

argument is more convincing, for the accounting basis of insurance would be threatened with serious complication. In the *Rogers* case a different element was suggested. That all the directors could not be brought before the court in New York meant that some directors might not be forced to restitution. How this would inconvenience the corporation is difficult to see; and culpable directors should not complain that their *confrères* are not also held to suffer.

"Internal affairs" cases, while finally recognizing that questions of convenience, and not of jurisdiction, are controlling, still are swayed by magic words. For some reason Taney's *dictum* has stood firm, and the forces making of the states a nation have not succeeded here: "foreignness" pervades. Leaving aside the insurance cases, threat of hardship to the defendant can scarcely be found proved. Not yet fully embraced is the idea that the place of trial presents an administrative problem purely,<sup>95</sup> and whereas other *forum non conveniens* cases seem too eager to afford a forum,<sup>96</sup> "internal affairs" cases seem too reluctant. The *Rogers* case—the first in the Supreme Court to sanction dismissal—has emphasized especially dubious considerations.

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THE PUBLIC POLICY CONCEPT IN THE CONFLICT OF LAWS.—In a short concurring opinion, Mr. Justice Stone recently parted company with Mr. Justice Brandeis and presumably the rest of the Supreme Court on the abstract proposition that under the full faith and credit clause the public policy of a forum may be ineffectual to prevent the enforcement of rights accruing under the laws of another state pos-

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of *Amer. v. Mixer*, *supra* note 83, holding full faith and credit must be given to the charter and by-laws of the fraternal association, relied for its authority on *Royal Arcanum v. Green*, 237 U. S. 531, 35 Sup. Ct. 724 (1915). In that case a Massachusetts society had changed its rate of assessment. The plaintiff policy holder brought a representative bill in Massachusetts against the company to have the by-law declared invalid. The court denied his contention. He later sued in New York to enjoin the corporation from exacting the new rate. The court granted him relief and disregarded the Massachusetts decision, charter and by-laws using as the basis for its decision New York law. The Supreme Court reversed, holding the Massachusetts determination to be binding on all courts. Significantly, the court declared that it had been recognized by state courts that it was unwise to interfere with the assessments of mutual fraternal societies because that endangers the structure of the organization. See Note (1932) 46 HARV. L. REV. 291, 296.

<sup>95</sup> "The question of the proper place of trial is essentially administrative in character, like the question of time which arises upon a motion and continuance. . . . Intricate metaphysical reasoning as to the nature of actions and dogma as to jurisdiction should not be allowed to obscure this simple, practical issue." FOSTER, *op. cit. supra* note 50, at 41.

<sup>96</sup> Cf. *Boright v. Chicago, R. I. & P. R. Co.*, *supra* note 17. In New York and elsewhere there seems prevalent the view that actions by residents should not be dismissed and that only in tort cases will a law court exercise discretion in taking or refusing jurisdiction. See Blair, *supra* note 31. But cf. *Universal Adjustment Corp. v. Midland Bank Ltd.*, *supra* note 32.

essed of a predominance of contacts with the litigious situation.<sup>1</sup> The extent of that departure is at present indeterminate. The majority of the Supreme Court can widen the breach in three ways:—by extending its novel doctrine to rubrics other than workmen's compensation; by depriving even more striking divergences in public policy of operative significance; or by acquiescing in the principle of this case even where the forum has less convincing connections with the transaction underlying the suit.<sup>2</sup> Whatever happens, it will be instructive to see how far

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<sup>1</sup> *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 52 Sup. Ct. 571 (1932); (1932) 32 COLUMBIA LAW REV. 131. Employee, a Vermont citizen, bound by a Vermont contract of employment with a Vermont corporation which had its principal place of business in Vermont, was killed in New Hampshire in the course of employment. His administratrix brought in the latter state a common law action for negligence, which was later removed to the federal court sitting in the same state. The employer pleaded the Vermont contract, under which, by operation of the Vermont workmen's compensation statute, it was presumed that the parties had elected the remedies given by that statute to the exclusion of all others. By the New Hampshire compensation statute, which defendant had accepted by filing the necessary papers, the employee had an election, after the injury, between his statutory and common law remedy. The lower court refused effect to the Vermont statute on the ground that it was contrary to the public policy of New Hampshire. The Supreme Court reversed. "No decision of the state court has been cited indicating that recognition of the Vermont statute would be regarded in New Hampshire as prejudicial to the interests of its citizens . . . the mere fact that the Vermont legislation does not conform to that of New Hampshire does not establish that it would be obnoxious to the latter's policy to give effect [to it]. . . . The interest of New Hampshire was only casual." In an elaborate *dictum* the Court expressed the view that at any rate the full faith and credit clause prevented the operation of the public policy argument in the instant case. See note 153, *infra*, and accompanying text. Cf. *Bond v. Hume*, 243 U.S. 15, 37 Sup. Ct. 366 (1917), where the Court similarly held on the ground of comity, and expressly reserved the full faith and credit question.

For discussions of constitutional limitations in the conflict of laws, see Note (1932) 45 HARV. L. REV. 291; (1930) 40 YALE L. J. 291, and authorities there cited. Cf. Corwin, *the Full Faith and Credit Clause* (1933) 81 U. OF PA. L. REV. 371; see Note, *supra* p. 492, 506. Assumed progenitors of the Bradford case in the Supreme Court are probably explicable on other grounds. The cases, with the exception of *Home Insurance Co. v. Dick*, 281 U.S. 397, 50 Sup. Ct. 338 (1930) (due process clause), *infra* note 157, and some nominal language in *Converse v. Hamilton*, 224 U.S. 243, 260, 32 Sup. Ct. 415, 419 (1912) (full faith and credit clause; suit on a judgment), do not discuss public policy, and proceed entirely on the theory of misapplication of law. As to the latter, the general rule of *Kryger v. Wilson*, 242 U.S. 171, 37 Sup. Ct. 34 (1916), still obtains (subject to certain exceptions in the case of fraternal benefit associations and life insurance companies, and probably henceforth in workmen's compensation) that an erroneous application of conflicts doctrine is not reviewable under the Constitution. Cf. Note (1932) 45 HARV. L. REV. 291, 295; Note (1930) 40 YALE L. J. 291, 296.

<sup>2</sup> See *supra* note 1, at 163, 52 Sup. Ct. at 577. In a recent holding the New York Court of Appeals has likewise minimized the importance of the locus of the tort. *Proper v. Polley*, 259 N. Y. 516, 182 N. E. 161 (1932), discussed in (1932) 32 COLUMBIA LAW REV. 1427. The Bradford case may indicate that the Supreme Court frowns upon the "immunity bath" [see *Forgan v. Bainbridge*, 34 Ariz. 408, 417, 274 Pac. 155, 159 (1928)] conferred upon the employer by the employee's stepping across the state line. Courts have been similarly reluctant to let a married woman forego her protected status [See *Union Trust Co. v. Grosman*, 245 U.S. 412, 416, 38 Sup. Ct. 147, 148 (1918); *Taylor v. Leonard*, 275 S. W. 134, 135 (Tex. Civ. App. 1925)] by stepping out of the forum. Nor, by stepping into the forum, can an obligation be evaded, see *In re McCurdy's Estate*, 303 Pa. 453, 462, 154 Atl. 707, 709 (1931), nor one imposed, see *Forepaugh v. Delaware, L. & W. R. Co.*, 128 Pa. 217, 18 Atl. 503, 504 (1889).

that voluntary growth called comity<sup>3</sup> has developed along these lines. Certain it is that the delusive autonomy which the courts erected on the assumption of the non-extraterritoriality of statutes and which found expression in the workmen's compensation field in the contractual theory<sup>4</sup> has been severely shaken; the full faith and credit clause<sup>5</sup> applies to public acts and not to mere contracts incorporating such acts.

The problem is difficult. Thus, courts have frequently found no inherent necessity to use the "public policy" concept in terms; a decision that a contract is obnoxious to the laws of the forum;<sup>6</sup> or injurious to the interests of the forum, the welfare of its people, or in fraud and violation of its laws<sup>7</sup> sufficiently ousts the offending foreign statute.<sup>8</sup>

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<sup>3</sup> "Comity is complaisance, courtesy, the granting of a privilege not of right, but of goodwill." See *Newlin v. St. Louis & S. F. R. Co.*, 222 Mo. 375, 391, 121 S. W. 125, 130 (1909); *Johnston v. Chicago Great Western R. Co.*, 164 S. W. 260, 262 (Mo. App. 1914). "Comity is . . . accepted . . . from mutual interest and convenience, and a sense of the inconvenience which would otherwise result, and from moral necessity to do justice that justice may be done in return." See *Parker-Harris Co. v. Stephens*, 205 Mo. App. 373, 378, 224 S. W. 1036, 1037 (1920); *Strawn Mercantile Co. v. First Nat. Bank of Strawn*, 279 S. W. 473, 474 (Tex. Civ. App. 1926). It is a type of mutual respect through which statutes "acquire extraterritorial effect." See *Union Securities Co. v. Adams*, 33 Wyo. 45, 49, 236 Pac. 513, 514 (1925). It is "a purely voluntary act . . ." and ". . . totally inadmissible when contrary to the policy or prejudicial to the interests of the forum." See *Minor v. Cardwell*, 37 Mo. 350, 354 (1866).

<sup>4</sup> Cf. Note (1932) 80 U. OF PA. L. REV. 1139. "The significance of the contract relation is foundational." See *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 371, 94 Atl. 372, 374 (1915). See also *Pierce v. Bekins Van & Storage Co.*, 185 Iowa 1346, 1355, 172 N. W. 191 (1919). When courts wished to assert their own law, they met this proposition by the statement that the forum superimposed the defendant's obligation under workmen's compensation as a condition of the performance of the contract within the state. See *Hagenbeck and Great Wallace Show Co. v. Randall*, 75 Ind. App. 417, 422, 126 N. E. 501, 503 (1920). The "statutory relation" which the Supreme Court insists on, see *Cudahy Packing Co. v. Parramore*, 263 U. S. 418, 423, 44 Sup. Ct. 153, 154 (1923); *Bradford Electric Light Co. v. Clapper*, *supra* note 1, at 158, 52 Sup. Ct. at 575, would suggest an analogy to the wife who removes from the foreign jurisdiction, *Baer Bros. v. Terry*, 105 La. 479, 29 So. 886 (1901), or the non-resident wife who tries to escape the laws of her domicile, *Merrielles v. State Bank of Keokuk*, 5 Tex. Civ. App. 483, 24 S. W. 564 (1893); *Walker v. Goetz*, 218 S. W. 569 (Tex. Civ. App. 1920), neither of whom are accorded the benefit of the exemption laws of the forum.

<sup>5</sup> See U. S. Const., art. 4, § 1.

<sup>6</sup> *Falls v. U. S. Savings Loan & Bldg. Co.*, 97 Ala. 417, 13 So. 25 (1892) (allowance of more than 8% interest).

<sup>7</sup> *Fisher v. Lord*, 63 N. H. 514, 3 Atl. 927 (1886) (plaintiff not only sold defendant intoxicating liquors but aided defendant to violate the laws of the forum).

<sup>8</sup> Thus one case found it possible to cite the *Kensington, Bond, and Grosman* cases (all of which see *infra*) without itself mentioning public policy. *Bothwell v. Buckbee-Mears Co.*, 275 U. S. 274, 48 Sup. Ct. 124 (1927). If public policy has the broad meaning of requiring contracts to be valid by the law of the forum (practically a repudiation of the general rule), little utility would appear to be left for the word. See *Veytia v. Alvarez*, 30 Ariz. 316, 328, 247 Pac. 117, 121 (1926). Note, in this connection, that in *Sally v. Bank of Union*, 150 Ga. 281, 103 S. E. 460 (1920), the certified question asks whether, if making a married woman liable on her contract of suretyship is "in contravention of express statute law of the forum" it should be enforced, the court decides that it is "contrary to the policy of this State as expressed by statute."

Similarly, a declaration that the statute of the forum is without extra-territorial effect<sup>9</sup> may be ample to allow enforcement of the foreign right. Presumptions arising from failure to plead or impropriety in proving the foreign law have often intervened. The presumption that the law of the alien jurisdiction is the same as that of the forum has been used to overthrow<sup>10</sup> more often than uphold<sup>11</sup> the asserted foreign right; *per contra*, the presumption that the common law prevails in the foreign jurisdiction is generally a saving influence.<sup>12</sup> Where courts are required to take judicial notice of the laws of the several states, this device is of course unavailable.<sup>13</sup>

It has been intimated that the requirement of the foreign right's non-conflict with the statute, or the policy of the forum has been applied only to "substantive matters affecting [the] right of action."<sup>14</sup> While this may express a terminological desideratum, such a statement is nevertheless not wholly true. Usage which applies the argument of public policy to the enforcement of penal laws,<sup>15</sup> the assumption of jurisdiction in particular cases,<sup>16</sup> and to the application of comity in gen-

<sup>9</sup> Cf. *Boston & M. R. Co. v. McDuffey*, 79 Fed. 934 (C. C. A. 2d, 1897) (death statute).

<sup>10</sup> *J. R. Watkins Co. v. McMullan*, 6 S. W.(2d) 823 (Tex. Civ. App. 1928) (violation of anti-trust laws—defendant restricted to prescribed area); cf. *Golder v. Golder*, 235 Mass. 261, 126 N. E. 382 (1920) (married women's disability—foreign law not appearing, law of forum governs); see *Bramwell v. Conquest*, 2 S. W.(2d) 995 (Tex. Civ. App. 1928) (married woman's disability).

<sup>11</sup> *Norfolk & W. Ry. Co. v. Denny's Adm'r*, 106 Va. 383, 56 S. E. 321 (1907) (death statute); see *The Miguel Di Larrinaga*, 217 Fed. 678, 679 (S. D. N. Y. 1914) (presumption that a contract valid where made is valid everywhere overrides presumption that the law of the place of the tort is like the law of United States).

<sup>12</sup> *Henning v. Hill*, 80 Ind. App. 363, 141 N. E. 66 (1923) (parol contract for commission on the sale of land); *Atwater v. Edwards Brokerage Co.*, 147 Mo. App. 436, 126 S. W. 823 (1910) (futures where only one party did not intend delivery); *Zeltner v. Irwin*, 25 App. Div. 228, 49 N. Y. Supp. 337 (1st Dept. 1898) (gambling contract); *Columbian Building & Loan Ass'n v. Rice*, 68 S. C. 236, 47 S. E. 63 (1904) (usury); cf. *Schlee v. Guckenheimer*, 179 Ill. 593, 54 N. E. 302 (1899).

<sup>13</sup> Cf. *Williams v. Scaife & Sons Co.*, 227 Fed. 922 (D. N. J. 1915) (death statute); *Jacobs v. Hyman*, 286 Fed. 346 (C. C. A. 5th, 1923) (future); *Loranger v. Nadeau*, 1 P.(2d) 1049 (Cal. 1931) (guest-driver statute).

<sup>14</sup> See *St. Bernard v. Shane*, 220 Fed. 852, 856 (C. C. A. 6th, 1915).

The public policy of the foreign jurisdiction, along with its statutes and decisions helps fix the plaintiff's rights and remedies in the forum, see *Wasilewski v. Warner Sugar Refining Co.*, 87 Misc. 156, 159, 149 N. Y. Supp. 1035, 1036 (City Ct. 1914), but that is not our concern here.

<sup>15</sup> *Christilly v. Warner*, 87 Conn. 461, 88 Atl. 711 (1913) (death statute); *Botts v. Mercantile Bank of Memphis*, 170 App. Div. 879, 156 N. Y. Supp. 700 (Sup. Ct. 1915) (futures transaction).

<sup>16</sup> *Upson v. Robison*, 179 Ark. 600, 17 S. W.(2d) 305 (1929) (since an action on a debt concerning, and not a lien against, foreign land, not against public policy to take jurisdiction); *Meacham v. Jamestown, F. & C. R. Co.*, 211 N. Y. 346, 105 N. E. 653 (1914) [attempt to adjust all differences by arbitration, valid by Pennsylvania law, held against policy of state—a substantive use. But see *Cardozo, J. concurring*].

eral<sup>17</sup> is, from this point of view, confusing. Statutes have also been considered indicative of public policy concerning remedies;<sup>18</sup> or specific sections of them have been dismissed as going to the remedy, while the statute as a whole has been conned for its bearing on the forum's policy.<sup>19</sup> Or, after a decision that a suspect provision is remedial, a court may gratuitously add that it is<sup>20</sup> or is not<sup>21</sup> against public policy. Few courts consciously approach the sophistication of the court which said that it would not allow a right not contrary to the public policy of the forum to be defeated by calling it a remedy.<sup>22</sup> The use of public policy to trample upon an already prostrated foreign right<sup>23</sup> is as prolific of confusion as the failure to use it in fields to which it is properly applicable.<sup>24</sup> A final factor which, once dissociated from the general *mêlée*, can perhaps clear up some of the confusion in the field is the position of the federal courts which declare themselves not bound by state court decisions where the question is a matter of general law,<sup>25</sup> or, tantamount to that, a mercantile matter,<sup>26</sup> or where there is involved

<sup>17</sup> See *Forgan v. Bainbridge*, *supra* note 2, at 412, 274 Pac. at 157 (1928) (recording of chattel mortgage); *Union Securities Co. v. Adams*, *supra* note 3, at 57, 236 Pac. at 517 (recording of chattel mortgage) (policy of every state should be to extend comity, but not where there is lack of reciprocity).

<sup>18</sup> See *Hamilton v. Glassell*, 57 F.(2d) 1032, 1034 (C. C. A. 5th, 1932) (statute of frauds); *cf. Wooden v. Western N. Y. and Penn. Ry. Co.*, 126 N. Y. 10, 26 N. E. 1050 (1891) (restriction on amount of damages in death statute).

<sup>19</sup> *Armbruster v. Chicago, R. I. & P. Ry. Co.*, 166 Iowa 155, 147 N. W. 337 (1914) (death statute); *Wooden v. Ry.*, *supra* note 18; *Brown v. Perry*, 104 Vt. 66, 156 Atl. 910 (1931) (death statute); *cf. Hanna v. Grand Trunk Ry. Co.*, 41 Ill. App. 116 (1891) (question involved was whether judge or jury, or jury alone, should determine the assessment of damages).

<sup>20</sup> See *Mount Ida School for Girls v. Rood*, 253 Mich. 482, 487, 490, 235 N. W. 227, 230 (1931) (forum required proof of damages on breach of a contract, the foreign jurisdiction allowed recovery on the full contract price).

<sup>21</sup> *Cf. Evey v. Mexican Cent. Ry. Co.*, 81 Fed. 294 (C. C. A. 5th, 1897) (objectionable factors held matters relating to procedure, not to right, nor even remedy).

<sup>22</sup> See *Lowry v. Fidelity-Phenix Fire Insurance Co.*, 219 Mo. App. 121, 132, 272 S. W. 79, 83 (1925) (recovery of attorney's fees).

<sup>23</sup> *Citizen's Bank of Waynesboro, Ga., v. Hibernia Bank and Trust Co.*, 19 La. App. 461, 140 So. 705 (1932); *cf. Hirschfeld v. McCullagh*, 64 Ore. 502, 127 Pac. 541 (1912), *aff'd* on other grounds, 64 Ore. 502, 130 Pac. 1131 (1913), where after a decision that the contract was a forum contract, it was said that the law of the forum governs the remedy, which will not be applied if the contract, though valid elsewhere, is contrary to the public policy of the forum.

<sup>24</sup> *Supra* p. 510. *Cf. Becker v. Interstate Business Men's Ass'n*, 265 Fed. 508 (C. C. A. 8th, 1920) (insurance policy provision that no liability shall result from bodily injury produced by firearm unless an eyewitness was present held not a stipulation as to what type of evidence the courts shall receive, but a contractual limitation of the risk).

<sup>25</sup> See *Texas & P. Ry. Co. v. Cox*, 145 U. S. 593, 605, 12 Sup. Ct. 905, 909 (1892) (death statute); *Greaves v. Neal*, 57 Fed. 816, 817 (1893) (assignment for benefit of general creditors) (the federal courts need not even investigate the law of the forum); *cf. Missouri Pac. Ry. v. Larussi*, 161 Fed. 66 (C. C. A. 7th, 1908). But see *Forepaugh v. Delaware, L. & W. R. Co.*, *supra* note 2, at 226, 18 Atl. at 505, where the theory of *Swift v. Tyson* is vigorously attacked.

<sup>26</sup> See *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 443, 9 Sup. Ct. 469, 472 (1889) (carrier's liability).

a question of international comity.<sup>27</sup> Federal courts, with their wide-flung organization, are perhaps more likely to entertain tolerant views on public policy.<sup>28</sup>

The usual order of things in a conflicts case is for a court first to determine the jurisdiction whose law controls the transaction, and then, if the transaction be not invalid under that law,<sup>29</sup> decide its repugnancy to the policy of its own laws.<sup>30</sup> In practice, however, the expected order of procedure is often inverted, and the court saves considerable ratiocinative labor. *Because* the foreign law alleged violates public policy, the technical conflicts problem need not be settled<sup>31</sup> nor need the foreign law even be inquired into;<sup>32</sup> *because* the foreign law does not violate public policy, inquiries into the law of the forum become superfluous,<sup>33</sup> or it becomes unnecessary to decide which of two outside jurisdictions both favorable to the asserted right prevail,<sup>34</sup> or the favorable jurisdiction is accorded preference over a jurisdiction with a law inimical to the forum's policy.<sup>35</sup> This, plus the indifference of many of the cases to factors of location, renders difficult a statement as to whether the rebuffing public policy can become less stringent as the forum acquires more contacts and still be effectual to rebut the alien right.<sup>36</sup> It has been difficult to see how public policy can be affected<sup>37</sup> or the rights and interests of the forum's citizens injured<sup>38</sup> by contracts made and entirely to be performed without the forum;<sup>39</sup> the *Straus* case,<sup>40</sup> however,

<sup>27</sup> See *Evey v. Mexican Cent. Ry. Co., Ltd.*, *supra* note 21, at 309.

<sup>28</sup> *Cf. Swann v. Swann*, 21 Fed. 299 (C. C. E. D. Ark. 1884) (Sunday law).

<sup>29</sup> Of course if the transaction is invalid under the laws of the foreign jurisdiction, it is invalid everywhere. STORY, CONFLICT OF LAWS (8th ed. 1883) 327.

<sup>30</sup> This suggests a possible method of circumventing the Bradford case, *supra* note 1; one need simply make an erroneous decision on the conflicts question. See note 1, *supra* and note particularly the qualifications on the doctrine there considered.

<sup>31</sup> *Cf. Atlantic & W. P. R. Co. v. Broome*, 3 Ga. App. 641, 60 S. E. 355 (1908) (carrier's liability); *Vandalia R. R. Co. v. Kelly*, 187 Ind. 323, 119 N. E. 257 (1918) (worker's relief fund); *Ayub v. Saloman*, 252 S. W. 291 (Tex. Civ. App. (1923) (intoxicating liquors). *Cf.* also, less explicitly, *J. R. Watkins Co. v. McMullan*, *supra* note 10 (violation of anti-trust laws).

<sup>32</sup> *Cf. St. Louis Southwestern Ry. Co. of Texas v. McIntyre*, 36 Tex. Civ. App. 399, 82 S. W. 346 (1904) (arbitrary limitation of carrier's liability).

<sup>33</sup> *Cf. Baltimore & Ohio R. R. Co. v. Glenn*, 28 Md. 287 (1868); *Forepaugh v. Delaware, L. & W. R. Co.*, *supra* note 2.

<sup>34</sup> *Cf. Klein v. Keller*, 42 Okla. 592, 141 Pac. 1117 (1914).

<sup>35</sup> *Cf. Forgan v. Bainbridge*, *supra* note 2.

<sup>36</sup> A table of inverse variation would be extremely interesting if the number of cases permitted reliable generalization.

<sup>37</sup> See *The Fri*, 154 Fed. 333, 338 (C. C. A. 2d, 1907), *cert. den.*, 210 U. S. 431, 28 Sup. Ct. 761 (1908) (carrier's liability).

<sup>38</sup> See *Greenwood v. Curtis*, 6 Mass. 358, 380 (1810) (slave trading); *cf. Vanbuskirk v. Hartford Fire Insurance Co.*, 14 Conn. 583 (1842). For this as a component of the public policy concept, see *infra* notes 103 *et seq.*

<sup>39</sup> *Cf. Cervceria Cuauhtemoc v. Sonora Bank & Trust Co.*, 33 Ariz. 220, 263 Pac. 626 (1928) (intoxicating liquors). Also *cf.*, less definitely, *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664 (1896) (tort action for personal injury).

<sup>40</sup> *Straus & Co., Inc. v. Canadian Pacific Ry. Co.*, 254 N. Y. 407, 173 N. E. 564 (1930) (carriers' liability exemption), discussed in (1930) 30 COLUMBIA LAW

was a crushing blow to those who expected a liberal tendency in this direction to prevail.

Public policy, amazingly shifty phenomenon,<sup>41</sup> finds expression indifferently in the constitution, statutes or judicial records of a state<sup>42</sup> although many cases in *dicta* overlook the constitutional aspect.<sup>43</sup> What is the relative importance of these three? In the face of a constitutional declaration, the legislature<sup>44</sup> and the courts are equally powerless,<sup>45</sup> even to the invalidation of transactions centered entirely without the forum.<sup>46</sup> Perhaps this serves in part to explain the strong refusal of the courts to waive woman's disabilities.<sup>47</sup> The status of most state constitutions as glorified statute books has no doubt, however, served to lessen their significance in this connection.

REV. 495. New York, it will be recalled, was a *bête noire* as far as the carrier's liability exemptions was concerned, precipitating, by its one-time affirmance of their validity, many of the situations in which other jurisdictions were troubled by the public policy problem. And in the Straus case, with all British contacts, judgment for plaintiff was affirmed! For the implications of this last see *infra* notes 154 *et seq.* Cf. *Home Ins. Co. v. Dick*, *supra* note 1 (mainly non-forum contacts).

<sup>41</sup> "Different States may have different policies and the same State different policies at different times. . . ." See *Wall v. Chesapeake & O. Ry. Co.*, 290 Ill. 227, 231, 125 N. E. 20, 22 (1919) (death statute); *Sutterly v. Fleshman*, 41 Pa. Super. Ct. 131, 134 (1909) (futures). As illustrations, see the Straus case, *supra* note 40, at 413, and *cf.* *Richardson v. N. Y. Central R. R. Co.*, 98 Mass. 85 (1867) with *Hanlon v. Frederick Leyland & Co.*, 223 Mass. 438, 111 N. E. 907 (1916), revealing the metamorphosis of attitude with respect to death statutes.

<sup>42</sup> See *e.g.*, *Chubbuck v. Holloway*, 182 Minn. 225, 227, 234 N. W. 314, 315 (1931); *Taylor v. Leonard*, *supra* note 2, at 135 ("unwritten or common law").

These are the only authentic and admissible evidence of public policy. See *Swann v. Swann*, *supra* note 28, at 301. Cf. *Newlin v. St. Louis & S. F. R. Co.*, *supra* note 3, for the interplay of these three factors. One should also note, as not many courts do, that public policy may be controlled by the Constitution, laws, and treaties of the United States, or (presumably for federal courts only) by the general principles of the commercial, and mercantile law. See *Becker v. Interstate Business Men's Acc. Ass'n of Des Moines, Iowa*, *supra* note 24, at 510.

<sup>43</sup> A plaintiff cannot rely on an act not recognized by the legislative, executive, and judicial authorities of the foreign jurisdiction to contravene the public policy of the forum. See *Wasilewski v. Warner Sugar Refining Co.*, *supra* note 14, at 160, 149 N. Y. Supp. at 1037; *Fox v. Postal Telegraph-Cable Co.*, 138 Wis. 648, 653, 120 N. W. 399, 400 (1909); *cf.* *Davis v. Jointless Fire Brick Co.*, 300 Fed. 1 (C. C. A. 9th, 1924) for a handling of these two factors in juxtaposition.

<sup>44</sup> Although a Washington statute is violated in State *ex rel.* *Baker River & Shuiksan R. Co. v. Nichols*, 51 Wash. 619, 99 Pac. 876 (1909) (appropriation of existing corporate name), a general provision of the constitution and judicial declarations (on another issue) are stressed in deciding that the public policy of the state has been infringed.

<sup>45</sup> See *Chicago, B. & Q. R. Co. v. Gardiner*, 51 Neb. 70, 81, 70 N. W. 508, 511 (the liability of a common carrier shall never be limited). A constitutional provision may be solely prospective in operation, *e.g.*, no conception of public policy shall hereafter invalidate a workmen's compensation act. See *Wasilewski v. Warner Sugar Refining Co.*, *supra* note 14, at 160, 149 N. Y. Supp. at 1037.

<sup>46</sup> *Ayub v. Automobile Mortgage Co.*, 252 S. W. 287 (Tex. Civ. App. 1923) (the force of the law of the United States was added to the constitutional sanction).

<sup>47</sup> See *Lloyd v. Cooper Corporation*, 101 Fla. 533, 134 So. 562 (1931); *Ulman, Magill & Jordan Woolen Co. v. Magill*, 155 Ga. 555, 556, 117 S. E. 657 (1923).

Usually, the legislature establishes the policy of the forum<sup>48</sup> and the court's duty is to give effect to its declaration<sup>49</sup>—the “judicial rule of comity gives way.”<sup>50</sup> The persistent existence of a statute is particularly persuasive.<sup>51</sup> However a statute which has been held harsh, in derogation of the common law, and therefore strictly to be construed, will not suffice.<sup>52</sup>

Even without indication occasionally present that the courts are the controlling factor in the situation,<sup>53</sup> and despite *caveats* for them not to encroach on the legislature's prerogative,<sup>54</sup> it would still remain that the

<sup>48</sup> See, e.g., *Shore Acres Properties, Inc. v. Morgan*, 44 Ga. App. 128, 129, 160 S. E. 705 (1931); *Commonwealth Mut. Fire Ins. Co. v. Hayden*, 60 Neb. 636, 638, 83 N. W. 922, 923 (1900); *Henni v. Fidelity Building and Loan Ass'n*, 61 Neb. 744, 746, 86 N. W. 475, 476 (1901). It is also said that a statute is evidence that the policy of the forum is favorable to the assertion of certain rights. See *Chicago, St. Louis & New Orleans R. R. Co. v. Doyle*, 60 Miss. 977, 983 (1883). Statutes must speak affirmatively as against the common law. Thus if they do not go as far as to enable a woman to bind her separate property to the securing of her husband's debts, they forbid it. See *Union Trust Co. v. Grosman*, *supra* note 2, at 417, 38 Sup. Ct. at 148 (1918). Nor is a legislative modification of public policy posterior to the creation of a right of action of any avail, see *The Glenmavis*, 69 Fed. 472, 478 (E. D. Pa. 1895); nor understandably enough, does the adoption of the 19th Amendment, probably even before the cause of action arose, change the legal status of the wife as merged in her husband's. Cf. *Ulman, Magill & Jordan Woolen Co., Inc. v. Magill*, *supra* note 47.

<sup>49</sup> See *Thompson v. Taylor*, 65 N. J. L. 107, 109, 46 Atl. 567, 568 (1900).

<sup>50</sup> See *In re Dennis' Estate*, 98 Vt. 424, 426, 129 Atl. 166, 167 (1925); or in alternative phraseology, the state may, by appropriate legislation, decline to observe the rule of comity, see *Herold Motorcar Co. v. Commonwealth*, 216 Ky. 335, 338, 287 S. W. 939, 940 (1926) (recording of chattel mortgage). Even when dealing with citizens of the forum, the courts should wait for an express legislative requirement and should not presume judicially to abrogate part of the “law of nations,” i.e., comity. See *Van Buskirk v. Hartford Fire Insurance Co.*, *supra* note 38, at 593. The theory that comity is of the states, and not of the courts, is now probably only another way of emphasizing the legislature's predominance. See (1928) 5 N. Y. U. L. REV. 69.

<sup>51</sup> See *Ulman, Magill & Jordan Woolen Co., Inc. v. Magill*, *supra* note 47, at 557, 117 S. E. at 658 (married woman's disability from suit on insurance contract); *Gooch v. Faucett*, 122 N. C. 270, 273, 29 S. E. 362, 363 (1898) (statute prohibiting gambling existent in forum for over 100 years). Perhaps it is as universally accepted that one cannot relax a newly established public policy, which is supreme. See *Carl Hagenbeck & Great Wallace Show Co. v. Randall*, *supra* note 4, at 422, 126 N. E. at 502 (workmen's compensation).

<sup>52</sup> See *Sullivan v. German National Bank of Denver*, 18 Colo. App. 99, 106, 70 Pac. 162, 165 (1902) (gambling statute).

<sup>53</sup> “The statutory restatement of the rule of the common law [here, the fellow-servant rule] can be given but a limited significance in establishing a public policy as compared with the public policy reflected by the judicial record in the *Herrick case*” [*infra* note 93, where the fellow-servant rule had but common law sanction]. See *Chubbuck v. Holloway*, *supra* note 42, at 228, 234 N. W. 314, at 315. Before a foreign contract will be denied enforcement it must be something inherently bad, “shocking to one's sense of . . . right as measured by moral standards,” and “in the judgment of the courts, pernicious and injurious to the public welfare.” See *International Harvester Co. of America v. McAdam*, 142 Wis. 114, 120, 124 N. W. 1042, 1044 (1910).

<sup>54</sup> See *Henning v. Hill*, *supra* note 12, at 370, 141 N. E. at 69 (a “delicate and undefined power,” which, like the declaration of a statute's unconstitutionality, should be used only in cases free from doubt).



specific application of the constitutionally and legislatively declared public policy of the state is entrusted to them,<sup>55</sup> although they are to act only in clear cases.<sup>56</sup> One case, however, suggests the issue whether the arbitrary judgment of a ministerial officer can declare public policy.<sup>57</sup> The courts must raise the issue of public policy even if the parties do not.<sup>58</sup> The danger, or perhaps the advantage, of leaving the courts the final arbiters is that they may be influenced by the specific facts of the case confronting them. They note that it will be impossible to serve the defendant with process in another jurisdiction;<sup>59</sup> that it is a citizen of their own state who will be prejudiced by the application<sup>60</sup> or non-application<sup>61</sup> of the foreign law,<sup>62</sup> or that nobody is prejudiced anyway;<sup>63</sup> that the party asserting public policy,<sup>64</sup> or the party against whom public policy is being asserted,<sup>65</sup> is morally culpable, if not

<sup>55</sup> This is so whether, with White, *C.J.*, we assume that the courts may participate with the legislature in the ascertainment of the conditions which constitute a violation of public policy, see *Bond v. Hume*, 243 U. S. 15, 21 *et seq.*, 37 Sup. Ct. 366, 368 (1917), or whether we adopt, on the Austinian and Benthamite model, the theory that the legislature creates public policy and the courts merely declare it, see *Raisor v. Chicago & A. R. Co.*, 215 Ill. 47, 56, 74 N. E. 69, 73 (1905). See, also *Fox v. Postal Telegraph-Cable Co.*, *supra* note 43, at 653, 120 N. W. at 400.

A discovery, on rehearing, that Congress, as well as the federal judges, had sanctioned a certain practice of bargaining for reduced punishments, was merely the signal for a renewed outburst of indignation about the iniquity of the practice in *Wight v. Rindskopf*, 43 Wis. 344 (1877), an action by an attorney to recover money for securing the defendant a mitigation of punishment.

<sup>56</sup> See *Bond v. Hume*, *supra* note 55, at 21, 37 Sup. Ct. at 368; *Beach, J., dissenting*, in *Christilly v. Warner*, *supra* note 15, at 472, 88 Atl. at 715; *Henning v. Hill*, *supra* note 12, at 370, 141 N. E. at 69.

<sup>57</sup> See *State ex rel. Baker River & Shuiksan R. Co. v. Nichols*, *supra* note 44, at 621, 99 Pac. at 877.

<sup>58</sup> See *Minzeshheimer v. Doolittle*, 60 N. J. Eq. 394, 397, 45 Atl. 611, 612 (1900) (a futures transaction); *Nielsen v. Donnelly*, 110 Misc. 266, 181 N. Y. Supp. 509 (Mun. Ct. 1920); *cf. Wight v. Rindskopf*, *supra* note 55.

<sup>59</sup> See *Chubbuck v. Holloway*, *supra* note 42, at 228, 234 N. W. at 316; *Floyd v. Vicksburg Cooperage Co.*, 156 Miss. 567, 581, 126 So. 395, 399 (1930) (workmen's compensation); *Loucks v. Standard Oil Co. of N. Y.*, 224 N. Y. 99, 112, 120 N. E. 198, 202 (1918) (death statute).

<sup>60</sup> See *Succession of Petit*, 49 La. Ann. 625, 629, 21 So. 717, 718 (1897).

<sup>61</sup> See *Chubbuck v. Holloway*, *supra* note 42, at 228, 234 N. W. at 316.

<sup>62</sup> Realization is present that occasional instances of hardship affecting the citizens of the forum should not countervail against the possible mischievous results that would ensue if retaliation were used by the other state. See *Studebaker Bros. Co. v. Mau*, 14 Wyo. 68, 80, 82 Pac. 2, 6 (1905) (conditional sale contract); note 3, *supra*.

<sup>63</sup> As when the beneficiaries in the immediate case turn out to be the same under the forum and foreign death statutes, see *Morris v. Chicago, R. I. & P. R. Co.*, 65 Iowa 727, 731, 23 N. W. 143, 146 (1885); *cf. Whitlow v. Nashville, C. & St. L. R. Co.*, 114 Tenn. 344, 84 S. W. 618 (1904), or when the defendant, against whom the decision went, is in fact advantaged by his plea of contributory negligence. See *Johnston v. Chicago Great Western R. Co.*, *supra* note 3, at 263 (1914).

<sup>64</sup> See *Sullivan v. German Nat. Bank of Denver*, *supra* note 52, at 106, 70 Pac. at 165; *Eubanks v. Banks*, 34 Ga. 407, 417 (1866) ("disreputable" attempt by the older line of issue to bastardize the younger line of issue).

<sup>65</sup> See *Fidelity Sav. Ass'n v. Shea*, 6 Idaho 405, 415, 55 Pac. 1022, 1025 (1899) (usurious transaction masked as an issuance of shares in a corporation); *Palmer v. Palmer*, 26 Utah 31, 45, 72 Pac. 3, 9 (1903) (a contract to facilitate divorce not enforced; the husband was a drunkard and deceived his wife).

legally; or that the case illustrates precisely the evil result that a strict enforcement of the public policy of the forum would obviate.<sup>66</sup>

Occasionally, the judge looks beyond the borders of his own state.<sup>67</sup> The fact that the legislation in question is progressive,<sup>68</sup> or is in accord with the weight of authority<sup>69</sup> conduces to the decision that public policy is not violated; that a foreign jurisdiction has overruled the case which was the inspiration of the forum's line of cases has been found persuasive.<sup>70</sup> Or he may rely, as sufficient to prevail over any local considerations, on certain broad principles, not necessarily inherently connected with the foreign statute, *e.g.*, the commercial law doctrine of protecting a *bona fide* purchaser,<sup>71</sup> the presence of injury to interstate and foreign commerce,<sup>72</sup> the principle holding every man receiving valuable consideration to the full and fair performance of his contract,<sup>73</sup> the general principle that an individual's estate be applied to the payment of his debts.<sup>74</sup> In general, though, the "vested rights" doctrine has not re-

<sup>66</sup> See *The Hugo*, 57 Fed. 403, 411 (S. D. N. Y. 1893), where the court remarked that perhaps the exemption from liability for accident or mortality might have hastened the readiness of the master to make an indiscriminate sacrifice of all the cattle on board. And courts are no doubt impressed with the need for attaching serious consequences to failure of insurance companies to comply with regulations intended for the protection of the forum's citizens, when the action is brought by the receiver of an insolvent company. *Cf.* *Seamans v. Zimmerman*, 91 Iowa 363, 59 N. W. 290 (1894); *Seamans v. Temple Co.*, 105 Mich. 400, 63 N. W. 408 (1895); *Rose v. Kimberly & Clark Co.*, 89 Wis. 545, 62 N. W. 526 (1895).

<sup>67</sup> Perhaps something of this sort is indicated by the proposition that comity does not require the forum to enforce rights when they are "repugnant to its own policy or to public policy." See *Hartford Accident & Indemnity Co. v. City of Thomasville, Ga.*, 100 Fla. 748, 751, 130 So. 7, 8 (1930).

<sup>68</sup> See *Albanese v. Stewart*, 78 Misc. 581, 582, 139 N. Y. Supp. 942, 943 (Sup. Ct. 1912), where a demurrer on the basis of public policy by the plaintiff to the defense that the plaintiff should have pleaded the New Jersey Workmen's Compensation Act was overruled.

<sup>69</sup> See *Slattery v. Hartford-Connecticut Trust Co.*, 161 Atl. 79, 80 (Conn. 1932) (allowing a son to inherit from his natural as well as his adoptive father); *cf.* *Garrigue v. Keller*, 164 Ind. 676, 688, 74 N. E. 523, 527 (1905) (married woman's disability).

<sup>70</sup> Particularly if other states have conflicting decisions. \*See *Haase v. First Nat. Bank of Amiston*, 203 Ala. 624, 625, 84 So. 761, 762 (1920) (assignment of life insurance policy to party without insurable interest).

<sup>71</sup> See *Sullivan v. German Nat. Bank of Denver*, *supra* note 52, at 106, 70 Pac. at 165 (note the strong kind of case required for the public policy exception). But *cf.* *Pope v. Hanke*, 155 Ill. 617, 40 N. E. 839 (1894) (futures).

<sup>72</sup> *Schweitzer v. Hamburg-American Line*, 78 Misc. 448, 452, 138 N. Y. Supp. 944, 946 (Sup. Ct. 1912) (workmen's compensation); *cf.* *Lee v. Belknap*, 163 Ky. 418, 437, 173 S. W. 1129, 1137 (inheritance case; indispensable to interstate exchange of private and business affairs). But see *Wiggins v. Postal Telegraph Co.*, 130 S. C. 292, 295, 125 S. E. 568 (1924) (failure to transmit message directing the sale of an illegal future). Comity, it should be recalled, is essential to the security of interstate and international commercial transactions. See *Studebaker Bros. Co. of Utah v. Mau*, *supra* note 62, at 80, 82 Pac. at 4.

<sup>73</sup> See *Henning v. Hill*, *supra* note 12, at 370, 141 N. E. at 69 (parol contract for commissions on the sale of lands).

<sup>74</sup> See *New York Trust Co. v. Brewster*, 241 Mass. 155, 158, 134 N. E. 616, 618 (1922).

ceived much conscious application.<sup>75</sup> He may find precedents in past conflicts cases in his own jurisdiction, although language employed in these cases emphasizes the unnecessariness,<sup>76</sup> as his results depict the futility, of such a technique. Thus, in a manner reminiscent of Cardozo's color-matching and card-index judge,<sup>77</sup> he may note that usury<sup>78</sup> and gambling<sup>79</sup> transactions banned by the law of the forum and even a marriage contracted elsewhere to avoid that law,<sup>80</sup> have nevertheless been enforced by virtue of their validity in the determinative foreign jurisdiction; gambling contracts have, however, generally been differentiated.<sup>81</sup> In decisions refusing enforcement, cases involving assignments for the benefit of creditors,<sup>82</sup> and futures<sup>83</sup> have been cited as persuasive analogies and the usury cases differentiated;<sup>84</sup> illegal futures are denominated gambling contracts.<sup>85</sup>

Other courts come closer to the specific policy issue controverted. The statutes of the forum and of the foreign state need not be identical or precisely alike;<sup>86</sup> the mere existence of slight variations does not con-

<sup>75</sup> The phrase appears in the general pronouncement on violation of public policy in the case of *Chubbuck v. Holloway*, *supra* note 42, at 228, 234 N. W. at 316, and is invoked in opposition to the misleading word "comity" in *Loucks v. Standard Oil Co.*, *supra* note 59, 110, 120 N. E. at 201, but the concept does not figure much in the articulate rationale of the majority of the cases. Comity is the accepted theory. See *supra* note 3. But *cf.* *Bradbury v. Chicago, R. I. & P. Ry. Co.*, 149 Iowa 51, 128 N. W. 1 (1910) (whether the federal employer's liability act can be enforced in the state court), where it is said that once a cause of action is fixed, and legal liability incurred, the doors of the courts should not be closed unless it is against the laws and public policy of the forum.

<sup>76</sup> Ideally, the decision is on principles running through all the cases and higher than any of them. See *Wight v. Rindskopf*, *supra* note 55, at 355.

<sup>77</sup> See *CARDOZO, THE NATURE OF THE JUDICIAL PROCESS* (1928) 20, 21.

<sup>78</sup> See *Greenwood v. Curtis*, *supra* note 38, at 378 (sale of slaves); *Thuna v. Wolf*, 130 Misc. 306, 310, 223 N. Y. Supp. 765, 770 (City Ct. 1927) (gambling); *Forepaugh v. Delaware, L. & W. R. Co.*, *supra* note 2, at 226, 18 Atl. at 506 (carrier's liability exemption); *Hatcher v. Idaho Gold & Ruby Mining Co.*, 106 Wash. 108, 113, 179 Pac. 106, 108 (1919) (forum requires payment of laborers in cash; *cf. infra* note 84).

<sup>79</sup> See *Swann v. Swann*, *supra* note 28, at 307 (Sunday law). The court had some qualms on the desirability of this precedent.

<sup>80</sup> See *Veytia v. Alvarez*, *supra* note 8, at 328, 247 Pac. at 121 (sale of intoxicating liquor).

<sup>81</sup> See *Columbian Building & Loan Ass'n v. Rice*, *supra* note 12, at 241, 47 S. E. at 65 (usury).

<sup>82</sup> See *Chicago, B. & Q. R. Co. v. Gardiner*, *supra* note 45, at 81, 70 N. W. at 510 (carrier's liability); *Flagg v. Baldwin*, 38 N. J. Eq. 219, 225 (1884) (futures).

<sup>83</sup> See *Chicago, B. & Q. R. Co. v. Gardiner*, *supra* note 45, at 81, 70 N. W. at 510.

<sup>84</sup> See *Flagg v. Baldwin*, *supra* note 82, at 226; *Gooch v. Faucett*, *supra* note 51, at 273, 29 S. E. at 364.

<sup>85</sup> See *Pope v. Hanke*, *supra* note 71, at 630, 40 N. E. at 840; *Atwater v. A. G. Edwards & Sons Brokerage Co.*, 147 Mo. App. 436, 444, 126 S. W. 823, 826 (1910). *Cf.* the wagering element as possibly serving to vitiate an assignment of an insurance policy, *Haase v. First National Bank of Amiston*, see *supra* note 70.

<sup>86</sup> See *Wooden v. Ry.*, *supra* note 18, at 15, 26 N. E. at 1050. It is sufficient if they are "of similar import and character founded upon the same principle, and possessing the same general attributes."

stitute a difference in policy<sup>87</sup>—otherwise comity would be virtually abolished.<sup>88</sup> Foreign rights of action are enforced either because the general “principle” of the foreign statute has been recognized in the forum,<sup>89</sup> or because the forum has recognized other actions with the same disturbing feature,<sup>90</sup> or because the forum has allowed the larger class of causes of action of which the mooted type of action was only a part,<sup>91</sup> or because there is present a statute of more restricted scope but of similar tenor in the forum.<sup>92</sup> The following is presented as a reasonable hypothesis

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<sup>87</sup> See *Bradbury v. Chicago, R. I. & P. Ry. Co.*, *supra* note 75, at 64, 128 N. W. at 6; *Jerome P. Parker-Harris Co. v. Stephens*, *supra* note 3, at 378, 224 S. W. at 1038; *Miller v. Tennis*, 140 Okla. 185, 190, 282 Pac. 345, 350 (1929) (action under foreign employers' liability act allowed in a jurisdiction which had workmen's compensation).

<sup>88</sup> See *Lee v. Belknap*, *supra* note 72, at 437, 173 S. W. at 1137 (where the law of New York, the residence of husband and wife after marriage, was applied to give the husband all of his wife's estate, whereas the forum would have given him only one-half).

<sup>89</sup> See *Floyd v. Vicksburg Cooperage Co.*, *supra* note 59, at 580, 126 So. at 398, where it is said that the principle of liability and survivorship had been recognized long before the adoption of workmen's compensation, which merely determined maxima and minima of damages, the manner of payment, and the beneficiaries.

<sup>90</sup> See *Wellman v. Mead*, 93 Vt. 322, 329, 107 Atl. 396, 401 (death statute; punitive damages frequently given in forum); *Beach, J., dissenting in Christilly v. Warner*, *supra* note 15, at 472, 88 Atl. at 715, *et seq.*, pointing out that there are statutory actions in the forum where the defendant's culpability enters into the measure of damages (*nota*, the costs of a trial might be considered legal damages) and that the forum has allowed minimum recoveries. Note the method of comparing specific prior cases where the foreign death statute was considered accordant with public policy, (a) for the extent of dissimilarity in distributees, see *Walsh v. Boston & M. R. Co.*, 201 Mass. 527, 530, 88 N. E. 12, 14 (1909), or (b) for the amount of damages, see *Walsh v. Boston & M. R. Co.*, *supra*; *cf. Powell v. Great Northern Ry. Co.*, 102 Minn. 448, 113 N. W. 1017 (1907). *Cf. Haase v. First Nat. Bank of Amiston*, *supra* note 70, where no special public policy is said to render a right to a sum payable at the death of a person less assignable when conferred under an insurance policy than when given under any other contract or than a remainder in real estate expectant on the death of a party.

<sup>91</sup> See *Chicago & E. I. R. Co. v. Rouse*, 178 Ill. 132, 139, 52 N. E. 951, 953 (1899) (respondent superior generally recognized in forum, therefore foreign statute abrogating fellow servant rule enforced); *Moody v. Barker*, 188 Ky. 401, 404, 222 S. W. 89, 90 (1920) (married woman liable for payment of her debts, therefore she can be held liable as a surety); *Johnson v. Chicago Great Western R. Co.*, *supra* note 3, at 262 (the fellow-servant statute of both forum and foreign jurisdiction are the same; comparative negligence, even if it be against the policy of our laws, is an affirmative defense and cannot taint the cause of action); *Chicago, R. I. & P. Ry. Co. v. McIntire*, 29 Okla. 797, 798, 119 Pac. 1008, 1009 (foreign death statute enforced in forum, where both states had same statutes *re* recovery for injury from wrongful act). The general forum policy concerning professions generally (though not real estate brokers specifically) concurred with the Florida statute not allowing the recovery of commissions by real estate brokers who had not registered and filed fees. See *Pratt v. Sloan*, 41 Ga. App. 150, 153, 152 S. E. 275, 277 (1930).

<sup>92</sup> See *New York Trust Co. v. Brewster*, *supra* note 74, at 158, 134 N. E. at 618 (also a narrower common law liability of similar nature). Note, in this connection, the generative force of the *Herrick* case, 31 Minn. 11, 16 N. W. 413 (1883), as a precedent. Itself limited to the abrogation of the fellow-servant rule against corporations, it was shortly cited as authority for general abrogations of that rule, and then for the enforcement of foreign death statutes.

for the majority of the cases:—shifts in legal position occasioned by the foreign law which amount to the granting of complete liabilities and immunities unrecognized in the forum will generally be against public policy,<sup>93</sup> but reasonably limited substitute liabilities<sup>94</sup> may be upheld.<sup>95</sup> This requirement need not apply to every situation cognizable under the statute, but is satisfied if the majority of such situations fulfil it. Nor should the requirement be read in a Hohfeldian light, since the cases play havoc with Hohfeld's viewpoint. They weaken mainly his notion of jural correlatives;<sup>96</sup> in holding the determination of beneficiaries a secondary matter, the primary consideration being the assessment of damages;<sup>97</sup> in disregarding dissimilarities in distribution, which may occasionally operate to leave some claimants recourseless;<sup>98</sup> in blithely passing over the creation of a new type of party to a cause of action,<sup>99</sup> and possibly in their attitude towards nominal plaintiffs.<sup>100</sup> Furthermore they assert that the action for wrongful death was a remediless right of

<sup>93</sup> A stricter requirement for voiding a transaction in the foreign jurisdiction than exists in the forum should, however, be enforced. *Cf.* *Jacobs v. Hyman*, *supra* note 13.

<sup>94</sup> Thus, note that reasonable limitations of liability, fairly entered into, are generally upheld. See *Carpenter v. United States Express Co.*, 120 Minn. 59, 62, 139 N. W. 154, 155 (1912); *Hanson v. Great Northern Ry. Co.*, 18 N. D. 324, 332, 121 N. W. 78, 81 (1909); *cf.* *The Kensington*, 183 U. S. 263, 22 Sup. Ct. 102 (1902); *Nonotuck Silk Co. v. Adams Express Co.*, 256 Ill. 66, 99 N. E. 893 (1922). But see *Chicago, B. & Q. R. Co. v. Gardiner*, *supra* note 45, at 81, 70 N. W. at 510. Also, *cf.* *Reynolds v. Day*, 79 Wash. 499, 140 Pac. 681 (1914), where it was held that a common law action for negligent injury under Idaho law was maintainable in the face of the forum's Industrial Insurance Act (of limited scope). The common law rule was condemned in the forum not because it provided a remedy, but because it gave inadequate compensation; therefore it could not be said to be contrary to public policy to give any compensation at all.

<sup>95</sup> This hypothesis is more descriptive of tort situations, where interchangeability of remedy is a constant possibility. Contractual situations are more likely to be all-or-none matters. The concept of status, if vigorously insisted on, would seem to denote an unshiftable legal position assumed long before the operative facts of a case arise, unshaken by them, and giving rise to delictual and contractual rights and duties.

<sup>96</sup> See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE L. J. 16; (1917) 26 YALE L. J. 710.

<sup>97</sup> See *Powell v. Greater Northern Ry. Co.*, *supra* note 90, at 454, 113 N. W. at 1018 (the judge can fix the amounts due the heir-beneficiaries, since this is merely incidental to the entry of judgment and in no way affects the interests of the defendant); *Hanna v. Grand Trunk Ry. Co.*, *supra* note 19, at 129.

<sup>98</sup> *Cf.* *Stewart v. Baltimore & O. R. Co.*, 168 U. S. 445, 18 Sup. Ct. 105 (1897) (principal beneficiaries are near relations); *Morris v. Chicago, R. I. & P. R. Co.*, *supra* note 63; *Armbruster v. Chicago R. I. & P. R. Co.*, *supra* note 19.

<sup>99</sup> See *Texas & P. Ry. v. Cox*, *supra* note 25, at 605, 12 Sup. Ct. at 909 (the forum statute does not give a cause of action against receivers, as the foreign one does).

<sup>100</sup> *Cf.* *Stewart v. Baltimore & O. R. Co.*, *supra* note 98 (personal representative under forum statute; state under foreign one); *Boston & M. R. Co. v. McDuffey*, *supra* note 9 (executor and administrator against consort and relatives, ultimate distribution under the forum statute, it was pointed out, was to the latter group); *Hanna v. Grand Trunk Ry. Co.*, *supra* note 19 (personal representative against executor and administrator (Canada)); *Armbruster v. Chicago, R. I. & P. Ry. Co.*, *supra* note 19 (personal representative against spouse or minor children).

action at common law.<sup>101</sup> Along with all this has gone the occasional indulgence of a presumption in favor of a "right" to compensation.<sup>102</sup>

Justification for the debarring use of public policy occasionally resides in the assertion that the injury that the foreign statutory right will inflict, if enforced, is a public one.<sup>103</sup> Thus, a death statute,<sup>104</sup> carrier's liability exemption contracts,<sup>105</sup> a futures transaction,<sup>106</sup> a gambling contract,<sup>107</sup> the use of a foreign corporate name,<sup>108</sup> and a contract intended to facilitate divorce,<sup>109</sup> have failed of sanction in the forum partly because the public was said to be concerned. A regulation for the protection of a given class cannot therefore be said to express the public policy of the forum;<sup>110</sup> and the now ostracized carrier's liability exemp-

<sup>101</sup> See *St. Bernard v. Shane*, *supra* note 14, at 855; *Armbruster v. Chicago, R. I. & P. Ry. Co.*, *supra* note 19, at 162, 147 N. W. at 341; *Bruce's Adm'r v. Cincinnati R. R. Co.*, 83 Ky. 174, 181 (1885) (right of action given for similar cause at common law); *cf. Chicago, R. I. & P. Ry. Co. v. McIntire*, *supra* note 91 (foreign statute in derogation of common law, yet enforced).

<sup>102</sup> *Lewis v. Johnson*, 133 Misc. 777, 233 N. Y. Supp. 543 (Sup. Ct. 1929) (ordinary negligence action).

<sup>103</sup> "In a judicial sense, public policy does not mean simply sound policy, or good policy, but it means the policy of a state established for the public weal either by law, by courts, or general consent." See *Clough v. Gardiner*, 111 Misc. 244, 249, 182 N. Y. Supp. 803, 807 (Sup. Ct. 1920), *aff'd*, 194 App. Div. 923, 184 N. Y. Supp. 914 (2d Dept. 1920).

<sup>104</sup> See *Christilly v. Warner*, *supra* note 15, at 472, 88 Atl. at 712 ("public rights"). The consideration was unsuccessfully urged in *Armbruster v. Chicago, R. I. & P. Ry. Co.*, *supra* note 19, at 162, 147 N. W. at 343 (nothing obnoxious to the forum's system of policy); *Wikoff v. Hirschel*, 232 App. Div. 193, 195, 249 N. Y. Supp. 690 (Sup. Ct. 1931) (foreign death statute does not "menace the public welfare").

<sup>105</sup> See *The Glenmavis*, *supra* note 48, at 476 (affects injuriously not only immediate parties but the public at large); and, particularly, *Fox v. Postal Telegraph-Cable Co.*, *supra* note 43, at 563, 120 N. W. at 400 (contracts which are injurious to public rights, or offend against public morals, or contravene public policy, or violate public law as recognized in the forum will not be enforced. Note, however, the implications of the statement that the courts should administer the public will as emphasizing the dominance of the legislature, see *supra* note 48 *et seq.*

<sup>106</sup> See *Flagg v. Baldwin*, *supra* note 82, at 224 (contracts which would be injurious to, or conflicting with, the "operation of the public laws of a country" not enforced).

<sup>107</sup> See *Nielsen v. Donnelly*, *supra* note 58, at 269, 181 N. Y. Supp. at 511 (injurious to public rights of its people, "in contravention of public law"). *Thuna v. Wolf*, *supra* note 78, *per contra*, emphasizes the friendly and sociable nature of poker as played in private, and the necessity of an irreconcilable antagonism with the forum's conception of public morals before refusing enforcement. See 130 Misc. at 308, 223 N. Y. Supp. at 768.

<sup>108</sup> See *State ex rel. Baker River & Shuiksan R. Co. v. Nichols*, *supra* note 44, at 621, 99 Pac. at 877 (the public has a concern in maintaining distinctions between corporate names).

<sup>109</sup> See *Palmer v. Palmer*, *supra* note 65, at 45, 72 Pac. at 7 (the marriage status is a matter of public, not private concern; the state is an interested party).

<sup>110</sup> See *In re McCurdy's Estate*, *supra* note 2, at 462, 154 Atl. at 709 (the forum law said that a person acquiring property subject to a mortgage was not personally liable unless he assumed such liability by express words in writing, whereas according to Florida law, the mere receipt of a deed with an assumption clause effectually bound the "supine recipient"). In this case, the prime question was whether the foreign statute's enforcement was inimical to the public interest.

tion contracts were once enforced on the theory that they were a purely private concern.<sup>111</sup> In fact, one case comes close to suggesting a conflicts sphere of operation for the domestic policy concurrent with the police power of the forum,<sup>112</sup> to which may be added the fact that public policy is less flexible when it comes to the protection of life and limb than that of "senseless goods and chattels."<sup>113</sup> Allied to these cases are those stressing the protection of the citizens of the forum,<sup>114</sup> and those emphasizing the evasion of the laws of the forum<sup>115</sup> as vitiating contracts valid in other jurisdictions; where the contract requires,<sup>116</sup> or is accompanied by,<sup>117</sup> the performance of acts forbidden in the forum, the conclusion is similar. Perhaps statements that a contract violative of the conscience of the state,<sup>118</sup> or one which would lead to the disturbance and disorganiza-

<sup>111</sup> See *F. A. Straus & Co., Inc. v. Canadian Pac. Ry. Co.*, *supra* note 40, at 411, 173 N. E. at 566. *Cf.* the fact that the rule is there stated as for the protection of shippers, who are at the mercy of the common carrier, with note 110, *supra*.

<sup>112</sup> See *Lee v. Belknap*, *supra* note 72, at 437, 173 S. W. at 1137 ("... a rule of domestic policy established to protect the morals, health, safety, and welfare of the people..."). But *cf.* *Swann v. Swann*, *supra* note 28, at 302, where it was emphasized that the Sunday law of the forum was not a religious regulation, but a result of the legitimate exercise of the police power and itself a police regulation. If a foreign statute be against the public policy of a state, the fact that it was passed under the police power is immaterial. See *Boyce v. Wabash Ry. Co.*, 63 Iowa 70, 74, 18 N. W. 673, 675 (1884).

<sup>113</sup> See *Lake Shore & M. S. Ry. Co. v. Teeters*, 166 Ind. 335, 343, 77 N. E. 599, 602 (1906) (in consideration of plaintiff's free transportation, the contract exempted the carrier from liability).

<sup>114</sup> See cases cited *supra* note 66.

<sup>115</sup> See *Fidelity Sav. Ass'n v. Shea*, *supra* note 65, at 415, 55 Pac. at 1025 (subterfuge to evade forum's usury law); *Thompson v. Taylor*, *supra* note 49, at 109, 46 Atl. at 568 (protection given married woman cannot be evaded by providing for performance elsewhere). *Cf.* *O'Toole v. Meysenburg*, 251 Fed. 191 (C. C. A. 8th, 1918) where the court indulged the ironical presumption that the parties did not have the usurious character of their transaction in mind and therefore didn't intend to select the forum with the lightest penalty, as that would be in bad faith and against public policy. The fact that insurance companies and loan associations can, by making the offer originate with the insured or the borrower, conclude the making of a contract by acceptance in a foreign jurisdiction, or that even a private party may stipulate for payment of an obligation outside of the forum, may well intensify the court's reaction against the allowance of an artificially foreign right. The opportunities for manipulation of contacts that a party with superior bargaining advantages possesses should also be a constitutional consideration.

<sup>116</sup> See *Bothwell v. Buckbee-Mears Co.*, *supra* note 8, at 277, 48 Sup. Ct. at 125 (insurance company, besides not complying with registration requirements, agreed to defend against suits by strikers and to indemnify for loss of profits due to strikes).

<sup>117</sup> See *Corbin v. Houlehan*, 100 Me. 246, 254, 61 Atl. 131, 134 (1905) (sale of intoxicating liquors); *cf.* *Holmes, J.*, in *Graves v. Johnson*, 156 Mass. 211, 212, 30 N. E. 818, 819 (1892) (held unenforceable a contract for sale of intoxicating liquor, where seller had knowledge of purchaser's intention to re-sell in another state contrary to the latter's laws), to the effect that it would be a course of barbarous isolation to enforce all contracts made and to be performed in the forum regardless of how much they might "contravene the policy of our neighbor's laws." Such sensitivity is usually only expended on the forum's local policy.

<sup>118</sup> See *Eubanks v. Banks*, *supra* note 64, at 416 (inheritance case).

tion of the local municipal law,<sup>119</sup> or one clearly repugnant to positive institutions<sup>120</sup> are violative of public policy hit at the same factor, though undefined they would seem to be nothing more than vague sociological metaphors. The difficulty with statements that foreign causes of action which are contrary,<sup>121</sup> prejudicial,<sup>122</sup> or injurious,<sup>123</sup> to the interests of the forum's citizens, or injurious to the forum and its citizens<sup>124</sup> are not to be enforced, is the indeterminate scope of the word "interest" and the fact that the requirement is literally met if only the instant defendant or a limited class is in fact damaged in interest.<sup>125</sup>

Asserted foreign rights of action and defenses are attacked because of their inherent quality as well as the fact that they strike in some way at the protected class of the forum's citizens. A refusal to enforce or recognize because of conflict with local law,<sup>126</sup> or violation of the positive legislation,<sup>127</sup> or the positive laws<sup>128</sup> of the forum, is of course noth-

<sup>119</sup> See *Bond v. Hume*, *supra* note 55, at 21, 37 Sup. Ct. at 368 (1917).

<sup>120</sup> See *Sullivan v. German Nat. Bank of Denver*, *supra* note 52, at 106, 70 Pac. at 164.

<sup>121</sup> See *Wall v. Chesapeake & O. Ry. Co.*, *supra* note 41, at 231, 125 N. E. at 23 (death statute).

<sup>122</sup> See *St. Bernard v. Shane*, *supra* note 14, at 856 (death statute); *Sullivan v. German Nat. Bank of Denver*, *supra* note 52, at 106, 70 Pac. at 164 (gambling; "would prejudice rights"); *Hartford Accident & Indemnity Co. v. City of Thomasville, Ga.*, *supra* note 67, at 750, 130 So. at 9 (action on bond made under foreign statute); *Rick v. Saginaw Bay Towing Co.*, 132 Mich. 237, 240, 93 N. W. 632, 633 (1903) (abrogation of fellow servant rule in foreign jurisdiction; "against general interests"); *Howard v. Howard*, 200 N. C. 574, 579, 158 S. E. 101, 103 (1931) (no right of action in wife against her husband in foreign state).

<sup>123</sup> See *Christilly v. Warner*, *supra* note 15, at 472, 88 Atl. at 712 (death statute); *Floyd v. Vicksburg Cooperage Co.*, *supra* note 59, at 574, 126 So. at 399 (workmen's compensation); *cf. State ex rel. Baker River & Shuiksan R. Co. v. Nichols*, *supra* note 44 (use of foreign corporate name; would inflict injustice).

<sup>124</sup> See *Loranger v. Nadeau*, *supra* note 13, at 1051, *rev'd*, 10 P.(2d) at 65 (1932) (forum statute denying recovery for automobile injury to guest); *Vanbuskirk v. Hartford Fire Insurance Co.*, *supra* note 31, at 587 (assignment); *Greenwood v. Curtis*, *supra* note 38, at 378 (slave trade); *Carpenter, Baggott & Co. v. Hanes*, 167 N. C. 551, 557, 83 S. E. 577, 581 (futures); *Miller v. Tennis*, *supra* note 87, at 190, 282 Pac. at 350 (employer's liability act in foreign state against workmen's compensation in forum); *J. R. Watkins Co. v. McMullan*, *supra* note 10, at 824 (monopoly); *Reynolds v. Day*, *supra* note 84, at 502, 140 Pac. at 683 (negligent injury; calculated to injure); *International Harvester Co. of America v. McAdam*, *supra* note 53, at 120, 124 N. W. at 1044 (married woman's disability).

<sup>125</sup> See notes 59 and 66, *supra*.

<sup>126</sup> See *State ex rel. Baker River & Shuiksan R. Co. v. Nichols*, *supra* note 44, at 621, 99 Pac. at 877.

<sup>127</sup> *Ayub v. Automobile Mfg. Co.*, *supra* note 46 (action on notes in payment of stock in Mexican corporation engaged in sale of liquor); see *Carpenter, Baggott & Co. v. Hanes*, *supra* note 124, at 557, 83 S. E. at 581; *J. R. Watkins Co. v. McMullan*, *supra* note 10, at 824.

<sup>128</sup> See *Vanbuskirk v. Hartford Fire Insurance Co.*, *supra* note 38, at 592; *Christilly v. Warner*, *supra* note 15, at 472, 88 Atl. at 712; *Henning v. Hill*, *supra* note 12, at 370, 141 N. E. at 67; *Studebaker Bros. Co. of Utah v. Mau*, *supra* note 62, at 80, 82 Pac. at 4. Where the forum statute is not extraterritorial in effect, this requirement is nugatory.



ing more than reiteration of the distressing<sup>129</sup> demand for similarity between statute of forum and foreign state. Most of the courts, passing beyond this egocentric criterion, have, it would seem, sought for phraseology adequate to describe the point of inherent harmfulness<sup>130</sup> where it becomes inadvisable to recognize the foreign legal relationship. Contrariety to good morals, or *bonos mores*, a component of most statements of what is effective, may be said to add nothing to calling the right unlawful.<sup>131</sup> Other definitions stress the importance of violation of the "fundamental principles of justice"<sup>132</sup> or "jurisprudence,"<sup>133</sup> question-begging terms until it be determined whether they are philosophical constructions or empirical realities; and if the latter, whether Hottentot and Continental<sup>134</sup> legal structures are therein comprised. Much of the same idea doubtless persists in the demand that the foreign legal relationship be not opposed to "natural justice,"<sup>135</sup> or "abstract justice and pure morals."<sup>136</sup> The perniciousness of the foreign right or obligation is often regarded as its major invalidating feature; one case, out of regard for the local law perhaps, says that it must "perniciously violate the law,"<sup>137</sup> but the rest emphasize the presence of an example pernicious and detestable—one shocking to the prevailing moral sense of the com-

<sup>129</sup> See *supra* note 86, *et seq.*

<sup>130</sup> See *Internat. Harvester Co. of America v. McAdam*, *supra* note 53, at 120, 124 N. W. at 1045. A very indeterminate line of division.

<sup>131</sup> See *The Glenmavis*, *supra* note 48, at 476, where the remark is made of a carrier's liability exemption contract. The phrase is, if unaccompanied by more extreme epithets, usually a piece of linguistic ornament. But see *Garrigue v. Keller*, *supra* note 69, at 688, 74 N. E. at 527, where it was said not to be immoral for a married woman to incur liability; also the exceptional cases which declare carrier's liability exemptions against public policy, yet enforceable because not immoral, see *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553, 557, 27 N. E. 665, 667 (1891); *O'Regan v. Cunard S. S. Co.*, 160 Mass. 356, 361, 35 N. E. 1070, 1071 (1894).

<sup>132</sup> See *Chubbuck v. Holloway*, *supra* note 42, at 228, 234 N. W. at 316; *Loucks v. Standard Oil Co. of New York*, *supra* note 59, at 111, 120 N. E. at 201.

<sup>133</sup> See, although not strictly a conflicts situation, *Wight v. Rindskopf*, *supra* note 55, at 364.

<sup>134</sup> Note that the full faith and credit clause is peculiarly a sign of federal structure. The increasing extent of international commercial transactions renders it desirable that the state courts adopt of their own accord a liberal policy toward foreign-created rights; for constitutional supervision by the Supreme Court is unavailable except under the due process clause.

<sup>135</sup> See *St. Bernard v. Shane*, *supra* note 14, at 856; *Wall v. Chesapeake & O. Ry. Co.*, *supra* note 41, at 231, 125 N. E. at 23; *Rick v. Saginaw Bay Towing Co.*, *supra* note 122, at 240, 93 N. W. at 632; *Herrick v. Minneapolis & St. Louis R. Co.*, *supra* note 93, at 15, 16 N. W. at 414; *Floyd v. Vicksburg Cooperage Co.*, *supra* note 59, at 574, 126 So. at 399.

<sup>136</sup> See *Miller v. Tennis*, *supra* note 87, at 190, 282 Pac. at 350; *Wellman v. Mead*, *supra* note 90, at 329, 107 Atl. at 401; *Brown v. Perry*, *supra* note 19, at 913; *Reynolds v. Day*, *supra* note 94, at 502, 140 Pac. at 683.

<sup>137</sup> See *In re McCurdy's Estate*, *supra* note 2, at 462, 154 Atl. at 709; *Internat. Harvester Co. of America v. McAdam*, *supra* note 53, at 120, 124 N. W. at 1044.

munity.<sup>138</sup> Or, alternatively, it is suggested that something beyond mere *mala prohibita*,<sup>139</sup> tantamount to *mala in se*,<sup>140</sup> is required. Inherent viciousness<sup>141</sup> or moral turpitude<sup>142</sup> may therefore be the desirable acid test. It may well be queried whether either are possible among the several states of the union whose "differences relate to minor morals of expediency and debatable questions of internal policy."<sup>143</sup>

While only one type of transaction may be specifically condemned on the score of public policy, that condemnation may have collateral consequences. Thus a taint from the illicit feature of a contract may well be inseparable from and vitiate the whole contract.<sup>144</sup> Also, in the case of loss on a futures transaction arising from failure<sup>145</sup> or delay<sup>146</sup> in the transmission of a message, the telegraph company, a third party, cannot be held liable, nor can a defendant who was not party to the illegal transaction, since the only consideration for his acceptance of a draft was to enable the drawer to carry on the illegal transaction;<sup>147</sup> more extreme yet, the illegality of the transaction can be set up against a *bona fide* assignee.<sup>148</sup> It is often emphasized that it is the doing of business which

<sup>138</sup> See *Veytia v. Alvarez*, *supra* note 8, at 318, 247 Pac. at 118; *Cerveceria Cuahtemoc v. Sonora Bank & Trust Co.*, *supra* note 39, at 222, 263 Pac. at 627; *Sullivan v. German Nat. Bank of Denver*, *supra* note 52, at 106, 70 Pac. at 164; *Greenwood v. Curtis*, *supra* note 38, at 378. The last named case gives as illustrations (a) marriages incestuous by the law of nature (between parent and child), as opposed to those prohibited only by the law of the state (between a man and his deceased wife's sister), (b) a prostitute seeking to recover the wages of her prostitution.

<sup>139</sup> See *Greaves v. Neal*, *supra* note 25 at 818.

<sup>140</sup> See *Flagg v. Baldwin*, *supra* note 82, at 226; *cf. Greenwood v. Curtis*, *supra* note 38.

<sup>141</sup> See *Veytia v. Alvarez*, *supra* note 8, at 318, 247 Pac. at 118; *Cerveceria Cuahtemoc v. Sonora Bank and Trust Co.*, *supra* note 39 at 222, 263 Pac. at 627.

<sup>142</sup> See *Greenwood v. Curtis*, *supra* note 38, at 379.

<sup>143</sup> See *Beach*, *Uniform Interstate Enforcement of Vested Rights* (1918) 27 YALE L. J. 656, 662. These debatable questions include "the propriety of permitting dealings in cotton futures, or speculations in stocks on margin, or stipulations exempting telegraph companies from liability for negligence in the transmission and delivery of unrepeatable telegrams"; yet see *Pope v. Hanke*, *supra* note 71, at 630, 40 N. E. at 843, where dealing in futures was denominated a "dangerous evil," a "vice"; not only against public policy, but a crime against the state, religion, morality, and legitimate trades and businesses, a "blighting curse." Transactions of this sort have since become almost indispensable to the credit structure of the country. *Cf. Patterson, Hedging and Wagering on Produce Exchanges* (1931) 45 YALE L. J. 843. *Cf. also* note 119, *supra*.

<sup>144</sup> See *Ayub v. Automobile Mortgage Co.*, *supra* note 46, at 290 (intoxicating liquors). But *cf. Atwater v. A. G. Edwards & Sons Brokerage Co.*, *supra* note 12 (futures), where a system of double accounts may well have confused the court.

<sup>145</sup> *Wiggins v. Postal Telegraph Co.*, *supra* note 72.

<sup>146</sup> *Gist v. Western Union Tel. Co.*, 45 S. C. 344, 23 S. E. 143 (1895).

<sup>147</sup> *Burrus v. Witcover*, 158 N. C. 384, 74 S. E. 11 (1912).

<sup>148</sup> *Pope v. Hanke*, *supra* note 71. *Contra*, in a case involving notes given in payment of shares of stock in corporation in the liquor business, *Ayub v. Saloman*, *supra* note 31.

is prohibited in the forum,<sup>149</sup> yet an unobjectionable contract may be tainted with illegality if it grew out of an illegal solicitation.<sup>150</sup> The forum's "intolerable affectation of superior virtue"<sup>151</sup> has gone as far as to refuse to enforce a contract for the sale of shares in a Mexican corporation, domiciled and doing business in Mexico, on the ground that it was a sale of an interest in a stock of intoxicating liquors and in a retail liquor business.<sup>152</sup>

Even a decision that a transaction is utterly abhorrent to the forum renders possible a repulsion of the plaintiff's claim from the courts of the forum without proceeding to a judgment binding under the full faith and credit clause. Such an outcome is not possible where public policy is being asserted against a defense to an action, which would appear to be the reason for the recent invocation of the full faith and credit clause in this situation.<sup>153</sup> But even where the plaintiff's cause of action is attacked, final judgment usually eventuates in judgment for the defendant<sup>154</sup> and rarely in a non-suit for the plaintiff.<sup>155</sup> The former type of

<sup>149</sup> On which theory judgment was entered for the defendant in *Rose v. Kimberly & Clark Co.*, *supra* note 66 (unregistered corporation doing business), but the plaintiff got relief in *Klein v. Keller*, *supra* note 34 (sales of intoxicating liquor entirely consummated in jurisdictions where valid). And *Ayub v. Automobile Mortgage Co.*, *supra* note 46, is much to be criticized.

<sup>150</sup> See *Bothwell v. Buckbee, Mears Co.*, *supra* note 8, at 277, 48 Sup. Ct. at 125; *cf.* *Corbin v. Houlehan*, *supra* note 117.

<sup>151</sup> See *Beach*, *supra* note 129, at 662.

<sup>152</sup> *Ayub v. Automobile Mortgage Co.*, *supra* note 46.

<sup>153</sup> *Bradford Electric Light Co. v. Clapper*, *supra* note 1. Thus Mr. Justice Brandeis: "A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable laws of another State, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done." *Supra* at 160, 52 Sup. Ct. at 576. Typical of the cases presenting this set-up are those involving carrier's liability exemptions. *Cf.* *Straus and Co. v. Canadian Pacific Ry. Co.*, *supra* note 42; *Fox v. W. U. Telegraph Co.*, *supra* note 45, with which *cf.* *Johnson v. Chicago, Great Western R. Co.*, *supra* note 90. Note, in distinguishing a complaint from a defense the other three checks to the enforcement of statutory rights enumerated by Mr. Justice Brandeis, *i.e.*, the absence of a court with jurisdiction, the lack of appropriate procedure, and penal liability, are not available to attack defenses in bar.

<sup>154</sup> *Bothwell v. Buckbee, Mears Co.*, *supra* note 8 (registration); *Ulman, Magill & Jordan Wollen Co., Inc. v. Magill*, *supra* note 47 (married woman's disability); *Pope v. Hanke*, *supra* note 71 (future); *Raisor v. Chicago & A. R. Co.*, *supra* note 55 (death statute); *Seamans v. Temple Co.*, *supra* note 66 (registration of foreign corporation); *Gooch v. Faucett*, *supra* note 51 (gambling); *Sutterly v. Fleshman*, *supra* note 41 (margins); *Wiggins v. Postal Telegraph Co.*, *supra* note 72 (futures); *Taylor v. Leonard*, *supra* note 2 (married woman's disability); *Bramwell v. Conquest*, *supra* note 10 (married woman's disability; the defendant was last shown to have resided in the forum three years before trial); *Rose v. Kimberly & Clark Co.*, *supra* note 66 (registration of foreign corporation); *cf.* *Corbin v. Houlehan*, *supra* note 117 (directed verdict; sale of intoxicating liquor).

<sup>155</sup> *Burrus v. Witcover*, *supra* note 147 (futures); see *Carpenter, Baggott & Co. v. Hanes*, *supra* note 124, at 557, 83 S. E. at 580 (futures). Noteworthy, in *Citizen's Bank of Waynesboro, Ga., v. Hibernia Bank & Trust Co.*, *supra* note 23 (assessment against banking shareholder) an original judgment for the defendant was, on rehearing, changed to a non-suit for the plaintiff.

judgment is perhaps more justifiable where the court feels vehemently<sup>156</sup> or where the primary purpose of the forum's policy is the protection of its own citizens, but it may be that both these considerations should retire in favor of others.<sup>157</sup> Furthermore in an action in the federal courts, the court with initial jurisdiction may, if the matter be one of general law<sup>158</sup> and the probability be that the parties will resort to another federal court, enter judgment for the defendant purely on grounds of judicial economy. Also, on the theory of public wrong, it may well be that the state suffers an irremediable loss if the plaintiff goes scot-free.<sup>159</sup> Impelling to both these latter arguments is the principle *fnis litigiorum*.

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<sup>156</sup> Cf. *Pope v. Hanke*, *supra* note 71 (futures); *Gooch v. Faucett*, *supra* note 51 (gambling).

<sup>157</sup> See *Home Insurance Co. v. Dick*, *supra* note 1, at 410, 50 Sup. Ct. at 342, where it is said that the defendants, brought in by compulsory process, have asked no favors and "ask only to be let alone." If this be so when the public policy objection falls before a defense, the same outcome may be desirable where it prevails against a complaint.

<sup>158</sup> See *supra* note 25 *et seq.*

<sup>159</sup> See *supra* notes 103 *et seq.* While multiple punishments would seem possible in the criminal law, see Note (1931) 31 COLUMBIA LAW REV. 291, multiple civil liability is obviated by the full faith and credit clause. It is not immediately apparent why here the first state to obtain jurisdiction should have the exclusive privilege of avenging its "public wrong."