld. The Supreme Court upheld these requirements of the New York law.⁶⁹

On what grounds are the debtors protected with regard to such deductions made?

In case the debt relates to property, or to business, or to employment, of the creditor (the tax-debtor) in the state, and the debtor (the representative taxpayer) was using this property, or doing this business, or employing the creditor, in the state, the debtor could be validly made liable to pay the tax as agent of his creditor.⁷⁰ In such a case, it would seem, his

⁶⁹ *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60, 40 Sup. Ct. 228 (1920), *aff'g* *Yale & Towne Mfg. Co. v. Travis*, 262 Fed. 576 (S. D. N. Y. 1918).

⁷⁰ *Travis v. Yale & Towne Mfg. Co.*, *supra* note 69, at 77, 40 Sup. Ct. at 231, *per* Pitney, J.: "The taxes required to be withheld are payable with respect to that portion only of the salaries of its employees which is earned within the state of New York. It might pay such salaries, or this portion of them, at its place of business in New York; and the fact that it may be more convenient to pay them in Connecticut is not sufficient to deprive the state of New York of the right to impose such a regulation."

right to deduct the amount of the tax from what he owes to his creditor would be that of a set-off in private accounts between the debtor and the creditor, the set-off being the expense or liability of the debtor incurred on account of his creditor and with respect to the specific amount due on account of the creditor's property, business or employment in the state. Such set-off, if made in the taxing state, would be recognized as such everywhere. And even if payment of the debt was made in another state, there are no reasons why such a private law set-off should not be allowed there.⁷¹

In case the debt has *no* relation to property, business or employment of the creditor (the tax-debtor) in the state, but the contract between the parties stipulates that payment shall be made in the taxing state, the deduction would probably be recognized outside the state on the ground that the *solutio* of the debt is governed by the *lex loci solutionis* and therefore the deduction is binding on the creditor.⁷² *Quaere*, whether, in case payment is made in the taxing state by the debtor or banker (upon instructions of the debtor), but the debt has nothing to do with any property or business or employment of the creditor in the state and has not its *situs* in the state, a deduction made from amount due to a person subject to the tax jurisdiction of the state would be recognized in other states. In this connection it should be noted that the requirement of deduction would relate to acts to be done, and to money paid out, in the state.⁷³

There are cases, where the representative taxpayer would not recover, in other states, his expense, as such, and where the deduction of a tax, which the payer made from payments due to another person, would not be recognized, in other states, as valid discharge of the debt, in the amount so deducted.

Those cases are:

⁷¹ In *Alaska Packers' Ass'n v. Hedenskoy*, 267 Fed. 154 (C. C. A. 9th, 1920), an Alaskan statute imposed an annual tax of five dollars on each male person within the territory, and provided that it should be deducted by employers from the wages of employees who were subject to the tax. Libellant, who was domiciled in California, was for three months, during which the tax fell due, employed in the fishing industry in Alaska by the company, a California corporation. After he left the territory, the company paid the tax and deducted it from his wages which were payable in California. It was held, that the tax was valid (for reasons of no interest here) and that the deduction was proper. *Cf.* also *Haavik v. Alaska Packers' Ass'n*, 263 U. S. 510, 44 Sup. Ct. 177 (1924).

As a matter of fact the "deduction" in the above case was not of the Alaskan tax but of the expense of the company on account of an employee, relating to a tax on this employee, for which the company could properly be made responsible as it employed the tax-debtor in Alaska and the tax was on account of this employment in Alaska. It should be noted that the question primarily involved in these cases was that of the jurisdiction of Alaska to tax. The Alaska tax being held valid, the propriety of deduction in California was taken for granted.

Cf. *Travis v. Yale & Towne Mfg. Co.*, *supra* note 69, at 77, 40 Sup. Ct. at 231, *per* Pitney, J.: "It is true complainant asserts that the act impairs the obligation of contract between it and its employees; but there is no averment that any such contract made before the passage of the act required the wages or salaries to be paid in the state of Connecticut, or contained other provisions in any wise conflicting with the requirement of withholding."

⁷² *Cf.* text I, 1, and *Ralli case*, *supra* note 9.

⁷³ See text II, 2, (c), and note 108.

(a) When the foreign tax in question could not be validly⁷⁴ laid on the person, property or business of the supposed tax-debtor, because neither his person, nor, respectively, his property or business were subject to the jurisdiction of the taxing state,⁷⁵ or for other reasons.⁷⁶ In such a case the situation would be that of an expense with which the supposed tax-debtor has nothing to do, as he was not liable to pay the tax at all.

(b) When the foreign state could not validly make the other person responsible for, and/or liable to pay, the tax on the tax-debtor, because this other person was not at all, or not in the taxing state, agent of the tax-debtor, or, in case the other person was agent, in the taxing state, of the tax-debtor, the tax had no relation to the subject matter of the agency.⁷⁷ In such a case the claim of the representative taxpayer would not be one of an agent against principal, because either he was not agent of the tax-debtor at all, or the tax and his expense on the same had nothing to do with the subject matter of the agency.⁷⁸ He would be subrogated to the tax claim of the state, but such a right would not be enforced in other states.⁷⁹

(a) *Cases of Taxes on Subjects Outside the Jurisdiction of the Taxing State*

Some states attempt to tax shares and bonds of foreign corporations, owned by nonresident aliens on the ground that these corporations have property and/or do business in the state.⁸⁰ As neither the securities them-

⁷⁴ Cf. *In re Hollins*, *supra* note 55, at 716, *per* Fowler, J.: "When the Countess Zichy became the recipient of a legacy given by the will of an English woman and payable out of an English estate, wherever situated, the legacy itself, to my mind, was burdened with certain implied conditions, which bind the legatee whether in or out of English jurisdiction. In other words, the legatee must be taken to receive such legacy subject to any burdens which the sovereign of the donor lawfully imposes on gifts of its subjects. . . ."

⁷⁵ Cf. discussion and cases in text II, 2, (a).

⁷⁶ In connection with the French case, *Vogt v. Feltn*, *supra* note 55, the question arises as to whether the tax imposed on Feltn was valid. The sale was made on January 14, 1911, and the tax was established later on by the law of February 14, 1911. A certain stress was laid by the *Cour de Cassation* on this point.

⁷⁷ See discussion and cases in text, II, 2, (b).

⁷⁸ See text II, 2, (c).

⁷⁹ *Ibid.*

⁸⁰ In *Murray v. Federal Commissioner of Taxation*, 29 Commonwealth Law Reports (C. L. R.) 134 (Austral. 1931), a person resident and domiciled in England, held shares in certain companies incorporated in England, where the central management and control were, which companies carried on business in Australia and derived their main income from sources there. By reason of the income so derived the companies were enabled to declare dividends, and these dividends were payable and paid to the person in England. It was held that the Parliament of the Commonwealth of Australia had power to tax the dividends so received, and that the executor of that person was liable under the INCOME TAX ASSESSMENT ACT 1915-1916 to income tax in respect of so much of the whole of each dividend as bore to the whole of each dividend the same proportion that the profits derived by each company from sources in Australia bore to the total profits of each company. Cf., to a similar effect, *Commissioners of Stamps v. Wienholt*, 20 C. L. R. 531 (Aust. 1915); *Nathan v. Federal Commissioner of Tax*, 25 C. L. R. 183 (Aust. 1918).

The United States FEDERAL INCOME TAX STATUTE goes so far as to tax nonresident aliens upon the total amount received by them as dividends from a foreign corporation, "unless less than 50 per centum of the gross income of such foreign corporations for the three year period ending with the close of its taxable year preceding the declaration of such dividend (or for such part of such period as the corporation has been in existence) was derived from sources

selves, nor the person of their owners, are subject to the jurisdiction of the state, such taxes were held in the United States⁸¹ and in England⁸² unlawful.

There are cases in which corporations foreign to, but doing business or having property in a state, were made by that state liable to pay a tax on their securities owned by persons not subject to jurisdiction of the state and were authorized by that state to deduct the amount of the tax from the payments due to such persons. The companies were not allowed, however, in another state, where they made the payments, to make such deductions.⁸³ There was no question in these cases of "nonenforcement" of foreign revenue laws.⁸⁴ The deductions could not be authorized, either because the tax, being on shareholders, was unlawful,⁸⁵ or the tax was one

within the United States," in which case no tax is payable. REVENUE ACTS § 217, 42 STAT. 243 (1921); § 217, 43 STAT. 273 (1924), 26 U. S. C. A. § 958 (1928); § 217, 44 STAT. 30 (1926), 26 U. S. C. A. § 958 (1928); § 119, 45 STAT. 826 (1928), 26 U. S. C. A. § 2119 (1928); Rev. Acr (1932) § 119 (2) (B).

⁸¹ Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69, 46 Sup. Ct. 256 (1926), *rev'g* 187 N. C. 263, 121 S. E. 741 (1924); State v. Dunlap, 28 Idaho 784, 156 Pac. 1141 (1916); People v. Dennett, 276 Ill. 43, 114 N. E. 493 (1916); People v. Guyler, 276 Ill. 72, 114 N. E. 494 (1916); People v. Blair, 276 Ill. 623, 115 N. E. 218 (1917); Oakman v. Small, 282 Ill. 360, 118 N. E. 775 (1918); Welsh v. Burrell, 223 Mass. 87, 111 N. E. 774 (1916); Bodman v. St. Louis County, 142 Minn. 415, 172 N. W. 318 (1919); State v. Walker, 70 Mont. 484, 226 Pac. 894 (1924); *In re McMullen's Est.*, 199 App. Div. 393, 192 N. Y. Supp. 49 (1922); Rotan v. State, 195 N. C. 291, 141 S. E. 733 (1928); Estate of Shepard, 184 Wis. 88, 197 N. W. 344 (1924). Cf. Tyler v. Dane County, 289 Fed. 843 (W. D. Wis. 1923); *In re Harkness's Est.*, 83 Okla. 107, 204 Pac. 911 (1921) (state inheritance taxes); Utah Mortgage Loan Corp. v. Gilles, 49 Idaho 676, 290 Pac. 714 (1930) (state property tax).

⁸² Cf. Colonial Cases, *infra* note 83. Cf. also Dreyfus v. Inland Revenue Commissioners, 14 Tax. Cas. 560 (Eng. 1929).

⁸³ In *Spiller v. Turner*, [1897] 1 Ch. 911, an English company which carried on business in Queensland, passed resolutions under which a class of guaranteed stockholders became entitled to a cumulative payment of interest at the rate of 6 per cent. per annum in priority to the other stockholders. By a subsequent act of Queensland a dividend duty was imposed payable by companies carrying on business in Queensland on that proportion of their dividends declared by them during the year, as the capital employed by them during the year in Queensland is to their total capital. The act also provided that the company shall be entitled to deduct and retain for their use from the dividend payable a sum bearing the same proportion to the total tax payable by the company upon that dividend, as the amount payable to such persons bears to the total dividend. The English company had deducted from the interest on the preference stock the amount of the duty it paid to the colony. It was held that the preference stockholders are entitled to their 6 per cent. without any deductions in respect of the colonial duty. In *London S. Amer. Invest. Trust, Ltd. v. British Tobacco Co. (Australia), Ltd.*, [1927] 1 Ch. 107, an English company *A* held shares in another English company, *B*, deriving its income exclusively from shares in companies carrying on business exclusively in Australia. The company *B*, although an English company, carried on its business in Australia, where its directors held their meetings, and was assessed to Australian income tax. The Australian Income Tax Assessment Act (1915-1918) as amended, 1921, § 16, provided that a company shall be entitled to deduct and retain for the use of the company, from the amount payable to absentee share—and bondholders, such amount as is necessary to pay the tax which becomes due in respect of that amount. It was held that the defendant company *B* was not entitled to deduct any Australian income tax from dividends due to the company *A*.

⁸⁴ Such an argument of nonenforcement was put forward by counsel for the plaintiff in the *London South American Investment Trust, Ltd. v. British Tobacco Co.*, *supra* note 83.

⁸⁵ *London South American Investment Trust, Ltd. v. British Tobacco Co.*, *supra* note 83 at 114, *per Tomlin, J.*: "I think it may safely be said that powers of taxation by the Act conferred upon the Commonwealth Legislature do not extend to authorize the imposition of taxation upon a person who is not resident or domiciled within the Commonwealth in respect of property which is not situate within the Commonwealth."

on the corporation itself (on account of its property or business in the taxing state) and lawful, but then the deduction from shareholders was unlawful, as the tax was not on their shares.

An investment company, incorporated in England, advanced to an American railway company, incorporated under the laws of the United States, the sum of £500,000, and the railway company agreed to pay interest thereon in London at the rate of 5 per cent. By a deed made in 1905 between the railway company, the investment company, therein called the trustees, and the defendant company, also incorporated in England, the latter company guaranteed the payment of the interest on the sum of £500,000, in case of default in payment by the railway company. It was provided that the deed should be construed, and the rights of all persons claiming thereunder should be regulated, by the law of England. Later on the United States passed income tax laws imposing an income tax of 2 per cent. upon income received from all sources within the United States by every individual, a nonresident alien, and by every corporation, etc., organized under the laws of any foreign country, including interest on bonds, notes, or other interest bearing obligations of residents, corporate and otherwise. The railway company deducted the tax from their payment of the interest. The trustees instituted a suit against the guarantors for the amount of this deduction. It was held, that the guarantors were liable for the amount unpaid by the railway company.⁸⁶

The decision was reached on the ground that both the contract of guaranty and the contract of loan covered the case of an eventual American tax. As a matter of construction of these contracts, it was held that the debtor company undertook to pay, and the guarantor guaranteed the payment to the creditor of 5 per cent. net in all cases, even in case a tax would be laid on the debt by the United States. Thus the case has nothing to do with any question of "(non-)enforcement" of foreign revenue laws.⁸⁷

⁸⁶ *Indian & General Investment Trust, Ltd. v. Borax Cons., Ltd.*, [1920] 1 K. B. 539.

⁸⁷ *Cf. Indian and General Investment Trust, Ltd. v. Borax Cons. Ltd.*, *supra* note 85, at 551, 550, *per* Sankey, J.: ". . . in my view the Court would not be justified in reading into this English contract an implication that the plaintiff agreed that the provisions of an American Taxing Act should be enforceable against them in England. . . . 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. . . ."

This last reasoning, it is submitted, was unnecessary and is wrong. If the contracts would *not* have implied that the tax is to be borne by the debtor company, then, if the debt is subject to the tax jurisdiction of the United States, the expense of the debtor company for the payment of the tax on this debt, would have been a lawful charge against, and a proper deduction from, the amounts due to the creditor. Sankey, J., appears to deny it on the ground that English courts do not enforce American tax laws.

But then a British citizen could sue in England the warden of a jail in the United States for having (lawfully) kept him in the jail, and he could recover for the same reason.

The result of this doctrine would be the breakdown of the system of "stoppage at the source", adopted by numerous countries of the world, by an internationally wrongful interference by England with the legitimate exercise by these countries of their fiscal jurisdiction over legitimate subjects of taxation.

Another ground might eventually have been taken in this case, namely, that the United States had no jurisdiction to tax this debt, which, while due by an American corporation, was created, and made payable, in, and under the laws of, England. Whether the United States had or had not jurisdiction over this debt is a question of International Law,⁸⁸ and again this ground would have nothing to do with "(non-)enforcement" of foreign revenue laws.

(b) *Cases of Persons who could not Properly be Made, as Agents of Other Persons, Responsible for, or Liable to Pay, a Tax on these Other Persons (or their Property or Business)*

Two conditions, it is submitted, would be necessary in order that a person be validly made so responsible, or liable, as agent of the tax-debtor.⁸⁹ First, it would be necessary for such a person to have, within the jurisdiction of the state, property or funds of such other person, or to have done within jurisdiction of the state, acts or business, for or on behalf of such other person. Second, the tax in question would have to be on this property, or these funds, or, respectively, on these acts or business. The first condition means that the person, on whom such responsibility or liability is intended to be laid, should be actually, in a certain sense, an agent of the tax-debtor. The second condition means that the tax should relate to the subject matter of such an agency.⁹⁰ Only in case both these conditions are present, would the expense of the representative taxpayer be based on his implied authority, as agent for his principal, to incur this expense.

If a person is not at all, or (having, within the state, no property, or business done on account, of another person) not within jurisdiction of the

⁸⁸ It is doubtful whether in international law a state of the domicile of the debtor has no power to tax debts due to nonresident aliens. England, France, Germany, Italy and other countries do tax such debts. The American cases: *State Tax on Foreign Held Bonds*, 15 Wall. 300 (U. S. 1872) (property tax); *The Farmers' Loan Co. v. Minnesota*, 280 U. S. 204, 50 Sup. Ct. 98 (1930); *Baldwin v. Missouri*, 281 U. S. 586, 50 Sup. Ct. 436 (1930); *Beidler v. South Carolina*, 282 U. S. 1, 51 Sup. Ct. 54 (1930) (inheritance taxes); relate to taxing powers of member states and, it is submitted, have no application to the taxing power of the Federal Government. Cf. *De Ganay v. Lederer*, 250 U. S. 376, 39 Sup. Ct. 524 (1919); *Cook v. Tait*, 265 U. S. 47, 44 Sup. Ct. 444 (1924). Cf., however, *L. Hand, J.*, concurring, in *Comm'r of Int. Rev. v. Brooks*, 60 F. (2d) 890, 892 (C. C. A. 2d, 1932) (federal estate tax).

In England taxable *situs* of ordinary debts is at the domicile of the debtor. Cf. *Attorney General v. Pratt*, L. R. 9 Ex. 140 (1874); *Commissioners of Stamps v. Hope*, [1891] A. C. 476.

It is equally doubtful whether, in International Law, a State is deprived of jurisdiction to tax a debt due by a resident debtor only because the debt was created, and made payable, outside the State.

⁸⁹ See text II, 2.

⁹⁰ Cf. *LYELL, INCOME TAX* (London, 1931) 139: "By General Rule 6, the liability to assessment of the factor, agent, receiver, branch, or manager is limited to the profits or gains arising, whether directly or indirectly from the factorship, agency, receivership, branch, or management. It is not open to the Revenue to say to a person 'You are the agent of such and such a foreign firm who do business in this country, not only through you but through other persons, and you will be assessed on the whole of their trade done in this country.' The agent or other representative can be assessed only on the profits of the business which has gone through his hands."

state, agent of another person, he could not, it is submitted, be validly treated by that state as agent for that other person. While, if the principal gives authority to his agent to act on his behalf in some country, it is implied that the agent will so act in accordance with, and subject to, the laws of such a country, no authority could be implied for him to do, in another country, acts, or incur expenses, on account of the principal, only because the agent (or the agent's property) happens to be within the jurisdiction and power of that other country, and the principal happens to be liable to pay a certain tax to that other country.⁹¹

If a person is, in the state, agent of another person for some business, etc., but the tax is not on such business, but on the principal's other property or business or on the person of the principal, it would seem that the agent could not, in this case, be made liable or responsible for such a tax as agent of his principal, because he, as agent, had no authority other than that relating to the subject matter of his agency, and the tax has nothing to do with the same.

A state could of course properly enforce its claims (relating to a tax on the person of the tax-debtor, or on such of his property or business with which the agent has nothing to do) against property or funds of the principal in hands of the agent in the state. In such a case the agent would not be responsible to the principal for the property or funds so taken by the state.⁹²

A state could also properly make the agent responsible for not complying, with regard to his principal's property in his hands in the state, with rules and orders of the state and, in case the agent parts, against the rules, with the possession of such property or funds, to make him liable to pay the tax out of his own pocket.⁹³ In such a case, it would seem, he could sue the tax-debtor abroad only on the ground and within the limits of his principal's enrichment (if he saved the property of his principal from the seizure by the state). *Quaere*, whether he could sue his principal as his agent, if his principal instructed him to remove the property from the state. In any case, it would seem, he could not sue abroad the tax-debtor on the ground of subrogation to the taxing state's claim, as such a claim would not be enforced abroad.⁹⁴

In a Pennsylvania case, where a New York corporation was authorized to do, and did, business in Pennsylvania, where forty-two miles of its railroad, out of a total of 428 miles, were situated, the question was as to whether this corporation could be obligated, according to the Pennsylvania

⁹¹ See text II, 2.

⁹² *Supra* notes 67 and 68.

⁹³ See text II, and II, 2, (a).

⁹⁴ *Supra* note 60.

law,⁹⁵ to deduct and return the Pennsylvania tax upon payment of interest on its corporate bonds held by resident holders.⁹⁶ The bonded indebtedness of the company was contracted in New York, bonds were issued and sold in New York, and they were payable, principal and interest, in New York or London.

The Pennsylvania Court held⁹⁷ that the company was bound to deduct and return the tax, on the ground that a state, permitting a foreign corporation to do business in the state, can accompany its consent with any conditions which are not repugnant to the Constitution of the United States.⁹⁸ The Supreme Court held⁹⁹ that it was repugnant to the Constitution to require a corporation to act, in another state, as an assessor and collector of taxes,¹⁰⁰ to give orders with regard to funds not subject to the jurisdic-

⁹⁵ An Act of May 1, 1868, P. L. 108, established a tax on loans of indebtedness of private corporations and provided that the treasurers of corporations shall deduct from the interest stipulated to their creditors a certain amount on account of the tax and return the same into the State treasury. In *State Tax on Foreign Held Bonds*, *supra* note 88, the company was incorporated in two states, first in Ohio, in 1848, then in Pennsylvania in 1854. The holders of some bonds were not resident in Pennsylvania. The tax was held invalid. Afterwards the tax was construed as being "not a tax laid on the company nor on the bondholders as a body, but upon each resident bondholder as an individual." *Commissioner v. Reading R. Co.*, 150 Pa. 312, 24 Atl. 612 (1892); *Commissioner v. Lehigh Valley R. R. Co.*, 186 Pa. 235, 40 Atl. 491 (1898).

⁹⁶ The Act of June 30, 1885, P. L. 193, 72 PA. STAT. ANN. (Purdon, 1931) § 2162, required in its section 4 the treasurer of each private corporation, incorporated under the laws of any other state and doing business in Pennsylvania, when making payment of interest upon its bonds, etc., held by residents of that state, to assess the tax upon it, and to report to the Auditor General of the state, and to pay the tax so assessed and collected into the state treasury.

⁹⁷ *Commonwealth v. New York, Lake Erie, etc. R. R. Co.*, 129 Pa. 463, 18 Atl. 412 (1889). To the same effect on the authority of this case see *Commonwealth v. New York, Lake Erie, etc. R. R. Co.*, 150 Pa. 234, 24 Atl. 609 (1892), and *Commonwealth v. Delaware and Hudson Canal Co.*, 150 Pa. 245, 24 Atl. 599 (1892).

⁹⁸ *Commonwealth v. New York, Lake Erie, etc. R. R. Co.*, *supra* note 97, at 476, 18 Atl. at 413. But see *Commonwealth v. Delaware Div. Canal Co.*, 123 Pa. 594 at 625, 16 Atl. 584 (1889): "Foreign corporations exercising their franchises under the laws of other states and countries are beyond the reach of our processes of taxation. We could not require them ordinarily to comply with any such regulation of our law, and therefore they are necessarily excluded from the provisions of the Act" [of 1885, *supra* note 96]. This was a case of a domestic corporation and deduction of the tax by that corporation was upheld. It should be noted that the Act of 1885 did not exclude from its operation foreign companies, but on the contrary expressly imposed on them the duty to deduct and return the tax.

⁹⁹ *New York, Lake Erie, etc. R. R. Co. v. Pennsylvania*, 153 U. S. 628, 14 Sup. Ct. 952 (1893). It should be noted that interest coupons were payable in New York and London to bearer, so that it was in this case practically impossible to ascertain, at the time the coupons were presented, whether the bonds were owned by residents of Pennsylvania, or not. Harlan, J., declared, however, (at 641) that "these facts are not, in themselves, decisive." Cf. *Delaware and Hudson Canal Co. v. Pennsylvania*, 156 U. S. 200, 15 Sup. Ct. 358 (1894).

¹⁰⁰ "The fourth section of the Act of 1885 . . . assumes to do what the State has no authority to do, to compel a foreign corporation to act, in the State of its creation, as an assessor and collector of taxes due in Pennsylvania from residents of Pennsylvania . . ." *per Harlan, J.*, in *New York, Lake Erie, etc. R. R. Co. v. Pennsylvania*, *supra* note 99, at 645, 14 Sup. Ct. at 958.

tion of the state,¹⁰¹ and, generally, to require the corporation to do anything outside the state.¹⁰²

Thus the Supreme Court held, and it was sufficient for the purposes of the case, that the New York company could not be required by the State of Pennsylvania to do anything outside Pennsylvania. *Quaere*, however, whether Pennsylvania could make the company liable to pay the tax on its bondholders resident in Pennsylvania,¹⁰³ leaving it to the company to get from such bondholders, wherever and by whatever means it could (by suits in Pennsylvania, or by deduction of the tax from payments made outside Pennsylvania or by suits outside Pennsylvania) the amount of its expense.¹⁰⁴ It is submitted, that Pennsylvania could not properly do it. The company had, in Pennsylvania, no property or funds, belonging to any bondholders. Nor was the company doing, in Pennsylvania, any acts or business on account of any bondholders. The company was not, in Pennsylvania, either in agency, or any other legal, relationships with any of its bondholders. There was no express, or implied, authority given by bondholders to the New York company to do, on their behalf and account, anything at all in Pennsylvania. If the company would have been obliged to pay the tax, the only claim it would seem to have against the bondholders would have been

¹⁰¹ "The money in the hands of the company in New York to be applied by it in the payment of interest, which by the terms of the contract is payable in New York and not elsewhere, is property beyond the jurisdiction of Pennsylvania, and Pennsylvania is without power to say how the corporation holding such money, in another State, shall apply it, and to inflict a penalty upon it for not applying it as directed by its statute; especially may not Pennsylvania, directly or indirectly, interpose between the corporation and its creditors, and forbid it to perform its contract with creditors according to its terms and according to the law of the place of performance." *Per* Harlan, J., in *New York, Lake Erie, etc. R. R. Co. v. Pennsylvania*, *supra* note 99, at 646, 14 Sup. Ct. at 958.

¹⁰² "The . . . company is not subject to regulations established by Pennsylvania in respect to the mode in which it shall transact its business in the state of New York. . . ." *Per* Harlan, J., in *New York, Lake Erie, etc. R. R. Co. v. Pennsylvania*, *supra* note 99, at 646, 14 Sup. Ct. at 958.

It should be noted in this connection that in *State Tax on Foreign Held Bonds*, *supra* note 88, the company was incorporated first in Ohio in 1848, and then in Pennsylvania in 1854, and bonds were executed and delivered in Ohio and were payable outside Pennsylvania. While the tax was held invalid primarily for the reason that bonds were "foreign-held" some stress was also laid on the fact that "bonds were made and payable out of the state".

¹⁰³ *Cf.* also in this connection North Carolina Revenue Act of 1919, P. L. 90, §6 (f) as amended by Revenue Act of 1929, §9 (b), N. C. ANN. CODE (Michie, 1931) §7880 (g): "Any incorporated company not incorporated in this state and owning property in this state which shall transfer on its bonds the shares of stock of any *resident* decedent holder of bonds and/or shares of stock in such company, exceeding in value two hundred dollars, before the inheritance tax, if any, has been paid, shall become liable for the payment of said tax; and any property held by such company in this state shall be subject to execution to satisfy the same."

In *Rhode Island Hospital Trust Co.* *supra* note 81, where a nonresident decedent owned shares in a foreign company owning property in the state, the tax was held invalid (*cf. supra* note 81). Then the law was amended, by including the word "resident" as italicized above.

¹⁰⁴ In the case of *Spiller v. Turner*, *supra* note 83, where the company was registered in England, some of the preferential stockholders were domiciled in Queensland. Said Keke-wich, J., at 920: ". . . in view of the suggestion which has been made . . . that stockholders domiciled in Queensland may be bound by the provisions of the colonial Act, and may therefore be in a different contractual position from other stockholders, I think the judgment ought to be expressed to be without prejudice to any question affecting any stockholder who may be domiciled in Queensland."

that of subrogation, and such a claim would not be enforced outside Pennsylvania.¹⁰⁵

A West Virginia corporation had its principal office in New York, where was also the residence of the treasurer of the company. Bonds issued by the company were payable at the office of a trust company in Pennsylvania.¹⁰⁶ It was held¹⁰⁷ that the treasurer, being not a resident of Pennsylvania, could not be compelled to assess the tax and that therefore the trust company in Pennsylvania could not be ordered to deduct the tax which had never been assessed. The West Virginia company, having, in Pennsylvania, no property or funds belonging to, nor any business or other legal relationships with, its bondholders, this company could not have been made, by Pennsylvania, liable to pay, or responsible for the payment of, the tax on resident bondholders.

Quaere, whether the trust company in Pennsylvania could be required by the Commonwealth to assess and to deduct the tax. It should be noted that such a requirement would have related to acts to be done, and to money paid out in Pennsylvania.¹⁰⁸

A New Jersey corporation owned shares in several Pennsylvania corporations. The company transacted no business and had no property in New Jersey, where the transfer books were kept and the annual meetings of stockholders were held. The meetings of directors took place, bank account was maintained, and the treasurer of the company resided, in Pennsylvania. Interest on its bonds was payable in New York at a trust company. The sums necessary for the payment of interest on the bonds were sent from time to time by the treasurer from Pennsylvania to the trust company in New York by a check or a draft.¹⁰⁹

Another New Jersey corporation¹¹⁰ carried on its business, had its principal office and the office of its treasurer, in Pennsylvania. The president of the company resided in Pennsylvania, the treasurer in New Jersey.¹¹¹

¹⁰⁵ See text, II, and *supra* notes 60 and 94.

¹⁰⁶ *Commonwealth v. The Barrett Mfg. Co.*, 246 Pa. 301, 92 Atl. 302 (1914), *aff'g* 41 Pa. C. C. 538 (1914).

¹⁰⁷ On the authority of *New York, Lake Erie, etc. R. R. Co.*, *supra* note 99, and *Delaware and Hudson Canal Co.*, *supra* note 98.

¹⁰⁸ *Cf.* text, II, and *supra* note 73. In *Gilbertson v. Fergusson*, 7 Q. B. D. 562 (1881), the dividends of a foreign company were payable either at its London agency or abroad, at the option of the shareholders. The agency received no remittance from abroad to pay the dividends demanded of them in London in a particular year. The agency profits were sufficient for the purpose. It was held that the dividends paid in London were "entrusted" to the agency for payment, within the meaning of the Income Tax. *Cf.* also *Purdie v. Rex*, [1914] 3 K. B. 112.

Cf. for the United States, U. S. Treas. Reg. 74, Art. 761 (1928): ". . . a nonresident foreign corporation having its fiscal or paying agent in the United States is required to withhold a tax of 2 per cent. upon the interest on its tax-free covenant bonds paid to a citizen or resident of the United States. . . ."

¹⁰⁹ *Commonwealth v. Wilkesbarre R. R. Co.*, 251 Pa. 6, 95 Atl. 915 (1915).

¹¹⁰ *Commonwealth v. Sun Oil Co.*, 294 Pa. 99, 143 Atl. 495 (1928).

¹¹¹ It should be noted that by the Act of July 15, 1919, P. L. 958, 72 PA. STAT. ANN. (Purdon, 1931) § 2141, it was provided that "The provisions of this section [section 18 of the Act of

The bonds of the company, at least part of them, were payable in New York. "All of the interest payments are on checks originally drawn in Philadelphia."¹¹²

In both cases the Supreme Court of Pennsylvania held that the company had the duty to deduct the tax due on bonds owned by residents of Pennsylvania. The ground taken in both cases, was that the corporations had, and managed, in Pennsylvania, funds out of which they paid in New York interest on the bonds.¹¹³

As no tax, as such, would be allowed to be "deducted" in other states, the only "deduction" which the companies could make outside Pennsylvania, would be that of their lawful expense on account of bondholders. The companies could have been obligated to pay the Pennsylvania tax on the bondholders, as their agents, only in case the companies had, in Pennsylvania, property or funds of bondholders, or the legal relationships between the companies and their bondholders had their legal *situs* in, and were subject to the laws of, Pennsylvania.

These two cases, if properly decided at all, would seem to be on the border line, in this connection.¹¹⁴

1915, P. L. 507, which is a reproduction of the section 4 of the Act of 1885, *supra* note 96] shall apply to all foreign corporations, duly registered and doing business in this state, without regard to whether the treasurers or other fiscal officers of such corporation whose duty it may be to pay the interest on obligations of the character aforesaid may be residents or nonresidents of this Commonwealth." Cf. also Act of July 13, 1923, P. L. 1085, 72 PA. STAT. ANN. (Purdon, 1931) § 2121.

¹¹² Commonwealth v. Sun Oil Co., *supra* note 110 at 102, 143 Atl. at 496.

¹¹³ In Commonwealth v. Wilkesbarre R. R. Co., *supra* note 109, the case of Commonwealth v. Barrett Mfg. Co., *supra* note 106, was distinguished on the ground that there the treasurer managed the funds outside the state, while here the treasurer was resident of, and managed the funds (destined for payment of interest) within, the state. In Commonwealth v. Sun Oil Co., *supra* note 110, where the treasurer was *not* a resident of Pennsylvania, it was held, at 101, 102, 143 Atl. at 496, 497, that ". . . the question, so far as we are concerned is, where does he carry on his official business. . . ." It was also stated that ". . . all of the interest payments are on checks originally drawn in Philadelphia . . ." and that the rule of the New York, Lake Erie *etc.* R. R. Co., *supra* note 99, "does not apply where a state has a grip on corporate activities", as illustrated by the facts in the instant case.

¹¹⁴ In both the Commonwealth v. Wilkesbarre R. R. Co., *supra* note 109, and Commonwealth v. Sun Oil Co., *supra* note 110, the companies were, for all practical purposes, domiciled and resident in Pennsylvania. If the law would have recognized the possibility of a domicil of a corporation in a state other than that of its incorporation, then Pennsylvania could have ordered such deductions on the ground that it has jurisdiction *in personam* over the companies. Cf. Corry v. Baltimore, 196 U. S. 466, 25 Sup. Ct. 297 (1905). However, the law in the United States does not recognize a domicil of a corporation outside the state of its incorporation. In England a foreign corporation may be resident for tax purposes in the United Kingdom. Cf. De Beers Cons. Mines, Ltd. v. Howe, [1906] A. C. 455; Goerz & Co. v. Bell, [1904] 2 K. B. 136; Todd v. Egyptian Delta Co., Ltd., [1929] A. C. 1.