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## THE LAW SCHOOL

Again with deep sorrow there must be recorded on this page the death of a loyal and valued member of the faculty and staunch believer in the future of the School. On July 3d, 1920, Professor John Warren Edgerton died after a long illness from tuberculosis, at a time when it was hoped that he was on the road to recovery. Since 1903 Professor Edgerton had devoted his energies to the upbuilding of the Yale Law School, first as instructor, then as assistant professor, and from 1913 as professor. For many years also he had served as Secretary of the Faculty. His forceful and amiable personality endeared him to the students, and his long experience and thorough knowledge of commercial law subjects made him a strong teacher, whose place it will be most difficult to fill.

Another loss that is very serious for the School is the retirement of Professor Wurts. His health proved to be such last year that he deems it unwise to risk another severe winter in the North. Having completed twenty-five years of service at Yale, he has tendered his resignation as an active member of the Faculty, and will hereafter hold office as professor emeritus. No one could have served the School with greater loyalty and devotion. In the hearts of the graduates he has a place reserved for none other; no one could have received a

greater testimonial of regard from the students than that offered him at the smoker in his honor last spring.

Yet in spite of these losses, that come so soon after the death of Professor Barbour, one cannot help but feel that the School has before it a year of great development. A summer session was again held that was even more successful than the first one a year ago. The enrollment for the regular term is 179, the largest since the rule requiring a college degree went into effect some ten years ago, and begins to approach the numbers (including high-school graduates) registered annually before that time. It is thirty per cent larger than last year, and the number of Academic Seniors taking law work has also increased. The figures follow:

	1919-20	1920-21
Graduates .....	4	5
Third-year Class .....	33	48
Second-year Class .....	45	72
First-year Class .....	52	54
Academic Seniors (first-year) ....	41	45
	—	—
	175	224

The gaps in the ranks of the Faculty have been filled most satisfactorily, and the spirit of the School is all that could be desired.

The Summer session lasted from June 21st to August 31st with an enrollment of seventy-five students, of whom two-thirds were second- or third-year men. The courses offered included Criminal Law, Property I, Private and Municipal Corporations, Suretyship, Code Pleading, and Public Service Law. The School was fortunate in having the services of Professor Charles A. Huston, Dean of the Leland Stanford Jr. University Law School, and Professor Thomas P. Hardman of the West Virginia Law School.

Professor Wurts's courses will be taken over by Professor William Reynolds Vance, who resigned as Dean of the Law School of the University of Minnesota to accept the call to Yale. Professor Vance was a member of our Faculty from 1910 to 1912, and it is with great pleasure that all friends of the School will hear of his return. He received the degrees of B.A. in 1892, M.A. in 1893, Ph.D. in 1895, and LL.B. in 1897 from Washington and Lee University. For more than twenty years he has been engaged in law teaching, and his successful career as a teacher, as well as his recognized legal scholarship, give assurance of the strength which his appointment will add to our Faculty. In addition to Property II and III his courses will be Insurance and Wills.

For the past year Professor Edgerton's courses have been in charge of Mr. Karl Nickerson Llewellyn, one of our own graduates of the Class of 1918. Mr. Llewellyn has resigned his instructorship to enter

the practice of the profession in New York. His brilliant record as a student has been continued as an instructor. His departure would be a cause for much regret were it not regarded merely as a temporary absence for the purpose of increasing his experience in preparation for the resumption of his chosen career of law teaching.

To take over the work in Commercial Law carried by Mr. Llewellyn, the services have been secured of another Yale graduate, Professor Herschel W. Arant of Lamar School of Law, Emory University, Atlanta. He received from Yale with high honors the degrees of B.A. in 1911, M.A. in 1912, and LL.B. in 1915. Mr. Arant has been Professor of Law and Secretary in the Lamar School since its organization in 1915. He has been granted a year's leave of absence in order to serve on the Yale Faculty for the coming year. His courses will be Bills and Notes, Persons, Sales, and Code Pleading.

A few changes in the curriculum remain to be noted. Professor Morgan will give the course in Agency, and Professor Clark the course in Equity I and in Partnership. Judge Beach will give the course in Legal Ethics.

Professor Taft has again been forced to ask a year's leave of absence to serve on the Canadian Government Commission to evaluate the Grand Trunk Railway, but will return to the School within the year. His course in Constitutional Law will be given by Professor Borchard.

An important addition to the curriculum is a system of moot court clubs for the first-year men, to be worked out in connection with the Introductory Course under Professor Morgan.

The spirit of coöperation in the School, led by the unity and enthusiasm of its Faculty, leads the JOURNAL to predict a great year in its history.

#### RIPARIAN RIGHTS AND TIDE-FLOWED LANDS

The recent case of *Tiffany v. Town of Oyster Bay* (1920, App. Div.) 182 N. Y. Supp. 738, raises again the time-worn subject of the title to the foreshore and the riparian proprietor's rights therein. Throughout the United States various rules have been adopted to determine such cases until the common-law rule as it existed in England at the time of the settlement of the American colonies has been so distorted as to make it scarcely recognizable.

In the principal case the plaintiff, who owned a large tract of land on Cold Spring Harbor, received from the State Commissioners of New York a grant of twenty-one acres of land under the waters of the bay, which he filled in and thereby raised the land so that the surface was above high water. The defendant town, claiming the lands so granted, had established, in a former action,<sup>1</sup> its title, under

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<sup>1</sup>*Tiffany v. Town of Oyster Bay* (1913) 209 N. Y. 1, 102 N. E. 585.

a colonial patent from Governor Andros in 1677, and the invalidity of the plaintiff's grant from the state. Having refused the plaintiff's offer to restore the shore to its previous condition, the defendant proceeded to erect public bath-houses on the reclaimed land. The plaintiff brought this suit in equity asking for leave to restore the foreshore, and for an injunction to restrain the defendant from building. The court granted the petition, holding that the title of the town to the *locus in quo* was subject to the public rights of navigation and to the right of access by riparian owners.

"The town's rights were public in this estuary; such, for example, as ownership and regulation over oyster or other shell fish beds. . . .<sup>2</sup> But, except for some aid to commerce, fishing, or navigation, I find no power to fill in the harbor, or to maintain parks or establish recreation grounds upon lands reclaimed from lands under the water of this harbor."<sup>3</sup> ". . . Lands in front of a riparian owner are not building sites, save for structures in aid of navigation; and no supervening right over any part of such place can be exercised or maintained to the prejudice of the riparian owner."<sup>4</sup>

In England the title to the soil under tidal waters is, by the common law, in the King.<sup>5</sup> In this soil the Crown has rights of two sorts: (1) the *jus privatum*, which denotes a private proprietary right similar to that exercised by a holder of an estate in fee over his land; and (2) the *jus publicum*, which is a right exercised by the sovereign as a trustee on behalf of the public to secure to the people certain rights of navigation and fishing in the waters. The *jus privatum*, although the Crown may alienate it by grant in respect to any particular section of the shore, is always subject to the *jus publicum*, which is inalienable, and survives to the interest of the public no matter who possesses the *jus privatum*.<sup>6</sup> A grant, from the sovereign, of land bounded by the sea passes title to the high-water mark only, and does not include the foreshore unless specifically mentioned. Where any riparian owner, without such express grant, undertakes to build over the high-water line, the Crown may declare such a structure a purpresture and have it abated.<sup>7</sup>

After the time of the American Revolution these rights of the

<sup>2</sup> *Rogers v. Jones* (1828, N. Y. Sup. Ct.) 1 Wendell 237.

<sup>3</sup> Putnam, J., in the principal case.

<sup>4</sup> *Matter of City of Buffalo* (1912) 206 N. Y. 319, 99 N. E. 850.

<sup>5</sup> Hale, *De Jure Maris* (17th Cent.) cap. 4, reprinted in Moore, *History of the Foreshore*, *infra*, note 6. Hall, *Rights of the Crown in the Seashore* (2d ed. 1875) 2.

<sup>6</sup> Moore, *History of the Foreshore* (3d ed. 1888) 638; *Attorney General v. Parmeter* (1811, Exch.) 10 Price, 378.

<sup>7</sup> See *Shively v. Bowlby* (1898) 152 U. S. 1, 13, 14 Sup. Ct. 548, 552. Gray, J., in a very concise statement of the English law, says, "By the law of England, also, every building or wharf erected, without license, below high-water mark, where the soil is the King's is a purpresture, and may, at the suit of the King,

Crown became vested in the several states or their grantees,<sup>8</sup> except where title to submerged lands had previously been granted to towns or individuals by royal grants, colonial charters, or patents,<sup>9</sup> subject only to the rights surrendered to the federal government by the Constitution of the United States.<sup>10</sup> It is generally acknowledged that the rules governing the rights of the state and of the riparian proprietors are to be determined by each state for itself according to its statutes, customs, and usages.<sup>11</sup> There seem to be two distinct theories which the courts have adopted in regard to land under public waters:<sup>12</sup> (1) the so-called *trust* theory, by which the state is held to own the lands in fee, not in a proprietary capacity, but in trust for the public;<sup>13</sup> and (2) a theory by which the state occupies a position in respect to such submerged lands analogous to that of the Crown in England.<sup>14</sup>

either be demolished, or be seized and rented for his benefit, if it is not a nuisance to navigation."

See also, a very clear analysis of the development of the English law by Prof. Everett Fraser, *Title to the Soil Under Public Waters* (1918) 2 MINN. L. REV. 313, 315. Prof. Fraser shows how the prima facie theory of the ownership by the Crown of the land under tidal waters is based on a presumption contrary to the facts. "The riparian owners in England had by actual possession or by actual grant from the Crown acquired title to the submerged lands of the Kingdom." One Digges in the reign of Elizabeth wrote a treatise claiming to prove the prima facie title of the Crown to the foreshore. This doctrine was adopted by the courts in the reign of Charles I. *Attorney General v. Philpott*, cited in *Attorney General v. Richards* (1795, Exch.) 2 Anstr. 607. See also Moore, *op. cit.*, note 6, at p. 262.

<sup>8</sup> *Shively v. Bowlby*, *supra*, note 7. The English common law of course applied in full in America until the Revolution. Angell, *Tide Waters* (2d ed. 1847) 36.

<sup>9</sup> *Brookhaven v. Smith* (1907) 188 N. Y. 74, 80 N. E. 665; *Tiffany v. Town of Oyster Bay*, *supra*, note 1.

<sup>10</sup> *Martin v. Waddell* (1842, U. S.) 16 Pet. 367. The sovereign powers passed from the Crown to the Continental Congress and finally to the federal government after the adoption of the Constitution. At present the sovereign power is in the United States and not in any individual state. Logically then the *jus privatum* and the *jus publicum* of England should have passed to the federal government. This reasoning has not been followed. Courts uniformly hold these powers to be in the state, subject only to the right of the federal government to improve lands for navigation and commerce. Charles G. Stevenson, *Title of Land under Water in New York* (1914) 23 YALE LAW JOURNAL, 397.

<sup>11</sup> *Barney v. Keokuk* (1876) 94 U. S. 324; *State v. Korrer* (1914) 127 Minn. 60, 66, 148 N. W. 617, 619; *Shively v. Bowlby*, *supra*, note 7, at p. 49.

<sup>12</sup> See NOTE, *Rights in the Foreshore* (1909) 9 COL. L. REV. 174.

<sup>13</sup> *McClenman v. Prentice* (1893) 85 Wis. 427, 55 N. W. 764; *Brookhaven v. Smith*, *supra*, note 9. See also *State v. Korrer*, *supra*, note 11, at p. 78: "The decision of this court explicitly holds that the state owns the bed of this lake below low-water mark; 'not, however, in the sense of ordinary absolute proprietorship with the right of alienation, but in its sovereign capacity, for common public use, and in trust for the people of the state for the public purposes for which they are adapted.'"

<sup>14</sup> *Stevens v. Patterson, etc. Ry.* (1870) 34 N. J. L. 532, 545; *Eisenbach v. Hatfield* (1891) 2 Wash. 236, 26 Pac. 539; *Gould v. Ry.* (1852) 6 N. Y. 522. For a modified construction of the common-law rule see *Town of Orange v. Resnick*

This is practically a modification of the common-law rule varying according to the customs of each individual state.

The trust theory has arisen from a misconstruction of certain early decisions of the Supreme Court of the United States.<sup>15</sup> This doctrine has been severely criticized<sup>16</sup> on the ground that it ignores the *jus privatum* and disposes of the problem as if the *jus publicum* included all the rights of the sovereign in the land.<sup>17</sup> "That the state holds the subaqueous lands in trust with respect to the *jus publicum* is, for the present, assumed. That it holds them in trust with respect to the *jus privatum* is impossible, unless there may be an inalienable trust without a *cestui que trust* in *esse* or in *posse*. . . . It is submitted that the corporate state has both legal and beneficial interest in the *jus privatum*, with the power to use or alien it for any enjoyment not inconsistent with the public or riparian rights, that the trust theory only requires at the most these special rights to be preserved, and that its extension to include the *jus privatum* is unsound."

The second theory, although following the basic principles of the English common-law doctrine, has progressed along different lines. Some courts flatly refuse to allow the riparian owner any rights whatever in the foreshore beyond those possessed by the general public.<sup>18</sup> Other courts are more liberal and recognize special rights in littoral owners arising from the situation of their upland.<sup>19</sup>

The rule in most states recognizes the high-water mark as the boundary of the estate of the riparian owner.<sup>20</sup> There is also very little disagreement as to the rights of the public: namely, the rights of navigation<sup>21</sup> and the right of fishery.<sup>22</sup> The confusion arises prin-

(1920, Conn.) 109 Atl. 864. See also Tillinghast, *Tide-Flowed Lands and Riparian Rights in the U. S.* (1905) 18 HARV. L. REV. 341, for a somewhat different classification.

<sup>15</sup> *Martin v. Waddell*, *supra*, note 10; *Pollard's Lessee v. Hagan* (1845, U. S.) 3 How. 212.

<sup>16</sup> Fraser, *Title to Soil Under Public Waters—The Trust Theory*, 2 MINN. L. REV. (1918) 429, 436. See also Farnham, *Waters* (1904) 172.

<sup>17</sup> See Fraser, *op cit.* 432.

<sup>18</sup> See Anders, C. J., in *Eisenbach v. Hatfield*, *supra*: "The result of our investigation of the authorities leads us to the conclusion that riparian proprietors on the shore of the navigable waters of the state have no special or peculiar rights therein as an incident to their estate."

<sup>19</sup> *Town of Orange v. Resnick*, *supra*, note 14; *Harlan and Hollingsworth v. Paschall* (1882) 5 Del. Ch. 435; *Norfolk City v. Cooke* (1876, Va.) 27 Gratt. 430; *Rumsey v. Ry.*, (1892) 133 N. Y. 79, 30 N. E., 654; *Commonwealth v. Alger* (1851, Mass.) 7 Cush. 53, 64.

<sup>20</sup> Several states have adopted a contrary doctrine: *Commonwealth v. Alger*, *supra*, note 19; *Fulmer v. Williams* (1898) 122 Pa. 191, 15 Atl. 726; *Harlan and Hollingsworth v. Paschall*, *supra*, note 19. See also by statute in Virginia *Groner v. Foster* (1897) 94 Va. 650, 657, 27 S. E. 493.

<sup>21</sup> See Angell, *Tide Waters* (2d ed. 1847) ch. 4.

<sup>22</sup> *Id.* ch. 5.

cially in the exercise by the state or its grantees of the *jus privatum* and in the construction to be given to the special rights, if any, of riparian proprietors.

Under the English common law the riparian owner was "accorded no right in the absence of a license therefor, to build anything below high-water mark and 'has no rights higher than those of the General Public.'"<sup>23</sup> Without greatly altering its basic principles, the rule itself has been modified by more recent English decisions.<sup>24</sup> In the United States a few courts still enforce the strict common-law rule as it existed at the time of its adoption by the American colonies.<sup>25</sup> The hardships instant to the application of such a rule under the changed conditions of modern times has been generally recognized, and, both by court action and, in some cases, by legislation, riparian owners have been accorded a right of access to the water.<sup>26</sup> This right is generally broad enough to include the privilege of erecting wharves, and is subject only to the paramount rights of the public.<sup>27</sup> This appears to be a movement in the right direction. The principal change in the common-law rule seems to be the subjection of the *jus privatum* to a riparian right of access in addition to the *jus publicum*. In extending the rights of the riparian owner in this way, the courts are not altering the frame-work of the old common-law doctrine. As long as the title to the submerged lands is in the state, the *jus privatum* remains, although somewhat modified. The proprietary rights of the state in the foreshore and in subaqueous lands still exist and should include everything not inconsistent with the riparian owner's rights and the *jus publicum*.

#### "LOCUS REGIT ACTUM" AND THE FRENCH LAW OF WILLS

The continental rules of the conflict of laws applicable to wills differ profoundly from those of Anglo-American law. In consequence of the Roman doctrine of universal succession, upon which the modern continental law of testamentary and intestate succession is based, the estate as a whole passes to the heirs irrespective of the character of the property as real or personal. The conception of the right of succession as one in *universum jus* has profoundly affected the rules of the conflict of laws. As the heir is deemed in legal theory to continue the personality of the decedent it is felt that the devolu-

<sup>23</sup> Gray, J., in *Brookhaven v. Smith*, *supra*, note 9.

<sup>24</sup> *Lyons v. Fishmongers Co.* (1876) L. R. 1 A. C. 662; *Buccluch v. Metropolitan Board of Works* (1872) L. R. 5 H. L. 418.

<sup>25</sup> *Eisenbach v. Hatfield*, *supra*, note 14.

<sup>26</sup> Farnham, *op. cit.*, note 16, secs. 62-75.

<sup>27</sup> *Farist Steel Co. v. Bridgeport* (1891) 60 Conn. 278, 22 Atl. 561; *Revell v. People* (1899) 177 Ill. 468, 52 N. E. 1052; *Miller v. Commissioners of Lincoln Park* (1917) 278 Ill. 400, 116 N. E. 178; *Barnes v. Midland Ry.* (1908) 193 N. Y. 378, 85 N. E. 1093. See also note, 40 L. R. A. 593.

tion of his property should be controlled by his personal law, that is, by the law of the country to which the decedent belonged (formerly by the *lex domicilii*). This view has found expression in most of the modern codes.<sup>1</sup> The framers of the Code Napoléon were not ready, however, to accept this principle in its totality. Indeed, Article 3 of the Civil Code expressly provides that "real estate, even when owned by foreigners, is governed by French law." It is held accordingly that the descent of French immovables is governed by French law irrespective of the nationality of the decedent.<sup>2</sup> Article 3 is limited in its application, however, to "substantive rights of property" and does not determine the validity of wills disposing of immovable property as regards the "capacity" of the testator or the "formalities" of execution. The "capacity" to dispose of movable and immovable property upon death has been held on the continent, since the days of Bartolus, to be governed by the "personal" law of the testator. Even the great French champion of the theory of the territoriality of law, D'Argentré, did not dare to challenge a rule so firmly established in practice.<sup>3</sup> It has remained the traditional rule in France to this day,<sup>4</sup> notwithstanding the attack made upon it by the Dutch school.<sup>5</sup>

As regards the "formalities" with which wills must be executed it is generally held on the continent that the rule *locus regit actum* applies.<sup>6</sup> Through the influence of Bartolus and of Dumoulin the view became established that a will executed in the form prescribed by the local law should be valid everywhere.<sup>7</sup> D'Argentré was opposed to the doctrine in its application to wills disposing of immovable property and his successors in Belgium succeeded in 1611 in restoring the

<sup>1</sup> *Italy*: Art. 9, Prel. Disp. Civ. Code; App. Genoa, March 16, 1887 (1887) *La Legge*, 2, 310; App. Milan, March 21, 1905 (1906) *Clunet*, 1236; Cass. Turin, May 31, 1881 (1881) *Monitore*, 673. *Germany*: Art. 24, par. 1, Art. 25, Intr. Act Civ. Code. See also *Japan*: Art. 25, Law Concerning the Application of Laws in General (Hōrei).

<sup>2</sup> Cass. Jan. 26, 1892 (1892) *Dalloz*, 1, 497; App. Paris, Dec. 31, 1889 (1891) *Dalloz*, 2, 41. The movable property of a deceased foreigner will be distributed in France in accordance with French law if the decedent had an "authorized" domicile in France. Cass. May 5, 1875 (1875) *Sirey*, 1, 409; (1875) *Dalloz*, 1, 343; App. Pau, May 14, 1907 (1907) *Clunet*, 1109. In the absence of such a domicile his national law will govern. Cass. Jan. 26, 1892 (1892) *Dalloz*, 1, 497; May 8, 1894 (1894) *Dalloz*, 1, 355; March 8, 1909 (1909) *Dalloz*, 1, 305. The above rules are to be understood in the *renvoi* sense. Cass. June 24, 1878 (1879) *Dalloz*, 1, 56; Feb. 22, 1882 (1882) *Sirey*, 1, 393; (1882) *Dalloz*, 1, 301; March 1, 1910 (1910) *Clunet*, 888; (1910) *Revue de droit international privé*, 870.

<sup>3</sup> 2 Lainé, *Introduction au droit international privé*, 124.

<sup>4</sup> *France*: App. Paris, August 10, 1872 (1874) *Clunet*, 128 (semble). *Germany*: Arts. 7, 24, Introductory Act, Civ. Code. *Italy*: Art. 6, Prel. Disp. Civ. Code.

<sup>5</sup> (1918) 13 *ILL. L. REV.*, 386.

<sup>6</sup> As to the origin of the maxim *locus regit actum*, see (1911) 20 *YALE LAW JOURNAL*, 428, note 3.

<sup>7</sup> (1911) 20 *YALE LAW JOURNAL*, 427-428.

supremacy of the law of the *situs* as regards such wills. The traditional rule became reestablished, however, in that country in 1634 and has apparently not been questioned since.<sup>8</sup> The rule that a legal transaction conforming to the local law as regards the mode of execution should be regarded as valid everywhere was dictated by considerations of convenience and justice.<sup>9</sup> A person becoming suddenly ill away from home might not be able to comply with the law of his domicile or with that of the *situs* of the land, so that, if he could not make use of the forms prescribed by the local law, he would be deprived of the faculty of executing a will. In its origin the rule *locus regit actum* was an optional rule. In the course of time the reasons that had prompted its acceptance were lost sight of, and as the rule was commonly stated in the categorical form indicated it was assumed to have a mandatory character.<sup>10</sup> This became the established law in France through the decision of the Parliament of Paris in the case *In re Pommereuil*, decided in 1721.

Most of the modern codes, in recognition of the origin of the rule *locus regit actum*, assign to it only an optional character.<sup>11</sup> The matter is not so clear, however, under the provisions of the French Civil Code. Article 999 provides as follows:

"A Frenchman who is in a foreign country can make his will by instrument under private signature, as is specified in Article 970, or by public instrument (*acte authentique*), according to the form in use in the place where such instrument shall be made."

The first draft of the code relating to the question contained the following general provision: "The form of legal transactions is governed by the law of the country in which they are executed or take place."

<sup>8</sup> (1911) 20 YALE LAW JOURNAL, 428. See also *Italy*: Art. 9, Prel. Disp. Civ. Code; Cass. Turin, May 31, 1881 (1881) *Monitore*, 673. *Germany*: Arts. 11, 24, Intro. Act. Civ. Code. *Spain*: Art. 11, Civ. Code; *Japan*: Art. 26, Hōrei.

<sup>9</sup> It is Lainé's great merit to have shown this. 2 *Introduction au droit international privé*, 328; (1905) *Revue de droit international privé*, 21, 456; (1907) *ibid.*, 833; see also Naquet (1904) *Clunet*, 39; Surville (1906) *Clunet*, 961.

<sup>10</sup> (1911) 20 YALE LAW JOURNAL, 430-431.

<sup>11</sup> A will may be executed either in conformity with the law of the place of execution or in accordance with the national law of the testator. *Germany*: Arts. 11, 24 Intro. Act. Civ. Code; *Greece*: App. Athens, June 6, 1895 (1897) *Clunet*, 623; *Italy*: Art. 9, Prel. Disp. Civ. Code; Cass. Turin, May 31, 1881 (1881) *Monitore*, 673; *Japan*: Art. 26, Hōrei. Where the national law of the testator prohibits its subjects from executing holographic wills even when abroad the Italian court will enforce the prohibition, notwithstanding the fact that the will is valid according to the local law. Cass. Turin, April 12, 1892 (1892) *Monitore*, 346. The law of the *situs* of the land need not be satisfied. *Austria*: 5 Püttlingen, *Handbuch des internationalen Privatrechts*, 66; *Italy*: Art. 9, Prel. Disp. Civ. Code; *Germany*: Arts. 11, 24, Intro. Act. Civ. Code; *Russia*: Cass. Feb. 11, 1904 (1906) *Clunet*, 890.

The article was dropped, however, at the last moment because it was deemed too general and it was feared that it might lead to abuse and erroneous applications.<sup>12</sup> The omission of the general provision just mentioned in connection with the particular wording of Article 999 has given rise to much controversy in France. It is to be noted in the first place that Article 999 speaks only of Frenchmen executing wills abroad. Under the terms of the provision it is manifest that French subjects are privileged to execute their wills in the French holographic<sup>13</sup> form without regard to the law of the place of execution or the nature or location of the property.<sup>14</sup> It is also clear that they can validly execute a *public* will in the form in use in the place of execution. But what if the local law does not recognize a *public* will or, if it does, authorizes at the same time other forms of wills and the will in question is a private will? Here the question is thus presented whether the word "authentic" in Article 999 is to be understood in the technical sense of the French legislation or whether it simply has reference to any kind of "solemn" will authorized by the *lex loci*. The courts have given to the Article the more liberal meaning so that the ordinary Anglo-American will, signed by the testator before witnesses, will be sustained by the French courts if it satisfies the law of the place of execution.<sup>15</sup> A recent decision of the Civil Court of the Seine, *Violette v. Procureur de la République*,<sup>16</sup> conformed to this view and upheld the will of a French lady which she had executed in England according to the provisions of the English Wills Act.

<sup>12</sup> See 2 Fenet, *Recueil complet des travaux préparatoires du Code Civil*, 6; Merlin, *Répertoire, Loi, Sec. 6, Nos. 7 and 8*; Lainé (1905), *Revue de droit international privé*, 456-475; (1907) *ibid.*, 857-866.

<sup>13</sup> As to holographic wills, see (1918) 28 *YALE LAW JOURNAL*, 72. The French law recognizes three kinds of wills, the holographic, the public and the mystic. The holographic will must be wholly written, dated and signed by the testator. Art. 970, Civ. Code. The public will is taken down by a notary from the testator's dictation, and, after being read over by the notary in the presence of the witnesses, is signed by the testator, notary, and two witnesses together with a second notary, or by the testator, notary and four witnesses. Arts. 971-974, Civ. Code. The mystic or secret will is written by the testator or a third party, signed by the testator and handed closed and sealed to a notary in the presence of at least six witnesses, or is closed and sealed in their presence. The testator has to affirm that he has signed it as his will, and then a *procès verbal* to this effect is drawn up by the notary and duly signed by the testator, notary and witnesses. Art. 976. Concerning military and maritime wills see Colin (1897) *Clunet*, 508, and Arts. 981 ff. Civ. Code, with subsequent amendments.

<sup>14</sup> App. Paris, June 3, 1878 (1878) *Clunet*, 613.

<sup>15</sup> Cass. Feb. 6, 1843 (1843) *Sirey*, 1, 218 (English will); Feb. 28, 1854 (1854) *Dalloz*, 1, 126; July 3, 1854 (1854) *Dalloz*, 1, 313 (Louisiana will); August 19, 1858 (1859) *Dalloz*, 1, 81; App. Paris, August 10, 1872 (1873) *Dalloz*, 2, 149 (California will); Feb. 26, 1896 (1897) *Clunet*, 337 (English will); Trib. civ. Seine, March 11, 1899 (1899) *Clunet*, 1014; App. Rouen, Jan. 4, 1911 (1911) *Clunet*, 940; (1912) *Revue de droit international privé*, 124; Trib. civ. Lille, June 27, 1912; App. Douai, Dec. 3, 1912 (1913) *Clunet*, 1285 (English will).

<sup>16</sup> Trib. civ. Seine, Feb. 6, 1919 (1919) *Clunet*, 756.

A French subject may execute his will abroad, therefore, either in the French holographic form or in any "authentic" or "solemn" form recognized by the *lex loci*. Whether the French courts will go beyond this and allow French subjects to execute their wills under all circumstances in any form authorized by the local law is doubtful. So far they have felt constrained by the specific wording of Article 999 to hold that the local form cannot be followed if it has no "authentic" character under the *lex loci*.<sup>17</sup>

No distinction is made by the French law between wills disposing of movable or immovable property.<sup>18</sup> Under treaties between France and a number of other countries and it seems even in countries with which France has no treaty, French subjects are enabled to execute wills before their consuls.<sup>19</sup>

There is no provision in the French Code regarding the execution of wills by foreigners. The problem arises therefore whether the provisions of Article 999 are to be applied by way of analogy with respect to them: That foreigners could execute wills in France under the Civil Code, in accordance with the traditional rule, in the mode prescribed by the French law was never doubted.<sup>20</sup> A foreigner may dispose of his French property, therefore, by holographic will, notwithstanding the fact that such wills are not recognized by his national law.<sup>21</sup> Such a will has been sustained even where the national law of the testator has prohibited the subjects of such country from executing such wills even while abroad.<sup>22</sup> The problem that has aroused a great

<sup>17</sup> Cass. Feb. 28, 1854 (1854) Dalloz, 1, 126; July 3, 1854 (1854) Dalloz, 1, 313.

<sup>18</sup> App. Paris, June 3, 1878 (1878) Clunet, 613. A Frenchman can make a will therefore in France only in accordance with the local law. 10 Aubry & Rau, *Droit civil* (5th ed.) 593.

<sup>19</sup> See Dalloz, *Codes Annotés, Nouveau Code Civil, Art. 999, nos. 34 ff.* It is held by most courts that Art. 999 of the Civil Code has not abrogated Art. 24, tit. 9, bk. 1 of the Marine Ordinance of 1681, according to which a will might be "received" by the Chancellor of a French consulate in the presence of a consul and two witnesses and signed by them. Cass. March 20, 1883 (1883) Dalloz, 1, 145; App. Aix, Feb. 16, 1871 (1872) Dalloz 2, 52; App. Dijon, April 9, 1879 (1879) Dalloz, 2, 108. As the ordinance does not specify the formalities in detail it is held that the requirements of the Civil Code and of the law concerning notaries (25 vent. an 11, art. 68) govern. Cass. March 20, 1883 (1883) Dalloz, 1, 145; June 3, 1891 (1892) Dalloz, 1, 317; Jan. 23, 1893 (1893) Dalloz, 1, 83.

<sup>20</sup> A foreigner, not understanding the French language, cannot make a public will in France unless he can find a notary and witnesses who understand his own language. 4 Weiss, *Traité de droit international privé* (2d ed.) 663, note; App. Rennes, Jan. 8, 1884 (1885) Sirey, 2, 214; see also Cass. August 3, 1891 (1893) Dalloz, 1, 31. According to Cass. Belge May 5, 1887 (1888) Dalloz, 2, 120, the witnesses need not understand the testator's language. Some early decisions have allowed the use of an interpreter. Colin (1897) Clunet, 932, note.

<sup>21</sup> Cass. August 25, 1847 (1847) Sirey, 1, 712; App. Aix, July 11, 1881 (1882) Clunet, 426; Trib. civ. Seine, July 21, 1883 (1884) Clunet, 405; App. Paris, May 7, 1897 (1897) Clunet, 816.

<sup>22</sup> Cass. August 25, 1847 (1847) Dalloz, 1, 273; App. Orleans, August 4, 1859 (1859) Dalloz, 2, 158; (1860) Sirey, 2, 37.

deal of discussion is whether the rule of *locus regit actum* has retained under the Civil Code its former imperative character. In a decision of the Court of Cassation (by the Chambre de Requetes) of March 9, 1853, it was held that the former character of the rule had not been changed by the Civil Code as regards foreigners executing wills in France.<sup>23</sup> This view maintained itself in the courts until 1909 when the Court of Cassation (Chambre Civile) overthrew the doctrine in the celebrated case of *Gesling v. Viditz*,<sup>24</sup> in which the optional character of the rule was recognized with respect to foreigners executing wills in France. Foreigners in France may execute their wills, therefore, so far as the French courts are concerned, in any of the forms prescribed by French law or if they execute a private will by conforming to the requirements of their national law.<sup>25</sup> It is obvious that a *public* will in the technical sense cannot be executed in France except in the French form, for a French notary executing a will in a foreign form is deemed to act in a private and not in his official capacity.<sup>26</sup> The national law may be followed, it would seem, regardless of the character of property as movable or immovable.<sup>27</sup>

A foreigner abroad may under French law execute his will in the form prescribed by the law of the place of execution or by his national

<sup>23</sup> Cass. March 9, 1853 (1853) Dalloz, 1, 217; App. Aix, July 11, 1881 (1883) Sirey 2, 249; App. Paris, August 11, 1892 (1893) Clunet, 418; March 20, 1896 (1896) Clunet, 402. *Contra*, App. Rouen, May 7, 1898 (1899) Clunet, 578; Trib. Sup. de Papeete, Sept. 22, 1898 (1899) Clunet, 595.

<sup>24</sup> Cass. July 20, 1909 (1909) Clunet, 1097. The reversal of its former position by the Court of Cassation resulted, it seems, partly from the historical investigations into the origin of the rule *locus regit actum* by Lainé and partly from the acceptance of the rule in its optional form by the convention of the Hague. See (1909) *Revue de droit international privé*, 915. The Hague convention of July 17, 1905, relating to succession, provides: "Wills are valid, as regards form, if they conform either to the law of the place where they are executed, or with the law of the country of which the deceased was a subject at the time of their execution." Art. 3, par. 1. The decision of the Court of Cassation was accepted by App. Amiens, Dec. 11, 1912 (1913) Clunet, 947.

<sup>25</sup> Politis is of the opinion that under the decision of the Court of Cassation of July 20, 1909, a will can be sustained only if the testator intended to execute his will with reference to a particular law. For example, if an American citizen domiciled in Connecticut should go to a French notary and execute his will in the presence of three witnesses its validity should depend, according to this writer, upon the fact whether he intended to execute a will according to the Connecticut or the French form. If he intended to execute it in the French form the will would be invalid. (1911) Dalloz, 1, 186. As regards citizens of the United States their "national" law is held to be the law of the state in which the testator was domiciled at the time of the execution of the will, or, if he was no longer domiciled at that time in the United States the law of the state in which he had his last domicile.

<sup>26</sup> Politis (1911) Dalloz, 1, 186.

<sup>27</sup> Trib. civ. Seine, Dec. 23, 1881 (1882) Clunet, 322; App. Aix, July 11, 1881 (1882) Clunet, 426; Trib. Sup. de Papeete, Sept. 22, 1898 (1899) Clunet, 595; Colin (1897) Clunet, 938, 2 Baudry-Lacantinerie, *Des donations entre vifs et des testaments* (3d ed.) no. 2249; 10 Aubry & Rau, *op. cit.*, 598.

law,<sup>28</sup> and this rule applies, it seems, to wills disposing of real property. A will relating to French real property may be executed also, according to Aubry & Rau,<sup>29</sup> in conformity with French law, that is in the holographic form of Article 970 of the French Civil Code.

It remains to be seen whether the French courts in the development of the rule *locus regit actum* in its application to wills will restrict the parties to a choice between the law of the place of execution and their national law, or whether they will allow them to execute them with reference to the law of their domicil, and, if the will relates to land, with reference to the law of the *situs*. Another interesting question will be whether, for the sole purpose of *sustaining* wills, they will extend the application of the *renvoi* doctrine to the formal requirements of wills.

E. G. L.

FREEDOM OF SPEECH—A NOTE ON PROFESSOR CORWIN'S ARTICLE

As was to be expected, Professor Corwin, in his article appearing earlier in this number of the JOURNAL<sup>1</sup> upon freedom of speech and press, accomplishes the difficult task of illuminating further a subject which has already been the occasion for much able discussion. Nevertheless, the very diversity of inferences which have been drawn by competent writers from the historical background against which stands the First Amendment warns us that contemporary construction gives no final answer to the problems we have to solve. Thus, from the well-known fact that opposition to the Sedition Act of 1797 was in part at least founded on doctrines of states' rights, Professor Corwin would apparently draw the inference that nationalists should uphold a broad view as to the power of Congress over speech and the press. But Mr. Hart has shown clearly the general consensus of opinion of all parties at the time of the adoption of the Constitution that neither by it nor by the First Amendment did Congress possess any general power over these subjects.<sup>2</sup> Hence the inference is logically one of lack of power in Congress, and in fact its only powers in this regard are such as may be considered fairly necessary to carry out the grants of other powers to it.<sup>3</sup> We must therefore always keep in mind that our problem is the application of the constitutional provisions to

<sup>28</sup> App. Paris, August 5, 1886 (1887) Clunet, 621; Dec. 23, 1909 (1910) Clunet, 604.

<sup>29</sup> 10 Aubry & Rau, *op. cit.*, 599.

<sup>1</sup> *Freedom of Speech and Press Under the First Amendment: a Résumé* (1920) 30 YALE LAW JOURNAL, 48. Other discussions are there cited.

<sup>2</sup> Hart, *Power of Government over Speech and Press* (1920) 29 YALE LAW JOURNAL, 410.

<sup>3</sup> *Ibid.* This, of course, follows from the fact that the powers of Congress are only those expressly or impliedly granted in the Constitution. Here there is no express grant.

*present-day* situations. Surely Professor Corwin cannot justly tax liberal constructionists with inconsistency in asking that the restrictions of the First Amendment, too, shall not receive a construction that will reduce them to nothing.

Now it should be noted that the cases under the present wartime Espionage and Sedition Acts have raised questions of great importance which are wider than the limited query as to the power of Congress. These concern, among other things, the conduct of public prosecutors, of judge, and of jury. In fact, in the important series of cases which split the United States Supreme Court at its last term, the vital question in each case was not that of the constitutionality of the law, but whether the trial court had erred in holding that the prosecutor had made sufficient case to go to the jury.<sup>4</sup> The constitutional question was only indirectly involved, calling simply for a construction of the law which would carry out the policy and comply with the restrictions, of the First Amendment. This, in the view of the dissenting judges, required a directed verdict for the defendants, since "a present danger of immediate evil or an [actual] intent to bring it about was not shown."<sup>5</sup> The majority have stated no limitation of this kind, but have so far taken the view that proof of the utterance of any language having a *tendency* to produce the evils forbidden by the statute makes a jury question. If this view is followed logically, it is difficult to see why conviction could not be sustained on proof of practically any agitation for the change of existing laws, since such agitation may surely have a possible tendency to induce violations of such laws. And if a conviction may be sustained, the whole benefit of the constitutional restriction is lost, for if it is to fulfill any other purpose than that of an indefinite moral admonition, it must operate to protect the individual from a jury which may under unusual conditions, such as the stress of war emotions, be predisposed against him.

To those of us who believe that at least the limitations set by the minority, unsatisfactory and indefinite as they are, must be strictly adhered to, both on general principle and because of the Constitution, there seem, among others, two especially strong grounds for our belief, one from the standpoint of the individual and one from the standpoint of the community. From the point of view of the individual who appeals to the First Amendment for protection it appears that the test of tendency only has given to prosecutors and courts the opportunity, availed of under a misguided view of patriotism, literally to pursue "poor and puny anonymities" in a way nothing short of disgraceful to the mind of one trained in a law that accords

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<sup>4</sup> *Abrams v. United States* (1919) 250 U. S. 616, 40 Sup. Ct. 17; *Pierce v. United States* (1920, U. S.) 40 Sup. Ct. 205; *Schaefer v. United States* (1920, U. S.) 40 Sup. Ct. 259.

<sup>5</sup> See (1920) 29 YALE LAW JOURNAL, 337, 677.

the vilest wretch opportunity to show on a fair trial the innocence presumed in his favor until proven guilty. Examples of this kind have been collected in law review notes,<sup>6</sup> and Professor Chafee has shown in some detail the attitude of the trial court in the Abrams case.<sup>7</sup> In enforcing such a law, which clearly will reach the fool more often than the secret and clever intriguer, it is hard under the circumstances to expect impartial juries. Experience has shown that the accused may not even be sure of an impartial court.

But even more important than the fate of the few is the effect upon the many. The only hope of success for a government of and by the people is that the people should act under the spur of beliefs formed without compulsion and as a result of arguments tested by their power to get themselves "accepted in the market." Two of the most admirable qualities of the ordinary citizen are his patriotism and his respect for law. If an administration may brand views opposed to its own as criminal—and, by sentences extraordinarily long in comparison with all but the most heinous crimes, as dangerously criminal—its views need less intrinsic power to compete with others for the support of such citizen. The Abrams case furnishes an excellent example. The thought which Abrams and his associates so intemperately expressed was that the United States should not interfere with Soviet Russia. Subsequent events have shown that the Administration's course in Russia has been at least of debatable wisdom. But at the time when that public opinion was forming which either tolerated or actively supported that course, the Administration had the benefit of the exploitation by the press in news articles and editorials of a conviction and sentence of twenty years' imprisonment

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<sup>6</sup> (1919) 29 YALE LAW JOURNAL, 107; (1920) 33 HARV. L. REV. 956. An example is that of the trial in New York of the Russellites—members of a religious order founded in 1870 and opposed *inter alia* to war—where the trial judge in the presence of the jury committed a witness for the defense to jail for contempt of court for testifying that he had never seen a defendant write and could not testify as to his signature, when the court thought he really could. Conviction was followed by a sentence of twenty years' imprisonment upon seven of the defendants and of ten years upon the other defendant, the judge's scathing comments being prominently displayed in the press. The defendants were refused admittance to bail pending appeal and were sent to Atlanta. Some time thereafter the Circuit Court of Appeals directed that they be admitted to bail and still later ordered a new trial because of the possible prejudice resulting from the contempt proceedings. *Rutherford v. United States* (1920, C. C. A. 2nd) 258 Fed. 855. The witness who was jailed had previously been ordered released by the United States Supreme Court after ten months' confinement. *Ex parte Hudgings* (1919) 249 U. S. 378, 39 Sup. Ct. 337. Cf. (1919) YALE LAW JOURNAL, 826. Thereafter the prosecutions were dropped.

<sup>7</sup> (1920) 33 HARV. L. REV. 747. Cf. *Schaefer v. United States*, *supra*, where the fifth count, one of the counts upon which conviction was had, apparently rests entirely upon a mistranslation in the indictment of a newspaper item originally appearing in German. See COMMENTS (1920) 29 YALE LAW JOURNAL, 677.

given an opponent of its views. The creation of such an opportunity for the perversion of public opinion is too high a price to pay for anything but the prevention of "a clear and imminent danger" to the country. Perhaps this is not our most pressing danger, and yet it is hard to see how in a democracy there can be a much more vital one than that of such perversion of public opinion. Surely we have had enough of views promulgated by the most high, to be religiously accepted by all his followers.

C. E. C.

#### CONFLICT OF LAWS IN WORKMEN'S COMPENSATION

During the last seven years the subject of the conflict of laws under workmen's compensation acts has witnessed a decided trend of authority away from the strictly territorial theory of the legislation and in favor of that conception of the statute which regards it as a legislative standardization of certain master and servant contracts and therefore essentially a rule of contract law, applicable to all contracts otherwise governed by the law of the enacting state. In one respect, however, the divergent lines of authorities present a significant contrast. The territorial rule has been adopted in four jurisdictions and applied in seven cases,<sup>1</sup> every one of which was a case of an extraterritorial injury under a local contract, involving therefore a renunciation of jurisdiction which would have been asserted under the contract theory. The latter, on the other hand, where accepted, has in every instance been established in cases involving a local contract of employment and an injury occurring outside the state.<sup>2</sup> Where the converse case of a local injury under a foreign

<sup>1</sup> *Hicks v. Maxton* (1907) 124 L. T. Jour. 135; *Tomalin v. S. Pearson & Son* [1909] 2 K. B. 61; *Schwartz v. India Rubber etc. Co.* [1912] 2 K. B. 299; *Gould's Case* (1913) 215 Mass. 480, 102 N. E. 693; *North Alaska Salmon Co. v. Pillsbury* (1916) 174 Calif. 1, 162 Pac. 93; *Kruse v. Pillsbury* (1917) 174 Calif. 222, 162 Pac. 891; *Union Bridge & Construction Co. v. Industrial Commission* (1919) 287 Ill. 396, 122 N. E. 609. See also *Keyes Davis Co. v. Allerdyce* (April, 1913) Mich. I. A. B.

<sup>2</sup> *Kennerson v. Thames Towboat Co.* (1915) 89 Conn. 367, 94 Atl. 372; *Grimmell v. Wilkinson* (1916) 39 R. I. 447, 98 Atl. 372; *Rounsaville v. Central R. Co.* (1915) 87 N. J. L. 371, 94 Atl. 392; *Post v. Burger* (1916) 216 N. Y. 544, 111 N. E. 351; *Gooding v. Ott* (1916) 77 W. Va. 487, 87 S. E. 862; *Foughty v. Ott* (1917) 80 W. Va. 88, 92 S. E. 143; *Jenkins v. Hogan & Sons* (1917) 177 App. Div. 36, 163 N. Y. Supp. 707; *Gilbert v. Des Lauriers Column Mould Co.* (1917) 180 App. Div. 59, 167 N. Y. Supp. 274; *Hagenback v. Leppert* (1917, Ind. App.) 117 N. E. 531; *State ex rel. Chambers v. District Ct.* (1918) 139 Minn. 205, 166 N. W. 185; *State ex rel. Maryland Casualty Co. v. District Ct.* (1918) 140 Minn. 427, 168 N. W. 177; *Industrial Commission v. Barene* (1919) 107 Misc. 486, 177 N. Y. Supp. 689; *Holmes v. Communipaw Steel Co.* (1919) 186 App. Div. 645, 174 N. Y. Supp. 772; *Industrial Commission v. Aetna Life Ins. Co.* (1918, Colo.) 174 Pac. 589; *Anderson v. Miller Scrap Iron Co.* (1919) 169 Wis. 106, 170 N. W. 275; *Pierce v. Bekins Van & Storage Co.* (1919, Iowa) 172 N. W. 191.

contract has been presented, a remarkable course has been pursued. The "contract" statute of New Jersey has repeatedly been held applicable to injuries suffered in New Jersey under New York contracts.<sup>3</sup> The Connecticut act, though previously decided to be of the "contract" type, has once been applied to an injury suffered in Connecticut under a Massachusetts contract of employment.<sup>4</sup> A recent Indiana case<sup>5</sup> adds a third to the jurisdictions swinging over to the territorial rule by way of bringing local injuries under foreign contracts within the operation of the local act, notwithstanding the fact that the act in express terms rejected the territorial rule of application,<sup>6</sup> and had been held to belong to the contract class of statutes.<sup>7</sup> In one state only has the contract theory been applied by way of renunciation of the application of the local law.<sup>8</sup>

May there not be some fundamental error in an interpretation which so generally refuses to work both ways? If a preconceived theory of construction has failed to take into account the dominant purpose of an enactment, the case which under the theory calls for an exclusion of the application of the statute is most likely to reveal this fact, for an instinctive perception of that dominant purpose is almost certain in such a case to override the theory. Is not this unwillingness to renounce jurisdiction in any case of local injury symptomatic of a direction of the legislative interest very different from that presupposed by the contract theory,—an interest in conditions of fact and not in contracts as such?<sup>9</sup>

The contract theory is usually supported by reliance upon some of the most superficial aspects of the legislation. It is not enough to say that certain types of contracts are partially standardized as a result of the enactment.<sup>10</sup> All regulations of the conditions of performance of contracts produce this effect. It would probably not be

<sup>3</sup> *American Radiator Co. v. Rogge* (1914) 86 N. J. L. 436, 92 Atl. 85, 94 Atl. 85, (1915) 87 N. J. L. 314, 93 Atl. 1083; *Davidheiser v. Hay Foundry & Iron Works* (1915) 87 N. J. L. 688, 94 Atl. 309; see also *Gilbert v. Des Lauriers Column Mould Co.*, *supra*.

<sup>4</sup> *Douthwright v. Champlin* (1917) 91 Conn. 524, 100 Atl. 97, (1917) 27 YALE LAW JOURNAL, 113; but see *Banks v. Howlett Co.* (1918) 92 Conn. 368, 102 Atl. 822, (1918) 27 YALE LAW JOURNAL, 707, in which reliance was placed upon an actual novation to bring the case within the statute.

<sup>5</sup> *Hagenbeck & Great Wallace Show Co. v. Randall* (1920, Ind. App.) 126 N. E. 501.

<sup>6</sup> Burns Ann. Ind. St. 1918 Supp. sec. 8020d 1.

<sup>7</sup> *Hagenbeck v. Leppert*, *supra*.

<sup>8</sup> *Schweitzer v. Hamburg-American etc. Co.* (1912) 78 Misc. 448, 138 N. Y. Supp. 944 (common-law action); *Barnhart v. American Concrete Steel Co.* (1917) 181 App. Div. 881, 167 N. Y. Supp. 475; *Barnhart v. American Concrete Steel Co.* (1920, N. Y.) 125 N. E. 675 (compensation suit).

<sup>9</sup> See *Young v. Duncan* (1914) 218 Mass. 346, 349, 106 N. E. 1, 3.

<sup>10</sup> *Post v. Burger*, *supra*; *Anderson v. Miller Scrap Iron Co.*, *supra*; *Pierce v. Bekins Van & Storage Co.*, *supra*.

contended that regulations of child labor or of the hours of labor had other than a strictly territorial operation. Yet an eight-hour law unquestionably reads its requirements into the terms of a contract of employment made and to be performed within the state. The question remains, what contracts are thus standardized, and to what extent? And this question cannot be answered except by considering whether this standardization was the dominant purpose of the statute, as in the case of life insurance legislation, or merely the incidental effect of an enactment primarily concerned with facts and not with the conditions and modes of contracting.

If the compensation statute truly embodied a rule of contract law, a court confronted by the case of an injury locally suffered under a foreign contract of employment would feel no impulsion to indulge in the palpable fiction of a new contract by reason of the crossing of the state boundary.<sup>11</sup> It has been suggested that this is no more fictitious than the reading of the provisions of the *lex loci contractus* into the original agreement.<sup>12</sup> Such a contention ignores the vital distinction between giving the law of the contract its natural and necessary effect upon the legal incidents of the original agreement, and inventing a novation of which the parties never dreamed for the sole purpose of bringing into operation an otherwise inapplicable law. Admittedly the sovereign of the *locus delicti* can regulate local conduct under a foreign contract. But the admission of a disposition to do so is an admission that the regulation in question is not a matter of contract law.

Similarly if the compensation statute were truly a rule of contract law, the court of the place of injury would have no motive for refusing effect to the foreign contract as determined by the foreign law. No conflict could be perceived between such a contract and the public policy of the place of injury,<sup>13</sup> for the local statute as a rule of contract law would involve no declaration of policy concerning acts performed under contracts with the regulation of which this contract law could have no concern.

On the same principle, if the contract theory were true to the legal facts, no difficulty would be felt in giving effect to a foreign compensation statute in an action at common law brought in the *locus delicti*, with respect to the waiver of common-law rights of action and defences. Parties may by contract effect this result. Why should not similar effect be given to a standardized agreement prescribed by the law of the contract?<sup>14</sup> The *lex loci delicti* merely supplies the rule

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<sup>11</sup> See *American Radiator Co. v. Rogge*, *supra*; *Douthwright v. Champlin*, *supra*; *Hagenbeck & Great Wallace Show Co. v. Randall*, *supra*; see also I Bradbury, *Workmen's Compensation* (2d ed. 1914) 56-57.

<sup>12</sup> Angell, *Workmen's Compensation for Injury Abroad* (1918) 31 HARV. LAW REV. 619, 623-624.

<sup>13</sup> See *Hagenbeck etc. v. Wallace*, *supra*.

<sup>14</sup> *Schweitzer v. Hamburg-American etc. Co.*, *supra*.

governing tort liability in the absence of an admissible contractual modification. Whether and to what extent such a modification has taken place should be referred without hesitation to the law governing the contract as such.

Yet extreme reluctance is shown to accept any of these conclusions. With respect to the last point a curious situation has arisen. While reliance is placed, in favor of the contract theory, upon the uncontroverted proposition that the liability created by the statute is not of a tortious character, nevertheless it is felt that those provisions which plainly modify and partially supersede a branch of the law of torts, are necessarily of a territorial character.<sup>15</sup> Yet nothing could be clearer than that the compensation statutes should be construed as a whole, each provision being complementary to the rest and therefore coextensive in application. The provision of a statutory waiver of the common-law remedy, and the absolute or conditional abolition of the defences of contributory negligence, the assumption of risk, and the fellow servant rule, are indissolubly connected with the scheme of compensation provided, as an obvious measure of inducement or coercion for the purpose of giving effect to the latter. If a system of compensation is designed to cover extraterritorial injuries, and if when accepted it does not protect from common-law actions for such injuries, the result is both irrational and severe. Especially would this be true if the *locus delicti*, by hypothesis not the law of the contract, chanced to have abolished the common-law defences.

The adoption of a theory which can not be consistently applied has already brought into the courts cases of double recovery under the statutes.<sup>16</sup> While the result was mitigated by an allowance, contrary to predictions,<sup>17</sup> of the proceeds of the former recovery in partial satisfaction of the latter, the hardship and confusion of a double proceeding remain.

Excessive stress upon the usual provision for an election<sup>18</sup> by the employer and employee is largely responsible for the present impasse. What is the character of this election and for what purpose is it granted? The alternative of an aggravated common-law liability would, if imposed absolutely, have been clearly territorial in character.<sup>19</sup> The same should be true of the alternative of a limited liability irrespective of fault, and the permission or requirement of insurance in lieu of this liability is merely a modification of the means

<sup>15</sup> *Johnson v. Nelson* (1915) 128 Minn. 158, 150 N. W. 20; *Pendar v. H. & B. American Machine Co.* (1913) 35 R. I. 321, Atl. 1; *Piatt v. Swift* (1915) 188 Mo. App. 584, 176 S. W. 434; *Mitchell v. St. Louis Smelting & Refining Co.* (1919, Mo. App.) 215 S. W. 506; see Angell, *op. cit.*, 626.

<sup>16</sup> *Gilbert v. Des Lauriers etc. Co.*, *supra*; *Jenkins v. Hogan & Sons*, *supra*.

<sup>17</sup> See *Rounsaville v. Central R. Co.*, *supra*, 374.

<sup>18</sup> *Kennerson v. Thames Towboat Co.*, *supra*; *Foughty v. Ott*, *supra*; *Hagenbeck v. Leppert*, *supra*. See Bradbury, *op. cit.*, 48.

<sup>19</sup> *Alabama Great Southern Ry. v. Carroll* (1892) 97 Ala. 126, 11 So. 803; *Payne v. New York, Susquehanna & W. Ry.* (1911) 201 N. Y. 436, 95 N. E. 19.

to the same legislative end. What new element is added by the grant of an ostensible option between this aggravated common-law liability and the scheme of insurance or of liability without fault? The allowance of a degree of latitude in the character and conditions of redress indicates no change in the direction of the legislative purpose. This is the more evident in view of the fact that the option granted, at least so far as the employer is concerned, is not and is not intended to be a real one, but the aggravated common-law liability is designed to coerce the employer into the acceptance of the ostensible alternative. As evidence of the dominant legislative intention this fictitious option should not be regarded otherwise than as a penal sanction.

While the important consideration is that a consistent and so far as possible uniform theory of the workmen's compensation statutes should prevail,<sup>20</sup> it is submitted that this end can be best achieved by starting with an interpretation which accords with the motives underlying the legislation. This requirement is clearly not met by the contract theory unfortunately prevailing.

#### FURTHER LIMITATIONS UPON FEDERAL INCOME TAXATION

The decision of the United States Supreme Court denying the taxability of stock dividends as income under the Sixteenth Amendment<sup>1</sup> aroused a fever of interest before it was announced, culminating in the stock market flurry caused by the erroneous first report of it.<sup>2</sup> Since its announcement it has been the subject of extensive comment, both favorable and adverse.<sup>3</sup> It seems, however, to have been rather

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<sup>20</sup> See also COMMENT (1917) 27 YALE LAW JOURNAL, 113.

<sup>1</sup> *Eisner v. Macomber* (1920, U. S.) 40 Sup. Ct. 189.

<sup>2</sup> See COMMENT (1920) 29 YALE LAW JOURNAL, 678.

<sup>3</sup> See article by the writer hereof, *Eisner v. Macomber* (1920) 29 YALE LAW JOURNAL, 735. The soundest suggestion for upholding any part of the tax upon stock dividends is given by Professor Warren, *Taxability of Stock Dividends as Income* (1920) 33 HARV. L. REV. 885. In effect, it is that accrued increases in value of capital items are taxable and that Congress has the power to state, and has here stated, what shall be the test to show that such gains have accrued. But, it may be suggested: (1) that, as Professor Warren states, this would at most only sustain the tax so far as levied upon the increase in value taking place while the recipient of the stock dividend holds the stock, and would leave so little of the actual statute left and so unfair a resulting situation as to make it questionable whether any of the statute should be upheld under such conditions; (2) that declaring of a stock dividend by no means signifies an increase in value to the extent of the book value of the stock dividend—that being the taxable amount [Art. 1545 of (1919) U. S. Int. Rev., Reg. 45]—but is ordinarily a suggestion of a present partial increase and an augury of further increase in market value; and (3) that the declaration of a stock dividend may conceivably be an expression of the opinion of the directors of the corporation that an increase in value has taken place, but is no more an actual realization of a monetary gain to the stockholder than a raise in a tax assessment by a board of assessors is such a realization to the taxpayer.

generally thought a blow to government revenues.<sup>4</sup> A few weeks later the same Court without apparently stirring a ripple of interest announced a decision which to the mind of the writer hereof will mean an infinitely greater loss in revenue to the government and will have an infinitely greater effect upon our scheme of income taxation as a whole. In *Evans v. Gore* (1920, U. S.) 40 Sup. Ct. 550, which decided that the salary of a federal judge was not taxable as income, the court finally settled decisively that the Sixteenth Amendment added no new fields of taxation to those within the power of the federal government and expressly placed beyond the reach of that government all income received either as salary or interest on indebtedness from the various states and their local subdivisions. The opinion was by Justice Van Devanter. Justice Holmes filed a dissenting opinion, in which Justice Brandeis concurred.

There are two possible reasons for the lack of interest in this case: one was that the particular question involved, recovery by a federal judge of an income tax paid upon his salary, was of course of limited scope and the larger question was only to be perceived upon a study of the opinion; and the other was that many have doubtless felt the non-taxability of state securities to be well settled. Moreover, the particular question also involved a consideration of another point, namely the effect of the constitutional prohibition against diminishing the compensation of a federal judge during his continuance in office.<sup>5</sup>

It is true that the history of the Sixteenth Amendment and the decisions under it gave much ground for this belief as to the question of the taxability by the federal government of income received from a state or its subdivisions.<sup>6</sup> Prior to the Amendment it had been held, apparently without serious conflict of opinion, that as the power to tax was the power to destroy, Congress had no power of taxation over any instrumentalities of a state.<sup>7</sup> When the Sixteenth Amendment was proposed to the states, Governor Hughes of New York asked the assembly of that state to reject it on the ground that it gave such

<sup>4</sup> That the effect of *Eisner v. Macomber*, *supra*, upon government receipts will not in the long run necessarily be large, see (1920) 29 YALE LAW JOURNAL, 738.

<sup>5</sup> Art. III, sec. 1, of the Constitution. The salary of the President is subject to a similar safeguard. Art. II, sec. 1, cl. 6. The same question is there involved.

<sup>6</sup> See (1920) 29 YALE LAW JOURNAL, 735, 740, 741. See also A. C. Ritchie, *Power of Congress to Tax State Securities*, (1919) 5 AM. BAR ASS'N. JOUR. 602; cf. Harry Hubbard, *The Sixteenth Amendment*, (1920) 33 HARV. L. REV. 794.

<sup>7</sup> *Collector v. Day* (1870, U. S.) 11 Wall. 113, 114 (state salaries not taxable); *United States v. Baltimore & Ohio Ry.* (1872, U. S.) 17 Wall. 322 (municipal bonds not taxable; two justices dissenting, one justice abstaining from decision); *Pollock v. Farmers Loan & Trust Co.* (1895) 157 U. S. 429, 15 Sup. Ct. 673, (1895) 158 U. S. 601, 15 Sup. Ct. 912, *Ambrosina v. United States* (1902) 187 U. S. 1, 23 Sup. Ct. 12; *Farmer's, etc., Bank v. Minnesota* (1914) 232 U. S. 516, 34 Sup. Ct. 354. Cf. *South Carolina v. United States* (1905) 199 U. S. 437, 26 Sup. Ct. 11, upholding a tax upon a non-governmental agency of a state.

power to Congress and thus jeopardized the future existence of the states. This called forth so much adverse comment at the time as to lead the Supreme Court in the principal case to say that "the apprehension was effectively dispelled and ratification followed." And finally the Supreme Court has previously said in several cases that the Amendment gave no new taxing power to Congress, but merely removed a disability that hindered the method of levying a certain kind of tax.<sup>8</sup> Nevertheless, the question could not be considered definitely settled until a decision had expressly considered the point, for there had been some noteworthy accord with Governor Hughes' views,<sup>9</sup> and the question had been considered so far open that it was debated in Congress at the time when the income tax bill of 1918 was under consideration.<sup>10</sup> Only last spring a powerful argument was made in a law review article for the position now repudiated by the majority of the Court, and its reasoning was accepted *in toto* by the dissenting justices.<sup>11</sup>

It was necessary for the Court to pass upon this matter, since it first came to the conclusion, discussed hereafter, that under the original Constitution the salaries of the federal judges could not be subject to an income tax.<sup>12</sup> Then the question arose whether the Sixteenth Amendment by referring to "incomes from whatever source derived"<sup>13</sup> had given such additional power to the federal government,

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<sup>8</sup> *Brushaber v. Union Pacific Ry.* (1916) 240 U. S. 1, 36 Sup. Ct. 236; *Stanton v. Baltic Mining Co.* (1916) 240 U. S. 103, 36 Sup. Ct. 278; *Peck v. Lowe* (1918) 247 U. S. 165, 38 Sup. Ct. 432. See Ballantine, *Constitutional Aspects of the Excess Profits Tax* (1920) 29 YALE LAW JOURNAL, 625, 628, and *cf.* comment on these cases as *dicta* by Hubbard, *op. cit. supra*, note 6.

<sup>9</sup> Citations are given in Ritchie, *op. cit. supra*, note 6. See Professor R. C. Minor, *The Proposed Income Tax Amendment* (1910) 15 VA. LAW REG. 737, 753; A. C. Graves, *Inherent Improprieties in the Income Tax Amendment* (1910) 19 YALE LAW JOURNAL, 505, 528; Governor A. E. Willson of Kentucky, *The Income Tax Amendment* (1911) 43 CHI. LEG. NEWS, 251, quoting from a letter of Governor Hughes.

<sup>10</sup> The House supported such a measure, but the Senate did not. See Ritchie, *op. cit. supra*, note 6. The language of the present Act, however, is broad enough to include incomes from salaries of state and local officials and apparently in the view of the Senate Finance Committee the constitutional question was to be raised. Montgomery, *Income Tax Procedure*, (1920) 268, 269. The Attorney General has, however, ruled against the collection of a tax on such income. (1919) 31 Op. Atty. Gen. 441. Senator Knox supported the constitutionality of a tax on the income of state securities under the war powers of the government. *Cong. Rec.* (65th Cong., 2d sess.) 11854, 11859-11861. See arguments *contra* of Senator Kellogg, *id.* 12179, and of Professor Taft, *id.* 12451.

<sup>11</sup> Hubbard, *op. cit. supra*, note 6.

<sup>12</sup> Under the provisions cited in note 5, *supra*.

<sup>13</sup> "The Congress shall have power to lay and collect taxes on incomes, *from whatever source derived*, without apportionment among the several states, and without regard to any census or enumeration." The words in italics did not appear in the original amendment proposed in Congress, but the wording was, "direct taxes upon incomes." See Hubbard, *op. cit. supra*, note 6.

a question the answer to which, as the court expressly states, decides the question of the taxability of all incomes received from the states.<sup>14</sup>

Quite probably the words quoted from the Amendment were inserted in part at least to blot out all distinctions between incomes from different sources. The famous Pollock case had suggested such distinctions, stating that a tax on the gains or profits from business, privileges, or employments as distinguished from income from real and personal property and the like, might be sustained as an "excise tax."<sup>15</sup> Nevertheless, there is nothing in such history to demand a decision that these words add nothing to the previous definitions by the Court of *taxable* income. On the contrary, the ordinary meaning of the all-inclusive words used would seem to demand the opposite construction, namely one including all kinds of income, no matter from what source derived. The decision unduly limits the words used in the Amendment, a limitation which it attempts to justify by defining the purpose of the Amendment as in effect to remove the restrictions stated in the Pollock case, i. e. the requirement of apportionment. It is submitted that there is nothing in this historical background to make necessary the attributing of such a limited purpose to the framers of the Amendment and to require the consequent restriction of the plain language of the Amendment. The arguments to be drawn from certain facts, namely, that the Pollock case also held taxes upon municipal bonds invalid, and that the wording of the amendment was changed in Congress to include the broader designation of income, point the other way.<sup>16</sup>

There is another view which lends weight to a contrary construction of the Amendment and even makes doubtful the court's view of the law irrespective of the Amendment. That is the question how far for the purpose of a tax figured on a general balance struck after adding all gains and subtracting all proper deductions for the year it is possible or permissible to consider such balance as composed of items from separate sources. As Mr. Justice Holmes in his dissent puts it, at some point money received as salary loses its specific character as such and becomes intermingled with the general funds of the owner. Thus, if put into a house, the house of the judge is not tax-exempt,

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<sup>14</sup> Since, in the view of the cases cited in note 7, *supra*, such income was taxable, if at all, only under the Sixteenth Amendment.

<sup>15</sup> See *Pollock v. Farmers' Loan and Trust Co.* (1895) 158 U. S. 601, 635, 15 Sup. Ct. 912, 920.

<sup>16</sup> It should be remembered that in the Pollock case the Court held, five to four, that taxes on income from property were direct taxes and hence required equal apportionment, and further held unanimously that taxes on income from state securities were beyond the power of Congress. The Act under consideration there was improper for both reasons. The latter portion of the Sixteenth Amendment would remove the first objection, while the words in italics, especially in view of the change from the original form proposed (see note 13, *supra*), would be surplusage unless they remove the second objection.

and so if converted into other things subject to taxation, e. g. playing cards subject to the federal government's excise tax. There seems to be no reason why a man's income may not be treated as one entire fund for the year, and it is reasonable to suppose an intention of the framers of the Amendment to do away with all questions of its derivation so long only as it is income.

This argument had been well developed by the government to meet the contention that the tax violated the Constitution because it diminished the judge's compensation during his term of office, and it had met with the approval of the lower court.<sup>17</sup> Moreover the Attorney General in a well-reasoned opinion given last year had argued that the tax, at most, had "increased the cost of living by creating a new obligation of citizenship, to the discharge of which a part of the salaries must be devoted."<sup>18</sup> Here, too, admitting all that the majority say as to the vital necessity of an independent judiciary, it seems hard to justify their construction of the constitutional provision as to the diminishing of compensation. They properly hold it was intended primarily for the benefit of the public to secure a proper judiciary, and was not designed for the benefit of the individual judges. Hence the purpose involved was to prevent any legislative attacks upon the judges' livelihood which might render them subservient to that branch of the government. It is difficult to see how the distribution of the burdens of government over all the citizenry without discrimination is going to have any particular effect in destroying the independence of the judiciary.<sup>19</sup>

Such a view of income as a blended mass the Court had tended to foster by certain of its decisions under the Amendment. Thus it had held that a tax levied upon the income of a corporation of which more than two thirds was derived from exports did not violate the pro-

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<sup>17</sup> *Evans v. Gore* (1919, N. D. Ky.) 262 Fed. 550, approved in (1920) 18 MICH. L. REV. 698.

<sup>18</sup> (1919) 31 Op. Atty. Gen. 475, 484. The Attorney General, as well as counsel for the government and the court below, had felt it necessary to concede, in view of the cases cited in note 8, *supra*, that the Sixteenth Amendment gave no new taxing power to Congress. The dissent indicates that the concession was unwise.

<sup>19</sup> See citations in notes 17 and 18, *supra*, and see especially 262 Fed. 552. The Supreme Court's construction of section 1 of Article III appears to coincide with the views of Chief Justice Taney, expressed in a letter of protest to the Secretary of the Treasury, (1863) 157 U. S. 701; with the opinion of Attorney General Hoar, (1869) 13 Op. Atty. Gen. 161; and with the views of Mr. Justice Field in the Pollock case, (1894) 157 U. S. 429, 604-606, 15 Sup. Ct. 673, 698-699. The decisions in the state courts on similar constitutional provisions are conflicting. Authorities are collected in (1919) 31 Op. Atty. Gen. 475, and in *State ex rel. Wickham v. Nygaard* (1915) 159 Wis. 396, 150 N. W. 513, holding that the Wisconsin income tax did not diminish the salary of a public officer during his term of office. Since the decision in the principal case, the acting Attorney General has ruled that the salaries of federal judges appointed *after* the passage of the Revenue Act of 1918 are subject to the income tax levied by that Act. (1920) 32 Op. Atty. Gen. 248.

hibition against a tax on exports.<sup>20</sup> A similar rule was announced as to interstate commerce.<sup>21</sup> The Court's differentiation of these cases is that an income tax laid, not on gross receipts, but on net proceeds remaining after all expenses were paid and losses adjusted, does not directly burden the business, but only indirectly and remotely affects it. It does not seem clear why an indirect and remote effect is not permissible in one class of cases while it is in another.<sup>22</sup>

The effects of the Court's broad holding are serious. Not merely is a large and growing field of revenue shown to be beyond the reach of the federal government, but the whole present scheme of federal income taxation with its surtaxes increasing with the amount of income, is impracticable. The resulting effects upon business in general and upon such especially acute situations as the present lack of housing cannot be underestimated. Why should one possessing capital invest in real estate mortgages to enable a would-be householder to build, when vastly more return may be obtained from a municipal bond?<sup>23</sup> The whole incentive of this situation is to turn capital from fields vitally necessary to everyone to fields of public works. Such works in part at least are of course desirable, but many forms of public works are non-productive and the greater security involved in investments of this character has under ordinary conditions made them sufficiently attractive to investors. To make them still more attractive is to place an incentive on governmental extravagance at the expense of productive forms of business, and at the same time the whole theory that he who has the greater income must share a greater portion of the burden of government falls to the ground, for he invests in tax-exempt securities.<sup>24</sup>

The outlook for a change in this situation is dark. The only possible change is by another constitutional amendment, and the prospects of securing the passage of such an amendment against the opposition of the states seems slight. The only compensating feature of the situation is in the notice thus given the government that the field of income taxation is not limitless and that the burdens of government must be reduced.

C. E. C.

<sup>20</sup> *Peck & Co. v. Lowe* (1918) 247 U. S. 165, 38 Sup. Ct. 432; cf. (1918) 27 YALE LAW JOURNAL, 1096.

<sup>21</sup> *United States Glue Co. v. Oak Creek* (1918) 247 U. S. 321, 38 Sup. Ct. 499.

<sup>22</sup> See Powell, *Indirect Encroachment on Federal Authority* (1919) 32 HARV. L. REV. 902, 926-928; also 262 Fed. 554.

<sup>23</sup> Under the present federal income tax a 4½ per cent tax-free bond yields as much net income to a person possessing income exceeding \$40,000 as a taxable security paying 6.08 per cent. The rate increases until in the case of persons with incomes of over \$1,000,000 the 4½ per cent tax-free bond is as profitable as a security yielding 16.67 per cent. Kahn, *Two Years of Faulty Taxation* (1920) 14, 15.

<sup>24</sup> Obviously federal securities must be kept tax-free in order to compete with the state and municipal securities.

## THE CONSTITUTIONALITY OF THE FOOD CONTROL ACT

Section 4 of the Lever Act, or Food Control Act, of August 10, 1917,<sup>1</sup> rendered unlawful the sale of necessities at an unjust and unreasonable price. Congress failed to provide a penalty for this offense. Therefore the Circuit Court of Appeals held that charging an unreasonable price for sugar was no crime under Section 4, as federal courts have no jurisdiction in criminal cases except where the punishment is specifically provided for by an Act of Congress.<sup>2</sup> This is the traditional view as to the criminal jurisdiction of federal courts.<sup>3</sup>

The amendment to this Act, of October 22, 1919,<sup>4</sup> provided that a fine not exceeding \$5,000 or imprisonment for two years, or both, be visited upon a violator of this section, excepting from the application of this statute, however, farmers, dairymen, and stockmen with respect to products raised on land owned or leased by them, and excepting collective bargaining of farmers and dairymen through their coöperative associations. In two decisions of federal district courts on the constitutionality of this section, as amended, it was held void in that it denies to the accused the information as to the nature and cause of the accusation, which is assured to him by the Sixth Amendment. It was said that a statute creating a crime should be sufficiently definite so that a man may know whether or not he is committing one without running the risk of a different interpretation on the part of a jury which tries him.<sup>5</sup> But the majority of the courts in which this question has arisen have held the section to be sufficiently definite and it would seem that this is the preferable view.<sup>6</sup> An extraordinary condition existed at the time of the passage of the Lever Act. Some curb was necessary upon the rapaciousness of the profiteer. Local conditions were too varied to permit of a set schedule of prices. The establishment of a maximum percentage of profit would have been too cumbersome and slow of enforcement. It was thought safe to leave this question to the jury. "The law is full of instances where a man's fate depends upon his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." These were the words of Justice Holmes in upholding the constitutionality of the criminal sections of the Sherman Anti-Trust Act in the case of *Nash v. United States*.<sup>7</sup> In that decision the same objection was made as in the instant case; that the words, "unduly restrict competition," were so

<sup>1</sup> Comp. St. U. S. 1918, Comp. St. Ann. Supp. 1919, sec 3115 1/8 ff.

<sup>2</sup> *Mossew v. United States* (1920, C. C. A. 2d) 266 Fed. 18.

<sup>3</sup> *Tennessee v. Davis* (1879) 100 U. S. 257.

<sup>4</sup> 41 Stat. at L., 297.

<sup>5</sup> *Detroit Creamery Co. v. Kinnane* (1920, E. D. Mich.) 264 Fed. 845; *United States v. Cohen Grocery Co.* (1920, E. D. Mo.) 264 Fed. 218.

<sup>6</sup> *United States v. Russell* (1920, E. D. La.) 265 Fed. 414; *United States v. Oglesby Grocery Co.* (1920, N. D. Ga.) 264 Fed. 691.

<sup>7</sup> (1913) 229 U. S. 373, 377, 33 Sup. Ct. 780, 781.

indefinite as to constitute a violation of the Sixth Amendment. Those attacking this section of the Lever Act laid great stress on the case of *International Harvester Co. v. Kentucky*.<sup>8</sup> But that was a case under a state statute making "any combination lawful unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article." And this "real value" was to be its market value "under fair competition and under normal market conditions." The court held that this was compelling the corporation to guess what prices would be in an imaginary world and under penalty of an indictment, and held the law void. The opinion in the Harvester Co. case distinguishes the Nash case by saying, "that deals with the actual, not with an imaginary condition other than the facts." "The statute may be construed to forbid, in time of war, any departure from the usual and established scale of charges and prices in time of peace, which is not justified by some special circumstance of the commodity or dealer."<sup>9</sup> Thus interpreted, it would seem that the Lever Act cannot be successfully attacked on the ground of indefiniteness.

Section 4 of the Lever Act has, however, been held unconstitutional as a violation of the Fifth Amendment, because it exempts from its operation farmers and others. In the case of *United States v. Armstrong*<sup>10</sup> Judge Anderson of Indiana held that the "due process of law" clause was violated because of the arbitrary and unreasonable classification in exempting farmers and stockmen. These persons were favored in comparison with the producers of fuel, for example, whose product was of similar nature and quite as necessary to the conduct of the war. This presents an interesting problem on which we may shortly expect to see further litigation.<sup>11</sup>

#### SOCIAL WELFARE

A field in which reliable social welfare statistics as to the effect of legal principles in actual operation would be of inestimable value in deciding what the law ought to be, is that of attorney's contingent fee contracts. The argument from necessity for such contracts is obvious: that otherwise poor suitors with deserving cases would find it impossible to get their cases into court. Hence the validity of such contracts

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<sup>8</sup> (1914) 234 U. S. 216, 34 Sup. Ct. 853.

<sup>9</sup> *United States v. Oglesby Grocery Co.*, *supra*, note 6, at p. 695.

<sup>10</sup> (1920, D. Ind.) 265 Fed. 683.

<sup>11</sup> The payment of a fine imposed in a criminal case, even if the judgment of conviction was void, is not a bar to a suit to recover the money. *United States v. Rothenstein* (1911, C. C. A. 7th) 187 Fed. 268. Under this rule a fine which had been paid to the government following a conviction under the original section was recovered in *Mossew v. United States*, *supra*, note 2.

is usually upheld in this country.<sup>1</sup> Just as obvious is the fact that there is now afforded unworthy members of the profession an opportunity availed of all too often for making extortionate and unconscionable agreements and for speculating in weak cases, accompanied, as such practice usually must be, by the worst forms of solicitation and touting of business.<sup>2</sup> Statistics, if available, as to the number of meritorious cases saved by contingent fee contracts, the number of cases decided for defendants instituted under such agreements and the like would throw much light upon the desirability of the present legal viewpoint.<sup>3</sup> The proper result may well be that it is more desirable to provide for the needs of poor litigants in other ways, such as the legal aid society and similar agencies.<sup>4</sup> At any rate courts may well refuse to uphold such contracts when the necessity for them does not exist or is outweighed by other considerations. Thus the law's well-known abhorrence of divorce leads to a refusal to enforce contingent fee contracts to procure divorces.<sup>5</sup> In *Baca v. Padilla* (1920, N. M.) 190 Pac. 730, the same principle was applied to an attorney's contract to assist in the prosecution of a criminal case for a fee contingent upon the conviction of the accused. There has been considerable question as to the wisdom of allowing private counsel to assist in public prosecution at all; whether the interest of state and accused are not better served by having the prosecution entirely in the hands of a disinterested public official. Most courts have thought such assistance permissible, however, so long as the actual control of the prosecution remains with the public prosecutor.<sup>6</sup> But a contingent fee contract under such circumstances must rest upon not one but two principles of doubtful societal value and the court properly refused to enforce it.<sup>7</sup>

<sup>1</sup> Cases are collected in 2 Thornton, *Attorneys* (1914) sec. 421; 1 Ann. Cas. 299, note. As to the limitations on such agreements in some jurisdictions see *Hadlock v. Brooks* (1901) 178 Mass. 425, 59 N. E. 1009, and Thornton, *op. cit.*, sec. 388.

<sup>2</sup> See discussion by J. H. Cohen, *The Law, Business or Profession* (1915) 205 ff., especially 209: "Its general practice is to-day at the root of much of all the evils in the practice of the law, and sooner or later will be controlled either by rules of court or by legislation."

<sup>3</sup> See C. E. Grinnell, NOTES (1882) 16 AM. L. REV. 240, 242; "the actual effect of an habitual practice for contingent fees . . . seems to us to be the turning point of the discussion, so far as its value to the profession is concerned."

<sup>4</sup> See R. H. Smith, *Justice and the Poor* (1919) for review of agencies devised to secure better justice for poor litigants.

<sup>5</sup> *Newman v. Freitas* (1900) 129 Cal. 283, 61 Pac. 907; *Barngrover v. Pettigrew* (1905) 128 Iowa 533, 104 N. W. 904, 2 L. R. A. (N. S.) 260, note; 33 L. R. A. (N. S.) 1074, note.

<sup>6</sup> *State v. Kent* (1895) 4 N. D. 597, 62 N. W. 531. But see *Rock v. Ekern* (1916) 162 Wis. 291, 156 N. W. 197. Cases are collected in Ann. Cas. 1912 B, 659, note.

<sup>7</sup> There is little authority. See *Rock v. Ekern*, *supra*, with L. R. A. 1916 D, 459, note; *Price v. Caperton* (1864, Ky.) 1 Duv. 207.

Lobbying contracts are not always illegal; but contracts for the use of "personal influence" with legislators or executive officers are illegal and void.<sup>1</sup> This is the more certain if payment for such service is contingent either wholly or in the amount payable, upon success in the undertaking. In *Eads v. Stifel* (1920, Mo. App.) 222 S. W. 482, the appellate court of Missouri held that the same principle applies in the case of contracts for personal service in political campaigns, primary and final. The plaintiff's testimony showed that he was promised \$100 per week "to use his influence to secure delegates to a national convention favorable to the candidate supported by the defendant." The court held this contract to be illegal, both by virtue of a particular statute defining the crime of bribery, and on grounds of general public policy.

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One has a glowing mental picture of that "innocent female" of the old melodrama, that sweet heroine of incredible gullibility relentlessly pursued by a tort-feasing villain of criminal intent. But the Supreme Court of Iowa<sup>1</sup> produces an "unmarried" (in the sense of de-married)<sup>2</sup> Juliet of forty-four, twice led to the altar and twice divorced, and heroically sustains a charge of seduction against the villain. He had promised to marry her—they always do—and now, in five-reel style, enters a plea of "vampire" as a defense. Chivalrous but unromantic, the law perhaps can not consider the knowledge and experience of those whom it undertakes to protect.<sup>3</sup> So that aside from its failure as a scenario, the decision seems sound.<sup>4</sup>

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<sup>1</sup> *Trist v. Child* (1874, U. S.) 21 Wall. 441; *Providence Tool Co. v. Norris* (1864, U. S.) 2 Wall. 45; *Crocker v. United States* (1915) 240 U. S. 74, 79, 36 Sup. Ct. 245.

<sup>2</sup> *Wiley v. Fleck* (1920, Iowa) 178 N. W. 410.

<sup>3</sup> *State v. Eddy* (1918) 40 S. D. 390, 167 N. W. 392.

<sup>4</sup> *State v. Wallace* (1916) 79 Ore. 129, 154 Pac. 430.

<sup>5</sup> *People v. Weinstock* (1912, City Magistrate's Court, N. Y.) 140 N. Y. Supp. 453, where the subject is ably reviewed. *Contra*, *Jennings v. Commonwealth* (1909) 109 Va. 821, 63 S. E. 1080.