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Note and Comment

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NOTE AND COMMENT

THE FEDERAL COURTS AND LOCAL LAW IN PORTO RICO.—A recent decision of the Supreme Court of the United States further manifests the policy of that court not to interfere with the civil law system in vogue in the territory acquired by the United States, as a result of the Spanish-American War, any more than is necessary to protect the interests of the people of those countries.

The case of *José Antonio Fernandez y Perez* v. *José Perez y Fernandez*, decided in the Supreme Court of the United States, on April 23, 1906, came to it on writ of error to the District Court of the United States, for the District of Porto Rico. In the lower court an action was begun, in 1901, by the defendant in error to recover in an action for "trespass upon the case for wrongful attachment." A writ of attachment had been levied upon the premises of the defendant in error and notice posted thereon. The attachment had afterwards been vacated. The suit for damages for wrongful attachment had been tried before a jury in the District Court and a verdict for $7,000 damages was given. *Held*, by the Supreme Court of the United States, that the United States District Court had no jurisdiction of this action and consequently that the proceedings had therein were null and void.

From the brief of the attorneys for the plaintiff in error it seems that it has been the custom of the United States District Court in Porto Rico, ever since its establishment, "to exercise a common law jurisdiction exactly as do Federal courts in common law states like Illinois." In this particular case the attachment proceeding complained of was commenced in January, 1901, in the military court, known as the United States Provisional Court for the Department of Porto Rico. After the serving of the usual summons upon the defendant, the levying of the writ and the posting of the notice on the premises attached, the proceeding had been stayed by an injunction issuing out of the United States District Court, granted on the grounds that the plaintiff in attachment, who sued as an executor of a will probated in Spain, had not taken out ancillary letters in Porto Rico. The affidavit in attachment had been sworn to by José Antonio Fernandez y Perez, and against him the verdict for wrongful attachment had been brought in.

Section 34 of the Foraker Act established a United States District Court for Porto Rico and gave to it in addition to the ordinary jurisdiction of a District Court of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States, and provided that it should proceed therein in the same manner as a Circuit Court, "the intention of Congress evidently being," as Mr. JUSTICE DAY says in his opinion, "to require the District Court exercising the jurisdiction of a Circuit Court, in analogy to the powers of the Circuit Courts in the States, to adapt itself, save in the excepted cases of equity and admiralty, to the local procedure and practice in Porto Rico." The "provisional seizure" law in force in Porto Rico is a most admirable and complete attachment act. (See Title XIV, Law of Civil Procedure for Porto Rico, War Department Translation, Article 1395 *et seq.*) The theory of these sections of the Code is that when the court which issues the attachment is satisfied that the same has been wrongfully issued, it will proceed in the manner pointed out by the statute to ascertain the loss and damages which the defendant has suffered, and in the same action to tax the costs against the plaintiff and to adjudge him to indemnify the defendant for such losses and damages. These proceedings, which immediately follow as soon as the defendant in attachment has been declared entitled to recover damages, are said by the United States Supreme Court, "to preclude the application of general provisions of the Civil Code giving a right of recovery for acts of fault or negligence."

It is worthy of note that our Supreme Court finds no difficulty in resting its decision on the statement of a text book writer, according to the continental practice, rather than on a decided case, as the English system of jurisprudence theoretically demands. The court quotes the text book dictum of Senor José Maria Manresa y Navarro, in his *Commentario a la Ley de Enjuiciamiento Civil*, to the effect that this method of recovery of damages for wrongful attachment is exclusive and that an independent action for damages would not lie. The Court further says "that there is nothing in this special procedure encroaching upon the right of a jury trial secured by the Federal Constitution, in suits at common law where the value in controversy exceeds twenty dollars. If it be assumed—a point which it is not necessary to decide—that that part of the Constitution is applicable and in

force in Porto Rico, the proceeding is not a suit at common law, but simply a method of ascertaining damages in a special proceeding in which property has been wrongfully seized."

It would seem that the effect of this decision would be to compel the United States District Court in Porto Rico to adopt the practice of the Porto Rican courts, and of course the question naturally presents itself as to what will be the position of other parties whose suits have been adjudicated by the District Court during the past five years in accordance with common law procedure. It looks as though much of the work might have to be done again. To one viewing the situation from the outside it would appear to be not only good law, but likewise most excellent policy for the United States District Court in Porto Rico to model its procedure as closely as possible upon that of the local courts. By the course heretofore followed, the native bar of Porto Rico, which includes in its ranks many members of wide cultivation and learning, is practically excluded from representing its own people in the United States Court. We certainly do not want to erect a protective tariff wall around American lawyers practicing in Porto Rico, whatever may be our views in general about that divine and beneficent institution.

Not the least interesting question involved in this suit is one that does not appear in the opinion at all, or at least it is dismissed by the Court as irrelevant to the decision. In the first briefs of the attorneys on either side the question was argued at length as to whether recovery could be had in a *civil* suit for damages for malicious prosecution under the provisions of Article 1902 of the Civil Code of Spain (§ 1803 of the Civil Code of Porto Rico): "A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to *repair* the damage done." In the very able brief for the plaintiff in error, presented by Messrs. James and John Harlan of Chicago, it is argued that the word *"repair"* in this Article applies only to the recovery of damages of a material nature that is capable of being exactly valued, but that damages to one's reputation or dignity through the wrongful act of another must be punished criminally according to the Spanish system of law, and that the proceedings must be under the provisions of the Criminal Code. The want of jurisdiction under the Civil Code in actions to recover damages for libel and slander was recognized by the legislative assembly of Porto Rico, after judgment in this case had been given in the lower court, by the passage of "An act authorizing civil actions to recover damages for libel and slander" approved, February 19, 1902. Revised Statutes and Codes of Porto Rico, 1902, p. 214. It was therefore argued that "at the time when the attachment writ complained of in this record was issued there was no such thing in Spanish jurisprudence as a civil action sounding in tort." If this contention is correct it gives to an English student approaching the study of Spanish law a satisfactory solution to the puzzling question as to the meagreness of the law of torts in the Spanish Civil Code. The old time confusion of the classic Roman law between torts and crimes seems to have been perpetuated in the Spanish system, and the Spanish lawyer must go to the Penal Code in many instances for the adjudication of a question of civil damages, as a sort of a side issue or an addendum to the punishment of crime.

The decision, however, leaves this question untouched as it went off on the affirmative decision of the third question propounded to the attorneys by the Supreme Court as the theme for an additional brief; namely, "under the law of civil procedure as existing in Porto Rico at the time of the attachment proceedings complained of, could the damages herein claimed have been allowed or assessed in that proceeding upon dissolution or discharge of the attachment? If so, was that mode exclusive of every other for ascertaining such damages?"

MR. JUSTICE WHITE with MR. JUSTICE MCKENNA dissented from the majority opinion of the Supreme Court on the ground that the question upon which the judgment was reversed was not saved in the court below, and that the error, if any, was a mere question of the mode of procedure involving no want of jurisdiction *ratione materiae.*

J. H. D.

THE INVESTIGATION OF CORPORATE MONOPOLIES.—The Supreme Court of the United States has recently given a clear and brief statement of its views respecting the right of a corporation officer to refuse to testify on the ground that his testimony may subject the corporation to a criminal prosecution. *Hale* v. *Henkel,* 26 Sup. Ct. Rep. 370. Hale was summoned before a grand jury in a proceeding under the Sherman anti-trust act, and upon being interrogated respecting certain transactions of the MacAndrews & Forbes Co., of which he was Secretary and Treasurer, refused to answer, on the ground that the Federal immunity law was not broad enough to embrace corporations, and that a corporation agent could therefore claim a constitutional right to refuse to answer questions tending to incriminate such corporation.

To this plea, MR. JUSTICE BROWN, speaking for the Court, replied: "The right of a person under the 5th amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation... The amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself;* and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation. As the combination or conspiracies provided against by the Sherman anti-trust act can ordinarily be proved only by the testimony of parties thereto, in the person of their agents or employees, the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject? Indeed, so strict is the rule that the privilege is a personal one that it has been held in some cases that counsel will not be allowed to make the objection. We hold that the questions should have been answered."

E. R. S.

COMPELLING THE PRODUCTION OF CORPORATION BOOKS AND PAPERS.—Hale, the plaintiff in the case of *Hale* v. *Henkel, supra,* was served with a *subpoena duces tecum,* commanding him to produce before the grand jury all contracts, memoranda, correspondence, reports, letters, etc., having to do with the business of the MacAndrews & Forbes Company. He pleaded immunity from the operation of the subpoena under the 4th amendment, which prohibits unreasonable searches and seizures. The Court held that an order for the production of books and papers may constitute an unreasonable search and seizure within the 4th amendment. "While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd Case* [*Boyd* v. *United States,* 116 U. S. 616] the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum,* against which the person, be he individual or corporation, is entitled to protection. Applying the test of reasonableness to the present case, we think the *subpoena duces tecum* is far too sweeping in its terms to be regarded as reasonable. . . A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms."

MR. JUSTICE MCKENNA, in a concurring opinion, dissented from the opinion of the court in all these particulars, and not only declared the *subpoena duces tecum* sufficient and valid, but thought it so far removed in its nature from a search warrant that its use could not be deemed within the restrictive force of the 4th Amendment. And he went so far as to hold that if the 5th Amendment did not apply to corporations, neither did the 4th Amendment apply to them. But no other member of the court agreed with him.

These three propositions summarize the holding of the Court: (1) A *subpoena duces tecum* must be as specific as a search warrant, (2) The 4th Amendment applies to such a subpoena, and (3) A corporation may avail itself of the protection of the 4th Amendment as fully as may an individual.

E. R. S.

GOODS DAMAGED BY ACT OF GOD BECAUSE OF A CARRIER'S NEGLIGENT DELAY.—There is a sharp conflict of authority among the cases upon the question of a carrier's liability for goods damaged by an act of God, where such injury would not have occurred but for the carrier's negligent delay in transporting the goods. An examination of the cases directly in point shows that they are about evenly divided, although it has been said that the greater number of cases hold the carrier not liable under such circumstances (GODDARD'S OUTLINES OF BAILMENTS AND CARRIERS, § 248), that the preponderance of authority favors the carrier (6 CYC. 382), and that the weight of authority is in accordance with this view (SCHOULER ON BAILMENTS, § 348, n. 5.)

The courts which support the rule that the carrier is not liable, base their decisions upon the theory of proximate cause, holding that the act of God, and not the negligent delay of the carrier, is the proximate cause of the injury. "A man is answerable for the consequences of a fault only so far as the same are natural and proximate, and as may, on this account, be seen by ordinary forecast. and not for those which arise from a conjunction of his

fault with other circumstances that are of an extraordinary nature." *Morrison* v. *Davis* (1852) 20 Pa. St. 171. This rule prevails in the Supreme Court of the United States, the Federal courts, Massachusetts, Mississippi, North Carolina, Ohio, Pennsylvania and Virginia. It also appears to be the present doctrine of the appellate courts of Missouri.

Those courts which hold the carrier liable maintain that the act of God must not only be the proximate, but also the sole, cause of the loss, and that the carrier is not excused by the act of God where the injury would not have occurred but for its negligent delay in transportation. "To excuse the carrier, the act of God must be the sole and immediate cause of the injury. If there be any co-operation of man, or any admixture of human means, the injury is not, in a legal sense, the act of God." *Michaels* v. *New York Cent. Ry. Co* (1864) 30 N. Y. 571. "In order to avail himself of such exemption, he must show that he was himself free from fault at the time. His act or neglect must not contribute or concur to produce the injury, and if he departs from the line of his duty and violates his contract, and, while thus in fault, the goods are injured by an act of God, he is not protected." *Dunson* v. *New York Cent. Ry. Co.* (1870), 3 Lans. (N. Y.) 265. This doctrine is followed in Alabama, Illinois, Iowa, Kentucky, Louisiana, New York and West Virginia. It seems to be the doctrine of the Missouri Supreme Court, but the appellate courts of that State at present hold the contrary view. It is claimed that this rule is based upon grounds of public policy. 36 Am. St. Rep. 838 (Note).

The Supreme Court of Iowa, in the recent (Mar. 9, 1906) case of *Green-Wheeler Shoe Co.* v. *Chicago, etc., Ry. Co.,* 106 N. W. Rep. 498, has adopted the rule holding the carrier liable, thus taking the position said to be against the weight of authority. In that case, which was tried upon an agreed statement of facts, the defendant was guilty of negligent delay in forwarding the goods of the plaintiff from Fort Dodge to Kansas City, where they were lost or injured on May 30, 1903, in the great flood which visited Kansas City and vicinity at that time. The flood was so unusual and so extraordinary as to constitute an act of God, but if there had been no negligent delay the goods would not have been caught in the flood nor damaged thereby. In the absence of any previous express declaration in Iowa upon the precise point involved, the court felt free to adopt the rule which seemed to it just and reasonable. The Court said: "The real difficulty seems to be in determining to what extent, if at all, it is necessary that the negligent party must have been able to foresee and anticipate the result of his negligent act in order to render him liable for the consequences thereof rsulting from a concurrence of his negligence and another cause for which he is not responsible. In an action on contract the party who is at fault is only liable for such consequences as arise according to the usual course of things from his breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time the contract was made as the probable result of the breach. *Hadley* v. *Baxendale* (1854) 9 Exch. 341. * * * But in an action for tort, and the present action is of that character, recovery is not limited to the consequences within the contemplation of the parties or either of them, but includes all of the consequences 'resulting by ordinary natural sequence, whether

foreseen by the wrongdoer or not, provided that the operation of the cause of action is not interrupted by the intervention of an independent agent or overpowering force, and that but for the operation of the cause of action the consequence would not have ensued.' SEDGWICK, ELEMENTS OF DAMAGES, 54. It is true that, for the purpose of determining whether the injury suffered by the party complaining was the natural and probable result of the wrong complained of, a convenient test is to consider whether such a result might have been foreseen as the consequence of the wrong, but it is not necessary 'that the injury in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been the natural and probable consequence.' *Hill* v. *Winsor* (1875) 118 Mass. 251. * * * Now, while it is true that defendant could not have anticipated this particular flood, and could not have foreseen that its negligent delay in transportation would subject the goods to such a danger, * * * defendant should have foreseen, as any reasonable person could foresee, that the negligent delay would extend the time during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty, and would therefore increase the peril that the goods should be thus lost to the shipper." As a further argument in support of its conclusion, the court calls attention to an analogy which it claims exists between deviation and delay. It is a well settled rule that if the carrier transports the goods over some other route than that specified in the contract, or reasonably within the contemplation of the parties, he must answer for any loss or damage occurring during such deviation, although it is from a cause which would not in itself render him liable. *Davis* v. *Garrett* (1830) 6 Bing (C. P.) 716; *Crosby* v. *Fitch* (1837) 12 Conn. 410; *Powers* v. *Davenport* (1845) 7 Blackf. (Ind.) 497. In brief, then, the court bases its decision upon two grounds: First, that this is a tort action for which a different rule of damages obtains than in a contract action; and second, that the rule of liability which is applied in cases of deviation should be applied to cases of delay, because the two situations are analogous.

That the liability for a tort extends to more consequences of the wrongful act than the liability for a breach of contract, is a well settled rule of law. This principle, however, does not seem to have been considered in the cases holding the carried not liable, possibly because many of them were contract actions. A good many of these cases cite approvingly the rule laid down in the famous case of *Hadley* v. *Baxendale* (1854) 9 Exch. 341, but, of course, this rule is strictly applicable only to contract actions. "The duties of common carriers with respect to the transportation of persons or property is a duty independent of contract." RAY, PASSENGER CARRIERS, 19.

The analogy between deviation and delay has been recognized by the Supreme Court of the United States in the case of *Constable* v. *National Steamship Co.* (1894) 154 U. S. 51, 14 Sup. Ct. Rep. 1062, 1068. It is also spoken of in HUTCHINSON ON CARRIERS, (2nd Ed.) § 200. It is difficult to see wherein a substantial difference lies between the legal effect of the two sets of circumstances. It is claimed that the distinction lies in that a material deviation amounts to a conversion, which makes the carrier absolutely liable; but it is not apparent why a material delay would not amount to a conversion also. The truth is that the idea of conversion does not enter into the cases which

have established the law of deviation; their decisions are based upon the ground that "the carrier is bound to proceed, without deviation from the usual and ordinary course, to the place of delivery." *Bennett* v. *Byram* (1859) 38 Miss. 17; *Crosby* v. *Fitch* (1837) 12 Conn. 410; *Powers* v. *Davenport* (1845) 7 Blackf. (Ind.) 497. "No wrongdoer can be allowed to apportion or qualify his own wrong, and * * * as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done." *Davis* v. *Garrett* (1830) 6 Bing. (C. P.) 717. It is clear that no idea of conversion prevailed in that case, a case which is the pioneer upon the law of deviation by a carrier. Again, it is difficult to see why the deviation by the carrier in the one case is the proximate cause of the loss, while the act of God is the proximate cause in the other. It would seem that the negligent delay by the carrier is just as much the proximate cause of the loss in the one case, as the deviation is in the other. It is not contended that the law of deviation is theoretically correct, but it is contended that it is inconsistent to hold the carrier liable in the case of deviation, and not liable in the case of delay.

The case of *Bibb Broom Corn Co.* v. *Atchison, etc., Ry. Co.* (1905) 102 N. W. Rep. 709, is authority for the statement that there is no conflict in the cases regarding perishable goods, the carrier uniformly being held liable, and that the conflict arises only in reference to non-perishable goods. The court refers especially to damage by freezing. An examination of such cases, however, shows that the statement is not strictly accurate, although the majority of the cases bear it out. *Mich. Cent. Ry. Co.* v. *Burrows* (1875) 33 Mich. 6; *Herring* v. *Chesapeake, etc., Ry. Co.* (1903), 101 Va. 778.

One case makes a distinction between delay in forwarding and delay in transportation, holding the carrier not liable for the former. It is, therefore, authority for neither side. *Lamont* v. *Nashville, etc., Ry. Co.* (1871), 56 Tenn. (9 Heisk.) 58.

The acts of God involved in the cases divide themselves into four main classes: Floods, fires, freezing, storms. The following is a list of the cases upon both sides of the question. Only those cases, however, relating to common carriers of goods are listed; cases relating to common carriers of live stock, and to baggage, are not included. CARRIER LIABLE. *Floods: Michaels* v. *New York Cent. Ry. Co.* (1864) 30 N. Y. 564; *Read* v. *Spaulding* (1864) 30 N. Y. 630; *Dunson* v. *New York Cent Ry. Co.* (1870) 3 Lans. (N. Y.) 265. *Fires: Condict* v. *Grand Trunk Ry. Co.* (1873) 54 N. Y. 500; *McGraw* v. *Balt., etc., Ry. Co.* (1881) 18 W. Va. 361; *Meyer* v. *Vicksburg, etc., Ry. Co.* (1889) 41 La. Ann. 639; *Hernsheim* v. *Newport News, etc., Co.* (1896) 18 Ky. L. Rep. 227, 35 S. W. Rep. 1115; *Louisville, etc., Ry. Co.* v. *Gidley* (1898) 119 Ala. 523. *Freezing: Mich. Cent. Ry. Co.* v. *Curtis* (1875) 80 Ill. 324; *Vail* v. *Pacific Railroad* (1876) 63 Mo. 230; *Armentrout* v. *St. Louis, etc., Ry. Co.* (1876) 1 Mo. App. 158; *Hewett* v. *C., B. & Q. Ry. Co.* (1884) 63 Ia. 611. CARRIER NOT LIABLE. *Floods: Morrison* v. *Davis* (1852) 20 Pa. St. 171;

Denny v. *New York Cent. Ry. Co.* (1859) 79 Mass. 481 (13 Gray); *Memphis R. R. Co.* v. *Reeves* (1869) 77 U. S. 176 (10 Wall); *Grier* v. *Railroad* (1904) 108 Mo. App. 565; *Moffatt Commission Co.* v. *Union Pacific Ry. Co.* (1905) 88 S. W. Rep. 117 (Mo. App.). *Fires: Hoadley* v. *Northern Trans. Co.* (1874) 115 Mass. 304; *Scott* v. *Baltimore, etc., Steamship Co.* (1884) 19 Fed. Rep. 56; *Thomas* v. *Lancaster Mills* (1896) 71 Fed. Rep. 481; *Yazoo, etc., Ry. Co.* v. *Millsaps* (1899) 76 Miss. 855; *General Fire Extinguisher Co.* v. *Carolina, etc., Ry. Co.* (1904) 49 S. E. Rep. (N. C.) 208. *Freezing: Mich. Cent. Ry. Co.* v. *Curtis* (1875) 33 Mich. 6; *Herring* v. *Chesapeake, etc., Ry. Co.* (1903) 101 Va. 778. *Storms: Daniels* v. *Ballentine* (1872) 23 Ohio St. 532. R. G. H.

THE EFFECT OF DOGMATIC CHANGES UPON THE LEGAL STATUS OF A CHURCH.—The devolution of property held by a church, or in trust for a church, in the event of a split in the organization has been the occasion of much un-Christian controversy. The case of *Christian Church of Sand Creek et al.* v. *Church of Christ of Sand Creek et al.*, decided February 21, 1906, in the Illinois Supreme Court—76 N. E. Rep. 703—and the case of *Free Church of Scotland et al.* v. *Overtoun et al.* [1904] A. C. 515, are the most recent adjudications in England and America upon this subject. A comparison of the two cases would seem to indicate a greater similarity in the law of the two countries than has sometimes been thought to exist. The question involved is the execution of a trust. The church funds are a trust and should be administered in accordance with the wish of the donor. If the donor expressly provides that the property shall be devoted to the support of some specific form of religious doctrine or polity then his wish will be enforced, however difficult the questions may be. As to this there is no dispute. Often, however, the gift is to a specific church without any expressed qualification as to doctrine. The question then arises as to which of two rival branches of the former organization is entitled to the fund. For the purpose of settling this property question the courts will then determine which is the original organization—a question which they would otherwise decline to adjudicate.

The Sand Creek controversy arose in this wise. A congregation of the Disciples of Christ or "Christian" church was organized at Sand Creek in 1834. In government this denomination is purely congregational, and it has, says the opinion, "no creed except the Bible; the view of the followers of Alexander Campbell [the founder] being that, where the Bible speaks, the congregation and its several members are authorized to speak, but where it is silent the congregation and the members thereof should remain silent." Since 1849 there has been throughout the denomination a division of opinion as to the practice to be adopted with reference to matters on which the Bible is silent, such as the use of instrumental music in the services, employment of a minister at a fixed salary and for a fixed time, organizations subsidiary to the church, and church fairs. One view is that in such matters the silence of the Bible should be construed as a positive prohibition; the other is that its silence makes their employment permissive at the discretion of the congregation.

The former view had been in force in the congregation of Sand Creek until 1904, when a division took place. Those in favor of the more liberal rule (a minority of the former congregation) bring this bill for the construction of the deed to the church site and for a decree adjudging that land and church to them. The plaintiffs showed that a large majority of the congregations of the denomination held their view and they claimed also the authority of the founder himself. The court, however, refused the decree, laying down the rule that "When the members of a religious congregation divide, and one faction breaks away from the congregation and forms a new congregation, the title to the property of the congregation will remain in that part of the congregation which adheres to the tenets and doctrines originally taught by the congregation to whose use the property was originally dedicated." The defendants maintained those tenets and were entitled to possession.

In the Free Church case the factional differences were less important. That church was founded in 1843 by secession from the Established (Presbyterian) Church of Scotland as a protest against the form of establishment then in force; but it declared in favor of a purified establishment. In 1900 this church united with the United Presbyterian Church and thereupon declared its opposition to any form of establishment, and also amended the statement of the dogma of predestination in the Westminster Confession, its articles of faith. To a minority of some thirty ministers and a few thousand laymen, which protested against these changes, the House of Lords awarded all the property of the former Free Church. This church had been the largest in Scotland, and its property consisted of about 800 church edifices, with their schools, three universities, and over £1,000,000 of invested funds.

In an article on "American Versus British Ecclesiastical Law," in the April number of the *Yale Law Journal* Professor Epaphroditus Peck, in connection with a discussion of this case takes occasion to congratulate American lawyers and churchmen on our courts having clearly departed from the English precedents. He asserts the American doctrine to be that of *Watson* v. *Jones*, 13 Wall. 679, which is, no doubt, the leading American case. Briefly stated, the rules there enunciated are: 1. When the property conveyed is in express terms devoted to the teaching, support or spread of some specific form of religious doctrine or belief, then the express trust must be enforced, however difficult the question involved may be. 2. "When the property is held by a religious congregation which, by the nature of its organization is strictly independent of other ecclesiastical organizations, and so far as church government is concerned, owes no fealty or obligation to any higher authority," then "the usual rules governing voluntary associations will prevail, that the majority governs." 3. Where the congregation holding the property is but a subordinate member of a general church organization with a supreme judicatory, the controversy must be submitted to the church tribunals, and the courts will not act except to follow and enforce their decision.

In the decision of the Free Church case there is nothing to indicate that the English courts disagree with the conclusions stated under rules 1 and 3 of *Watson* v. *Jones*. Rule 2, however, if sustained without qualification by

the weight of American authority, marks an essential difference in the law of the two nations. As stated by Mr. Francis Lowell in his article in the *Columbia Law Review* for March, 1906, "The Free Church of Scotland Case," the difference would be that the English courts seek the unity of a church in identity of doctrine, the American courts in continuity of organization. But is this the correct American doctrine?

The Illinois case was decided squarely on a question of dogma or polity, although there was no provision in the deed for the support of any specific doctrine. The faction holding the old beliefs was, it is true, in this case the majority also. But in *Smith* v. *Pedigo,* 145 Ind. 361, where the old school party was in the minority, there was the same holding. A Baptist church (congregational in government) had previously held the belief that "the Holy Spirit acts independently, directly, and through no communication whatever except the immediate contact with the life-giving spirit given to the sinner's heart." A majority, pursuing the regular course of procedure, amended the confession of faith so as to have it declare "that God does sometimes communicate the same life-giving power in some other way than directly and abstractly," in other words, that He uses "means of grace." The court limited the application of rule 2 of *Watson* v. *Jones,* to minor questions of policy; and said, "There was not only no case before the court of a church divided into two factions on account of one of them having abandoned the original faith on which it was founded but the court was not speaking of such a case. The existing religious opinions, the right of inquiry into which is denied in the opinion [in *Watson* v. *Jones*] has no reference to the original faith on which the church was founded, but has reference to the conflicting views of the two opposing bodies as to Christian duty to adhere to the lawful government of the country in time of war or rebellion." Other cases in which the minority holding the old doctrine were awarded property left in general to the use of the congregation are *Hale* v. *Everett,* 53 N. H. 9; *Reorganized Church of Jesus Christ of Latter Day Saints* v. *Church of Christ,* 60 Fed. 937; *Fernstler* v. *Seibert,* 114 Pa. St. 196; *Mt. Zion Baptist Church* v. *Whitmore,* 83 Ia. 138; *Mount Helm Baptist Church* v. *Jones,* 79 Miss. 488; *Park* v. *Chaplin,* 96 Ia. 55; *Nance* v. *Busby,* 91 Tenn. 303 (citing and approving the English cases); *Christian Church* v. *Carpenter,* 108 Ia. 647.

In many cases where doctrinal changes by the regular action of the majority have been permitted without forfeiture of property the courts have distinctly averred that the changes were not fundamental. *Schlichter* v. *Keiter,* 156 Pa. St. 119, 142; *Fadness* v. *Braunborg,* 73 Wis. 257; *Kuns* v. *Robertson,* 154 Ill. 394. A change in a church of the Congregational denomination from Trinitarian to Unitarian belief was permitted without forfeiture of an endowment given it upon its foundation. The gift had been made to found a Congregational church. At the time the gift was made no doctrine had been formulated for that congregation, and churches holding both beliefs had existed in the denomination long prior to the donation of the fund. Hence there was no presumption as to which form of belief the donor intended to support. *The Dublin Case,* 38 N. H. 459. Under a law which provided the same system of incorporation and property holding for religious societies as for other mutual associations, and which made the mem-

bers of each congregation the beneficial owners of the property thereof, it was held that such congregations might carry with them their property, even when going over to another denomination in direct violation of the general canons of the church. *Petty* v. *Tooker*, 21 N. Y. 267; *Youngs* v. *Ransom*, 31 Barb. 49; *Burrel* v. *Associate Reformed Church*, 44 Barb. 282. (These cases are discussed in *Hale* v. *Everett, supra.*) In *Calkins* v. *Cheney*, 92 Ill. 463, an Episcopal parish of the Low Church school took a deed of its property not through the regular officers, but three trustees; and this was done for the express purpose of keeping it out of the control of the diocesan authorities. *Held*, that on secession from the church this parish might take the property with it. "That a trust can be created in opposition to the known will and earnest efforts to the contrary of those by whom it is claimed to be created, is a doctrine which we cannot indorse." This case, then, falls under rule 1 of *Watson* v. *Jones*. In the absence of conditions such as those present in these last two cases the seceding congregation must give up its property. *First Presbyterian Church of Louisville* v. *Wilson*, 14 Bush (Ky.) 252. *Winebrenner* v. *Calder*, 43 Pa. St. 244; *Ferraria* v. *Vasconcelles*, 23 Ill. 403; *Vasconcellos* v. *Ferraria*, 27 Ill. 237; same, 31 Ill. 25.

These exceptional cases serve but to prove the rule that, when the question concerns solely the identity of a religious society, the courts, American as well as English, will require identity of doctrine as well as of organization. Admittedly most of the American courts will be more liberal in permitting changes of doctrine than the courts of England. It is doubtful whether any American tribunal would have decided the Free Church case as it was decided. Yet the difference is not in legal theory but in its application—a difference to be accounted for, as Mr. Lowell in his paper cited above points out, in the temperament of the people and the different position of the churches of the two countries. The Sand Creek case would seem to approach very close to the English cases. C. L. D.

BAYS AND GULFS AS TERRITORY OF THE ADJOINING NATION.—On the question of international law arising out of the prosecution of foreign trawlers in the Moray Firth, the *Law Times*, of London, in a recent issue, comments as follows upon the question and upon the paper (published 2 MICH. LAW REV. 333) read by Dean Charles Noble Gregory before the International Law Association at its meeting at Antwerp:

"Dean Gregory, who was Vice President of the Antwerp Conference, has collected and discussed most of the cases bearing on the subject of *'Jurisdiction over Foreign Ships in Territorial Waters.'* On the particular branch of the subject which is at present canvassed in Scotland, the dean has some pregnant remarks, and his conclusions are as follows: 'It may be taken for granted that every nation has jurisdiction over her ports, gulfs and bays which are inclosed within her borders. As to what waters must be treated as so inclosed there is no complete agreement. According to one theory, if the points of land guarding the entrance to the water are sufficiently near so that persons on one side can distinctly see persons on the other with the unaided eye, the waters within such points belong to the adjoining nation.

In others, the ability to command the mouth of the harbor by batteries placed upon the shores is regarded as the test. While bays whose "fauces" are not more than from six to ten miles apart are commonly admitted to belong to the shore, the rule has been very commonly reached that waters which are enclosed within the territory of a given country, but with far wider openings to the sea, may be regarded as part of the territory of that nation, if for a length of time, undisputed jurisdiction has been claimed and exercised.'

Applying the last of the tests above mentioned, there can be little doubt that for a period which may probably be measured by centuries, Great Britain has claimed and exercised undisputed jurisdiction over the Moray Firth within the fauces of Tarbat Ness and Burghead. These are fifteen miles apart, but the distance is not so great as in the case of Conception Bay, which in 1877 our Privy Council held was within the territory of Great Britain: (*Direct United States Cable Company* v. *Anglo-American Telegraph Company*, 36 L. T. Rep. 265; 2 App. Cas. 394). The conflict here was between marine telegraph companies and resulted in a judgment that Conception Bay was British territory, though it had an average width of fifteen miles for forty miles from its entrance, and although the headlands were twenty miles apart at its mouth. Dean Gregory also refers to the case of *The Grange* in 1793, where, a British ship having been captured in Delaware Bay by a French privateer, Great Britain demanded that the United States should compel France to release the captured ship. Mr. Randolph, the Attorney-General of the United States, gave his written opinion that the whole of the bay was within the territorial jurisdiction of the United States, regardless of the marine-league or cannonshot limit from the shore. This opinion was rested on the fact that the 'United States are proprietors on both sides of the Delaware from its head to its entrance into the sea.' Mr. Jefferson accordingly demanded the restitution of the Grange, and the demand was promptly complied with by the French Government."