LORD HALDANE AND THE MONROE DOCTRINE

The general interest excited by the notable address on "Higher Nationality," delivered by the Right Honorable Viscount Haldane, Lord Chancellor of England, during the meeting at Montreal in September last, of the American Bar Association, has prompted his admirers to give special prominence to his observations upon the Monroe Doctrine, made at the last Thanksgiving Day banquet of the American Society of London. On that occasion, in offering a toast to the President of the United States, Lord Haldane said:

"The Monroe Doctrine remains to be completed, and it seems to me * * * that, just as his Government in the days of Monroe assumed a great responsibility for the protection of the nations south of the United States on the great American Continent, so today the United States feel that the responsibility must be extended to securing good government and fair treatment for all those who live and trade in those countries. My interpretation is that the United States is ready to accept the responsibility, not merely for insuring good government and good treatment in the interest of her own subjects, but in the interests of the world at large, so that all who live and trade on the American Continent may feel that she has set before her a high ideal, to secure for them equally with her own subjects that justice and righteousness of which President Wilson has spoken."

In attempting to state in a dogmatic form the precise relation which the United States bears today to the Latin Republics to the south of us Lord Haldane has undertaken the most difficult of all tasks, for the reason that the Monroe Doctrine is an evolution which can not be dogmatically defined; it can only be described in the light of its history. The nearest approach, perhaps, ever made to an exhaustive definition was that contained in President Cleveland's special message to Congress of December 17, 1895, wherein, after referring to the contention of the British Prime Minister that the Monroe
Doctrine had been given "a new and strange extension and development," he said that "without attempting extended argument in reply to these positions, it may not be amiss to suggest that the doctrine upon which we stand is strong and sound, because its enforcement is important to our peace and safety as a nation and is essential to the integrity of our free institutions and the tranquil maintenance of our distinctive form of government. It was intended to apply to every stage of our national life and cannot become obsolete while our republic endures. If the balance of power is justly a cause for jealous anxiety among the governments of the Old World and a subject for our absolute non-interference, none the less is an observance of the Monroe Doctrine of vital concern to our people and their government. * * *

The Monroe Doctrine finds its recognition in those principles of international law which are based on the theory that every nation shall have its rights protected and its just claims enforced." Such was the summing up made by one of the most lucid of our statesmen, seventy-two years after the doctrine in question was announced in President Monroe's epoch-making message of December 22, 1823. And yet the fact remains that the full import of President Cleveland's notable declaration can not be grasped until we have first recalled, in outline at least, the series of events connecting it with the message of December 22, 1823.

The key to President Cleveland's declaration must be found in the fact that in the summer of 1823 the Holy Alliance notified Great Britain that, so soon as France should complete the overthrow of the revolutionary government of Spain, a congress would be called for the purpose of terminating the revolutionary governments in South America, which had then been recognized by the United States but not by Great Britain. The attempt thus made by those who claimed the right to exercise a primacy or overlordship in the affairs, external and internal, of European states, to extend that system of interference to American Republics forced the government of the United States, as the dominant political power in this hemisphere, to assert that in itself alone resides a primacy or overlordship, which has gradually become as well defined in the New World as that of the Concert of Europe in the Old. Like every other institution that has been the result of growth it did not attain its full stature in a night; it did not spring into life fully armed. As all the world knows, the real draftsman of the so-called Monroe Doctrine was not Monroe, but Jefferson, then in retirement, who, in his famous letter of October 24, 1823, said to Monroe: "The question
LORD HALDANE AND THE MONROE DOCTRINE

presented by the letters you have sent me [correspondence between Canning and Rush, then American Minister at London], is the most momentous which has been offered to my contemplation since that of Independence. That made us a nation; this sets our compass and points the course which we are to steer through the ocean of time opening on us. And never could we embark upon it under circumstances more auspicious. Our first and fundamental maxim should be never to entangle ourselves in the broils of Europe; our second, never to suffer Europe to intermeddle with cis-Atlantic affairs. America, North and South, has a set of interests distinct from those of Europe, and peculiarly her own. She should, therefore, have a system of her own, separate and apart from that of Europe." In paragraph seven of his message of December 2, relating to unsettled boundaries in the northwest, a portion of the doctrine whose author was John Quincy Adams, President Monroe informed Congress: "In the discussions to which this interest has given rise and in the arrangements by which this may terminate, the occasion has been judged proper for asserting, as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be consided as subjects for future colonization by any European powers."

Pending the controversy with Great Britain as to the Oregon territory, and in the face of possible intervention by the European powers on account of the annexation of Texas, President Polk, in his message of December 2d, 1845, greatly widened the protest of President Monroe against "future colonization by any European powers" when he said that "it should be distinctly announced to the world as our settled policy, that no future European colony or dominion shall, with our consent, be planted or established on any part of the North American Continent." That enlarged declaration, unfettered by any implication that European settlements might be made in North America outside the boundaries of civilized nations, was evidently intended by the use of the word "dominion" to forbid the acquisition by conquest or purchase of any territory already occupied. In obedience to that principle Great Britain and France were more than once notified that the United States could not witness with indifference the transfer of Cuba by Spain to any other European power; while in the Clayton-Bulwer Treaty of 1850 Great Britain expressly bound herself not to exercise dominion over "any part of Central America," a pro-
vision under which she was finally induced to give up the protectorate, acquired long before the treaty was made, over the Indians of the Musquito Coast.

The step backward taken at the making of the Clayton-Bulwer treaty of 1850 was more than regained when in December, 1865, it became necessary for the government of the United States to terminate the intervention of France in the internal affairs of Mexico. Notice was then given that friendship with that country must cease," unless France could deem it consistent with her interest and honor to desist from the prosecution of armed intervention in Mexico to overthrow the domestic republican government existing there, and to establish upon its ruins the foreign monarchy which has been attempted to be inaugurated in the capital of that country." Five years later a full and final expression was given to the aspirations of the United States upon that subject by Mr. Fish, in his report of July 14, 1870, to President Grant, accompanying the President's message of the same date,—when he said: "This policy is not a policy of aggression; but it opposes the creation of European dominion on American soil, or its transfer to other European powers, and it looks hopefully to the time, when, by the voluntary departure of European governments from this continent and the adjacent islands, America shall be wholly American."

Such were the antecedents of the declaration made by President Cleveland in his message of December 17, 1895, at the time when the government of the United States deemed it its duty to intervene in the boundary controversy then pending between Great Britain and the Republic of Venezuela, after Great Britain had contended in her reply to the original suggestion of arbitration that the Monroe Doctrine does not embody any principle of international law which "is founded on the general consent of nations," and that "no statesman, however eminent, and no nation, however powerful, are competent to insert into the code of international law a novel principle which was never recognized before and which has not since been accepted by, the government of any other country." When the government of Great Britain justly and wisely conceded the right of arbitration thus asserted by the United States, solely by virtue of its primacy or overlordship in the New World, enduring foundations were laid for that close moral alliance since developed between the two broad divisions of English-speaking peoples. In the light of an examination of that primacy as it exists today it is folly to contend that it is just what it was when originally formulated by President Monroe. As "it was intended to
apply to every stage of our national life and cannot become obsolete while our Republic endures,” it has grown with our growth, and now stands ready to adapt itself to all future developments. The change that has taken place has, however, been less in its outward form than in its inner spirit. To use the words of Bagehot, it “is like an old man who still wears with attached fondness clothes in the fashion of his youth; what you see of him is still the same; what you do not see is wholly altered.” No more graphic picture of the change in question can anywhere be found than in the statement of the English publicist, Prof. T. J. Lawrence, who has said that “If it be true that there is a primacy in America comparable in any way with that which exists in Europe, it must be wielded by her (the United States), and by her alone. There is no room for that machinery of conferences, congress, and diplomatic communications which play so large a part in the proceedings of the great powers. The supremacy of a committee of states and the supremacy of a single state can not be exercised in the same manner. What in Europe is done after long and tedious negotiations, and much discussion between representatives of no less than six countries, can be done in America by the decision of one cabinet, discussing in secret at Washington.” The marvel to students of the American Constitution is that the upbuilding of the primacy of the United States in the New World has been worked out by the pens of Presidents and Secretaries of States; it is purely a creation of the executive power.

HANNIS TAYLOR.

Washington, D. C.
THE GRAND JURY

The grand jury today is a most important arm of the Federal courts in discovering and punishing crime.

The Fifth Amendment to the Constitution provides that "No person shall be held to answer for a capital, or otherwise infamous, crime unless on a presentment or indictment of a grand jury."

The term "infamous" as here used does not mean a crime, conviction of which rendered the defendant incompetent as a witness at common law, but refers to the character of the punishment. Imprisonment in the penitentiary, whether at hard labor or not, is infamous. So that a crime is infamous in the constitutional sense if the defendant may be imprisoned in the penitentiary. Ex parte Wilson, 114 U. S. 417; In re Claasen, 140 U. S. 204.

Imprisonment is in the penitentiary whenever the term is longer than one year. (Section 5541, R. S. U. S.; In re Mills, 135 U. S. 263, 269; Section 934, Code D. C.)

It follows that where the law authorizes the imposition of a sentence for more than one year, the crime is infamous, and can be prosecuted only by indictment. And this is so even though the sentence actually given may be a fine or imprisonment for but a few days.

Violations of the Pure Food Law are usually prosecuted by information, the severest penalty being imprisonment for not more than one year. In the District of Columbia, the United States, having local jurisdiction, prosecutes a large number of other minor crimes by information. Except for these and similar cases, the Federal offenses are infamous, and therefore punishable only by indictment.

Many lawyers have never been before a grand jury, either as witness or in any other capacity. Grand jury proceedings to a large extent are secret, and this secrecy, as a rule, is carefully observed. There are but few books upon the subject. Every adult male citizen is liable to be called to serve as a grand juror. The subject, therefore, is one which should be of interest both to the lawyer and the layman.  

1The book of Mr. George J. Edwards, Jr., of Philadelphia, upon "The Grand Jury" (1906) is perhaps the best modern book upon the subject. A concise but most interesting treatise upon the Office and Duty of Grand Jurors is prefixed by Mr. Daniel Davis, for many years Solicitor General of Massachusetts, to his "Precedents of Indictments," published in 1831.
At common law a grand jury consists of not less than twelve nor more than twenty-three. A presentment requires the concurrence of twelve. Thus there must always be at least twelve to vote, and twelve always constitute a majority.

In the United States courts a grand jury consists of not less than sixteen nor more than twenty-three persons. (Sec. 282, Judicial Code.) The exact number of the jury between these figures is within the discretion of the court. It is usual to impanel the full number. But the minimum or any intermediate number is sufficient. So, if a juror dies, becomes sick, or in any way disqualified, he may be discharged, and his place need not be filled, provided sixteen are left. 2

The qualifications of Federal jurors, grand as well as petit, are those of jurors in the highest court of law of the State in which the particular jurors are sitting. (Sec. 275, Judicial Code.)

The qualifications in the District of Columbia are fairly illustrative. Section 215 of the District Code provides:

No person shall be competent to act as a juror unless he be a citizen of the United States, a resident of the District of Columbia, over 21 and under 65 years of age, able to read and write and to understand the English language, and a good and lawful man, who has never been convicted of a felony or a misdemeanor involving moral turpitude.

Lawyers, doctors, ministers, officers of the United States and of the District of Columbia and a large number of others are exempt, and need not serve if called.

The manner of obtaining the jurors is provided by statute. In Federal courts the matter is governed by Chapter 12 of the Judicial Code of March 3, 1911, in force January 1, 1912. I am more familiar with the practice in the District of Columbia, and, as it is fairly illustrative, will describe it rather than the Federal practice.

2A recent case within my own experience illustrates this principle. A grand juror came drunk to his duties. When his condition was discovered it was reported to the court, and the juror was found guilty of contempt and discharged from the jury, which continued its deliberations as a body of twenty-two. Curiously enough, in considering the proper course to pursue, we discovered a similar case in Arkansas in 1821, reported as follows:

In the matter of Radford Ellis. On motion of the prosecuting attorney, the court imposed a fine of $30.00 on Radford Ellis, foreman of the grand jury, for intemperance, discharged him from the jury and ordered execution to issue for the fine, and the court appointed Samuel McCall foreman of the grand jury in his place and administered the proper oath to him in the presence of the grand jury. 1 Hempstead's Arkansas Reports 10.
Here certain officers constitute a jury commission. It is their
duty to place the names of qualified persons in a box, which is sealed
and delivered to the clerk of the court. The names are written on
separate slips of paper, which are folded so that the names cannot be
seen. The service of grand jurors begins with the term of the court on
the first Tuesday of October, January and April, and continues through-out the term. Ten days prior to the opening of the term the jury box
is opened, the names of twenty-three men are drawn, and they are
summoned to attend court as possible grand jurors. Upon the day
fixed, such of the men as have been served attend and are examined.
Those disqualified, exempt, or who present valid excuses are dis-
charged, and sufficient additional names are drawn from the box for
attendance on the next day to insure the completion of the jury. Finally
twenty-three competent men are selected and the others are excused.
Thereupon the court appoints one of them to act as foreman. The
oath is administered to the foreman first, and afterward to the other
jurors in a body.

Thereupon the court delivers a formal charge to the jury. The
length of the charge is in the court's discretion, but it is customary
to explain briefly the duties of the jurors, to call attention to their
position in criminal procedure, the character and amount of evidence
they should receive, and to discuss somewhat in detail the elements of
their oaths.

Upon the conclusion of the charge, the grand jury retire to their
own quarters and organize by selecting a clerk, or secretary, to keep
their records.

From this point until the indictments are filed in court the pro-
ceedings of the grand jury are secret, and the injunction of secrecy
applies not only to them, but to the prosecuting attorney, the witnesses,
and to the court officials in attendance upon them.

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3The following is the form of the oath: You, as foreman of this inquest, for
the District of Columbia, do swear (or affirm), that you will diligently inquire,
and true presentment make, of such articles, matters, and things as shall be given
you in charge or otherwise come to your knowledge, touching the present service;
the government's counsel, your fellows' and your own you shall keep secret; you
shall present no one for envy, hatred or malice; neither shall you leave any one
unpresented for fear, favor or affection, hope of reward or gain, but shall present
all things truly as they come to your knowledge, according to the best of your
understanding (so help you God).

4The same oath (or affirmation) which your foreman hath taken, on his
part, you and every of you, shall well and truly observe, on your part (so help
you God).

In the District of Columbia an old law requires that the jurors shall also
be sworn to inquire into all offenses against the laws prohibiting dueling. See
840 R. S., D. C.
THE GRAND JURY

Immediately upon the organization of the grand jury the district attorney visits them and explains their duties somewhat more in detail than the court has done in its charge. In jurisdictions where the grand jury work is light the district attorney will attend in person, but in large cities and important Federal districts where a grand jury is constantly in session, an assistant, specially charged with that duty, will attend instead.

On the first day the district attorney usually places one or two clear cases before the grand jury. The attorney first explains the law, defining the crime and pointing out its elements. He also outlines the facts. The first witness is then called in. The witness may have been sworn by the clerk of the court; if not, he is sworn by the foreman. The latter has the oath written out, and at first reads it somewhat haltingly, but he soon learns to administer it fluently and impressively. The witness is then examined in the ordinary way by the district attorney, and after he has concluded the foreman and the jurors ask such questions as they desire. This first witness is usually the detective or other officer who has prepared the case, and he explains the entire case to the jury. There is frequently considerable confusion in the questioning, the degree of which depends upon the ability of the foreman to control his associates. Sometimes the foreman will insist that all questions be asked through him; at other times the juror will first address the foreman before putting his questions. As the jurors become accustomed to their duties, however, any friction disappears, and each juror asks his questions with but little confusion. During the first few days the jurors are keenly alive to their responsibilities, and each asks many questions, a simple case consuming much time, but they very soon learn to refrain from asking unnecessary questions. Frequently there are one or two members of the jury who thoroughly enjoy occupying the floor and who insist upon asking some questions of each witness, much to the disgust of their brethren.

As each witness is excused, the bailiff or deputy marshal in attendance is summoned by a bell and given the name of the next witness the jury desires to hear.

At the conclusion of all the evidence, the district attorney will sum up the case briefly. He then retires, and the jurors discuss the matter among themselves as long as they wish, and then take their vote. If they think a prima facie case has been made out, they vote to present or indict, and the clerk prepares and the foreman signs a paper called a presentment. This is, in fact, no more than a notification to the

6This presentment is by no means necessary, and is not used in all jurisdictions.
district attorney that they have decided to indict, and a request to prepare the formal indictment. Frequently the indictment has been prepared in advance, and when this is done the foreman signs the indictment at the time of the vote. If less than twelve vote to indict, the charge is said to be ignored, and this fact is noted upon the minutes and upon the indictment, if one has been prepared.

The jury is then ready for the next cases, and they are heard one at a time, and disposed of in the same way.

After a few days the jurors become accustomed to the work, and thereafter the district attorney does not attend before them except in important cases. The grand jurors themselves dispose of the great majority of the cases, sending the presentments to the district attorney at the conclusion of each session.

From these presentments and notes of the witnesses' testimony the indictments are prepared. Most of these are simple, and time-honored forms are followed. Frequently, however, the case is unusual, and considerable time is consumed by the pleader in drafting a satisfactory indictment.

When the indictments are completed, they are signed by the district attorney and sent to the grand jury. The clerk checks them over to see that they agree with his minutes, the foreman signs his name under the endorsement "A true bill," and the entire body carry them into open court. The clerk, after calling the roll, inquires if they have any communication to make to the court. The foreman responds in the affirmative and hands the indictments to the clerk, who examines them hastily as to form. The jurors are then excused—permanently, if they have finished their duties or their terms have expired; temporarily otherwise.

Service on the grand jury to the average citizen is easier and more pleasant than attendance on a trial jury. Grand jurors sit without the presence of the judge, and to a large extent fix their own hours of session. They are usually able to complete their work within two hours a day. It is not necessary for every juror to be present throughout the day. Jurors may be excused by the foreman without endangering the indictment. It is sufficient if there are present the minimum number necessary to constitute the grand jury. In fact, it is even held in some cases that all but twelve of the jurors may be absent, but the decisions are by no means unanimous on this point. (See Edwards, Grand Jury, p. 46.) On this principle, members of a grand jury prejudiced against a defendant are frequently excused, not from the
panel, but merely from the consideration of that case. (See Jackson v. United States, 102 Fed. 478.)

The records of a common law grand jury are simple in the extreme. The clerk keeps a book, in which he records the attendance of the jurors and of the witnesses. The purpose of the first record apparently is to fix the compensation of the jurors. The second record gives the caption of the case considered, the names of the witnesses heard, and the action, whether indictment or ignoramus. No other record is kept by the jury.

It is true that a stenographic report of the testimony is frequently kept, but unless made so by statute this is no part of the jury's minutes, and a defendant is not entitled to inspect the transcript.

The district attorney and his assistants have the right to appear before the grand jury during the examination of witnesses, and, in fact, up to the time of voting. Indeed, in some cases it is said that the attorney may remain during the voting, but must keep silent. The practice, however, is in accord with the better view that he should retire while the vote is being taken. Whenever the grand jury testimony is reported, it is done by an assistant or clerk of the district attorney.

The jurisdiction of the grand jury is very broad. The injunction of the oath is that the jurors shall inquire into such matters as shall be given them in charge or otherwise come to their knowledge. There has been considerable discussion over the extent of the jury's power. It is agreed that they must inquire into all cases where the accused has been held by a committing magistrate for their action. It is also agreed that the court may direct the jury to inquire into a matter. In fact, a special grand jury is frequently impaneled for the purpose of investigating a matter of great public interest where it is probable that a crime has been committed, but only careful inquiry by a grand jury can develop the facts. The right of the prosecuting attorney to lay cases directly before the jury without a preliminary hearing is denied by some authorities, and in some jurisdictions it may be exercised only with the leave of the court. However, in the Federal courts the matter is entirely within the discretion of the prosecuting attorney.

Dispute has arisen over the right of the jury to originate investigations. It is agreed that if perjury is committed before them, or if investigation of one crime incidentally discloses the commission of another, they may present. But their power to originate cases otherwise is vigorously denied. The weight of authority is in favor of the existence of the inquisitorial power, as it is called. So far as
Federal grand juries are concerned, the matter was set at rest by the Supreme Court in *Hale v. Henkel*, 201 U. S. 43-65. There the Court said (pp. 65, 66):

We deem it entirely clear that, under the practice in this country, at least, the examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed; that the result of their investigations may be subsequently embodied in an indictment, and that in summoning witnesses it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called to testify, without indicating the nature of the charge against them. So valuable is this inquisitorial power of the grand jury that, in States where felonies may be prosecuted by information as well as indictment, the power is ordinarily reserved to courts of impaneling grand juries for the investigation of riots, frauds and nuisances, and other cases where it is impracticable to ascertain in advance the names of the persons implicated. It is impossible to conceive that in such cases the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted. As criminal prosecutions are instituted by the State through an officer selected for that purpose, he is vested with a certain discretion with respect to the cases he will call to their attention, the number and character of the witnesses, the form in which the indictment shall be drawn, and other details of the proceedings. Doubtless abuses of this power may be imagined, as if the object of the inquiry were merely to pry into the details of domestic or business life. But were such abuses called to the attention of the court, it would doubtless be alert to repress them. While the grand jury may not indict upon current rumors or unverified reports, they may act upon knowledge acquired either from their own observations or upon the evidence of witnesses given before them.

The hearing before the grand jury is *ex parte*. The defendant has no right to testify or to be present, and usually his witnesses are not heard. The grand jury is purely an investigating body, and is not charged with finally determining whether the accused is guilty. It is
concerned only to know whether there is a \textit{prima facie} case and whether the accused should be put to his trial before a petit jury.

For this reason, the amount of evidence submitted to the grand jury is usually far less than that given to the trial jury. It is enough if the grand jurors have probable cause to believe that the accused committed the crime.

It is not necessary that they hear all witnesses. When, therefore, the jurors think a \textit{prima facie} case has been made out, they are quite likely to so intimate to the prosecuting attorney and refuse to hear other witnesses. In rare instances it is difficult to get them to hear enough evidence to justify their action. Ordinarily, however, the jurors are scrupulous to hear so much evidence as is necessary, but the moment they are satisfied they do not hesitate to shut off the flow of witnesses.

Not only the defendant, but all other persons, are excluded from the grand jury. It is commonly held, though the authorities are not unanimous, that the presence of a disqualified person while the jury is hearing evidence or taking a vote will vitiate the indictment. Sometimes it is said that actual prejudice must be shown, but it is ordinarily held that mere presence of a disqualified person is enough. This does not apply, of course, to the district attorney, his assistants, and the bailiff. The rule is sometimes very inconvenient. The prosecutor wants to have with him the officer who prepared the case, especially where technical matters are involved. For example, in \textit{United States v. Heinse}, 177 Fed. 770, an expert accountant was appointed special assistant to the district attorney, and was present when witnesses were examined. The indictment was quashed because of his presence in the jury room.

Notwithstanding the well-settled rule, it is not an uncommon thing for the lawyer for an accused person to demand that he be allowed to go before the grand jury to cross-examine the witnesses.

It goes without saying that only legally admissible evidence should be received before a grand jury. The district attorney is usually careful to see that the law is obeyed in this respect. Whenever incompetent evidence does get in, the district attorney is scrupulous to advise the jurors that they must disregard it and base their judgment entirely upon the legal evidence.

Interesting questions arise when illegal evidence is received. While there is some contrariety among the decisions, the better rule is that if there was any legal evidence before the grand jury, the court will
not inquire into its sufficiency, nor quash the indictment because some illegal evidence was also received.

The district attorney is the legal adviser of the grand jury. For all practical purposes, he decides questions of law for them. True, they have the right to ask the advice of the court, but this right is rarely exercised.

The responsibility of the district attorney is a grave one. He is not only prosecutor, but counsel for the accused and judge as well. After weeks or months of intimate association, the jurors often unconsciously seek to ascertain his view and to govern themselves accordingly. Sometimes they do not hesitate to ask directly whether the district attorney thinks an indictment should be found. It is therefore frequently a difficult matter to avoid influencing them on the facts. The prosecutor's duty is thus described by Mr. Daniel Davis (Davis' Precedents, 21):

The least attempt to influence the grand jury in their decision, upon the effect of the evidence, is an unjustifiable interference, and no fair and honorable officer will ever be guilty of it. It is very common, however, for someone of the grand jury to request the opinion of the public prosecutor as to the propriety of finding any intimations upon the subject; but in all cases to leave the grand jury to decide independently for themselves. It may be thought that this is too great a degree of refinement in official duty. But the experience of thirty years furnishes an answer most honorable to the intelligence and integrity of that body of citizens from which the grand jury are selected; and that is, that they almost universally decide correctly. This is the natural effect of justice and truth upon minds left uninfluenced and unembarrassed by the conflicting opinions or arguments of others.

In some of the States the grand jury has been abolished. The wisdom of such a course is a serious question, a discussion of which is beyond the scope of this article. In the Federal courts the grand jury cannot be abolished except by constitutional amendment. Some of the arguments in support of its continuance are well stated by Chief Justice Shaw of Massachusetts in the following extract from a charge to the grand jury given in 1832 (8 American Jurist, 217):

Another important advantage of the institution of grand juries is that it tends to an impartial and satisfactory administra-
tion of criminal justice. In a free and popular government it is of the utmost importance to the peace and harmony of society, not only that the administration of justice and the punishment of the bill. But it is his duty explicitly to decline giving it, or even crimes should in fact be impartial, but that it should be so conducted as to inspire a general confidence that it will and must be so. To accomplish this, nothing could be better contrived than a selection of a body, considerably numerous, by lot, from amongst those who, previously and without regard to time, person, or occupation, have been selected from among their fellow-citizens as persons deemed worthy of this high trust by their moral worth and general respectability of character. And, although under peculiar states of excitement and in particular instances, in making this original selection, party spirit or sectarian zeal may exert their influence, yet it can hardly be expected that this will happen so frequently or so extensively as seriously to affect the character or influence the deliberations of grand juries. Should this ever occur, to an extent sufficient to weaken the confidence now reposed in their entire impartiality, and thus destroy or impair the utility of this noble institution, it would be an event than which none should be more earnestly deprecated by every lover of impartial justice and every friend of free government.

* * * * * *

The grand jury, by the mode of its selection, by its numbers and character, and the temporary exercise of its powers, is placed beyond the reach or the suspicion of fear or favor of being overawed by power or seduced by persuasion.

JESSE C. ADKINS.

Washington, D. C.
Chief Justice Harry M. Clabaugh, Dean of the Law Department Georgetown University, since 1903, and Lecturer since 1900, died on March 7, 1914. The following resolutions were adopted by the Faculty upon his death.

Resolved, That the President and Faculty of the Law School of Georgetown University, in meeting assembled, deeply deplore the death of its Dean, Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, and desire to place upon record an expression of the respect and esteem in which he was held by his associates and by the student-body of the Law School.

Justice Clabaugh became a member of the Faculty as a lecturer in 1900. Three years later he was chosen Dean, which position he held at the time of his death. From his entrance into the school he endeared himself to his associates on the Faculty and to the students by his attractive personality and the ability and earnestness which characterized his work. As time passed, the integrity and purity of his life and character, his high ideals of student and professional conduct, his devotion to his duties as a teacher of law, made him a power for good in the upbuilding and development of the School. Taking into consideration the number of young men, from all sections of the Country, who, during fourteen years, have come under the inspiration of Justice Clabaugh's lofty conceptions of professional ethics and conduct and of his accurate statement of legal principles, it is difficult to overestimate the length and breadth of his service to the Law School and to the Country.
Justice Clabaugh was proud of the Law School, as the Law School was proud of him; he was devoted to it, as it was devoted to him; and his devotion was measured only by his life: for death met him on his way to the School to deliver his last lecture of the Winter Term.

Resolved, further, That the Secretary be directed to enter these resolutions upon the minutes, and to send a copy to the bereaved widow and family of Justice Clabaugh, with an expression of our sincere sympathy for them in the irreparable loss which they have sustained.
NOTES AND COMMENT

LIABILITY OF MAIL CARRIER FOR MAIL MATTER LOST.
ACTION BY THE UNITED STATES AS BAILEE.

*United States v. Atlantic Coast Line R. Co.*

(District Court, E. D. North Carolina. July 9, 1913.)

(189 Fed. 779; 206 Fed. 190.)

The liability of a mail carrier to the Federal Government for the value of mail matter lost while in the possession of the carrier, under a contract providing for the transportation of mails, where the government undertakes to recover in an action as bailee for the owners of the articles lost, has been tested in the case of *United States v. Atlantic Coast Line R. Co.* (189 Fed. 779; 206 Fed. 190).

The firm of Rousselon, Freres & Cie, jewelers, registered in the post office at Paris a sealed package containing diamonds valued at $6,000. The package was placed in the mail at that city for transmission, via the United States, to the addressee in Havana, Cuba. The character of its contents was not disclosed to the French postal authorities by the sender or otherwise, and it was brought with other mail to New York and thence forwarded to Washington, where it was placed in the mail car attached to one of defendant's south-bound trains. A postal convention between the United States and France was in effect at the time, whereby the mailing of packets of samples of merchandise, containing "any article having a salable value," was prohibited in both countries. As this convention was a matter of public law in France and the United States, the owners of the diamonds were properly chargeable with notice of it. An accident occurred on the Washington & Charleston R. P. O. line, and the diamonds were lost, together with other mail matter and certain postal equipment belonging to the Federal Government. The diamonds had been insured by the sender, and on this policy it recovered their full value. The wreck occurred in 1904, and six years thereafter, when the owners had recovered against the insurer and the Postmaster General had imposed upon the defendant a fine of $500, under
authority of Section 3862, R. S. (5 Fed. Stat. 893), providing in
effect that the Postmaster General may make deductions from the
pay of mail contractors for failure to perform service according to
their contract, the Government brought suit against the railroad com-
pany, charging a breach of the contract to carry the mails, arising
from the negligent destruction of the mail car and the mail matter
therein, and further charging the defendant with a conversion of the
mail matter remaining in the debris after the wreck.

The Government, in the present case, undertook to recover in
its own name the value of the equipment loss, and, as bailee of
the owners, the value of the mail matter lost in the accident. With respect
to the latter phase of the case, the plaintiff alleged, in effect, that, as
bailee of the owners of the diamonds, it placed the registered package
in the possession of the defendant for carriage, and that, by the negli-
gence of the employees, it was destroyed.

The relation existing between the Government and the individual
users of the mails is properly classified as "locatio operis faciendi." The liabilities arising from this relation in favor of the bailor are
limited. None are, in fact, created, except such as the postal regula-
tions specifically provide in the form of indemnity. In the present
case, in view of the infringement by the sender of the postal provision,
it is doubtful whether even the ordinary relation of bailment of the class
designated as locatio operis faciendi was established between the
owners of the diamonds and the Government. The true status of the
Government in respect to the lost jewels was rather that of a depositor,
and, as such, it was not liable to the owners for the result of the acci-
dent, gross negligence not being an element of the transaction.

The authorities are agreed that a railroad carrying mail is neither
a common carrier nor a private carrier, but, at most, a public agent
discharging public duties (Boston Ins. Co. v. Chicago, R. I. & P. R.
Co., 118 Iowa 423.)

113 Fed. 414, it was held, in effect, that were it to be conceded that a
railroad may be held liable by the addressee of a package for the loss
of the same in the mail through the railroad's negligence, the degree
of care required is only the reasonable care exacted of the ordinary
bailee for hire.

Commenting on the liability to the Government of the mail car-
rier for mail matter lost, where the Government assumes the position
of bailee in respect of such matter, the court said in the present case,
having in mind the violation of the conventional provision (206 Fed. 190, 201, 202):

"Considered from this viewpoint, it may be regarded as elementary that, when a plaintiff sues in a representative capacity, and for the benefit of another—that is, as trustee for the cestui que trust, or, as here, the bailee for the bailor—his right of action and extent of recovery must be confined to the right of the party for whose benefit he sues; that any and all defenses which would be open to the defendant in an action by the real party in interest would be likewise open to him in the action by the representative. *

* * *

"Recognizing the fact that neither the owners of the diamonds nor the insurance company, which paid their value to such owner, had a right of action against the defendant for their loss, the plaintiff seeks to recover their value as the bailee of the owners. The general rule undoubtedly is that damages recoverable for trespass or conversion are limited to the actual injury sustained by the plaintiff. It seems to have been held that the right of the bailee to recover from a third party the full value of the property was, by the ancient common law, based upon the fact that the bailee was answerable over to the owner for the property or its value."

The doctrine that a bailee's right of action against third persons stands on his responsibility over is supported by authorities collected in 4 Suth. Dam. No. 1097. Beven, in his work on Negligence (2 Bev. Neg. 734), gives the origin of the rule as follows:

"In Heydon and Smith's Case (13. Co. Rep. 69) the law was laid down with some precision: 'Clearly the bailee, or who hath a special authority, shall have a general action of trespass against a stranger, and he shall recover all the damages because that he is chargeable over.' The authority given for this is the Y. B. 21 H. VII, 14 b. pl. 23, an action of replevin. There Fineux, J., says: 'In this case the bailee has a property in the thing against a stranger for he is chargeable over to the bailor, and for the same reason he shall recover against a stranger who takes the goods out of his possession.'"

An interesting account of this doctrine is found in the celebrated Lectures of Holmes (Holm. Com. Law, 165 et seq). The learned
author there traces the source of the rule to the undeveloped condition of remedial English law in the fifth century, a time when, he says, "of law there was very little, and what there was depended almost wholly upon the party himself to enforce." By this law, before a party was allowed to substantiate his claim over cattle—then the principal property known—which had been stolen from him, he was required to affirm, under oath, that he had lost possession of the cattle against his will. *Possession*, therefore, and not *ownership*, was the ground for recovery under this procedure, which made way for the enunciation and the establishment in later times of the rule that, where a bailment of chattels had taken place between the owner and another person and the goods had been wrongfully appropriated by a third, the bailee, and not the bailor, was the proper party to sue. The corollary to the rule immediately followed: if—as was the case—all remedies for the recovery of bailed chattels lay in the hands of the bailee and the law refused to recognize in the bailor a right of action directly exercisable by him against third parties wrongfully interfering with the possession by the bailee of his property, the owner should be protected by compelling the bailee to hold his bailor harmless, and the rule was so laid.

The growth of the law in subsequent times removed the restrictions which theretofore had prevented a recovery by an owner out of possession in these actions, but the responsibility over to the bailor by the bailee remained, in the words of Mr. Holmes (*supra*):

"as such rules do remain in the law, long after the causes which gave rise to it had disappeared, and at length we find cause and effect inverted. We read in Beaumanoir (A. D. 1283) that, if a hired thing is stolen, the suit belongs to the bailee, because he is answerable to the person from whom he hired (XXXI 16). At first the bailee was answerable to the owner, because he was the only person who could sue. Now it was said he could sue because he was answerable to the owner."

The development of the rule in the direction noted laid the foundation for the theory that the extent of the bailee's right of action against third parties is to be measured by the degree of his liability to the bailor for the property bailed. From the inverted explanation of Beaumanoir, to which Holmes make reference (*supra*), that the bailee could sue because he was answerable over, in place of the original rule, that he was responsible to the bailor because only he could sue, the conclusion was forced in later times that, if by the terms of the trust
the bailee was not answerable for the goods if stolen, he would not have an action against the thief (Holm. Com. Law, 170).

On this point Holmes says (supra, 170, 171):

"The same explanation is repeated this day. Thus we read in a well-known text-book, 'For the bailee being responsible to the bailor, if the goods be lost or damaged by negligence, or if he do not deliver them up on lawful demand, it is therefore reasonable that he should have a right of action,' etc. (2 Steph. Comm. [6th ed.] 83, cited Dicey, Parties, 353). In general, nowadays, a borrower or hirer of property is not answerable if it is taken from him against his will, and if the reason offered were a true one, it would follow that, as he was not answerable over, he could not sue the wrongdoer. It would only be necessary for the wrongdoer to commit a wrong so gross as to free the bailee from responsibility, in order to deprive him of his right of action. The truth is, that any person in possession, whether intrusted and answerable over or not, a finder of property as well as bailee, can sue anyone except the true owner for interfering with his possession." * * *

In England, the doctrine of Heydon and Smith's Case, supra, was revised in a subsequent case, The Winkfield, 1 Q. B. 422. In the latter case, a ship carrying the mails was sunk in a collision and a part of the mails lost. The Postmaster General, as bailee, proceeded against the fund brought into court by the owners of the colliding vessel. The Court of Appeal, reversing a judgment for the defendants, held that, in an action against a stranger for the loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the thing bailed.

In the United States, the influence of The Winkfield, supra, has manifested itself in National Surety v. United States, 129 Fed. 70, an action by the United States for the breach of a bond given by a letter carried, upon which the company was surety. The mail carrier received for delivery letters containing money, and rifled them of their contents. As to the damages which the Government was entitled to recover, the court held:

"It (the United States) was a carrier—a bailee of the letters and their contents for hire of labor or services. From this carrier
or bailee Eich took and converted the letters and their contents to his own use. But a bailee may maintain an action of trespass, of trover, or of conversion against a wrongdoer for his disturbance of his possession of the property. *(The Beaconsfield, 158 U. S. 303, 307; 15 Sup. Ct. 860; 39 L. Ed. 993.)* * * * The United States, therefore, was not without sufficient interest in the subject-matter to enable it to recover of Eich, the letter carrier, the entire value of the property he took, as its damages for the conversion of the money. * * * Since the government was entitled to recover the value of the letters as its damages for their conversion, this value was also the measure of the damages it sustained under the bond, and a cause of action against the obligors in the bond to recover these damages arose as soon as the theft of the letters was completed."

The tendency to depart from a strict interpretation of the rule applied in the Heydon and Smith's Case—of which tendency The Winkfield and the National Surety cases are instances—has not, however, developed in this country to the point where it might be proper to regard it as an accepted doctrine of law. Very few cases involving this question have been decided by the courts, and none of the decisions rendered thus far on this point has the force of a *stare decisis*. It is apparent, however, that this movement recognizes for its purpose a readjustment of the remedies open to the bailee where a wrong has been committed with reference to the property bailed, and its tendency is to shift the ground of the bailee's recovery from his responsibility under the bailment to the legal consequences of his possession.

A. G. L.

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**LOCAL BILLS OF LADING**


May a State, under the Constitution, fix the rate for the transportation of goods by railroad, on a local bill of lading, from a point within its territory to another point in the same State, when the goods are destined from the beginning for export to another State or to a foreign country? This question has been answered in the negative by the Supreme Court of the United States in a series of recent decisions, ending with *Railroad Commission of Louisiana v. T. & P. Ry. Co.*
The decision in the case depends upon whether, when goods are destined from the beginning for export to another State or to a foreign country, their movement on a local bill of lading between two points in the same State is required as a separate and distinct shipment, or merely a part of a through shipment to another State or to a foreign country. If the former view be taken, the movement is intrastate commerce, and the State has power to fix the rate governing it; if the latter, it is interstate or foreign commerce, and the State has no power to fix the rate governing it.

The first of the cases was Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498 (February 20, 1911). There the question was presented whether it was an undue preference, in violation of the Act to Regulate Commerce, for the Terminal Co. to grant to one Young exclusive wharfage facilities at Galveston, Tex., while denying similar privileges to other shippers. One of the defenses was that the Interstate Commerce Act had no application because the wharfage facilities were facilities of state commerce and not facilities of interstate commerce. This was based on the fact that most of the goods handled over the wharf at Galveston moved to that point on local bills of lading from other points within the State of Texas and remained at Galveston several days before they were delivered to ocean steamships, to be transported to foreign countries. That the goods (cottonseed meal and cake) were destined for export to foreign countries from the time they commenced to move from the interior Texas points and that their movement from such points to Galveston was merely an initial step or part of a through shipment to foreign countries, was not seriously disputed. Moreover, it was virtually conceded that the stop or delay at the port of transshipment was merely incidental to such through shipment, the delay being for the purpose of grinding and sacking the goods, and of securing space on board the steamships. These facts, the court found, were established by the evidence. In other words, it appeared as a matter of fact that the goods were in the course of transportation to foreign countries from the moment they started to move from the interior Texas points, and that they did move from such points to destination in foreign countries. The court held that the goods took on the character of foreign commerce from the moment that they commenced to move in the course of transportation to foreign countries, and that the goods did not lose their character as foreign commerce because of the incidental use of local bills of lading, or because of their incidental stop at the port of transshipment. The essential character of the transaction and not
its incidents determined whether the goods were foreign or interstate commerce, on the one hand, or state commerce, on the other. The court, therefore, concluded that the shipment constituted foreign commerce; that, as the wharfage facilities were facilities for handling such commerce, the wharfage facilities were facilities of foreign and interstate commerce; and that the Interstate Commerce Commission had jurisdiction to issue an order requiring the Terminal Co. to cease granting to Young such wharfage facilities while denying similar facilities to other shippers.

The next case is Ohio Railroad Commission v. Worthington, 225 U. S., 101 (May 27, 1912). The State Commission of Ohio had fixed a rate on coal from interior Ohio points to "on board" vessels at Huron, Ohio. It was admitted that coal "on board" vessels at Huron was destined from the beginning to points in other States, and that the movement to the port of transhipment was a mere part of through transportation to the other States. It further appeared in this case that the exact points of destination in the other States were not determined, when the goods commenced to move from the interior Ohio points. In other words, it was uncertain which part of the coal should go to New York or which part to New Jersey, or to Canada, although it was certain that all coal was to go beyond the State of Ohio. The movement from interior Ohio points to Huron, Ohio, was on local bills of lading. The evidence, however, established the fact that the use of local bills of lading was merely a matter of convenience, it not being known definitely, at the time the coal started from the interior points, what particular steamship would transport the coal from Huron; and the several days' stop at Huron, it was shown, was merely incidental to the through movement, such delay being for the purpose of securing space on board the lake steamships. In substance, the question presented was similar to that presented in the Young case, supra; and the decision in this case was similar to that in the Young case. From the beginning, the coal was interstate commerce. Being a rate affecting interstate commerce, the rate fixed by the Ohio Railroad Commission was void under the commerce clause of the Constitution as an attempt to regulate interstate commerce.

The third case is Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S., 111 (January 27, 1913). There lumber ordered, manufactured and shipped for export to foreign countries, had moved on local bills of lading from interior Texas points to Sabine, Texas, where it remained several days before it was forwarded to its foreign destination. The facts of record showed that the lumber was destined
from the beginning for export to a foreign country, and the court held that from the beginning the shipment was a part of foreign and inter-
state commerce, notwithstanding the incidental use of local bills of lading and an incidental stop at the port of transhipment; it was con-
cluded that the rate on file with the Interstate Commerce Commission, and not the State rate, applied.

The last case (Railroad Commission of Louisiana v. T. & P. Ry.
Co., 229 U. S., 336 (June 10, 1913) is similar to the Sabine Tram
case, supra, the ruling being that staves and logs destined from the
beginning for export to foreign countries, but moving on local bills of lading from interior Louisiana points to New Orleans, La., were for-

eign and interstate commerce (and not state commerce), and that the
rate on file with the Interstate Commerce Commission, and not the
state rate, applied.

The doctrine of these cases is clear. It amounts simply to this, that shipments take on the character of foreign and interstate com-
merce when they commence to move toward their foreign and inter-
state destinations, and that their character as foreign and interstate commerce is not affected or varied as to a part of the movement, merely because such part is made on a local bill of lading or merely because there is an incidental stop at the port of transhipment.

It has been stated in the course of judicial decisions that this is a new doctrine and that it overrules a principle announced by the
Supreme Court of the United States in Gulf, C. & S. F. Ry. Co. v.
Texas, 204 U. S., 403 (February 25, 1907).

The doctrine, however, is not new, for as early as 1870 the Su-
preme Court decided in The Daniel Ball, 10 Wall. (U. S.), 557, that
"Whenever a commodity has begun to move as an article of trade
from one State to another, commerce in that commodity between the
States has commenced." Also in 1886, in Coe v. Errol, 116 U. S.,
517, the rule was stated to be that goods become the subject of inter-
state commerce when they have begun to be transported from one
State to another, or have been delivered to a carrier for such trans-
portation.

Nor is the doctrine at variance with the Gulf case.

The Gulf case presented the question whether a movement of corn
on a local bill of lading from Texarkana, Texas, to Goldthwaite, Texas, was governed by a state rate under the following facts and circumstances: Saylor & Burnett, at Goldthwaite, Texas, ordered two cars of corn from the Hardin Grain Co., of Kansas City, Missouri, under a purchase contract, by virtue of which the corn was to be de-
delivered at Goldthwaite, the title to pass to Saylor & Burnett upon delivery at that point. The Hardin Grain Co., not having the corn on hand, entered into a purchase contract with the Harroun Commission Co., of Kansas City, for such quantity of corn, to be delivered to the Hardin Grain Co., at Texarkana, Texas, title to pass to the Hardin Grain Co. upon delivery of the corn at that point. The Harroun Commission Co. had previously ordered two cars of corn from Forrester Bros. of Hudson, South Dakota, under a purchase contract which called for delivery of the corn at Texarkana, the freight rate from Hudson to Texarkana to be paid by Forrester Bros. Forrester Bros. knew nothing of the arrangement between the Harroun Commission Co. and the Hardin Grain Co., nor did they know anything of the arrangement between the Hardin Grain Co. and Saylor & Burnett. Being an utter stranger to the transaction between the Harroun Commission Co. and the Hardin Grain Co. on the one hand, and between the Hardin Grain Co. and Saylor & Burnett on the other, Forrester Bros. shipped the two cars of corn from Hudson, South Dakota, to Texarkana, Texas, under a through bill of lading, naming those points respectively as the points of origin and destination, and paid the freight rate for this shipment. Meantime, the Harroun Commission Co. knew nothing of the arrangement between the Hardin Grain Co. and Saylor & Burnett. It was not until the corn had reached Kansas City on the journey to Texarkana that the Harroun Commission Co. was made aware of the fact that the Hardin Grain Co. intended to send the corn to Goldthwaite, to fill the order of Saylor & Burnett. When the corn had reached Kansas City, the Hardin Grain Co. notified the Harroun Commission Co. to advise the latter's agent at Texarkana to reship the corn, for the Hardin Grain Co., upon its arrival at Texarkana, to Goldthwait. Pursuant to these instructions, the agent of the Harroun Commission Co., five days after the corn had arrived at Texarkana, reshipped the corn to Saylor & Burnett at Goldthwaite. And this shipment from Texarkana, Texas, to Goldthwaite, Texas, was made on a local bill of lading, naming those points respectively as the points of origin and destination.

On these facts the question was presented whether the movement from Texarkana, Texas, to Goldthwaite, Texas, was interstate commerce. If it were, a low state rate applied; if it were not interstate commerce, but merely a part of a through shipment from Hudson, South Dakota, a high interstate rate applied. It is to be observed that the question was not whether a rate fixed by a State applies on a movement on local bills of lading between two points in the same
State, of goods which were destined from the beginning for export to another State or to a foreign country. That the movement from Hudson, South Dakota, to Texarkana, Texas, was interstate commerce was unquestioned. Nor was the question presented whether a state rate applies on a movement on local bills of lading between Texarkana, Texas, and Goldthwaite, Texas, of goods which were destined to Goldthwaite from the time they started to move from Hudson; for the evidence clearly established the fact that the goods when they started to move from Hudson were not destined to Goldthwaite, but were destined to Texarkana and to Texarkana only. That this was so was manifested by the fact that Forrester Bros., who shipped the corn from Hudson to Texarkana, did not know that the corn was to go beyond Texarkana. And the Harroun Commission Co. had ordered the corn to be shipped to Texarkana many days before the Harroun Commission Co. entered into its contract with the Hardin Grain Co. So also it was manifested by the fact that Forrester Bros. had contracted to ship the corn to Texarkana before Saylor & Burnett had ordered any corn to be shipped to Goldthwaite. It was further manifested by the fact that neither the Harroun Commission Co., nor the Hardin Grain Co., nor Saylor & Burnett had anything to do with the shipment from Hudson to Texarkana. That shipment, it will be remembered, was made by Forrester Bros. Besides, the corn had already started on its journey to Texarkana before the Harroun Commission Co. became aware of the fact that the Hardin Grain Co. intended to reship the corn to Goldthwaite. It thus appeared of record, that the corn when it commenced to move from Hudson, was destined to Texarkana and to no other point. In other words, the facts showed a separate and distinct shipment from Hudson, South Dakota, to Texarkana, Texas, and another separate and distinct shipment from Texarkana, Texas, to Goldthwaite, Texas. The sole question in the case was, therefore, whether the Texas state rate applied on this separate and distinct shipment from Texarkana, Texas, to Goldthwaite, Texas. That this was a separate and distinct shipment between two points in the same State was clearly established, and that a separate and distinct shipment between two points in the same State constitutes interstate commerce was not questioned. The court decided that this shipment, being a separate and distinct shipment, wholly within the State of Texas, was interstate commerce, and, as such, governed by the Texas state rate.

The decision in the *Gulf case* amounts simply to this: That it is the essential character of a transaction that determines whether a shipment is state commerce; that goods take on the character of state commerce;
merce when they move, as a separate and distinct shipment, between two points in the same State; and that their character as such inter-state commerce is not affected by the fact that incidentally, at some time or other, the goods happened to have come from another State. It was because of the essential character of the goods as foreign and interstate commerce that they were held to be foreign and interstate commerce in the four recent cases. The use of local bills of lading was not controlling. The essential character of the goods was the determining test in both instances.

J. J. M. O'L.

**Nature and Quality of Title to Property of Charitable Corporation.**

*Trustees of Sailors' Snug Harbor v. Carmody, 144 N. Y., Supp. 24.*

*Note.—The Appellate Division has allowed an appeal to the Court of Appeals which will probably be heard in the higher court.

In 1801 Captain Randall devised certain real and personal property to several officials in the State of New York, and their successors in office, upon certain uses and trusts, namely, the estate to be used for the purpose of building and maintaining an asylum or marine hospital for the support and maintenance of aged, decrepit, and worn out sailors. The will recites that it is the testator's desire, if the purposes of the will cannot be carried out legally without an act of the Legislature, that the said officers apply for an act of the Legislature to incorporate them for the purposes specified. Application was made by the trustees named in the will and in 1806 the Legislature passed an act incorporating the trustees of the Sailors' Snug Harbor for the purposes expressed in the will.

It may here be mentioned that the United States Supreme Court sustained the validity of Captain Randall's will (Inglis v. Trustees of Sailors' Snug Harbor 3, Pet. 99), the decision going upon the ground that a charitable use was created and the title vested in the trustees, with an executory devise over to the corporation when created.

In the course of the administration of the estate various questions have arisen, and the trustees, as a corporation and as individuals, filed a complaint, making the Attorney General defendant, setting up their perplexities and requesting the instructions of the court.
The main question in the case relates to the nature of the title held by the corporation. The Attorney General contended that the corporation holds the land, not as trustee, but as a corporation for the purposes for which it was incorporated; that the corporation holds both the legal and the equitable title and is therefore not entitled to apply to a court of equity for instructions. This contention was sustained by the lower court, where it was held that the absolute title to the property rested in the corporation, not as a trust estate, but for corporate use as expressed in the act of incorporation, and, if necessary to sell a portion thereof the corporation may do so if it has the power under its charter; but if it has not the power the court can not give it: recourse must be had to the legislature. The Appellate Division took a contrary view, holding that the corporation is a trustee, holding the real property in trust for the benefit of a certain class; that there are questions which require construction of the terms of the trust by the court for the advantageous execution of the trust; that the trustee has the right to apply to the court for the purpose of obtaining such instruction: that there are no parties in existence interested in the mainenance of the trust, except the Attorney General of the State, who can be made parties to the action, and that the Attorney General is a proper party.

No doubt the inherent jurisdiction of courts of equity over charities (referring of course to the general jurisdiction which did not depend upon the royal prerogative of the statute of 43 Elizabeth 4), had its origin in the law of trusts—using that word in its broadest sense, that is to say, in the power of the Chancellor to compel the holder of the legal title to apply it in the charitable manner intended by the donor. But a charitable gift or devise never constituted a trust in the strict technical sense. Such gifts or devises were always for the benefit of uncertain persons—there was no defined cestui que trust or beneficiary—and the so-called charitable trust was therefore differentiated from all other trusts by the consideration that there was no individual who could claim its enforcement, and by the rule (which owed its existence to that consideration) that it was the duty of the Crown or the State—as parens patriae, to enforce such trusts as the representative of the undefined beneficiaries. Moreover, charitable gifts were very often intended to be perpetual, and hence were excepted from the operation of the rule against perpetuities. Really the charitable gift had little in common with the ordinary private trust, except that the donee or devisee of the property would be compelled by Chancery to apply it in accordance with the wishes of the donor or devisor. The use of the
word "trust" or "trustee" in connection with a gift for charitable uses is misleading. Indeed those words are rarely used by the earlier writers, or the more exact of the later writers, upon the law of charities. But whatever the terms used to describe the donee or devisee, the weight of authority is to the effect that when a pre-existing charitable foundation is incorporated, the charter creating the corporation is merely machinery for effectuating the pre-existing trust, and the granting of the charter does not divest courts of equity of their power to supervise and regulate the administration of the trust. Tudor on Charities and Mortmain (4th Ed.), page 185, says:

The court has no general jurisdiction to establish a charity founded by charter, for such a charter has already been established by a higher authority than that of the court. * * * *

The case is different where a charter of incorporation is granted subsequently to the original foundation. Here the charter is merely machinery for providing an incorporated trustee, armed with appropriate corporate power, to carry into effect a pre-existing trust; and the grant of such a charter does not in any way affect the powers of the court to establish and regulate the charity.

So, also, in Perry on Trusts (Sec. 743), it is said:

If a private person founds a charity, and the crown grants a charter, the presumption is that the crown intended to carry out the intentions of the donor, and the jurisdiction of the court of chancery will be continued.

But in Bringham v. Peter Bent Bringham Hospital, 134 Fed. 513, the court held that a corporation created in accordance with the provisions of a will to which the testator's residuary estate is transferred, as directed in the will, for use in founding and maintaining a hospital, does not hold the property in trust in the true sense of the term, but as its own, to be devoted to the purpose for which it was created. In that case the court said:

Such a holding is sometimes called a quasi trust and an institution like the one in question is subject to visitation by the state but the holding does not constitute a true trust. On the transfer of the property devised by the fourteenth paragraph to a corporation as was anticipated, all technical trusts ceased.
Also in the Tilden case, 130 N. Y. 48, it is said:

"In Inglis v. The Sailors' Snug Harbor (3 Pet. 99), there was no trust created, no discretion vested in the executor, no conveyance to be made after the testator's death. His intention to give his property to a corporation to be created to carry out his charitable purpose was clear."

Such was the fact in Burrill v. Boardman, 43 N. Y. 254:

"By the will in that case the property was given directly to the corporation which the testator contemplated should be created after his death. * * * Once created, the property by force of the will vested in the corporation."

Of course the nature of the title is a question of interest mainly in connection with the administration of the estate, and this brings up the further question, Does the fact that the legislature has seen fit to incorporate trustees holding property for charitable uses, deprive courts of equity of power to construe the instruments creating the charitable uses, or to give instructions and additional powers, as changing circumstances may require?

There are many cases in this country in which power to sell real estate, or to make other changes of investment, has been conferred by the courts upon corporations holding property charged with a charitable use, where the existence of such jurisdiction has been assumed, but there appears to be no American decision (other than the principal case) in which the court has debated the question. These American cases, in general, support the proposition that the devisee of lands impressed with a charitable use may apply to a court of equity for instructions regarding the administration of the trust, and need not wait for the Attorney General to take the initiative. In Harvard College v. Society &c., 3 Gray, 280, the court said:

The prayer of this bill is not founded upon any allegations of legal incapacity of the trustees to administer the charity, or any failure to execute the trust by reason of any present want of actual trustees, nor upon any allegation of abuse of trust by the present trustees; but its avowed purpose is simply that the trustees may, under the sanction and approval of this court, on the ground of expediency and of the difficulty of managing the trust, resign their trust into other hands. Such being the nature of the bill, we see
no objection to the trustees filing it in their own behalf, making the Attorney General, as representative of the Commonwealth, a party defendant. This course seems to have been directly sanctioned in two cases cited by counsel of the complainants, Governors of Christ Hospital v. Attorney General, 5 Hare, 257. Clum Hospital v. Lord Powys, 6 Jurist, 252. Cited in 1 Chit. Eq. Dig., 479, Pt. 11."

In Smith Charities v. Northampton, 10 Allen, 498, the complainant was a corporation established to administer certain property for charitable purposes under a will. Instructions on several points were asked, the Attorney General being named as a party defendant. The instructions prayed for were given by the court, even though one of the questions did not present a difficulty in the way of a present administration of the estate, but rather one that might arise in the future.

To similar effect are the cases of Weeks v. Hobson, 150 Mass. 377; Petition of Baptist Church &c., 51 N. H. 424; Rolfe & Rumford Asylum v. Lefebre, 69 N. H. 238; Academy of the Visitation v. Clemens, 50 Mo. 167; Attorney General v. Newberry Library, 150 Ill. 229. In the last case just cited the court said:

It is one of the well recognized functions of courts of equity, wherever there is any bona fide doubt as to the true meaning of an instrument creating a trust to, at the suit of the trustee brought for that purpose, give a judicial construction to the instrument, and direction to the trustee as to his powers and duties thereunder. * * * * *

Where the public is interested in the execution of a trust, the Attorney General is the proper party, either plaintiff or defendant, as the representative of the public. * * * * *

In England these questions have received much consideration and the result has been reached that the courts have substantially the same jurisdiction which the American courts have assumed. Sir John Romilly, M. R., discusses this in the case of Attorney General v. Dedham School, 23 Beav. 350, as follows:

But where the crown itself grants a charter of incorporation, or a charter appointing governors, and, at the same time that it incorporates them, gives them the power to make rules, and all this with respect to a charity founded by somebody else; in that case the court infers that the crown does what the court of chancery
would do by decree in any such case, viz., that it grants that charter with the view and intention of carrying into effect the views and wishes of the original founder; and, accordingly when, as in this case, the court finds thereafter that those rules and those regulations do not carry into effect the views and wishes of the original founder, this court interposes to make such a scheme for the purpose of furthering the intentions of the founder as may have been rendered necessary by the altered state of circumstances and the increased civilization of the country. That, I apprehend, is the foundation of the jurisdiction which this court exercises in those cases, and, accordingly, I have, in a great number of instances, interfered, where there has been a charter of incorporation and a direction to the governors or persons to make rules, and I have directed a scheme where the altered circumstances of the charity have made it necessary for the purpose of carrying into effect the wishes and views of the original founder."

Other cases along the same general line are Clephane v. Lord Provost of Edinburgh, 1 House of Lords (Scotch App.), 417; Attorney General v. Earl of Clarendon, 17 Ves. Jr. 491; Re Shrewsbury Grammar School, 1 Macn. & G., 324.

B. L. M.

**Stipulation in Articles of Agreement Against Dissolution of A Partnership.**

*Hornaday vs. Cowgill et al., 101 N. E. 1030 (Indiana).*

Whether a stipulation in the Articles of Agreement is sufficient to prevent the dissolution of a partnership, in the event of the death of a member of the firm, was considered by the Appellate Court of Indiana in the case of Hornaday v. Cowgill et al. (101 N. E. 1030). Hornaday made deposits in the North Bank of Manchester, a partnership, in 1901. In that year one of the partners, J. C. Lawrence, had died. Several years prior to her death Carey E. Cowgill and Harvey B. Shively, members of the same partnership, withdrew from the firm. In 1904 the bank failed, and Hornaday was paid only a portion of the amount he had deposited up to that time. He sued to obtain the remainder of his deposits with interest, and for this purpose entered suit against the members of the firm, including Cowgill and Shive'y. It was held that the death of a member of a partnership effected a
dissolution of the firm, notwithstanding that the partnership articles provided for its continuance regardless of the death of a partner; so that any business transacted after the death of such partner was with a new firm, and any partner who had retired from the business prior thereto, could not be held for subsequent obligations of the firm. Cowgill and Shively were not liable.

This decision, while claiming to follow the weight of authority, is contrary to the rulings in other states. (Duffield v. Brainerd, 45 Conn. 424; Hart v. Anger, 38 La. Ann. 341; In re Shaw, 81 Me., 207, 16 Atl. 662; Edwards v. Thomas, 66 Mo. 468; Wild v. Davenport, 48 N. J. Law (19 Vroom) 129, 7 Atl. 295, 57 Am. Rep. 552; Saville v. Steers, 60 Hun., 576, 14 N. Y. Supp.; Alexander's Ex'trs. v. Lewis, 47 Texas 481; McNeish v. U. S. Huless Oat Co., 57 Vt. 316); among them may be mentioned Rand v. Wright (141 Ind. 226, 39 N. E. 447).

In the absence of any provisions in the partnership articles, or in the decedent’s will on the subject, the survivor has no authority to continue the business, as distinguished from winding it up (Perin v. Megibben, 53 Fed. 86. 13 C. C. A. 443; Remick v. Emig, 42 Ill. 432). The same rule was laid down in Powell v. North (3 Ind. 392, 56 Am. Dec. 513). If he does continue the business, he alone is liable for the debts incurred (Julian v. Watson, 43 N. Y. 571; Staats v. Howlett, 4 Den. (N. Y.) 559), and must answer for all depreciation and loss due to such continuance (Roberts v. Hendrickson, 75 Mo. App. 484; Hooley v. Gieve, 9 Daly (N. Y.) 104).

It appears that the effect of a stipulation in the articles of agreement, providing for a continuance of the firm in the event of the death of a member, is to prevent the survivors from binding the decedent’s estate for new debts contracted (Vincent v. Martin, 79 Ala. 540; Wilcox v. Derickson, 168 Pa. St. 331, 31 Atl. 1080). By such an agreement the decedent’s share in the partnership is alone liable for the new debts (Vincent v. Martin, supra: Wilcox v. Derickson, supra). In Hawkins v. Quinette (156 Mo. App. 153, 136 S. W. 246) the St. Louis Court of Appeals said:

“It is entirely clear that the copartnership was not dissolved; for, although it be true that a mere direction in the will of one partner that the partnership shall continue after his death amounts to no more than the creation of a new partnership upon the taking effect of the will on the theory that the surviving partners do not assent thereto until that time, as was decided in Exchange Bank v. Tracy, 77 Mo. 594, it is true as well that an existing partnership
continues after the death of a member until the termination prescribed; if it is so stipulated in terms in the contract of partnership. So it is, though death ordinarily operates a dissolution of a partnership, it accomplishes naught with respect to that matter in cases such as this one where, by express stipulation in the articles of copartnership, the partners have agreed the partnership shall continue.” (Citing Edwards v. Thomas, supra; Farmers' and Traders' Sav. etc., v. Garesche, 12 Mo. App. 584; Hox v. Burnes, 98 Mo. App. 707, 73 S. W. 928).

Apparently there is a conflict of authorities on the point in question. Strictly speaking, a partnership is dissolved by the death of a member, and although the partnership is continued, there is, at least theoretically, the formation of a new firm.

A. J. B.

RECENT CASES

Descent and Distribution—Right of Husband to Inherit From Deceased Wife Whom He Feloniously Killed.

The father of one of the parties to a partition suit murdered his wife, and it was claimed that the father and any person claiming under him, thereby became incapable of enjoying any property of the wife because of the murder. Holloway v. McCormick, et al. (Oklahoma), 136 Pac., 1111.

Held, that both father and son might inherit, notwithstanding the murder. The court reaffirms the view taken by other authorities that the power to declare what shall be the rule of descent is vested in the legislature, that the statutes of descent make nearness of relationship and not the character or conduct of the heir the controlling consideration as to the right of inheritance, and that the court is not authorized to impose a penalty for crime in addition to that provided by the criminal code, by declaring the estate of a wrongdoer forfeited.


Plaintiff sued to recover damages for an injury alleged to have been received by him while engaged in framing up a new office in
NOTES AND COMMENT

a freight shed, belonging to the defendant, and in sawing boards and nailing them in place on the wall. The freight shed was used in connection with the transportation of both interstate and intrastate freight. The action was begun in the state court, and removed to the Federal court on the ground of diversity of citizenship; the plaintiff moved to remand on the ground that the action was one arising under the Federal Employers' Liability Act. Held, That the work upon which the plaintiff was engaged was in the nature of a repair of an instrumentality of interstate commerce, and the action was, therefore, within the Federal Employers' Liability Act. (Eng. v. Southern Pac. Co., 210 Fed., 92, Dist. Ct. Oregon, Dec. 22, 1913).


**Fixtures...... Intention of Owner of Realty Governs......**

**Conditional Sale of Personality to be Attached to Realty,**

**Burden Upon One Claiming as Bona Fide Purchaser for Value.**

In an action of replevin to recover possession of chattels sold to become attached to the reality, the agreement was that title was to remain in the vendor until the goods had been paid for. A statute provided that in such cases the vendor must file his conditional contract, or the title would pass to an innocent purchaser of the reality for value. Plaintiff sold such chattels to a contractor, which had agreed to put the fixtures in the building, for an amusement company. The latter company refused to accept the goods on the ground that they were not satisfactory, and later went into bankruptcy, the property was bought by three of its directors, who formed the defendant company. Held, that the burden of proving that the defendant was a bona fide purchaser for value was upon the defendant, notwithstanding the conditional contract was not filed; and that the intention of the owner of the reality determined whether or not the fixture became part of the reality, and that by rejecting such chattels, he will be presumed to have considered them as personal property, the title remaining in the plaintiff vendor. **Crocker-Wheeler Company v. Genesee Recreation Company 145 N. Y. Supp. 477.**
Landlord and Tenant......Where the Tenant Surrenders the Key Voluntarily and it is Accepted by the Landlord there is no Eviction Which Will Release the Tenant from Payment of Rent.

In an action against the guarantors of a lease to recover rent the lessee intervened and was made party defendant. The lessee, after being in arrears of rent, voluntarily surrendered the key to the front door of the premises to the agents of the lessor, and it was accepted by them. The lessee did not object to removing of counters and shelving by the lessor. The suit was to recover the rent which was due. The defendant lessee defended on the ground that he was released from the payment of rent by the alleged ejectment. Held, that the lessee was liable for rent accrued. Boschetti et al. v. Morton et al (Cal.) 137 Pacific 1085. Even though there had been an eviction there would have been a liability for rent due, although not if for rent to become due in the future upon a broken lease. Boyd v. Gore 143 Wisc. 531; 128 N. W. 68; 21 Ann. Cases 1263. American Bonding Company v. Pueblo Investment Company 150 Fed. 17; 80 C. C. A. 97; 9 L. R. A. (N. S.) 557; 10 Ann. Cas. 357.

Principal and Agent** Corporation not Charged with Notice Acquired by an Officer in His Personal Capacity when it is to His Interest not to Disclose the Information to the Corporation.

In an action to recover upon notes made by an agent, authorized to give notes in payment for subscriptions to stock. The agent was defrauded into giving certain notes in payment for stock subscriptions, in an insolvent corporation. The evidence conclusively showed that the agent was fraudulently induced to enter into the contract. The persons who induced the agent to give the promissory notes were not only officers and directors of the company, the stock of which was worthless, but they had been appointed president and cashier, respectively, of the bank which discounted the notes thus fraudulently obtained. The principal of the agent who gave the notes defended on the ground that the bank could not recover upon the notes because it was not a bona fide purchaser for value, being charged with notice of the fraud, owing to the fact that the officers of the bank knew of the fraud, having participated in it as officers of the insolvent corporation. Held, that the corporation could not be charged with notice
of the fraud through information obtained by officers acting in their private capacities. City Bank of Wheeling et al v. Bryan et al. (W. Va.) 78 Southeastern Reporter 400.

**United States vs. Regan, 34 S. Ct., Rep., 213. —— U. S. ——, Decided January 5, 1914.**

Section 4 of the Immigration Act of 1907 (34 Stats. at L., 1911, p. 499) makes it a misdemeanor for any person, partnership, or corporation to prepay the transportation, or in any manner to encourage or assist the importation or migration of any contract laborer into the United States, unless exempted by the Act. The action in the above case was brought under Section 5 of that Act, which provides in effect, that for every violation of Section 4 the offender shall forfeit $1,000, "to be sued for and recovered by the United States as debts of like amount are now recovered in the courts of the United States." The question being whether in a civil action to recover this penalty it was necessary to establish the violation, which was a misdemeanor, beyond a reasonable doubt, the court held that it was not, reversing the Circuit Court of Appeals for the Second Circuit. (203 Fed., 433).

This is perhaps the last of a long line of interesting cases developing, not without some conflict, the rules applicable to cases arising under statutes imposing penalties for violating the Revenue, Safety Appliance, Immigration and similar statutes of the United States. They appear to be uniform, however, in upholding the propriety of either a civil or a criminal proceeding. The difficulty has been in determining whether, when the civil form of proceeding is adopted, the action is so far criminal in its nature as to be attended with some of the incidents of a criminal proceeding, including the necessity of proof beyond reasonable doubt.

In *Atcheson vs. Everett*, 1 Cmp., 382, 391, an action of debt to recover the penalty for bribery of a member of Parliament, Lord Mansfield said:

"Penal actions were never yet put under the head of criminal law, or crimes. The construction of the statute must be extended by equity to make this a criminal case. It is as much a civil action as an action for money had and received.

In *Stockwell vs. United States*, 13 Wall., 531, 542, it was contended that the Government must proceed by indictment or informa-
tion to recover the penalty for violation of an act prohibiting the purchase of goods illegally imported. The court held otherwise, saying:

“But the question now is, whether a civil action can be brought and, in view of the provision that all penalties and forfeitures incurred by force of the act shall be sued for and recovered, as prescribed by the Act of 1799, we are of opinion that debt is maintainable. The expression ‘sued for and recovered' is primarily applicable to civil actions, and not to those of a criminal nature.”

To the same effect are Counselman vs. Hitchcock, 142 U. S., 547; United States vs. Zucker, 161 U. S., 475; St. Louis, etc. Co. vs. Taylor, 210 U. S., 281; Hepner vs. United States, 213 U. S., 103, 104, which arose under a statute identical with the Regan case, except that the offense was there said to be “unlawful,” while here it is described as a “misdemeanor,” the court in the Hepner case saying: “There can be no doubt that the words of the statute on which the present suit is based are broad enough to embrace, and were intended to embrace, a civil action to recover the prescribed penalty;” Chicago, etc., Co., vs. United States, 220 U. S., 559; New York, etc., Co., vs. United States, 165 Fed., 833, 838; United States vs. Illinois Central R. R. Co., 170 Fed., 542, 543; United States vs. Southern Pacific Co., 162 Fed., 412; Atchison, Topeka & Santa Fe Ry. vs. United States, 178 Fed., 12; St. Louis Co. vs. United States, 183 Fed., 770; Adams vs. Woods, 2 Cr., 336, 340; see also, Blackstone’s Com. Vol. 111, p. 158.

Some of the statutes under which these cases have arisen, notably those regulating the importation of goods, provide not for a pecuniary penalty, but that the goods which are the subject matter of the violation shall be forfeited, in which event the ordinary proceeding in rem to condemn the property is proper. United States vs. The Burdett, 9 Pet., 682, 687; Coffey vs. United States, 116 U. S., 436 Boxes of Opium vs. United States, 23 Fed., 367; The Good Templar, 97 Fed., 651.

That the party may be criminally prosecuted, even though the statute does not expressly make the offense a crime, is also well settled. In the Stockwell case, supra, the phrase in the statute “on conviction thereof,” referring to the offense, led the court in addition to declaring a civil action maintainable, to say: “It may be, therefore,
that an indictment may be sustained. In Coffey vs. United States, 116 U. S., 436, 443, the court said:

"It is also true that the proceeding to enforce the forfeiture against the res named must be a civil action, while that to enforce the fine and imprisonment must be a criminal proceeding, as held by this court, 14."

* * * * * * * *

In United States vs. Stevenson, 215 U. S., 190, under the same statute as the Regan case, it was said that Congress having declared the act to be a misdemeanor did not, by providing also for an action of debt to recover the penalty, cut down the right of the Government to resort to the criminal method of seeking to punish the offender.

The real question before the court in the Regan case, was "where the offense was expressly made a misdemeanor, and the statute provided that the penalty may be recovered in a civil action of debt, whether such civil action is so far criminal in its nature as to require the offense to be proved beyond a reasonable doubt.

Though this precise question was here directly presented to the Supreme Court for the first time, that court has, in similar cases, attached to civil actions to recover penalties some of the instances of a criminal prosecution, and, as will be seen, has used language which had led the Circuit Courts of Appeal, in some cases, to consider this court as upholding the requirement of proof beyond a reasonable doubt.

In United States vs. The Burdett, 9 Pet., 682, 687, to enforce the forfeiture of the brig Burdett, the court said:

"The object of the prosecution against the Burdett is to enforce the forfeiture of the vessel, and all that pertains to it, for a violation of the revenue law. This prosecution then, is a highly penal one, and the penalty should not be inflicted unless the infraction of the law shall be established beyond a reasonable doubt. . . . No individual should be punished for a violation of law which inflicts a forfeiture of property, unless the offense shall be established beyond reasonable doubt."

The same Court, in Chaffey & Co., vs. United States, 18 Wall., 516, 539, said:

"The court instructed the jury, in substance, that the Government
need only prove that the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and if they did not they were guilty beyond a reason-able doubt.”

and without stating that the court below was wrong in thus impliedly at least recognizing that the proof must be beyond a reasonable doubt, the Supreme Court reversed judgment for the plaintiff upon another ground.

Then followed the case of Lilienthal’s Tobacco vs. United States, 97 U. S., 237, a proceeding in rem, often cited as a leading case in support of the proposition that a preponderance of the evidence is sufficient. Taking up the contention that the proof must be beyond a reasonable doubt, in connection with the Chaffee case, the court said the two cases were “radically different, the present being an information against the property, and the former against the person to recover a statutory penalty. Informations in rem differ widely from an action against the person to recover a penalty imposed to punish the offender. But they differ even more widely in the course of the trial than in the intrinsic nature of the remedy to be enforced.”

Considering the Burdett case, supra, the court continued:

“Jurors in such a case ought to be clearly satisfied that the allegations of the information are true; and when they are so satisfied of the truth of the charge they may render a verdict for the Government, even though the proof falls short of what is required in a criminal case prosecuted by indictment.”

These three cases still left the question undetermined, the first two apparently answering it in favor of the criminal and the latter laying the foundation for the civil rule for the amount of evidence in such cases.

In Boxes of Opium vs. United States, 23 Fed., 373, the court held the true rule to be that the offense must be established beyond a reasonable doubt; and in view of the above quoted language from the Lilienthal case, that case would seem to be doubtful authority for the proposition that where the suit was against the person to recover a penalty growing out of a misdemeanor, a preponderance of the evidence would have been held sufficient. The Lilienthal case did, however, clearly point out the difference between a civil and criminal proceeding under the statute, and the statute in the Regan case author-
izing the civil suit, the court considered this distinction should be main-
tained, so far as the present question is concerned. It will be seen, however, that the fact that the suit may properly be civil, does not rob it of some aspects of a criminal case.

*Boyd vs. United States*, 116 U. S., 616, was an information by the United States under Section 12, 18 Stats. 186, imposing a fine, imprisonment or forfeiture of the goods for fraudulently im-
porting merchandise without paying the duty. It was held that the action, though civil in form, was criminal in nature, "for all the purposes of the 4th Amendment of the Constitution, and of that portion of the 5th Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself."

Following this was the case of United States vs. Shapleigh, 54 Fed.; 126 (8th Circuit), an action to recover penalties for presenting fraudulent claims against the United States. (3490 Rev. St.). After a full review of the authorities, the court held the offense must be proved beyond a reasonable doubt on the ground that the object of the action was to punish the defendant, and his character and prop-
erty were put in jeopardy,—characterizing it as a criminal case under the cloak of a civil suit.

In *Coffee vs. United States*, 116 U. S., 436, a proceeding in rem for violation of the internal revenue law, it was contended that an acquittal of the defendant in a criminal proceeding under the statute should not be conclusive in his favor in a subsequent civil suit to recover the penalty prescribed, as the amount of evidence necessary to convict in the former was greater than that in the latter. The court did not deny that the amount of evidence required was different in the two proceedings, but held the acquittal conclusive upon other grounds, which caused the court in the Regan case to consider the Coffee case as assuming that in a civil action a preponderance was sufficient.

*Counselman vs. Hitchcock*, 142 U. S., 547, 562, and *Lees vs. United States*, 150 U. S., 476, both held that the defendant could not be compelled to be a witness against himself in a civil action to recover a penalty under a statute similar to the one in the Regan case, saying, in the Lees case that the action was "unquestionably criminal in its nature."

It is clear, therefore, that though a civil action is altogether proper, it does not follow that such action is attended with all the incidents of a civil proceeding. Further upon the question whether
a preponderance of the evidence is one of the incidents which does attend it. In The Good Templar, 97 Fed., 651, a proceeding in rem, the court took the view that the quotation given above from the Burdett case was so modified by Lilienthal's Tobacco, followed by Coffee vs. United States, as to establish that a preponderance is sufficient. It should be noted, however, that the Burdett, Lilienthal and Coffee cases, as well as The Good Templar, were all proceedings in rem, and that even if the court in the Lilienthal case has expressly repudiated the language in The Burdett, the question would still be open as to the amount of evidence required when the action was against the person, especially as the court in the former case was careful to point out the difference in a proceeding to enforce forfeitures of property and one against the person.

United States vs. Southern Pacific Co., 162 Fed., 412, was an action against the person to recover the penalty for violation of the provisions of 34 Stats. 607, an act to prevent cruelty to animals in transit between the States, etc., a case more nearly like the Regan case than any of the foregoing; after stating that it was only just that proof be required beyond a reasonable doubt when a person’s life or liberty was in danger, the Court said: "But in civil actions there is not the same reason for requiring such strict proof of the facts in issue, and therefore the law does not demand it." The statute under which this case arose did not make the offense a crime, as is the case in United States vs. Regan.

United States vs. Zucker, 161 U. S., 475, was an action to recover the value of certain merchandise alleged to have been forfeited to the United States for violation of Section 9, 26 Stats. 131, providing for the punishment of a party defrauding or attempting to defraud the Government of duties upon imports. The Government offered to introduce a deposition taken in Paris, which was objected to by the defendant on the ground that the case was of a criminal nature, and he was, therefore, entitled to be confronted with the witnesses against him. The court held the deposition admissible, and upon the authority of this case, a preponderance of the evidence was held sufficient in the case of United States vs. Illinois Central Co., 170 Fed., 542, which was an action of debt to recover a penalty for alleged infraction of the Safety Appliance Law (26 Stats. 132), where the court said:

"It is impossible for us to distinguish this case upon any substantial ground, so far as concerns the present question, from
that of United States vs. Zucker, 161 U. S., 475, where, on the trial of an action by the United States to recover the value of merchandise forfeited by fraudulent importation, the case turned upon the admissibility of certain evidence. If the action was of a criminal nature, it was inadmissible. If it was not, it should have been received. The question was much discussed by Mr. Justice Harlan, and the result was that the court held that the evidence should have been received, and this upon the ground that it was not a criminal proceeding. . . . Being a remedy which does not touch the person, there is no such urgency for protecting him as to require that the rules for the conduct of a civil suit should be displaced and those of a criminal proceeding be taken in."

To like effect are N. Y. R. R. Co., vs. United States, 165 Fed., 833, 838; Atchison, etc., Co., vs. United States, 178 Fed., 12; and St. Louis, etc., Co., vs. United States, 183 Fed., 770, where it was said, "the United States may recover upon a preponderance of the evidence, and the trial judge may in a proper case direct a verdict."

Lastly, in Hepner vs. United States, supra, under the immigration statute, the court again emphasized the civil nature of an action like this, to the extent of holding that where the offense against Section 4 was established by undisputed testimony, a verdict might be directed in favor of the Government, as in an ordinary civil action.

It appears from these cases that though the action is civil in form it is so far criminal in its nature as to afford the defendant the protection of the Fourth Amendment to the Constitution and that he cannot be compelled to be a witness against himself. On the other hand, the defendant is not entitled to be confronted with the witnesses against him; and a verdict may be directed in favor of the government. Upon the question of the amount of evidence required, the Circuit Court held in this case that the Chaffee case controlled, and that it was authority for the necessity of proof beyond a reasonable doubt. But the Supreme Court were of opinion that in view of the Lilienthal and Coffey cases, neither The Burdett nor Chaffee cases "compel or lead to" such a rule; and that as Congress had plainly authorized the action of debt, its intention must have been to authorize an action attended with the usual incidents of a civil suit, one of which incidents is that a preponderance of the evidence entitles the plaintiff to recover. C. F.
BOOK REVIEWS

REED'S CONDUCT OF LAW SUITS.

This excellent little book is now in its second edition. It is invaluable to the practitioner and to the student who is completing his course of preparatory studies, but it is not adapted for the use of those students who are less advanced. Those who have made sufficient progress to appreciate its worth and to derive the advantages its pages impart, should not be content with a single or a second or even many readings. The work can be read and re-read, time and again, with great profit.

The practical suggestions which it contains are so varied, and in most instances of such high value, that a review of the work, in the ordinary sense of that term, cannot be made, in justice either to the author or to his prospective readers, without commenting separately and severally upon each of the various suggestions made in the book. Consequently, we must content ourselves with a bird's-eye view rather than a detailed review, and such survey has been so satisfactorily made by Mr. Wigmore in his introduction to the present edition that it is unnecessary to make apologies for quoting the following excerpt from that introduction:

"This is the kind of book whose substance every young lawyer should commit to memory. I mean that statement literally. On leaving the law school, he should live with this book until he knows its precepts from cover to cover. A rule of law can be searched for when needed, but not so these principles of tact and judgment in personal conduct. To be useful, they must be so firmly appropriated that they become part of one's own experience and belief, ready at an instant's call. In the presence of client, witness, judge, or jury, there is no opportunity, often not even a warning, to seek the kind of help that lies treasured here. If it is not already mastered and become a part of one's self, its help will come too late. And when a book is as good as this is on every page, the pains are worth bestowing. If to the equipment of legal knowledge and honest unskilled ambition which thousands of beginners among us today possess could be added to each one the intelligent use of the mature wisdom here purveyed, the profession and the community in the coming generation would be
BOOK REVIEWS

notably the better for it. To the memory of Mr. Reed (whom I never had the honor of knowing personally) I am glad to offer this public homage of gratitude.”

W. M. CLEARY SULLIVAN.

CASES ON CONSTITUTIONAL LAW. By James Parker Hall, Professor of Law and Dean of the Law School in the University of Chicago. West Publishing Company. 1913.

Man has certain natural rights and immunities, and the main purpose of law is to protect them and afford a remedy for their violation. With this end in view, the administration of law through the ages has evolved certain principles which are recognized as fundamental and as constituting the soul of the law.

These principles always remain the same, except when they yield to reflect a modified public opinion, though the forms under which they are applied are varied to meet the changing conditions of an advancing civilization, or to provide a better protection of rights, or more effective relief for their violation. They are accepted by the student from his teacher and text-writer, though they are only the result of the perceptions and reflections of others, and are, in the language of the law, but hearsay.

The student, having thus acquired a knowledge of these fundamentals, the reason for their existence and their general application, is prepared to enter the “legal laboratory” to dissect and analyze his subjects and ascertain the relations which principles bear to one another and their application to different facts and combinations of facts.

The reports of judicial decisions may be styled the “legal laboratory” to which he resorts. They are the great storehouse wherein are recorded myriads of cases, involving almost every phase of human action and of commercial and political conditions which have given rise to litigation. They contain the legal history of society and the causes for the periodical creation, abandonment and variation of laws and legal principles, and also the judicial methods of reasoning by which conclusions are arrived at.

An exploration at random of these vast treasure houses of legal learning would produce but moderate profit to one not qualified to distinguish rare legal gems from the glittering mass of their worthless surroundings, but one properly qualified, who proceeds systematically under the direction of a skilled guide, will find it pleasant and even fascinating, and will be richly rewarded without an unnecessary and useless consumption of time and mental energy.
This student, in turn, as the jurist of his day, further expands and develops these principles and applies them to the actual every-day affairs of life as he meets them, and the results are recorded for use by future generations. By this method, the sum total of legal knowledge is added to, while to reject all except that which is acquired through individual perception and thought would retard progress and leave each generation in the position of its predecessor.

A compilation of cases on constitutional law, carefully selected and arranged for use as a supplement to lectures and text-books, containing judicial reasoning and discussion of authorities at length, but with the "statements of facts * * * rewritten, and all irrelevant or merely repetitious matter * * * excluded," so as "to present the requisite amount of material within the desired space," which is claimed for this book, will be welcomed by students.

Howard Boyd.


The articles of the New York Stock Exchange are annotated in this volume by citations to leading cases. The Constitution, By-Laws and Rules of the Exchange are also given in full. A useful index of leading cases, with references to the particular principle of dealing upon the Exchange discussed therein, and an exhaustive subject index are appended.


It is particularly appropriate that this volume should be the first publication issued under the auspices of the Ames Foundation, established by contributions of the friends of the late Dean of Harvard Law School, for, as the editor states, the book owes much to his enthusiasm and encouragement. The present volume also places at the disposal of students another original authority, the consultation
of which was a fundamental principle in the teaching of both Ames and Langdell. The introduction, scholarly without being pedantic, adds greatly to the work. Several photographs of manuscripts from which the book was compiled, illustrate in a graphic manner, the difficulties of translation. One of the interesting facts brought to light by the editor is the tremendous volume of litigation in the period. His estimate places the number of cases per term at 10,000; this is at the rate of 40,000 cases per year, or a total for the reign in the Common Bench alone of 800,000. These figures afford a striking contrast with some of those given for modern litigation. It is stated that in the Municipal Court of Chicago, in 1911, 53,223 civil cases were brought, and 50,931 disposed of.

Several cases in the present volume are characterized by a quaint, human appeal. Two or three great pleaders seem to have divided the practice. A good deal of deference to their special ability is shown by the bench. In Carmyngton v. W. R., pp. 71, 72, Thirning, J., recognizes a subtelty in pleading by Hankford as follows: "Pass over, because you have nicely escaped from this writ." In another case, noted by the Editor, the defendant pleaded that he had apprenticed his son to the plaintiff to learn the grocer's art, that the plaintiff knew naught of the grocer's art, but was a brewer and set the lad to work at brewing, and so the boy left him because he did not care to be a brewer. The starting point in the development of legal principles is also clearly apparent, and the researches of scholars find additional illustration in several cases. Thus, in Anon., p. 19, a mass of earth fell upon a man in a tin mine in Cornwall; the King seized the opportunity to forfeit the entire mine, as a deodand, and conferred it upon two gentlemen of his household, but the court held, after "this matter was a long time debated between the Sergeants and the Justices and apprentices," that nothing should be forfeited except that which fell, that is the mass of earth. This common law theory of an inanimate thing, in the character of an offender, has been discussed by Justice Holmes (The Common Law, page 24, et seq.), and by Professor Gray, (The Nature and Sources of the Law, Secs. 109, 110, page 46, et seq.) (See also The Case of the Lord of the Manor of Hampstead, 1 Salk., 220).

H. J. F.