Jurisdiction—State Courts—Action under Federal Statute Not Maintained by State Court—[Rhode Island].—In August, 1944, the defendant sold an automobile to the plantiff for $210 more than the maximum legal price established under the Emergency Price Control Act of 1942 as amended by the Stabilization Extension Act of 1944.[1] The trial court awarded the plaintiff an amount equal to the overcharge plus attorney's fees. On the defendant's exception to the overruling of his demurrer, *held*, exception sustained. The treble damages provision of the federal statute is penal in the international sense and therefore not cognizable in the courts of Rhode Island under the conflict of laws rule that "The courts of no country execute the penal laws of another. . . . ."[2] *Testa v. Katt.*[3]

The Supreme Court of Rhode Island here followed its earlier decision in *Robinson v. Norato*[4] in which it had declared the 1942 version of the EPCA[5] to be a penal statute of a foreign sovereignty within the meaning of the conflicts rule. The plaintiff in the *Robinson* case had argued unsuccessfully that the act was not a penal statute in an international sense, that the United States was not a foreign sovereignty with respect to Rhode Island, and that in any event, the supremacy clause of the Constitution[6] required Rhode Island to enforce the act regardless of the penal nature of its sanctions.

On the conflicts point alone, the Rhode Island decisions go against the weight of authority in construing the EPCA as a penal statue of a foreign sovereignty.[7] It is understandable that the court might have difficulty in construing the Act as remedial inasmuch as it provides for criminal sanctions, for triple damages, for intervention by the administrator on behalf of any injured person, and for the administrator to bring the action on behalf of the government if the buyer cannot or does not bring the action within thirty days of the

[1] The pertinent section of this act, hereinafter called the EPCA, reads as follows: "If any person selling a commodity violates a regulation, order or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may . . . . bring an action against the seller on account of the overcharge. In such action the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine . . . ." 58 Stat. 632 (1944), 50 U.S.C.A. App. § 925 (e) (1944).

[2] The rule was stated by Chief Justice Marshall in *The Antelope*, 10 Wheat. (U.S.) 66, 123 (1825).

[3] 47 A. 2d 312 (R.I., 1946), cert. granted 67 S. Ct. 122 (1946).

[4] 71 R.I. 256, 43 A. 2d 467 (1945).

[5] 56 Stat. 23 (1942), 50 U.S.C.A. App. § 901 (1944).

[6] U.S. Const. Art. VI, § 2.

[7] Desper v. Warner Holding Co., 219 Minn. 607, 19 N.W. 2d 62 (1945); Lapinski v. Copacino, 131 Conn. 119, 38 A. 2d 592 (1944); Regan v. Kroger Grocery & Baking Co., 386 Ill. 284, 54 N.E. 2d 210 (1944); Beasley v. Gottlieb, 131 N.J.L. 117, 35 A. 2d 49 (1943).

violation.[8] Two situations, however, must be distinguished. When the action is not brought by the administrator but by an aggrieved purchaser, and the damages run to him rather than to the government, most courts have construed the statute as compensatory in nature.[9] In some of these decisions[10] the criterion of penalty laid down by the Supreme Court in *Huntington v. Attrill*[11] has been utilized. In that case the plaintiff brought an action in Maryland on a New York judgment. The Maryland court refused enforcement on the ground that the New York statute on which the judgment was based was penal in the international sense and therefore the cause of action to which the statute gave rise would not have been recognized if brought originally in Maryland. In holding that Maryland was obliged to give full faith and credit to the New York judgment, the Supreme Court said:

> The question whether a statute of one state, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends on the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act.[12]

When the action has been brought by the administrator and the damages have run to the government, this same test has been applied by some state courts in finding the EPCA to be penal.[13] Despite this, they have all, with the exception of Rhode Island, enforced the triple damages provision under one theory or another. Whatever their reasons for such enforcement, the crucial one sug-

[8] The provisions concerning criminal proceedings may be ignored by the state courts, for jurisdiction over these is given exclusively to the federal courts. 58 Stat. 632 (1944), 50 U.S.C.A. App. § 925 (1944).

[9] Cases cited note 7 supra. In Schaubach v. Anderson, 184 Va. 795, 36 S.E. 2d 539 (1946), however, the Virginia Supreme Court held that the EPCA was non-penal only on the theory that Congressional intent to have it construed as non-penal was controlling. Since a statute may operate far differently than the legislature "intends," and since Congressional intent is at best difficult to ascertain, the court appears to have strained to get its result. Cf. Bowles v., Chew, 53 F. Supp. 787 (Cal., 1944); Bowles v. Berard, 57 F. Supp. 94 (Wis., 1944); see Hatton, State Jurisdiction of Federal Rights of Action—Emergency Price Control Act, 40 Ill. L. Rev. 355 (1946).

[10] Desper v. Warner Holding Co., 219 Minn. 607, 19 N.W. 2d 62 (1945); Schaffer v. Leimberg, 318 Mass. 396, 62 N.E. 2d 193 (1945); Beasley v. Gottlieb, 131 N.J.L. 117, 35 A. 2d 49 (1943).

[11] 146 U.S. 657 (1892).

[12] Ibid., at 673. Under this definition the treble damages provision of the Sherman Anti-Trust Act, 26 Stat. 209 (1890), 15 U.S.C.A. § 1 (1941), was held to be remedial in Chattanooga Foundries and Pipe Works v. Atlanta, 203 U.S. 390 (1906). A leading state decision making use of the Huntington definition of penality as applied to a state statute is Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918).

[13] Bowles v. Heckman, 64 N.E. 2d 660 (Ind., 1946); Bowles v. Barde Steel Co., 177 Ore. 421, 164 P. 2d 692 (1945); Bowles v. Farmers' National Bank, 147 F. 2d 425 (C.C.A. 6th, 1945).

gested is that the state courts are bound to enforce federal statutes regardless of their penal nature because of the supremacy clause of the Constitution.[14]

In denying the applicability of the supremacy clause to the question of whether a state court must enforce a federal statue which the court regards as penal and thus unenforceable under its conflicts rule, the Rhode Island decisions have sharply focused attention upon a constitutional question of long standing. At the time of the Constitutional Convention of 1787 it was generally assumed without discussion that the United States and the several states were not foreign to each other and that the state courts had nothing to do with cases involving conflict of laws problems; these were regarded as a part of public international law to be handled only by the federal judiciary. The Rhode Island court, however, makes an ingenious argument to the effect that, though the several states and the United States are not foreign to each other in the sense of public international law, they are foreign in the sense of private international law.[15] It is submitted that a reasonable reading of the supremacy clause renders such an argument untenable.

The supremacy clause provides that:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.[16]

The broad sweep of the language, "anything in the . . . . laws of any State to the contrary notwithstanding," allows of no qualification. To argue, as does the Rhode Island court, that the supremacy clause requires the state courts to enforce federal statutes only when those statutes are in conflict with state *statutory* law seems unwarranted.[17] And to dispel any doubt as to the invalidity of a construction which would exempt the decisional law of state judges—specifically, conflict of laws decisions—from the operation of the supremacy clause, the mandate is directed to "the judges in every State."

The available historical evidence also appears to controvert the Rhode Island court's thesis. One of the major failings of the early Confederation which led to the calling of the Convention of 1787 had been the lack of adequate machinery for insuring the enforcement of federal laws by the states. The resolution proposing the supremacy clause, which was passed unanimously in sub-

[14] Bowles v. Heckman, 64 N.E. 2d 660 (Ind., 1946); Bowles v. Barde Steel Co., 177 Ore. 421 164 P. 2d 692 (1945); Regan v. Kroger Grocery & Baking Co., 386 Ill. 284, 54 N.E. 2d 210 (1944); Miller v. Municipal Court, 22 Cal. 2d 818, 142 P. 2d 297 (1943); see State Enforcement of Penalties under Section 205 (e) of Emergency Price Control Act, 41 Ill. L. Rev. 264 (1946).

[15] Robinson v. Norato, 71 R.I. 256, 43 A. 2d 467, 471 (1945).

[16] U.S. Const. Art. VI, § 2.

[17] Robinson v. Norato, 71 R.I. 256, 43 A. 2d 467, 474 (1945).

stantially its present form, was undoubtedly intended to help remedy this situation.[18] Moreover, when the supremacy clause was first considered, the Convention had not yet decided whether inferior federal courts should be established and thus it is evident that if the federal laws were going to be enforced at all, they would have to be enforced by the state courts.[19] It might be argued with some plausibility that the establishment of inferior federal courts ended the practical necessity for state enforcement of federal statutes, but historically a different turn was taken. Because of the hardship to litigants in having to travel to the relatively few federal courts in the early years of the union, and to some extent for political reasons, the state courts were under continual pressure to exercise jurisdiction over federal causes, and this was acceded to as reasonable since the state courts regarded themselves as having general jurisdiction which could be limited as to federal causes only by act of Congress.[20] It was generally accepted that the state courts had concurrent jurisdiction with the federal courts in all civil cases arising under federal statutes where such jurisdiction was not expressly prohibited by Congress.[21] Although the advocates of a strong central government succeeded in placing a section in the Judiciary Act of 1789[22] giving the federal courts exclusive original jurisdiction over all suits for the enforcement of penalties under federal laws, the states-rights exponents in Congress during the following years passed a number of federal statutes which might be said to have operated as a pro tanto repeal of that section of the Judiciary Act.[23] Under these statutes, state courts could and did take concurrent jurisdiction with the federal courts in both civil and criminal cases.[24] Not only did Congress permit the state courts to take jurisdiction but in some statutes it imposed affirmative duties upon the state courts and officials.[25] However, by about 1815 the state courts—which had earlier enforced federal laws as a means of increasing state power and prestige—came to feel imposed upon, and some of

[18] 2 Farrand, The Records of the Federal Convention of 1787, at 22 (1937). This resolution had been introduced after the Convention had been unable to agree to that part of the Virginia Plan which gave the national legislature a veto over the legislative acts of the several states—a somewhat more direct alternative to the supremacy clause. See 1 Farrand, ibid., at 21.

[19] 3 Farrand, op. cit. supra note 18, at 287.

[20] United States v. Dodge, 14 Johns. (N.Y.) 95 (1817); Teall v. Felton, 1 Comst. (N.Y.) 537, aff'd 12 How. 284 (1851); see Elmer v. Pennel, 40 Me. 430 (1855).

[21] 3 Farrand, op. cit. supra note 18, at 287; Hamilton, The Federalist, No. 82; 1 Kent Com. *395–404.

[22] 1 Stat. 76 (1789).

[23] See Bowles v. Barde Steel Co., 177 Ore. 421, 430, 164 P. 2d 692, 697 (1945).

[24] For excellent discussions of these federal statutes in the light of the Judiciary Article of Constitution, U.S. Const. Art. III § 2, see Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923), and Warren, Federal Criminal Laws and the State Courts, 38 Harv. L. Rev. 545 (1925).

[25] Fugitive Slave Act, 1 Stat. 302 (1793); Federal Tax Act, 1 Stat. 506 (1797); Alien Enemy Act, 1 Stat. 577 (1798).

them began to balk at enforcing federal statutes.[26] This judicial rebellion gained ground, according to Professor Warren, through the disinclination of the northern states to enforce the federal Fugitive Slave Law.[27] Finally, in *Prigg v. Pennsylvania*[28] Mr. Justice Story, speaking for the Supreme Court, held that the states could not be compelled to enforce the Fugitive Slave Law because the Constitution did not designate particular state functionaries to carry its provisions into effect. As suggested by Professor Warren, "This doctrine that no court could enforce the penal laws of another government seems to have been established as a judicial pronunciamento, without much reasoning, and chiefly from the desire of the federal courts to avoid friction with the states at a particularly nervous period."[29]

Once the period of tension had ended with the Civil War, the Supreme Court was in a position to reassert the supremacy of federal law within the state courts. In the leading case of *Claflin v. Houseman*[30] the Court held that when Congress in a particular statute did not make federal jurisdiction exclusive, any state court of competent jurisdiction could try the case. Expressive of the modern feeling of unity between state and nation was the Court's statement that, "The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and, within its jurisdiction, paramount sovereignty."[31]

In the *Second Employers' Liability Cases*[32] the Supreme Court went a step further. The Connecticut Supreme Court had refused to enforce the federal Employers' Liability Act[33] on the grounds that it conflicted with the public policy of the state and would be inconvenient for the state courts to administer. It was held that the right of a state court to entertain jurisdiction over a federal cause of action was made a positive duty where the act did not give exclusive jurisdiction to the federal courts and the state court was otherwise competent.[34] Certainly the conflict of laws rule of Rhode Island is no more persuasive than is the public policy of Connecticut as a rationale for not enforcing federal laws. Viewed from a historical perspective, the Rhode Island holdings appear as an anachronistic throwback to the pre-Civil War era.

[26] State v. Pike, 15 N.H. 83 (1844); Delafield v. Illinois, 2 Hill (N.Y.) 159 (1841); Davison v. Champlin, 7 Conn. 244 (1828); United States v. Lathrop, 17 Johns. (N.Y.) 4 (1819); Jackson v. Rose, 2 Va. Cas. 34 (1815).

[27] Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 70–1 (1923).

[28] 16 Pet. (U.S.) 539 (1842).

[29] Warren, Federal Criminal Laws and the State Courts, 38 Harv. L. Rev. 545, 584 (1925).

[30] 93 U.S. 130 (1876). [31] Ibid., at 136.

[32] Mondou v. N.Y., N.H. & H.R. Co., 223 U.S. 1 (1911).

[33] 35 Stat. 65 (1908), 45 U.S.C.A. § 51 (1943).

[34] Cf. Douglas v. N.Y., N.H., & H.R. Co., 279 U.S. 377 (1929).

Whether there are any significant practical implications to the Rhode Island decisions is debatable. Today there are several federal statutes which might be regarded as penal and which are customarily enforced in the state courts.[35] The closing of state forums to their enforcement would create many difficult problems. One writer has suggested that since suits under such statutes are often for small amounts which the state courts are accustomed to handling, since the state courts are generally more accessible to the injured parties and more familiar to their attorneys, and since state court procedure is generally less expensive and more expeditious than federal court procedure, the practical result of the Rhode Island holdings would not be merely to shift the burden of enforcement to the federal courts, but often to prevent the injured person from bringing his suit at all.[36] There are, however, other aspects to the problem. State courts, as opposed to those in the federal system, are typically "plaintiffs' courts." The caliber of the bench is generally lower, political influences are more likely to be manifest, juries are kept under less control and are more likely to be intemperate, and state procedural practices are almost universally inferior to the Federal Rules of Procedure.[37] In short, the federal courts are, by and large, better instruments for enforcing laws and administering justice. It is of course true that the federal courts are relatively few in number and thus less accessible than the state courts. But perhaps it would be salutary in the long run if the federal courts find themselves unable to cope with a flood of litigation turned away by the state courts so that Congress would be forced to establish new courts and extend the reach of the federal judiciary. With Rhode Island as the lone recalcitrant, however, such far reaching developments are hardly probable.

Labor Law—Internal Union Policy—Racial Discrimination within Union Certified under Federal Statute Prohibited by Fifth Amendment.—[Kansas].—The defendant union was certified under the Railway Labor Act[1] as the collective bargaining agent for a unit of railroad shop employees. The plaintiffs were Negro members of the unit who had been segregated into a "Jim Crow" lodge. The union's constitution provided that any such separate lodge "shall be under the jurisdiction of and represented by the delegate of the nearest white local in any meeting of the Joint Protective Board Federation or Convention where delegates may be seated."[2] The Negro members were not permitted to participate in

[35] National Bank Act, Rev. Stat. § 5198 (1873), 12 U.S.C.A. § 86 (1945); Anti-Trust Act, 38 Stat. 731 (1914), 15 U.S.C.A. § 1 (1941); Merchant Seamen's Act, 38 Stat. 1164 (1915) 46 U.S.C.A. § 596 (1944); Fair Labor Standards Act, 52 Stat. 1060 (1938), 29 U.S.C.A. § 201 (1942); Federal Employer's Liability Act, 53 Stat. 1404 (1939), 45 U.S.C.A. § 51 (1943); Emergency Price Control Act of 1942 as amended, 58 Stat. 632 (1944), 50 U.S.C.A. App. § 901 (1944).

[36] See Reese, Concurrent Jurisdiction of State and Federal Courts under Section 16 (b) of the Fair Labor Standards Act, 27 Va. L. Rev. 328, 336 (1941).

[37] 28 U.S.C.A. § 723c (1941).

[1] 48 Stat. 1185 (1934), 45 U.S.C.A. § 151 et seq. (1943).

[2] Betts v. Easley, 161 Kan. 558, 169 P. 2d 831, 835 (1946).