

cargo clause,³⁴ another ICC examiner has recommended that that agency lacks the power to outlaw hot cargo clauses in labor contracts and that this controversy should be handled by the National Labor Relations Board or Congress.³⁵ But, while the majority of hot cargo clause cases have involved common carriers, the Board has never discussed the existence of this duty in upholding the validity of these clauses. It may well feel that this problem, involving a carrier's duty, is beyond its limited powers. Yet, hot cargo clauses involving common carriers are directly contrary to what legislatures and the common law have conceived to be the public good. Unless the Commission or the Board assume jurisdiction, it remains for Congress or the courts to see that this problem is resolved.³⁶

³⁴ ICC Rule Bars Teamster Boycott of Hot Cargoes, N.Y. Times, p. 1, col. 6, p. 20, col. 8 (April 10, 1957).

³⁵ Examiner Rules ICC Lacks Power to Ban "Hot Cargo" Clauses, The Wall Street Journal, p. 5, col. 3 (Aug. 12, 1957).

³⁶ As this comment went to press, the Board, in a proceeding charging an 8(b)(4)(A) violation, held invalid a hot cargo clause contained in the union contract of a common carrier. Genuine Parts Co., 119 N.L.R.B. No. 53 (1957). Chairman Leedom and Member Jenkins felt that the Board's prior rationale upholding such clauses—i.e., that since a boycott established by a secondary employer at the union's request is concededly valid, an agreement to establish a boycott should also be valid—did not apply to cases involving common carriers, since "under the express provisions of the [Interstate Commerce Act], common carriers . . . are not free to decide, at will, to withhold the services they hold themselves out as able to perform, from any customer or class of customers." Ibid. Member Rodgers felt that hot cargo clauses are always invalid, since they contravene a section of the Taft-Hartley Act designed to protect the public. Member Bean concurred solely on the ground that the facts brought the case within the doctrine of Sand Door and Plywood Co. Member Murdock dissented, arguing that questions involving a duty under the Interstate Commerce Act should be decided by the ICC.

In terms of the results of cases before the Board, this new decision marks no change; even under the Sand Door and Plywood Co., and American Iron, cases, the existence of a hot cargo clause was irrelevant to the question of whether an 8(b)(4)(A) violation occurred. And there has been no change in the requirement of inducement, unless the dictum of Leedom and Jenkins, to the effect that the existence of a hot cargo clause is of itself prima facie evidence of inducement, is accepted. *Id.*, at n. 30. However, by placing its decision on a ground that eliminates, at least for common carriers, the indefensible "valid but unenforceable" rubric, the Board may have increased chances for ultimate court acceptance of its position.

EXTRASTATE ENFORCEMENT OF PENAL LAWS

Since Chief Justice Marshall's statement that "courts of no country execute the penal laws of another,"¹ many American courts considered the characterization of a law of another jurisdiction as "penal" to be sufficient grounds for refusing to enforce a judgment or cause of action based upon that law.² In

¹ The Antelope, 10 Wheat. (U.S.) 66, 123 (1825). In this case the Court held that a Spanish statute decreeing forfeiture of slaving vessels would not be enforced with respect to a Spanish craft captured off the American coast by a United States revenue-cutter.

² E.g., *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888) (denying enforcement to judgment based on statute imposing fine for failure to file statement about the business of a fire insurance

general, laws have been considered penal when the recovery provided for is not restricted to compensation for the injury suffered, or when liability is imposed without regard to whether the plaintiff was prejudiced by the defendant's non-compliance.

Marshall's statement first received serious critical examination in 1932, when Professor Robert Leflar in a persuasive article suggested that neither judgments nor causes of action should be denied enforcement because the statute upon which they are based is penal.³ Since publication of that article, full faith and credit principles, which seem contrary to the idea that a foreign penal law need not be enforced, have been fortified by Supreme Court decisions.⁴ To determine whether Leflar's suggestion has been followed by the courts, it is necessary to consider the present status of the penal concept in its role as an exception to full faith and credit principles.⁵

The United States Supreme Court is strict in requiring that full faith and credit be given to judgments, even though they may be based on so-called penal causes of action. In *Huntington v. Attrill*,⁶ the Court held that a state was required to give full faith and credit to a judgment based on a statute of a sister state making directors who signed false public certificates liable for corporate debts regardless of whether the plaintiffs had relied on such certificates. This case is generally taken to stand for the proposition that no judgments can properly be denied full faith and credit on the penal theory save those based upon criminal statutes.⁷ In 1935 this proposition was applied in *Milwaukee County v. M. E. White Co.*⁸ to a statute providing for a non-compensatory penalty. In that case the Court held full faith and credit due a foreign judgment for state income taxes, although it included a "penalty"⁹ for delinquent payment.

corporation); *Attrill v. Huntington*, 70 Md. 191, 16 Atl. 651 (1889) (denying enforcement to judgment based on statute imposing personal liability for corporate debts for making false representations in public reports). Cases denying enforcement to "penal" causes of action are cited in notes 13, 15, 16, 17, 18, 20, 21, *infra*.

³ Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 Harv. L. Rev. 193 (1932).

⁴ See Reese and Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 Col. L. Rev. 153 (1949).

⁵ U.S. Const. Art. 4, § 1. The Full Faith and Credit Clause of the Constitution is implemented by statute, 1 Stat. 122 (1790), as amended, 28 U.S.C.A. § 1738 (1948). For a discussion of the nature and effect of the 1948 amendment to this statute, see note 12 *infra*.

The term *penal* is used in other connections also, and this has contributed to difficulties which exist with respect to its use in the conflict of laws area. For instance, the type of statute which receives a short period of limitations is called *penal*.

⁶ 146 U.S. 657 (1892).

⁷ E.g., *Full Faith and Credit to Statutes*, 38 Minn. L. Rev. 536, 538 (1954). Criminal statutes are discussed at note 26 *infra*.

⁸ 296 U.S. 268 (1935).

⁹ *Id.*, at 279 (quotation marks are the Court's).

The Court remarked:

In a suit upon a money judgment for a civil cause of action the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis. . . . Recovery upon it can be resisted only on the grounds that the court which rendered it was without jurisdiction [citing cases]; or that it has ceased to be obligatory because of payment or other discharge [citing cases]; or that it is a cause of action for which the state of the forum has not provided a court [citing cases]; or possibly because procured by fraud.¹⁰

The omission from this statement of the familiar defense that it was a penal statute which gave rise to the judgment is significant. It is improbable that the so-called penal exception has any further vitality as regards full faith and credit to foreign civil judgments.¹¹

Full faith and credit to foreign penal causes of action does not seem to be as firmly established as for judgments. Since 1932, when the Leflar article appeared, causes of action created by statutes of sister states have sometimes been denied enforcement for the reason that they are penal in nature. However, the 1948 revision of the statute which implements the full faith and credit clause may have some significance in compelling greater full faith and credit to causes of actions.¹²

Causes of action based upon foreign statutes imposing personal liability on corporate officials or shareholders for corporate debts seem to be refused enforcement as many times as they are enforced.¹³ The notion that these causes of action are penal is still regarded by some courts as a proper ground for denying full faith and credit.¹⁴

¹⁰ *Id.*, at 275-76.

¹¹ This position is supported by *Connolly v. Bell*, 141 N.Y.S.2d 753 (1955) (enforcing judgment rendered in civil action even though original claim was brought by state officials in state's behalf and damages awarded were in excess of complainant's financial loss); *Jos. Riedel Glass Works, Inc. v. Keegan*, 43 F.Supp. 153 (S.D. Me., 1942) (holding that penal laws are only those imposing punishment for offenses against the state which the Executive has power to pardon); *New York v. Coe Mfg. Co.*, 112 N.J.L. 536, 172 Atl. 198 (S.Ct., 1934) (enforcing foreign judgment for franchise tax imposed on foreign corporations doing business in state and for statutory penalties imposed for failure to comply). See also Paulsen, *Enforcing the Money Judgment of a Sister State*, 42 Iowa L. Rev. 202, 207-8 (1957).

¹² In 1948, 1 Stat. 122 (1790) was amended by 62 Stat. 947, 28 U.S.C.A. § 1738 to specify that the *public acts* of sister states must be given the same faith and credit in every state as is accorded to judgments of sister states.

¹³ *Enforcement denied*: *Doggrell v. Great Southern Box Co.*, 208 F.2d 310 (C.A. 6th, 1953), rev'g 206 F.2d 671 (C.A. 6th, 1953); *Paper Products Co. v. Doggrell*, 195 Tenn. 581, 261 S.W. 2d 127 (1953); *Nesbitt v. Clark*, 272 Pa. 161, 116 Atl. 404 (1922), cert. denied 258 U.S. 621 (1922); cf. *Pink v. A.A.A. Highway Express*, 314 U.S. 201 (1941); see *Schaefer v. H. B. Green Transportation Line*, 232 F.2d 415 (C.A. 7th, 1956). *Contra*: *Broderick v. Rosner*, 294 U.S. 629 (1935); *Abercrombie v. United Light & Power Co.*, 7 F. Supp. 530 (D. Md., 1934); *Doggrell v. Great Southern Box Co.*, 206 F.2d 671 (C.A. 6th, 1953) rev'd on rehearing, 208 F.2d 310 (C.A. 6th, 1953); *Karvalsky v. Becker*, 217 Ind. 524, 29 N.E.2d 560 (1940).

¹⁴ E.g.: "[T]he penal nature of the Arkansas law in question is such that the Tennessee Court is not required by the full faith and credit clause of our Federal Constitution to give it effect." *Paper Products Co. v. Doggrell*, 195 Tenn. 581, 592, 261 S.W.2d 127, 131-32 (1953), noted in 38 Minn. L. Rev. 536 (1954).

Another type of action which has been labelled penal and not enforced is that originating from foreign usury statutes which provide for forfeiture of all interest or two or three times the interest,¹⁵ or for the borrower's payment of interest at the legal rate to a common school fund of the county where the action was brought.¹⁶ The only post-1932 case of this nature that was found branded such a usury statute penal and denied it enforcement.¹⁷

Actions to recover exemplary damages have been denied extraterritorial enforcement on penal grounds.¹⁸ Here again authority is sparse, but at least one case decided after the Leflar article held that a foreign statute permitting recovery of exemplary damages was enforceable.¹⁹ The most recent case holding such a statute unenforceable on the theory that it is penal was decided in 1929.²⁰

Causes of action founded on foreign wrongful death statutes imposing minimum recoveries or awarding damages according to the defendant's culpability have also been denied enforcement because courts considered them penal.²¹ In the recent cases of *Hughes v. Fetter*²² and *First National Bank v. United Air Lines*,²³ however, the Supreme Court prohibited states from denying full faith and credit to a wrongful death action based upon a statute of another state. In those cases the Court held that a state's policy against entertaining such causes of action must give way to "the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states. . . ."²⁴ But it does not seem entirely safe to conclude that *Hughes* and *United* require full faith and credit to wrongful death statutes which provide for mini-

¹⁵ *Willis v. Cameron*, 12 Abb. Pr. 245 (N.Y. C.P., 1861).

¹⁶ E.g., *Crebbin v. Deloney*, 70 Ark. 493, 69 S.W. 312 (1902).

¹⁷ *McCans v. Brandtjen & Kluge, Inc.*, 179 S.W.2d 352 (Tex. Civ. App., 1944).

¹⁸ *Taylor v. Western Union Tel. Co.*, 95 Iowa 740, 64 N.W. 660 (1895) (claim for exemplary damages based on statute of another state), and see other cases collected in Leflar, *op. cit. supra* note 3, at 210.

Claims for exemplary damages given by a federal statute have even been denied enforcement on penal grounds. *Robinson v. Norato*, 71 R.I. 256, 43 A.2d 467 (1945) (in suit by tenant against landlord for overcharges of rent, Federal Emergency Price Control Act held penal and unenforceable). But in *Testa v. Katt*, 330 U.S. 386 (1947), which was a suit by an automobile purchaser against a seller to enforce the statutory liability of triple the amount of the overceiling price, the Court assumed that the statute was penal and held that the Supremacy Clause of the federal Constitution required its enforcement by a state.

¹⁹ *Rodwell v. Camel City Coach Co.*, 205 N.C. 292, 171 S.E. 100 (1933).

²⁰ *Grinestaff v. N.Y. Cent. R.R.*, 253 Ill.App. 589 (1929) (claim for exemplary damages based on common law of another state).

²¹ E.g., *McLay v. Slade*, 48 R.I. 357, 138 Atl. 212 (1927), and see cases collected in Leflar, *op. cit. supra* note 3, at 206-7.

²² 341 U.S. 609 (1951).

²³ 342 U.S. 396 (1952), rehearing denied, 343 U.S. 921 (1952).

²⁴ *Hughes v. Fetter*, 341 U.S. 609, 612 (1951).

mum recoveries or measure damages by the defendant's culpability, because that type of statute was not involved in those cases.

Finally, courts split on whether extraterritorial enforcement should be denied actions for taxes in which statutory penalties in the form of interest are sought.²⁵ Since no court has allowed recovery of the penalty without allowing recovery of the tax claim, those cases which deny enforcement of the action may be explained on the basis of the maxim that foreign tax claims will not be enforced.

The foregoing indicates that the penal exception to full faith and credit requirements is on the decline, but that it is still very much alive. It seems advisable to consider reasons which might justify this kind of exception to full faith and credit principles. From such an examination it would seem that full faith and credit should not be refused judgments or actions on penal grounds unless they are based upon laws for the violation of which satisfaction may be had on the body of the defendant, that is, criminal laws.²⁶

The problem of enforcing a foreign criminal judgment is not likely to arise. Since a defendant cannot be tried criminally in his absence,²⁷ the state rendering judgment must have had him in custody and normally would deal with him then. Moreover, if a state were required to enforce foreign criminal judgments or actions, it would be in the position of bearing the expense of prison facilities for violators of another state's laws. In addition, for foreign criminal actions there would be the necessity of criminal trials, often more expensive than civil proceedings because of the greater procedural protection afforded the criminal

²⁵ *Enforcement denied*: Wayne County v. Foster & Reynolds Co., 277 App. Div. 1105, 101 N.Y.S. 2d 526 (1st Dep't, 1950); Wayne County v. American Steel Export Co., 277 App. Div. 585, 101 N.Y.S. 2d 522 (1st Dep't, 1950); Minnesota v. Karp, 84 Ohio App. 51, 84 N.E. 2d 76 (1948); City of Detroit v. Proctor, 5 Terry (Del.) 193, 61 A. 2d 412 (1948); Ohio v. Flower, 59 D. & C. 14 (Pa. C.P., 1947); Hamilton County Treasurer v. Hartzell, 55 D. & C. 100 (Pa. C.P., 1945). *Enforcement allowed*: City of New York v. Shapiro, 129 F. Supp. 149 (D. Mass., 1954); Oklahoma v. H. D. Lee Co., 174 Kan. 114, 254 P. 2d 291 (1953); State of Oklahoma v. Rodgers, 238 Mo. App. 1115, 193 S.W. 2d 919 (1946); Worner's Deed of Trust, 50 Lanc. Rev. 107 (Pa. Orphans Ct., 1946); Standard Embossing Plate Mfg. Co. v. American Salpa Corp., 113 N.J. Eq. 468, 167 Atl. 755 (1933); see also Ohio v. Arnett, 314 Ky. 403, 234 S.W. 2d 722 (1950). Cf. cases involving actions on bonds filed by public officers, in which statutory penalties over and above compensation for the loss suffered were sought, such as Arkansas v. Bowen, 3 App. D.C. 537 (1894) (recovery denied both on bond and for penalty).

²⁶ Under the criminal laws a wrongdoer may be sentenced to death, confined to prison, or required to pay a fine. If a fine is imposed but not paid, the defendant may be imprisoned so that he may "work it off." If the defendant is a corporation, failure to pay a fine could result in an execution upon its property (see, e.g., Ill. Rev. Stat. (1955) c. 38, § 668), forfeiture of its charter if it is domiciled in the forum state, or loss of the privilege of transacting business in the state. 17 Fletcher, Corporations § 8594, at 806 (1933).

²⁷ See Ohio Crim. Practice Manual § 2945.12 (Baldwin, 1954), for an example of a state provision requiring a criminal defendant to be personally present for trial. There is no requirement that a defendant in a civil case be personally present for trial. Service for an in personam action can be obtained on a party not present in the state under some circumstances, such as under non-resident motorist statutes. See, e.g., Ill. Rev. Stat. (1955) c. 95½, § 23. See also Rest., Judgments §§ 22, 30, 33 (1942).

defendant.²⁸ In the face of these inconveniences, there is no strong reason for allowing extrastate enforcement of criminal judgments or causes of action; extradition procedures usually make it possible for persons accused or convicted of crimes to be brought back to the prosecuting state for trial or punishment.²⁹

There is no reason, however, to deny full faith and credit to any civil judgment or cause of action based upon a foreign "penal" law. The expense to the forum state of the necessary judicial proceedings is no greater than the expense in cases involving non-penal laws. Moreover, extradition is unavailable in civil cases; if the defendant has no property in the state where the action originated or the judgment sued on was rendered, denial of extrastate enforcement may leave the civil plaintiff without remedy.³⁰ The necessities of enforcement and the absence of objection on grounds of convenience combine to indicate that the penal exception to full faith and credit should be discarded in all civil cases.

²⁸ A criminal defendant must under certain circumstances be provided with counsel, a jury, a copy of the trial transcript, and so on.

²⁹ U.S. Const. Art. 4, § 2, provides: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." In addition thirty-five states have adopted the Uniform Extradition Act, § 2 of which provides: "[I]t is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony or other crime, who has fled from justice and is found in this state." Handbook on Interstate Crime Control 10 (Rev. ed., 1949).

For a comprehensive treatment of the interstate criminal problem and of legislation dealing with it, see the note in 31 Minn. L. Rev. 699 (1947).

³⁰ A defendant against whom a civil judgment has been rendered cannot be held until he satisfies it, since the practice of imprisonment for debt has been abolished in most states. See Limitations on State Legislation Imposed by Constitutional Guaranties against Imprisonment for Debt, 41 Harv. L. Rev. 786 (1928); Ford, Imprisonment for Debt, 25 Mich. L. Rev. 24 (1926). Even if a defendant were imprisoned for not satisfying a non-criminal judgment, it would only be for the purpose of coercing payment and would not constitute a means of working off the obligation.

PRIMARY JURISDICTION: A REAPPRAISAL

The doctrine of primary jurisdiction in administrative law was conceived as a maxim to determine whether an issue should be submitted initially to the agency or to the courts when concurrent jurisdiction existed in both. Fifty years of constant litigation have failed to formulate the doctrine in a manner which enables litigants to choose the proper forum with a reasonable degree of certainty. In practice this uncertainty has subjected litigants to the delay and expense of double proceedings; it may well be asked whether this is too heavy a price to pay for any advantages the doctrine may have.

The doctrine has been most frequently applied in disputes over railroad tariffs. The Interstate Commerce Act specifically provides that "any person . . . claiming to be damaged by any common carrier . . . may either make complaint