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THE REVENUE RULE IN THE CONFLICT OF LAWS: TIME FOR A MAKEOVER

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An ancient rule of the conflict of laws holds that a court will not enforce the revenue law of a foreign country. It is capable of producing peculiar results, especially when it is recalled that there is no equivalent bar to the recognition of a foreign revenue law and the line which separates the two techniques is far from bright. Moreover, it produces manifestly unsatisfactory results when a fraudster, looter, or smuggler deploys it as a meretricious shield against an investigation of the illegality of his conduct. This paper attempts to ask where existing law might have gone wrong, and whether it might yield to a spot of gentle reinterpretation, by drawing on the broader doctrines of the common law conflict of laws in the hope of producing more rational results.

It is an established rule of the common law conflict of laws that a plaintiff may not bring (or may not obtain judgment in) an action to enforce a foreign revenue law.[1] Despite a recent flurry of caselaw provoked by this principle, in England and in the United States, and notwithstanding the uncomfortable feeling that the judicial fear of assisting a tax collector serves as a corrupting incentive to the would-be tax evader - two parties whom it is hard to see as being *in pari delicto* - the "revenue rule" remains as a cornerstone of the common law conflict of laws.[2] The purpose of this article is to examine whether there is a respectable basis for the revenue rule, and if there is, to ask what should be the proper modern limits on its application. It is not proposed to look at the jurisdictional rules of the Brussels Convention on jurisdiction and judgments in civil and commercial matters[3] or at Regulation 44/2001, adopted by the Council of the European

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1 AV Dicey & JHC Morris, *The Conflict of Laws*, 13th ed (London; Sweet & Maxwell, 2000), Rule 3.

2 Not only the common law: see Lord Goff of Chieveley in *Re State of Norway's Application* [1990] 1 AC 723 at 809, and *QRS 1 ApS* v *Fransden* [1999] 1 WLR 2169.

3 Civil Jurisdiction and Judgments Act 1982, Sch 1 (as amended).

Union, which may affect the way the rule works in an English context.[4] Nor is it proposed to look at the impact of Article 39 of the Regulation 1346/2000[5] on insolvency proceedings, save only to note that as it allows the tax authorities of a member state of the European Union to claim in an insolvency opened in a member state to which the Council Regulation applies, there will be in England at least a more urgent need to ensure that the remainder of the common law revenue rule rests on a sustainable foundation.[6]

I. WHAT IS A REVENUE LAW?

There is something a little unusual about the proposition that a court will not enforce a revenue or tax law, whether this is expressed as a matter of jurisdiction or one of discretion.[7] It is almost as though the usual processes of characterisation are suspended in the context of revenue claims. For instead of enquiring whether the claim before the court is a revenue *claim*, the approach appears to be to ask whether the legal rule which the court is called upon to apply to decide the case, the "rule of decision",[8] is a revenue *rule*; and if it is, the character of the claim is irrelevant. We will return later to the question whether this is a correct approach to the issues which arise. But it is well to begin with some definitions, to begin to identify what it is that the court will not do. Dicey and Morris[9] proceed on the basis that though a tax law may be a little difficult to define, non-definition by list is nevertheless possible. In fact, there are probably two elements which go to identify a revenue law as such: the legal basis for the demand for payment, and the identity of the payee.

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4 *QRS 1 ApS* v *Fransden* [1999] 1 WLR 2169 held that where the revenue rule was triggered, the claim was not a civil or commercial one, with the result that the case fell outside the domain of these jurisdictional instruments. Whether or not that is correct is not the concern of this paper, though as the analysis proposed below will suggest that *QRS 1 ApS* should not have been seen as a case to which the revenue rule applied, it is not obvious that the decision of the court was correct. See further (1999) 70 British Yearbook of International Law 341.

5 2000 OJ L160/1. The Regulation, adopted by the Council of the European Union, applies to collective insolvency proceedings in the courts of member states of the European Union except Denmark (Recital 33), and enters into force on 31 May 2002.

6 Nor is there an examination of the broader issues of revenue law and its effect on international business, though for those interested in such matters, R Jeffery, *The Impact of State Sovereignty on Global Trade and International Taxation* (Kluwer Law International, 1999) is a good point of departure.

7 See the discussion of whether the issue is one of jurisdiction or discretion in *Re State of Norway's Application (Nos 1 and 2)* [1990] 1 AC 723.

8 But as will be shown below, the revenue rule may stretch beyond cases where the rule of decision is a revenue rule to those where a revenue law merely makes a contribution to the outcome of the case.

9 *Supra,* note 1.

No controversy arises from the treatment of income and capital taxes, inheritance taxes and stamp duties, value added taxes and goods/service taxes: these are created by revenue laws which admit they are so; charges levied under the legislation are claims for tax and are collected as such. But the corollary is not reliable: a law may be regarded as a tax law, and a claim made under it regarded as a revenue claim, even though it is labelled as a charge. A brilliant example is the so-called "community charge", by which municipal councils in Britain raised revenues in Britain after the abolition of the system of domestic rating,[10] and which was a revenue law, notwithstanding its political and deceptive labelling as a charge for services.[11] A refusal to take the legislator's words at face value is consistent with a long line of English authority which requires the court hearing a case to apply its own law as a measuring stick to decide whether the particular foreign rule, otherwise applicable, falls into a category whose enforcement is prohibited,[12] or whether an institution created under a foreign law falls within the four corners of an English choice of law rule.[13] It is for the *lex fori* to undertake this exercise in characterisation for itself and, one would have thought, to encounter little difficulty in regarding the community charge legislation as imposing obligations by means of a revenue law.

But to identify the phenomenon is not to solve the problem: if the legislator is not to be trusted, how should a court, dealing with a claim for a payment falling due and owing under foreign law, determine whether it is a recoverable charge for services provided, rather than a tax? In the case of the community charge legislation, the law imposing it was a revenue law. The key reason for this would appear to be that though services were provided in return for the payment, there was no legal choice or freedom associated with the scheme of liability to make the payment: the householder had no right to not pay. In *Sydney Municipal Council* v *Bull*,[14] the claim by the city council was in respect of the improvement of the roads and other infrastructure, being levied by it against householders with adjacent property. The decision that the claim was one brought to enforce a revenue law was entirely correct, in that it was brought under a law which gave the defendant no legal right to decline to accept the benefits conferred by the council under the scheme and, having so declined the advantage, to be freed from the obligation to make the payment. This will have been the reasoning under which the community charge is a tax law: as a matter of English law, no landowner had the right to renounce and forgo the benefits of schools, libraries, fire services, police, and whatever else is paid for - and

[10] A form of property tax levied on an annual basis.

[11] It was abandoned in the mid-1990s, and replaced by something more honestly called a council tax.

[12] *Huntington* v *Attrill* [1893] AC 150 (characterisation of law as penal).

[13] *Lee* v *Lau* [1967] P 14 (characterisation of partnership as polygamous marriage).

[14] [1909] 1 KB 7.

in this sense provided - in return for the "charge". The law under which the charge arises allows for no opting out by an individual who otherwise meets the criteria for payment. And that is that. Likewise for income tax: the taxpaying employee has no legal right to give up any right or claim to the roads, armed forces, social security,[15] and so on: the law allows no opting out. The same is true for national health insurance, or value added tax, or goods and services taxes, or fuel, alcohol or tobacco duties. The pertinent question is whether the defendant had the right to say "no, I do not want the benefits which this payment goes to support, thank you very much", and thereby to be freed from the obligation to pay. A person who has no legal right to say this is being taxed, not making a contract. By contrast, if he has freedom under the law to renounce (albeit that he has little or no freedom in practice) the payment is voluntary and contractual.

It is of course irrelevant that the taxpayer could have escaped the clutches of the law by deleting himself from the category of those liable to pay. For example, an worker may choose to be unemployed, by which exercise of choice he will avoid having to pay income tax; but this does not make income tax liability any less a tax. Similarly a customer may elect not to buy shoes and socks, by which exercise of choice he will avoid the imposition of value added tax or goods and services tax; but this does not make the charge to VAT or GST any the less of a tax. Yet again, an employee may elect to take out private and comprehensive medical insurance, and eschew any claim to use the public facilities provided under the scheme of national health insurance. But if the law governing the insurance scheme does not accept this as a basis upon which the liability to pay may be avoided, the law will reveal itself as a revenue law, on the basis that an eligible person has no legal right to disclaim the benefit and be freed from the charge. Were it otherwise, income tax would be seen as voluntary and as depending on the election to work; goods and services tax as voluntary and as depending on the election to make a purchase; and the only real tax would be death duties. This is not the law.

It follows that where liability arises under a law which requires a payment to be made to a state monopoly supplier, such as a national water or electricity company, the payment will not arise under a revenue law if the householder had the legal right to dissociate himself from the supply and by doing so avoid the charge. But if the law requires him to pay whether or not he uses, or wishes to use, the supply, the law is to that extent[16] a revenue law. On this reasoning, no account is to be taken of the basis of calculation of the charge: whether it is charged on the basis of actual use (where the supply is metered) or otherwise. The legal basis of the liability will either

[15] Financial support from the state for those unable to find work or being otherwise sick, elderly or disabled, and now increasingly restricted in the United Kingdom at least.

[16] It is possible that some elements of the service may not be contracted out of, while others may be.

have allowed for renunciation or not: the latter is indicative of a tax law, but the former is not.

Potential difficulty surrounds the significance and identity of the payee. In the context just examined, utility services may be supplied by private corporations,[17] albeit that they may be subject to substantial regulatory control; and it is possible that the law in question does not permit a householder, for example, to avoid making payment to a private or privatised water company charge by disclaiming the benefits of the water and drainage service. Again, a person carrying on business as a legal practitioner may be required by law, as a condition of his entitlement to ply his trade, to pay a fee to a professional body; a person who in his work processes personal information may be required by law to register with and pay a fee to the Data Protection Registrar; a landowner may be required to pay a tithe to the local ecclesiastical authority, and under the law of a muslim state a person may be required by law to meet an annual levy on his wealth, this paid to the religious authorities for charitable purposes. In all cases, let us suppose that the obligation to make payment of the sum is imposed by law, and that in no case can the qualifying person avoid the obligation to pay by disclaiming the benefits provided by the payee from the payment made.[18] Does this mean that the liability to pay arises under a revenue law? Opinions may differ, but it is thought not, and that only if the payee may be regarded as the state will it be proper to see the charge as being a revenue one. It is difficult to see that a payment required by law to be made to a private individual can on that ground alone serve to indicate a revenue matter, for otherwise sums ordered to be paid by a judge would, by the judicial of making of the order to pay, become due under revenue laws, and this cannot be correct. So a conception of the payee as the state, though no doubt drawn with a measure of flexibility, will be needed to identify the law as a revenue law. Only in rare cases will payments not to the state be capable of being seen as made under revenue laws.

II. THE SIGNIFICANCE OF THE *LEX CAUSAE*

Whatever may have been the position in the past,[19] it would be quite wrong to say that the common law takes no notice of foreign revenue laws. Were

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[17] Not just as a result of privatisation.

[18] In the case of these professional bodies, they often do little more than sustain a bureaucracy which exists to justify its own existence.

[19] It having first been formulated by Lord Mansfield in *Holman* v *Johnson* (1775) 1 Cowp 341 and *Planché* v *Fletcher* (1779) 1 Doug 251. In fact Lord Mansfield stated that no country "ever takes notice of the revenue laws of another": a proposition which, if it made sense in the circumstances of the difficult relationship between the United Kingdom and France just before the Revolution, is certainly too widely stated for today's law: see the criticism conveniently collected by Kingsmill Moore J in *Peter Buchanan Ltd* v *McVey* [1955] AC 516 (note) at 522-3. But the view that a revenue law will not even be

it otherwise, an architect who sued for unpaid fees might find that he would not be entitled to collect the VAT or GST which he was by law required to add to his professional account, and a contract to smuggle goods and evade excise duties would be valid and enforceable even though illegal[20] under its proper law or the law of the place of performance. This cannot be, and is not, the law. All the common law withholds is its procedure for the enforcement of such foreign laws by action[21] in local courts; it does not withhold recognition from such laws in cases where this is all it is asked to do. So a court will not enforce a contract to break the revenue laws of a foreign country, because the revenue law will be recognised as a legal fact which makes the contract illegal under the *lex contractus* or under the law of the place for performance of the contractual obligations.[22] But if the claim brought before the court seeks an order that a payment be made by the defendant to the state or its collecting agent, pursuant to such a law, and whether the claim is directly (as where the tax collector brings the action in his own right) or indirectly (as where the tax collector has first obtained a judgment from the courts in his own country and now seeks to enforce that judgment against the debtor[23]) made, the court will decline to enforce the law which creates it and will dismiss the claim. Whether the concept of enforcement goes beyond this, reaching cases in which the contribution of the law to the claim is more tangential, is a more difficult question, and which is examined below.

Whatever the theory may be made to show, we can start from a practical example which gives rise to no controversy. If an employee brings a claim in respect of unpaid wages, the defendant employer cannot defend a part of the claim by pointing out (even if correctly) that this is the fraction which will go in tax, and that for a court to order its payment would be to assist a foreign state in its collection of income tax. After all, if the judge were to make a deduction to reflect the tax which would fall due if the entire sum were ordered to be paid there will be a similar, if reduced, tax liability on the smaller sum ordered to be paid; and if a proportionate reduction is made on account of that, and so on, the end will be absurdity. The law must give the answer that the employee can recover in full, and the theory will just

recognised was repeated by McNair J in *Rossano* v *Manufacturer's Life Insurance Co Ltd* [1963] 2 QB 352, which must at this point be regarded as wrong.

[20] The breach may be of a penal law rather than a revenue one. But in this context, nothing turns on the distinction.

[21] Cf those rules by which English law limited actions rather than prescribing claims, eg Law of Property Act 1925 (now repealed by Law of Property (Miscellaneous Provisions) Act 1989 s 2): the claimant cannot sue, though his right is not void of legal effect.

[22] *Regazzoni* v *K C Sethia (1944) Ltd* [1956] 2 QB 490 (affd [1958] AC 301) as interpreted by the New South Wales Court of Appeal in *Damberg* v *Damberg* [2001] NSWCA 87 (25 May 2001).

[23] *United States of America* v *Harden* [1963] SCR 366 (decision of the Supreme Court of Canada).

have to accommodate it. To the extent that the revenue law of the foreign state is engaged at all, this result comes about by showing such cases to be instances where the revenue law is recognised, rather than enforced.

Two possible justifications for this may be suggested. The first is that when the employee sues for unpaid wages, the legal liability to pay tax on earnings may not yet have accrued, and will not arise unless and until the judgment debtor complies with the order of the court and pays over the sum adjudicated. On this basis, the employee's claim cannot be seen as one to enforce a revenue law when at the time of the claim, there is no actual revenue claim to be met; that one may or will arise at a date in the future is not sufficient to invoke the rule.[24] The second is that if a defendant has agreed to pay a sum which was asked and agreed on by partial reference to the tax position of the plaintiff, this does not mean that the defendant has any liability under the law to pay this or any sum *as a tax*. So if a client agrees to pay his architect $20,000 plus $2,000 by way of GST, the invoiced sum of $22,000 will be the sum contractually agreed to be paid and, if this is important, the liability to the tax collector under a revenue law will be that of the plaintiff-supplier, not that of the defendant-purchaser. It would follow that there is no basis for treating the claim against the purchaser as one to enforce a foreign revenue law against the defendant, for no revenue law makes him (as opposed to making another) so liable.

But this, in turn, suggests that the true basis for the rule may be narrow and technical, rather than one which is concerned in a more general sense with the effects or consequences of a judgment in favour of the plaintiff. If the *jus actionis* upon which the claim is based is not a legal duty imposed by a revenue law but is a legal duty created by a genuinely contractual promise - to pay a supplier an agreed price for goods which the plaintiff was not obliged to buy if he did not want to - there should be no place for interference from the revenue rule. If the legal rule relied on does not impose on the defendant liability to make a payment of tax, albeit that compliance with the terms of the judgment will make it more likely that the plaintiff will in due course become liable to pay tax to a foreign collector, it should make no difference to the particular cause of action on which the plaintiff relies.

Now it is a striking fact that the cases in which the revenue rule has led to the dismissal of the claim are, so far as can be discovered, all cases in which the court was directed by its choice of law rules to apply a foreign

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[24] This may be the basis for the conclusion of Lord Mackay of Clashfern LC in *Williams & Humbert Ltd* v *W & H Trade Marks (Jersey) Ltd* [1986] AC 368, to the effect that the critical fact in *Peter Buchanan Ltd* v *McVey* [1955] AC 516 (note) was that at the time of the Irish action, there was an outstanding and unsatisfied revenue demand, whereas in *Williams & Humbert* itself, there was no unsatisfied claim created by and arising out of the Spanish public or revenue law, by which the shares in the Spanish company were expropriated.

law as *lex causae*. There appears to be no significant case in which a court refused to allow the plaintiff's claim when the *jus actionis*, identified by the choice of law rules, was one arising under the *lex fori*, rather than by a foreign law. At a very general level, in *Attorney-General for New Zealand* v *Ortiz*,[25] Lord Denning MR said, before explaining why the Historic Articles Act 1962 (NZ) could not be enforced by an English court, that "no-one has ever doubted that our courts will not entertain a suit brought by a foreign sovereign, directly or indirectly, to enforce the penal or revenue laws of another state. We do not sit to collect taxes for another country or to inflict punishments for it". This, admittedly general, statement suggests that the scope of the rule is one to prevent suits for the collection of taxes by states, pleaded by reference to the laws of those states. The English cases on the revenue rule give more insight into the basis of the rule. In *Sydney Municipal Council* v *Bull*[26] the court was directed by its choice of law rules to apply the law of New South Wales to the claim against the defendant for payment to pay for upgrading. That being so, it was bound to ask whether this would involve it in enforcing the *revenue* law of New South Wales: it held that it would, and disallowed the claim. In *re Visser, Queen of Holland* v *Drucker*[27] the court was directed by its choice of law rules, considering the question of choice of law *de bene esse*, to apply Dutch law to the claim against the defendant for the payment of death duties. That being so, it was bound to ask whether this would involve it in enforcing the *revenue* law of the Netherlands: it held that the obligation to pay death duties arose under a revenue law, and disallowed the claim. In *Peter Buchanan Ltd* v *McVey*[28] an Irish court was seised of a claim brought by a company alleging breach of fiduciary duty by, and seeking equitable relief against, a director. It was directed by its choice of law rules to apply Scottish law to the claim against the defendant. That being so, it was bound to ask whether this would involve it in enforcing the *revenue* law of Scotland. Observing that any and all sums recovered would pass straight through the hands of the liquidator and be handed on to the Scottish collector of taxes, it held[29] that it would, and disallowed the claim, even though the liability of the disloyal director was neither created nor defined by the revenue law of Scotland. In *Government of India* v *Taylor*[30] the English court was (or would have been, making a choice of law *de bene esse*) directed by its choice of law rules to apply Indian law to the claim of the Indian collector of taxes against an

[25] [1984] 1 AC 1 (CA; affirmed on different grounds, *ibid*).

[26] [1909] 1 KB 7.

[27] [1928] Ch 877.

[28] [1955] AC 516, note; a decision of the Irish courts, but which was specifically approved by the House of Lords in *Government of India* v *Taylor* [1955] AC 491, and followed by the Court of Appeal without dissent in *QRS 1 ApS* v *Fransden* [1999] 1 WLR 2169.

[29] Wrongly, as will be submitted below.

[30] [1955] AC 491.

English company, which carried on business in India, and which had gone into liquidation.[31] That being so, it was bound to ask whether this would involve it in enforcing the *revenue* law of India: it held that it would, as it would direct the liquidator to pay the claim of the Indian collector of taxes, and disallowed the claim from proof in the liquidation. In *Camdex International Ltd* v *Bank of Zambia*[32] the court was asked to make an order garnishing a debt in respect of a liability said to arise under the law of Zambia. It was common ground[33] that the application for a garnishee order would fail unless the debt sought to be garnished was one which could have been enforced by action in an English court: the issue was to that extent a theoretical one. But having been directed by its choice of law rules to apply Zambian law to establish the existence of the underlying liability, the court was bound to ask whether the (theoretical) order requiring payment over of the garnished debt would involve it in (also theoretically) enforcing the *revenue* law of Zambia: it held that it would, that the garnished debt was therefore not enforceable in an English court, and the precondition of the making of a garnishee order was absent. In *QRS 1 ApS* v *Fransden*,[34] the court was seised of a claim by a Danish company against a director who had allegedly stripped it bare in breach of his fiduciary duty. The court was directed by its choice of law rules to apply Danish law to the company's claim against the defendant. That being so, it was bound to ask whether this would involve it in enforcing the *revenue* law of Denmark. Observing that any sums recovered would be handed on to the Danish collector of taxes, it held[35] that it would, and disallowed the claim, even though the liability of the disloyal director was wholly unrelated to the revenue law of Denmark.

[31] For a claim to be admissible in an English liquidation, it is irrelevant that it arose under a foreign law, but it is necessary that it be a claim which would be enforceable in the English courts.

[32] [1997] CLC 714.

[33] By reference to RSC Order 49 r 1: "Where a person (in this order referred to as "the judgment creditor") has obtained a judgment or order for the payment by some other person (in this order referred to as "the judgment debtor") of a sum of money ... and any other person within the jurisdiction (in this order referred to as "the garnishee") is indebted to the judgment debtor, the court may ... order the garnishee to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee...". For the added complexity of garnishment cases, where there are two debts to consider (the judgment debt and the debt to be garnished) see also *Rossano* v *Manufacturers' Life Insurance Co Ltd* [1963] 2 QB 352, and *Soc Eram Shipping Co Ltd* v *Compagnie International de Navigation* [2001] CA Civ 1317, [2001] 2 AII E R (Comm) 721 (Order 49 is replaced by CPR Part 72 with effect from 25 March 2002, but this will make no change of substance). The critical point would appear to be to identify the *lex causae* of the debt to be garnished, as in *Camdex*. But if the judgment debt has been obtained by the application a foreign revenue law, this fact will preclude an attempt to enforce it by garnishment.

[34] [1999] 1 WLR 2169.

[35] Wrongly, as will be submitted below.

But by striking contrast, in *Re State of Norway's Application (Nos 1 and 2)*,[36] the Norwegian state sought, by letters rogatory, orders from the English court for the taking of evidence in England for use in the prosecution of a tax claim against a defendant in the Norwegian courts. The House of Lords agreed to make the order. In doing so it considered the application of the revenue rule, showing a marked disinclination to apply it to the facts of the case before it. Statutory interpretation apart,[37] it is unclear precisely what were the grounds on which the revenue rule was held to have no impact on the application. But the *lex causae* of the application to the English court was English law, as set out in the Evidence (Proceedings in Other Jurisdictions) Act 1975, and was not the law of a foreign state. On this view the court was not called upon by its choice of law rules to enforce Norwegian law at all, and could not therefore be enforcing Norwegian *revenue* law. Norwegian revenue law was certainly recognised: had it been otherwise, there would have been no basis for making any order under the 1975 Act, for there would have been no basis for seeing that a claim existed at all. It was clear beyond argument that the making of the order served only one purpose, namely to increase the likelihood that the Norwegian collector of taxes would get his money. But this was not considered to trigger the application of the revenue rule.

In every one of the above cases except for *Re State of Norway's Application*, the structure of the analysis was broadly the same. The principles of English choice of law would have instructed the English court to apply as *lex causae* the law of a foreign country. That being so, if the actual rule of foreign law to be applied was a law to collect taxes, or[38] if the effect of applying the foreign law - even though it was not a revenue law - was that the collector of taxes was the sole and certain beneficiary of the claim, then the application of the *lex causae* was to be denied, on the ground that it directly or indirectly involved the assertion of a power to collect taxes in the territory of another sovereign by recourse to that sovereign's law.

Of course, this may be seen as coincidental, and not as establishing or conforming to a rule which makes the *lex causae* a decisive factor. There may be other explanations for the cases, which cannot be categorically eliminated at this stage in the development of the jurisprudence. In *Re State of Norway's Application*, the proceedings in England were not brought to obtain an order for the payment of money, and the order made would not

[36] [1990] 1 AC 723.

[37] Evidence (Proceedings in Other Jurisdictions) Act 1975; and see the speech of Lord Goff of Chieveley at p 808, which notes that section 1 of the Act gives no encouragement to the intervention of the revenue rule.

[38] This is controversial, and it will be submitted that this should have no effect of triggering the revenue rule.

therefore go directly[39] to line the pocket of the foreign tax collector. And there are cases where, technically at least, the *lex causae* was the law of the forum and the revenue rule was still invoked. In *United States of America* v *Harden*,[40] the American tax authorities had obtained a judgment against a taxpayer, and sought to enforce it against him by action in the Canadian courts. Now at common law, the obligation which arises out of a foreign judgment which is presented for recognition and enforcement is created and defined by the *lex fori* of the recognising state;[41] the application to the Canadian courts was therefore governed by Canadian law. But if the revenue rule could be sidelined by so simple a device, it would serve no purpose at all; and the decision in *Harden* is justifiable for pragmatic reasons.

But it seems to be generally accepted that the revenue rule grew out of the original principle that the penal laws of a country are territorial only, and that they can be applied only by a court whose local law they are. Kingsmill Moore J in *Peter Buchanan Ltd* v *McVey*[42] observed that the revenue rule was well known in 19th century American law,[43] though had an uncertain scope in English law until the 20th century, and that not until *Sydney Municipal Council* v *Bull*[44] was it acknowledged that the principle of territoriality extended from penal laws to revenue laws. But the result was that if a collector of taxes, or his agent, seeks to collect a tax, he must go to his own court for the purpose of obtaining judgment and its enforcement;[45] if it is sought to impose or collect a fine, this must be done in the court of the jurisdiction whose law creates the liability to enforce it. This exclusionary rule cannot be got round by the device of suing in a different country but having recourse, via local choice of law rules, straight back to the laws of the first country, because these can only be given local effect; nor by the device of obtaining a local judgment to whitewash the underlying cause of action and then seeking to enforce that judgment without regard to its underlying basis: what the sovereign-legislator cannot do directly he cannot do indirectly either.[46] If this is correct, the vice at which the revenue rule strikes is the attempt by a sovereign to make laws which may claim to be applied in a foreign court but to use them for a purpose which the sovereign may enforce by action only in his own court. This is the basis for Lord Denning's general analysis in *Attorney General*

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[39] But this should not be a material factor: the traditional expression of the rule prevents direct and indirect enforcement of revenue laws.

[40] [1963] SCR 366.

[41] *Schibsby* v *Westenholz* (1870) LR 6 QB 155; *Godard* v *Grey* (1870) LR 6 QB 288.

[42] At 524.

[43] See *supra*, note 19.

[44] [1909] 1 KB 7.

[45] *United States of America* v *Harden* [1963] SCR 366.

[46] *United States of America* v *Harden* [1963] SCR 366.

for New Zealand v *Ortiz*:[47] it is the assertion of sovereignty (or measures having equivalent effect to an assertion of sovereignty) which is impermissible in the territory of another state. It is a fact that the English authorities appear to fit into that pattern.

III. Claims In Which A Foreign Revenue Law Has An Impact, But Which May Fall Short Of Enforcement

The reference to *Re State of Norway's Application* brings us to a related point. For despite what was said above, there are cases in which the formulation of a cause of action will involve making a reference to a revenue law, but in which it is difficult to take a clear view whether the extent of the reference amounts to an enforcement of the foreign law. And there will be cases in which the defence to a claim relies on the impact of foreign revenue law. In these cases, the claim, the *jus actionis*, is governed by the law of the forum, but the revenue law of a foreign state is part of the analysis, either as a matter of narrative fact or as a result of the defendant's pleading as to its effect. *Re State of Norway's Application* may be seen as an example of this group: there was no basis for the application for the taking of evidence unless the court found that there was a civil claim under the law of Norway,[48] and it was not doubted that the applicable rules of Norwegian law which defined the civil claim were revenue laws. But, as was said above, the *lex causae* for the application was English; and the extent to which it had to take account of Norwegian law did not lead the court to think that it was being asked to enforce that Norwegian revenue law.

But in other cases the impact of the foreign revenue law may appear more problematic. Recent decisions in the United States and Australia illustrate where the revenue law of a foreign state has a role in a cause of action, but in a contributory and supportive manner. A representative example from the United States might be seen in *Attorney General of Canada* v *RJ Reynolds Tobacco Holdings Inc*,[49] but the particular facts of that case are not significant to the analysis. Suppose a state considers that persons have conspired to smuggle goods across its borders, with the result that taxes or duties which would have been levied on an open transaction are not levied and are lost. If the conspirators have enough of a jurisdictional connection with the United States, civil proceedings against them under the Racketeer Influenced and Corrupt Organisations ("RICO") Act may be brought, claiming as damages such sums as were lost to the

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47 [1984] AC 1.

48 Evidence (Proceedings in Other Jurisdictions) Act 1975, s 1.

49 12 October 2001 (2d Cir 2001), aff'g 103 F Supp 2d 134 (NDNY 2000). See also *United States* v *Trapilo* 130 F 3d 547 (2d Cir 1997); *United States* v *Pierce* 224 F 3d 158 (2d Cir 2000).

plaintiff state by the conspiracy.[50] In an English context, a claim by a state that it has been the victim of a conspiracy to injure by unlawful means[51] may lead to the same point: that the uncollected sums which would have been due as taxes can be identified as the loss which completes the cause of action. In the case of RICO claims, the *lex causae* before the American court will be the Federal *lex fori*, and reference to a foreign revenue law will be necessary only to establish the datum and quantum of loss. In the case of common law conspiracy claims, the *lex causae* may or may not be the *lex fori*, but again, reference to the revenue law of the foreign state may be relevant only for the purpose of demonstrating the loss which, the plaintiff claims, flowed from the conspiracy. Would allowing such a claim involve the courts in the enforcement of foreign revenue law?

Two possible answers can be eliminated immediately: that the revenue law must be the principal aspect of the claim, which will involve a judgment call which is almost completely arbitrary; and that as long as the revenue law of a foreign state has to be mentioned and proved to establish any part of the claim, the rule applies.[52] The best answer may depend upon whether the concept of enforcement is limited to cases in which the court's rules for choice of law direct it to the application of, in the sense that it will decree the enforceability of the obligations created by, that foreign law. If it is read in this restrictive way, there appears to be no reason to contend that the revenue rule is triggered: the obligation which binds the defendant is one created by the local legislator, and the enforcement of this law according to its terms cannot seriously be alleged to involve the enforcement of a foreign revenue law. It is true that the prosecution of a cause of action created by the *lex fori* may have the consequence that the foreign collector of taxes gets his hands, sooner or later, on the defendant's money, but if he accomplishes this by means which do not infringe the sovereignty of the state of adjudication, but which do (by their appeal to the application of local law) submit to the law as made by the local sovereign, it is difficult to see the proper basis for objection. After all, if a defendant who is civilly liable for breach of an obligation created under the *lex fori* could escape liability by saying that if he is ordered to pay this will lead to the indirect profit of the foreign tax collector, and that this foreign fact furnishes an excuse for letting him off the hook of local law, the submission would surely be dismissed as impertinent.

Of course, if the revenue rule is construed more broadly, and held to be relevant in any case in which success for the plaintiff would result, if later,

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[50] The question whether states are "persons", or such losses indicate that the plaintiff has been injured in his "business or property", for the purposes of RICO, are disputed questions of United States' law which lie beyond the scope of this article.

[51] It is unlikely that a smuggling case would be actionable as a civil conspiracy with a predominant intention to injure.

[52] This must follow from *Re State of Norway's Application (Nos 1 and 2)* [1990] 1 AC 723.

in success for the collector of taxes, the scope of the rule is much wider and less certain. It needs to be said at the outset that a rule thus formulated does not represent English law. For though there is some support for it, it is directly contradicted by *Re State of Norway's Application*, where the only pecuniary result of the order made by the court was that the Norwegian collector of taxes found his prospects of success enhanced.

But the approach of the Court of Appeal of New South Wales does suggest that, as understood in that jurisdiction, the revenue rule is of considerably wider effect, and can taint claims which appear to have nothing whatever to do with it. In *Damberg* v *Damberg*,[53] a complicated set of intra-family property transactions had involved transfers of German land with a view to the evasion of German taxes on capital gains, and ended in tears as the members of the family sought to litigate each other into the ground. Among several issues for the court was whether it should enforce a resulting trust at the suit of the transferor of land in circumstances where the estate had been alienated without intending an out-and-out gift, and for a tax evasive purpose.[54] The problem arose as a result of *Nelson* v *Nelson*,[55] which meant that the court had power to recognise and enforce an equitable title in the transferor, and to enforce the resulting trust, by imposing a condition that the tax which was not paid was paid to the collector of taxes. The taxes evaded being German rather than Australian, it was submitted that the application of *Nelson* v *Nelson* would require the court to impose as a condition the payment of the evaded German taxes, a matter which was alleged to be precluded by the revenue rule. The consequence would be that as such a condition could not be imposed, either the trust would be enforced but without the condition required to remove the inequitable gain, or it would not be enforced at all. The Court accepted the submission: because the *Nelson* condition would require the German tax authorities to be asked to compute and claim the amount of tax which the Australian court would then order to be paid, the result would be enforcement of a German revenue law. In other words, the vice at which the revenue rule struck was the making of orders which would assist the collection of foreign taxes, enforcing a foreign revenue *law*, even though the foreign state was not participating in the proceedings as claimant and there was therefore no revenue *claim*. The key, according to the court, was the risk that an order made in the Australian proceedings would have the effect of executing the revenue law of a foreign state.

The decision in *Damberg* does not go quite so far as to hold that whenever one effect of the judgment will be that the foreign collector of

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53 [2001] NSWCA 87, 25 May 2001.

54 Note that this component of decision was for the German *lex situs*, albeit that this was taken to be to the same effect as Australian law. But it was, on the view advanced here, appropriate to consider the revenue rule when the *lex causae* was foreign.

55 (1995) 184 CLR 538.

taxes will be able to receive money due under his legislation, the action must on that account be dismissed.[56] But it goes a long way down that path, or even the path which leads to non-recognition of a revenue law; and it leads to the surprising result that a principle of Australian[57] equity is prevented from application because a condition which is integral to it cannot be imposed without infringing the revenue rule. Whichever way the court proceeds, the effect is that a claim, and the appropriate order, has to be mutilated because a condition, invented and decreed by the Australian court acting *ex officio*, would infringe the revenue rule, even though no claim had been made by the parties or the German state for the imposition of that condition. It is an outcome whose desirability is far from immediately plain. But what *Damberg* does illustrate is the absolute necessity to draw lines which define what the revenue rule does preclude. It would seem extraordinary that a claim to apply the *lex fori* can be overcome by the operation of a revenue law point which is being sought by nobody, whether party to the proceedings or otherwise. It almost appears that a judicial phobia against aiding the enforcement of foreign revenue laws prevents the court doing what is required by the otherwise-applicable *lex fori*, for though German law on the issue of resulting trusts was accepted as broadly similar to the Australian,[58] the principle in *Nelson* v *Nelson* is not so restricted. It also makes it clear that the scope of the rule in *Damberg* is defined in terms of revenue laws, and not in terms of revenue claims, and that the potential and consequential operation of a foreign revenue law may taint the entire claim. Slight support for this wider, effects-based, rule may be obtained from *Rossano* v *Manufacturer's Life Insurance Co*,[59] in which case an insurer was required to pay out to an insured on the maturity of a policy, notwithstanding that it had been served with a garnishee order by the Egyptian collector of taxes in respect of taxes owed by the insured. The insurer pleaded the risk of double jeopardy if it was made to pay out to the insured all the while being subject to a garnishee order; but the judge held that the garnishee order, having been imposed in pursuance of a tax claim,

[56] Because the payment to the German authorities would apparently have been by conditional order of the Australian court, and not just an expectation of future occurrence. Whether a different result could have been reached by the court declaring that it would enforce the equitable title if the plaintiff produced a certificate that he had paid the tax, this not being a matter ordered by the court, is unclear, but it is implausible that this should make a substantial difference.

[57] Assuming that it was appropriate to apply the Australian principles of resulting trusts of transfers of land in Germany, which is itself debatable, but which difficulty was avoided by the court's apparent acceptance that in this respect, German law was probably the same as Australian law.

[58] The case contains a very detailed analysis of the question whether a court is bound to accept that foreign law is the same as local law in every case where the contrary is not proved.

[59] [1963] 2 QB 352.

had to be ignored in its totality. Once ignored, there was no defence to the insured's claim for payment; and the decision, which had nothing to do with enforcing a revenue law, is manifestly wrong.

IV. A PREFERABLE APPROACH

There is no doubt that the revenue rule is a part of the common law conflict of laws. Though its effect can be overstated and understated with equal ease, there is something unattractive about a rule which is expressed in terms of the court's lack of jurisdiction to enforce such a law. The normal process of the conflict of laws is to characterise claims and issues, and then to apply a choice of law rule to it or them. Moreover, those writers who have in the past expressed dissatisfaction with a rule which appears to sanction the evasion of taxes,[60] and which may even assert itself when there is no more than a risk[61] that the revenue law of a foreign state will be executed, need to propose an alternative structure by reference to which the unwelcome aspects of the law could be limited. It is, perhaps, easier said than done. But it is worth noting that there are some respects in which inspiration can be sought from other areas of the conflict of laws, and which might show the way ahead.

One solution, and perhaps the best one, would be to accept that there is a choice of law rule for revenue claims, and that it selects the *lex fori*. In other words, a revenue claim - a claim for a payment, which is not contractual, to the state or its agent, and which is in the nature of a tax - can be advanced if it is well founded under the *lex fori*, but not otherwise. Where the *lex fori* has incorporated principles or points from foreign tax laws into its system, usually as a consequence of a bilateral treaty, these domesticated laws will apply to any claim which is characterised as a tax claim; and foreign law, not being the *lex causae*, will not do so. To restate the law in this way, by focusing on claims and issues rather than laws, would reflect the fact that, at least as far as the English authorities are concerned, they do appear to divide on the axis of the *lex causae*. And if the solution is a choice of law solution, this submission further reflects the fact that any alternative choice of law rule is really unthinkable. It would be impossible to devise a connection[62] which would suffice to identify foreign revenue laws which ought to be applied and to separate them from those

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[60] P B Carter, "Rejection of Foreign Law: Some Private International Law Inhibitions" (1984) 55 British Yearbook of International Law 111; (1989) 48 CLR 417; P StJ Smart, "International Insolvency and the Enforcement of Foreigh Revenue Laws" (1986) 35 ICLQ 704.

[61] This being the expression adopted by Heydon JA in *Damberg* v *Damberg* .

[62] What would it be? Where the taxpayer was resident? Or was domiciled? Or was present (and when)? Or died? Where the corporation is established? Or has its seat? Or has a presence? Or has its principal place of business? Or has a place of business? Where the income or other benefit arose?

which ought not: there are no judicially manageable standards out there, nor a common *ius gentium* of international taxation principles[63] to sort the good taxes from the bad. And it reflects the fact that the common law conflict of laws characterises claims rather than rules of law. Claims will be characterised; and choice of law will follow. No separate exclusionary rule will be needed.[64]

A second solution would be to accept that if it is true that, as Dicey & Morris say, there is no jurisdiction to enforce a foreign revenue law, this is strikingly reminiscent of the rule that there is no jurisdiction to determine title to foreign land: both identify subject matter over which the court has no jurisdiction, whether or not the parties purport to submit to its personal jurisdiction.[65] But the counterpart of the common law rule on title to immovable property should therefore also be accepted.[66] This provides that if there is a contract or other equity between the parties, the court does not lack subject matter jurisdiction, even if the contract or equity relates to foreign land; and that given personal jurisdiction over the defendant, the court may enforce it. According to the jurisprudence which commenced with *Penn* v *Baltimore*,[67] there is no lack of jurisdiction just because the personal obligation has an association with subject matter over which the court would have no adjudicatory jurisdiction. Applied to the facts of *Damberg*, this would have meant that the personal equity created by the transfer of property with only an incomplete intention to alienate it could be enforced according to its terms,[68] even though there would have been no power to adjudicate a claim brought by the German state for the taxes evaded. Applied to the facts of *QRS 1 ApS* v *Fransden*,[69] the court would have had jurisdiction to enforce the fiduciary duties owed by a disloyal director to his company, even if the doing so might have given a resultant and consequential windfall to a foreign collector of taxes. And so what? After all, the proposition that a foreign lawyer's professional fees should not be ordered to be paid because the tax man is waiting to pounce as soon as the payment is made should probably be laughed out of court. Yet this

63 Which as why, in *Damberg* v *Damberg*, the court declined to accept a submission that German tax law could be presumed to be the same as Australian.

64 It will also follow that the choice of law rule for penal claims is the *lex fori.* This is demonstrably sound, for an English court will only enforce English criminal and other penal law, either by punishing the offender or by applying the English law of extradition. In the latter case, English law is applied to the remedy sought; the foreign penal law is recognised as the foundation for the application for extradition.

65 *British South Africa Company* v *Companhia de Moçambique* [1893] AC 602; *Hesperides Hotels Ltd* v *Aegean Turkish Holidays Ltd* [1979] AC 508. In England the exclusionary rule has been trimmed back by statute: Civil Jurisdiction and Judgments Act 1982 s 30.

66 *Penn* v *Baltimore* (1750) Ves Sen 444.

67 (1750) 3 Ves Sen 444.

68 And, it is submitted, by making the order as this affected the German taxation.

69 [1999] 1 WLR 2169.

is, in essence, the submission which found favour with the court in *QRS 1 ApS*: the company's claim was dismissed on the basis that the only beneficiary was a foreign collector of taxes. Without knowing the full facts, which were never before the court for adjudication,[70] this is unrealistic. First, the successful claimant would have been the company, enforcing fiduciary duties owed to it by a disloyal office holder. Only after it had recovered the sums found due and ordered to be paid would any real question arise of a revenue entitlement. Secondly, even if the collector is the only unpaid creditor of a dissolved company, it is not impossible to imagine that in another case, a plaintiff company might recover more than the sum needed to satisfy the collector of taxes, the balance falling through to other creditors or the shareholders if there were no other creditors.[71] Private law rights should not be poisoned by the existence of a public law interest.

If it be objected that this is a plea for formalism, it is formalism of a very durable English kind; and it serves to preserve clarity of decision. For example, when dealing with claims to recover property confiscated by foreign governments, the foreign government, or a transferee from it, will be entitled to succeed if it can plead and establish a possessory title which is superior to the title of the opposite party. If it can make good its possessory plea without needing to refer to or rely on the confiscatory act, the court will accept the pleading at face value, and will not go into matters which are not raised for decision or are otherwise unnecessary to the claim.[72] Thus in cases from *Luther* v *Sagor*[73] to *Williams & Humbert Ltd* v *W & H Trade Marks (Jersey) Ltd*[74] the courts have given effect to[75] foreign penal and public laws when the pleading in support of the claim required no reference to these historical facts, it being nothing to the point that an unenforceable penal, revenue or public law of this kind, now *functus officio*, lay somewhere in the recent past. It is hard to see why the position should be any different if the impact of such a law lies instead in the near future. If the objection is that an English court will not lend itself to the enforcement of a foreign sovereign's extra-territorial assertion of power, it makes no

[70] The application was for the claim to be struck out as being bound to fail without the need to look at the evidence.

[71] On this, and the apparent dis-connection of the revenue rule, see Smart, (2000) 116 LQR 360, who points out that in *Ayres* v *Evans* (1982) 39 ALR 129, and in *Teletalk Mobile Engineers* v *Jyske Bank* 17 July 1998, the presence in an insolvency of creditors alongside a foreign collector of taxes meant that the liquidators were entitled to recover the assets claimed, notwithstanding the revenue interest. This may have been irrelevant in *QRS 1 ApS*, but it does show the arbitrary character of the rule.

[72] Unless there are so rebarbative that it is contrary to public policy even to recognise them: *Oppenheimer* v *Cattermole* [1976] AC 249.

[73] [1921] 3 KB 532.

[74] [1986] AC 368.

[75] Which is to say, have recognised as having an effect in the English legal order.

obvious difference whether this is used to describe a past or a coming act. In dealing with the law of government expropriation, English law has adopted a clearly formalistic[76] approach, but one which acknowledges that in the analysis of a legal dispute there may be many strands, but not all are in play at any one time.[77]

It will also follow that the concentration of the court should be on the pleading of the parties, and on the jural relation which is presented as the basis of the claim. The broader, and effects-based, approach, which seems to be concerned with whether a ruling in favour of the plaintiff will materially increase the chances that the foreign collector of taxes will be enriched, is too imprecise and, where it is precise, wide-ranging to be acceptable. Applying the view which is here contended for to the cases identified earlier, therefore, a claim for damages based on a cause of action under the *lex fori* would be permissible, whether in a court in the United States under the RICO Act or in a court in a common law jurisdiction under the tort of conspiracy. The legal right relied on may have a connection to subject matter over which the court lacks adjudicatory jurisdiction, but that was not enough to shut out the plaintiff in *Penn* v *Baltimore*, over 250 years ago; and it certainly should not be today. It would follow from this that neither *Peter Buchanan Ltd* v *McVey* nor *QRS 1 ApS* v *Fransden* could be supported, and neither could *Damberg* v *Damberg*.

V. CONCLUSION

The rule against the enforcement of foreign revenue laws is dug in too deeply for it to be unearthed from the common law conflict of laws; but a rule which interferes with the usual principles of the subject needs to be defined and applied with care and precision. It does not reflect credit on the

[76] In relation to illegality in contracts, the tradition of the common law was that if a remedy could be claimed which did not require the claimant to rely on the illegal transaction, as opposed (say) to the title he had acquired by delivery, there was no bar to recovery, but if this was not so, and the claimant needed to rely on enforcement of the illegal transaction to sustain his claim, the claim would fail: *Bowmakers Ltd* v *Barnet Instruments Ltd* [1945] KB 65. In fact, this traditional and rigid approach has been complicated and partially obscured by *Tinsley* v *Milligan* [1994] 1 AC 340, and in Australia, *Nelson* v *Nelson*, (1995) 184 CLR 538) but this does not cast doubt on the more general point.

[77] If it is relevant, such a construction would also reflect one of the principles of the Brussels Convention on jurisdiction and judgments in civil and commercial matters (Civil Jurisdiction and Judgments Act 1982, Sch 1; to be superseded from 1 March 2002 by Council Regulation (EC) 44/2001 (2001 OJ C12/1). Article 16 (which will become Article 22 of the Regulation) confers exclusive jurisdiction in proceedings which have "as their object" a particular legal element. Proceedings which have as their object a right in rem in land, for example, do not fall within this definition unless they are founded on an existing legal right to the land which is not sought to be enforced, and so on: the fact that the plaintiff hopes to obtain title to land as a result of the proceedings does not mean that the proceedings have title as their object.

law that the future or contingent interest of a foreign collector of taxes should give the taxpayer a shield against a private party who is suing for breach of a common or garden civil obligation. But it is unlikely that clarity or a more acceptable rule will emerge until it is understood that Dicey & Morris's Rule 3 is not the best foundation for the modern approach to cases in which a foreign collector of taxes has an interest. The common law conflict of laws has available to it at least two doctrinal bases for an improved and rationalised and restricted rule, and the intention of this article was to make the case for, and to point the direction to, such a reformulation of the common law revenue rule.