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THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

In the judicial system of the British Empire there are two tribunals of final appeal, the Judicial Committee of the House of Lords and the Judicial Committee of the Privy Council.

The British Empire, according to Professor Hearnshaw, comprises seventy or more units which he classifies into five main groups, (1) the Kingdom of Great Britain and Ireland; (2) the self-governing dominions: Canada, Newfoundland, Australia, New Zealand and South Africa; (3) colonies with representative institutions, such as the majority of the West Indian islands; (4) Crown colonies, as, for example, Gibraltar under the War Office, St. Helena under the Colonial Office, and Ascension Island (rated as a ship) under the Admiralty; (5) dependencies and protectorates, among which rank such old and important regions as India and Egypt and such new and undeveloped territories as Zanzibar and Uganda. The members of these five groups represent almost every stage of political development known to social science. They range from primitive tribal autocracies, through various types of oligarchy, to the most advanced forms of republican ochlocracy.

Appeals from the courts of the Kingdom of Great Britain and Ireland go to the Judicial Committee of the House of Lords, with the exception of appeals in ecclesiastical cases and cases from prize courts. The Judicial Committee of the Privy Council has jurisdiction of appeals from the Prize Courts and ecclesiastical courts of the the British Isles, and of appeals from the courts of all the other units of the Empire representing nearly four hundred million people. The Spectator recently compared the jurisdiction of our Supreme Court with that of the Judicial Committee of the Privy Council.

“No Court in the world, not even the Supreme Court of the United States of America, has a jurisdiction so vast and so many-sided. The great tribunal of the New World may claim to be more English, since in it the principles of the Common Law are always paramount; but as a Court of Law, measured by the extent of its review, the Judicial
Committee of the Privy Council has no rival in the world."
Judge Riddell, a Canadian Judge, gives a striking description of the vast extent and varied scope of the Committee's jurisdiction:

"From courts all over the world, wherever the map is marked with red, come appeals—In Europe, from the Channel Islands, the Isle of Man, Gibraltar and Malta, as well as from Cyprus; in Africa, from the Cape of Good Hope, Natal, the Transvaal, the former Free States, the Gold Coast, Sierra Leone, Zuzuland, Rhodesia, St. Helena, Lagos, Basutoland, Bechuanalnd, the Falkland Islands, Mauritius, Gambia, Griqualand and other "lands" more or less unknown; in Asia from Bombay, Calcutta, Madras, the Northwest Territory, Aden, Assam, Beluchistan, Burmah, Upper and Lower Oudh, Punjaub, Ceylon, Mauritius, Hong Kong, Borneo, Labuan; in Australasia, Australia, New Guinea, Fiji, New Zealand, Norfolk, and Pitcairn Islands; and in America, from Canada and her provinces—Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island, Manitoba, Saskatchewnan, Alberta, British Columbia, and from Newfoundland; Bermuda, the Bahamas, Jamaica, British Honduras, and from Guiana in South America, and many another British island lying in the Caribbean Sea.

"The laws of a score of self-governing communities must be interpreted—the English common law of the English-speaking colonies modified by local statutes; in Quebec the Coutume de Paris with similar modifications; the many varying and various laws of the many East Indian peoples, the Roman Dutch law of the South of Africa, the still more complex law of Malta; all these and more come before that assembly of jurists."

The Judicial Committee of the Privy Council is not to be confounded with the Privy Council, though English lawyers often call it by that name. The Privy Council, the ancient Consilium Regis Privatum, had its origin far back in the Anglo-Saxon period. Under the Norman and Angevin Kings we find it composed of the leading ecclesiastics and powerful barons. Later it appears as a smaller gathering of the Great Council which became the modern Parliament. The Privy Council, the constitutional advisers of the Crown, became under the Tudors, not only a consultative and administrative, but a judicial body. The King was the fountain of justice and to the King in council would be made appeals for redress of wrongs. The Court of Star Chamber and the Court of Requests were really Committees of the Privy Council.
After the Star Chamber was abolished in 1640, appeals to the Privy Council from the newly founded colonies began to increase in number. The framers of our Federal Constitution were familiar with the decisions of the Privy Council that set aside acts of the legislatures of the colonies, on the ground that they were repugnant to the colonial charters as in the familiar case of Winthrop v. Lechmere in 1728, when the Council declared an Act of the Connecticut legislature null and void.

The Privy Council now numbers over two hundred members. This membership includes the Royal family, the Ministry, the high dignitaries of the Church, leading members of the two houses of Parliament, together with the high judicial officers in England, India, and the self-governing dominions.

The Judicial Committee of the Privy Council was created by an Act of August 14, 1833, entitled "An Act for the better Administration of Justice in His Majesty's Privy Council." As organized under this and later amendatory Acts, the Judicial Committee of the Privy Council now consists of the Lord Chancellor, Lord President of the Privy Council, ex-Lords President, six Lords of Appeal in Ordinary, and such other Members of the Privy Council as shall from time to time hold or have held "High Judicial Office" within the meaning of the Appellate Jurisdiction Acts, 1876 and 1887. Among the last are included the Earl of Halsbury, Earl Loreburn, G. C. M. G., Viscount Haldane, K. T., O. M., Viscount Finlay, G. C. M. G., Lord Buckmaster, Lord Wrenbury and Lord Phillimore. Lord Parmour, K. C. V. O., is a member by virtue of section 1, and Sir John Edge and Syed Ameer Ali, C. I. E., are members by virtue of section 30 of the Judicial Committee Act, 1833. By virtue of the Judicial Committee Amendment Act, 1898, as amended by the Appellate Jurisdiction Acts, 1903 and 1913, the following Judges from the Dominions beyond the Seas are members:—Sir Charles Fitzpatrick, G. C. M. G. (Canada), Sir James Rose Innes, K. C. M. G., C. J. (South Africa—Supreme Court), Sir Lawrence Jenkins, K. C. I. E. (Bengal), Sir Louis Henry Davies, K. C. M. G. (Canada—Supreme Court), Mr. Justice Duff (Canada—Supreme Court), Charles Joseph Doherty (Canada), and Arthur L. Sifton (Canada).

The personnel of the Judicial Committee of the Privy and the
Judicial Committee of the House of Lords is practically the same, the six Lords of Appeal being the more active members of both bodies. The Act of 1833 provides that on the hearing of a case at least four members must sit, and a majority of those sitting must concur in the final judgment.

Where does this remarkable tribunal with its wide jurisdiction and vast powers hold its sessions? Its home is at the very heart of the Empire. As you leave the door of the north transept of Westminster Abbey you see on your right Westminster Hall and the Houses of Parliament. On your left stands the recently erected statue of Abraham Lincoln, a replica of the Statute by St. Gaudens in Lincoln Park, Chicago. You recognize with a thrill of pride the likeness of the great American among the bronze and marble effigies of the famous statesmen of England. Standing between this statue and the ancient hall of the English Parliament, and looking from one to the other you feel that is it appropriate and right for Lincoln to be there, for he more than any other man, brought to full fruition the seed sown in Magna Carta; he more than all other men made possible the evolution of *liber homo* the freeholder of the Great "any person" of the Fourteenth Amendment of the Constitution of the United States, whom no State can deprive of life, liberty or property without due process of law, *nisi per judicium parium suorum vel per legem terrae*. Walking northerly along Parliament Street about a quarter of a mile you come to Downing Street, which runs westerly from Whitehall about four hundred feet, with no exit at the west. On the north side of the western end of this street stands a block of three plain, rather dingy yellowish brick houses four stories high and not more than twenty feet wide. A brass plate on the green door of the east house in the row displays these words "First Lord of the Treasury." This is the official residence of the Prime Minister, the "efficient" head of an empire of four hundred million people. The other two houses are used by Government Officials. The entire south side of Downing Street is occupied by the Foreign Office, Colonial Office, Home Office, and Indian Office. At the northwest corner of Downing Street and Whitehall stands the Treasury, the centre or hub of the Imperial Government. In this building are the rooms occupied by the Judicial Committee of the Privy Council. There are two committee rooms or court rooms on the second floor, with the necessary ante-rooms and offices.
The entrance to these rooms is from Downing Street. The court rooms, in their size, furnishings and all other features are of great simplicity. The largest chamber is about forty feet square and thirty feet in height, plainly finished in oak. Large windows on the south side look on Downing Street, and on the opposite side similar windows look on a large, interior court. Members of the Committee hearing a case sit around the convex side of a semi-circular table standing on the floor of the room. They sit in low-backed oak chairs upholstered in dark red leather. In front of the Committee, about twenty feet distant, and on a slightly raised platform, is a reading desk from which the lawyers address the Committee. The walls of the room are lined with books and there are a few seats for counsel and spectators. On my first visit to a session of the Committee, wishing to secure a good seat, I went early and found myself alone in the room. Shortly before the time appointed for the convening of the Committee an official of the body, a courteous gentleman in conventional evening clothes, came from an inner room and having ascertained that I was a visiting American lawyer, and Professor of the History of English Law in Georgetown Law School, he gave me much interesting and valuable information respecting the business and procedure of the Committee. Among other things, he said that many of the customs of the Committee differed from the formalities practiced in the courts. Spectators and Counsel are excluded from the Committee room until the members have entered and taken their seats. In a court room counsel look up to the Judge, in the Committee room counsel look down on the members. As the time approached for the meeting my new-found friend showed me to a seat in the adjoining ante-room where I watched the barristers coming in with their brief cases and wig boxes. After a few minutes the official appeared at the door and announced that the Committee was in session. On entering the Committee room I was greatly surprised to see the members of this august tribunal arrayed in simple morning costume. They were keen, alert men of middle age and looked liked successful directors of a prosperous bank. Lawyers, when appearing before the Committee, must wear, as they do in all the courts of England, the customary black gown and white, curled, horse-hair wig.

All the proceedings in a case, including briefs, are printed and counsel reads from his brief in a quiet conversational tone, with no attempt at rhetoric or eloquence. He is often interrupted by members
of the Committee, and the members discuss points informally among themselves and with counsel in the effort to make clear a doubtful point. The spectator is impressed with the seriousness of the business in hand and with the earnest, honest co-operation of counsel and Committee towards one end, to get at the Truth, declare the Law, and do Justice.

Being in form a committee and not a court, the Judicial Committee of the Privy Council renders judgment in the form of a recommendation to the King in Council. The opinion may conclude with these words: "Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs;" or, in case of a reversal, with this formula: "Their Lordships will humbly recommend to His Majesty that appeal should be allowed, and that the judgment of the court below should be set aside."

These appeals constitute the final judgment in the case, and are filed in the record room of the Privy Council which has offices in the Treasury. All opinions of the Judicial Committee of the Privy Council are given as the unanimous opinion of the Committee and there is no dissent.

On the hearing of ecclesiastical cases a number of bishops sit as assessors. In appeals from India an Indian judge sits, and in prize cases a judge from the admiralty court usually takes part; while in cases from the dominions judges from the dominions act. On one occasion I found the Committee sitting in two sections, one hearing Indian appeals and other prize cases. In the former section there were present Lords, Buckmaster and Dunedin, Sir John Edge, and Mr. Ameer Ali, an Indian judge; while in the latter section were Sir Henry Edward Duke, President of the Admiralty Division of the High Court of Justice, Lord Parmoor, Lord Sumner, and Sir Arthur Mosely Channel. The friendly Committee official, whom I had met, gave me a printed "List of Business" for the Trinity Sittings and told me he thought that I would be specially interested in the prize case then on hearing. It was "In the matter of the steamships Kankakee, Hocking, and Genesee." The case was an appeal from the English Prize Court where these vessels had been condemned as prize, although they were sailing under the American flag and American registry. The case seemed to turn on the sufficiency of the proof that the use of the American registry and flag was fraudulent and that the vessels really belonged to German subjects.
On the "List of Business" were cases from South Africa, South Australia, New South Wales, Quebec, Newfoundland, the Supreme Court of Canada, Jamaica, Trinidad and Tobago, Bengal, Patna, Madras, Northwest Frontier India, Central Province India, Bombay, Lower Burma, Oudh, Allahabad, besides numerous prize cases. Several of the cases attracted my special attention as illustrative of the wide diversity of the questions considered by the Committee. Here is an appeal from Quebec, a husband's suit for nullity of marriage on the ground of consanguinity, involving construction of Article 127 of the Civil Code and the rule of the Lateran Council of 1215. Another case is a dispute as to rights of Commoners in lands granted in 1647 to the Society of Jesus. From Trinidad is an action against the Crown for damage caused to Appellants' ship owing to an alleged misleading buoy. Strange questions are presented from India: "A suit for specific performance of an agreement to execute an ijara;" "Suit to recover a pala yam;" "validity of a wakfnama;" suit by a mohunt of a temple to recover possession of a village." What are ijaras, palayams, wakfnamas, and mohunts? The members of the Committee are supposed to know.

During the last few years a great deal has been said and written in England and the Dominions respecting the wisdom (1) of abolishing all appeals from the self-governing dominions; and (2) of establishing one great Imperial Court of Appeal that would take over all the jurisdiction of the two present Tribunals of final appeal in the Empire. Those who favor the latter plan quote Bagehot who wrote over fifty years ago: "As a legal question, too, it is a matter of grave doubt whether there ought to be two supreme courts in this country—the Judicial Committee of the Privy Council, and the Judicial Committee of the House of Lords. ** The supreme court of the English people ought to be a great conspicuous tribunal, ought to rule all other courts, ought to have no competitor, ought to bring our law into unity, ought not to be hidden beneath the robes of a legislative assembly."

The creation of one Imperial Supreme Court of final appeals which should hear appeals from all the units of the Empire, would, in the opinion of many, tend to remove the prejudice now existing in some quarters of the dominions against taking appeals out of the self-governing provinces, especially if proportionate representation on the court were given to the dominions.

Mr. H. Duncan Hall, who is, I think, a native Australian, in his recently published book, *The British Commonwealth of Nations*, expresses
the opinion that among certain classes in the Dominions there is a well-developed opposition to allowing appeals to any tribunal outside of the Dominions:

“It is useless to ignore the widespread feeling amongst the working classes of the Dominions that the complication and the expense of the modern judicial system tells heavily in favor of the rich litigant as against the poor. This feeling applies especially to the right of appeal to the Privy Council. The delay and tremendous expense involved in an appeal to this distant body, though a source of some satisfaction to the lawyer, puts the individual or the association with limited means at an intolerable disadvantage, when compared with the wealthy individual or the wealthy corporation. Moreover, there is possibly some little ground for the suspicion sometimes expressed in Australia and Canada that the right of appeal to the Privy Council may work unduly in favor of what the Sydney Bulletin used to call “John Bull Cohen,” that is to say, the English monied interest. There is at any rate a certain amount of evidence that it is partly in the interests of the English investor that the British Government has fought so tenaciously to preserve the right of appeal to the Privy Council. Mr. Chamberlain quite plainly told the delegates in charge of the Australian Commonwealth Bill that the British Government felt it was its duty to look at the question of appeal “from the point of view of the very large class of “persons interested in Australian securities or Australian undertakings who are domiciled in the United Kingdom.” There is little doubt that one of the principal motives which induced the Australian Labor Party in 1918 to add to its General Platform the new clause; “The Australian High Court to be the final Court of Appeal” was the desire to secure for the Australian people greater equality in matters of justice, and to enable them to exercise a firmer control over absentee capitalist.

The conclusion of the argument seems to be that the British Commonwealth neither needs nor desires a central Court of Appeal, and that the dominions should take steps to secure, as part of their constitutional independence, full power to abolish appeals to the Privy Council, or to limit them out of existence. Even if appeal to the Privy Council disappeared so far as the Dominions were concerned, it would still remain for India and those dependent portions of the Empire, which
remain under the control of the United Kingdom; though even here the jurisdiction of the Privy Council would be threatened by the growth of Responsible Government."

It does not seem to me that a careful examination of the opinions of the Judicial Committee of the Privy Council will sustain Mr. Hall's contention that "John Bull Cohen" has been in any way favored. At any rate it is clear from such an examination that there is a marked tendency on the part of the Committee to sustain the judgments of the Dominion Courts.

When I visited the sittings of the Judicial Committee of the Privy Council in London last June, I heard a discussion in the ante-room among English lawyers and lawyers from the self-governing dominions of the Empire respecting the wisdom of discontinuing appeals to the Committee from these independent provinces. Several of those who took part in the discussion likened the Judicial Committee to the Supreme Court of the United States. It was pointed out that, as the Supreme Court had the power to set aside State constitutions and statutes, the Judicial Committee had the power to set aside statutes of the self-governing Dominions. I ventured to suggest that while the two tribunals were alike in the magnitude and importance of the cases considered and in the power to deal with state and provincial laws, the American court was unique in its power to declare null and void Treaties and Acts of Congress when their constitutionality was questioned in a law suit and in the opinion of the court such Treaties or Acts were repugnant to the Federal Constitution. The English judge who seeks to drive a coach and four through an Act of Parliament must drive it by the way of interpretation, and not by the route of declaring the Act invalid. No power on earth, but Parliament itself, can set aside an Act of Parliament, whereas the Supreme Court of the United States can and often has pronounced Acts of Congress void ab initio. The unanimous opinion of those to whom I listened was that to discontinue appeals from the self-governing Dominions would be a disaster not only to the Dominions but to the Empire, and that the jurisdiction of the Judicial Committee should be enlarged rather than diminished. No one, however, suggested that it should be given power to review an Act of Parliament.

The Spectator, the clearest mirror of the best opinion in the Empire in its issue of December 18, 1920, gives a strong presentation of the
reasons for continuing or increasing the present jurisdiction of the Judicial Committee of the Privy Committee Council, and recalls an important decision of the Committee:

“A remarkable instance of the Committee using very wide powers occurred in 1886. In 1884 and 1885 there was a great financial dispute between the two houses of the Queensland Legislature. The Legislative Assembly, or Lower House, introduced a Bill for the payment of members. The Legislative Council, or Upper House, twice rejected the Bill. The Legislative Assembly argued that the Legislative Council had no right whatever to reject it, as the Bill was a financial measure, and the functions of the Upper House, which were described as corresponding with those of the House of Lords, did not include control over finance. The Legislative Council retorted that they recognized no analogy between their own duties and those of the House of Lords. Ultimately the dispute was referred to the Judicial Committee, who decided that the Upper and Lower Houses of Queensland should consider themselves as occupying the relative positions of Lords and Commons, and that the Legislative Council was not therefore entitled to reject a Finance Bill. This decision, of course, corresponded with the usual conception of the Colonial legislatures which is expressed, for instance, in Professor Dicey’s well-known Law of the Constitution. Professor Dicey says that the Colonial Legislatures are “within their own sphere copies of the Imperial Parliament.” Thus the Lower House of Queensland remained supreme in the sense that the House of Commons is supreme.

It is impossible to imagine that such a dispute could have been settled with so little bitterness in any other way. The advantages were twofold; there was, first, the advantage to Queensland, which received a perfectly impartial consideration of the case, and there was, secondly the advantage to Great Britian and the whole Empire, because a continuity of constitutional practice—in itself a splendid Imperial link—was achieved. It is because we sincerely believe that the advantages are common and not one-sided—certainly not because we have and idea that the Dominions could possibly be kept in a state of legal tutelage—that we venture to commend the considerations we have set forth to our Canadian fellow-subjects. The ancient kingly prerogative embodied in appeals to the Judicial Committee is a bond that binds without friction and links without strain.”
The Judicial Committee of the Privy Council

American lawyers will watch with interest the future history of the Judicial Committee of the Privy Council of England, the only Tribunal that has been or could be compared with the Supreme Court of the United States.

(signed) Henry Sherman Boutell.
Professor of Constitutional Law and English Legal History.
ANTICIPATION AND PRIORITY AS DEFENSES TO PATENT SUITS

BY
THOMAS EWING.

The substantive law of patents of the United States is set forth in Sec. 4886 of the Revised Statutes. This section down to 1897 was a complete statement of who may obtain a patent and upon what conditions. By the Act of March 3, 1897, a change in the statute was introduced respecting the effect of prior foreign patents upon inventors' rights to patents in this country, which was not incorporated into Sec. 4886, but is incorporated in Rule 24 of the Rules of Practice of the Patent Office. This rule is therefore a complete statement and as the rule incorporates the language of Sec. 4886, it will be quoted here as follows:

"A patent may be obtained by any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, or more than two years prior to his application, and not patented in this country foreign to the United States on an application filed by him or his legal representatives or assigns more than twelve months before his application, and not in public use or on sale in the United States for more than two years prior to his application, unless the same is proved to have been abandoned, upon payment of the fees required by law and other due proceedings had."

The Meaning of New. In considering the language of the statute the word "new" is obviously to be taken with "not known or used in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof." These latter clauses constitute the statutory definition of the word "new". This definition has
changed with change of the law. Thus the Act of 1836, section 6, read as follows:

"any new and useful art, machine, manufacture or composition of matter not known or used before his discovery or invention thereof."

That is to say, under the Act of 1836 an invention was new in a patentable sense if not known or used by others before the date of the invention. Under the definition of Sec. 4886 it is new if not known or used by others in this country and if not patented or described in a printed publication in any country before the invention or discovery by the patentee.

An invention may be new and patentable to one who applies for patent in this country even though it is already known and used abroad, provided it has not been patented abroad or described in a printed publication before his invention or discovery thereof. Thus it will be seen that the word "new" is used in a sense which is not co-extensive with the ordinary meaning of the word.

The Meaning of Known. The clauses

"not known or used by others in this country and not patented or described in a printed publication in this or any foreign country"

would seem to involve tautology because if a thing is described it is in a popular sense known. But in the statute knowledge refers to a physical embodiment of an invention as distinguished from a description of an embodiment of an invention. The old English law, from which our law was derived, knew no such defense as that an invention had been described; it must have been practiced in Great Britain in order to defeat a patent. But with the growth of the art of printing and spread of knowledge through the printed page, the new defense of prior publication or patenting, which generally, but not in all countries, involves publication, became important and was incorporated by statute into our patent system.

That knowledge must be of a prior physical embodiment of the invention, or a description of an embodiment of the invention found in a prior patent or printed publication, is not everywhere accepted as the law. There is in fact a considerable divergence of opinion as to whether a patent may be defeated by producing an earlier document
which is neither a patent nor a printed publication, but which contains
a description of an embodiment of the invention made by some one
other than the patentee. Such a document may be an application for
patent which was abandoned.

An abandoned application is one which after having been duly filed
has lost its standing as an application because of some failure to con-
form to the requirements of the statute or the rules of the office.
About forty per cent. of all the applications filed become abandoned.
There have accumulated in the Patent Office in the course of years
nearly one million abandoned applications. Every application contains
a complete description of the invention on which a patent is sought and
if the invention can be illustrated with drawings, suitable drawings
accompany the application. In a great many of the abandoned appli-
cations claims have been allowed by the Patent Office, so that there
was some patentable matter; that is to say, some disclosure that was
distinguishable from anything in the literature, or in the knowledge of
the examiner who passed upon the case.

Down to 1878 the Patent Office in making a search against an ap-
lication used to go through these abandoned applications, and if any
was found which was pertinent it would be cited against the applica-
tion under examination, and the claims rejected thereon on the theory
that an abandoned application showed prior knowledge by the appli-
cant therein, his attorney, the Patent Office, and others who had come
in contact with it.

In the year 1878 a case came before the Supreme Court wherein
one of these abandoned applications was set up by the defendant to de-
feat the patent, and it was held not to be a good defense. (Bates v.
Coe, 98 U. S. 31. The syllabus prefixed to the report in 8 Otto is
there stated to have been prepared by Mr. Justice Clifford for the
Patent Office Gazette).

This decision led to a change in the practice of the Patent Office
which for the last forty years has not cited abandoned applications as
references against claims in applications under examination.

It will, therefore, be seen that there is a large accumulation of
material where evidence of knowledge of inventions, in the sense of
drawings and descriptions, might be found, which in the practical ad-
ministration of the law is not used at all. In fact, since the Commis-
sionship of Judge Montgomery, these abandoned files have not been
open to general inspection.
No case has arisen in which this practice of the office is distinctly passed on. But cases have arisen in which the courts have said that the decision in Bates vs. Coe was not to the effect that an abandoned application might not be competent; it was merely to the effect that under the pleadings in that case it was not competent. Obviously if it is a mere question of pleading whether abandoned applications are competent or not, they should be examined before patents are granted.

I call attention to a case in the Sixth Circuit, Lemley vs. Dodson, 243 Fed. 391. The opinion is by Judge Denison and discusses the question whether an abandoned application is competent or not. The point was not directly at issue, but in the course of his opinion he says, obiter, that its competency is altogether a question of pleading. He points out that the statute authorizes, among others, two defenses (the third and forth below)*, one that the invention has been patented or described in a printed publication prior to the date of invention of the patentee suing, and the other that the patentee suing was not the original and first inventor. Where only the first of these two defenses is pleaded Judge Denison says it is clear that an abandoned application is not competent, but where the second defense is pleaded, he thinks it equally clear that it is competent because the issue squarely raised is who is the first inventor; and if it appears that another than the patentee in suit was the first to have made the invention, the defense is good whether he had patented it or not, and whether the prior description was found in a publication or not.

I do not agree with Judge Denison’s reasoning nor his conclusion upon this point; and because the matter is one of serious importance, and presents an interesting question of construction of the Statute, I shall give my reasons for differing from him in some detail.

*The defenses are enumerated in R. S. Sec., 4920, as follows:

**First.** That for the purpose of deceiving the public the description and specification was in fact invented by another, who was using reasonable diligence in adapting and perfecting relative, to his invention or discovery, or more than is necessary to produce the desired effect; or,

**Second.** That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who using reasonable diligence in adapting and perfecting the same; or,

**Third.** That it has been patented or described in some printed publication prior to his supposed invention or discovery thereof, or more than two years prior to his application for a patent therefor; or,

**Fourth.** That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented; or,

**Fifth.** That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public.
In the first place, the pleadings in Bates vs. Coe (set forth at pp. 36-37 and in the syllabus found in 8 Otto) were ample support for any defense which might be based on an abandoned application. Moreover the Court was not then dealing with an abandoned application for the first time. In the Cornplanter case (Brown vs. Guild, 23 Wall, 181) decided in 1874, the Supreme Court considered an alleged prior use set up as a defense and concluded that it was an abandoned experiment. An application for patent had been filed which disclosed the machine under discussion but the application was ultimately abandoned. In disposing of the whole matter the court said (speaking by Mr. Justice Bradley):

"The appellees contend that this was an anticipation of several material parts of Brown's machine. But it is obvious that it had not the runners nor the covering rollers, nor was it adapted to planting in check-rows. As to the Patent Office in 1850, and in the models exhibited to the court, it was planned for an automatic drill-planter. The experiment made in 1849, when Remy worked it by hand, was a mere experiment, which was never repeated. It may have presented one or two ideas in advance of other machines, but it can hardly be said to anticipate the machine which we have described as Brown's. Were it not for the application for a patent it would justly be regarded as an abandoned experiment, incapable of being set up against any other claim. Can the fact that such an application was made and afterwards voluntarily withdrawn, and never renewed, make any difference? We think not. Had a patent been actually granted to Remy & Kelly, it would have been different. The case would then have come directly within the 7th section of the Act of 1836, which makes a "patent" or a "description in a printed publication" of the invention claimed, a bar to a further patent therefor. But a mere application for patent is not mentioned as such a bar. It can only have a bearing on the question of prior invention or discovery. If, upon the whole of the evidence, it appears that the alleged prior invention or discovery was only an experiment and was never perfected or brought into actual use, but was abandoned and never revived by the alleged inventor,
the mere fact of having unsuccessfully applied for a patent therefor, cannot take the case out of the category of unsuccessful experiments."

It is clear from the decisions in Brown vs. Guild and Bates vs. Coe that the Supreme Court definitely decided against abandoned applications as defenses. I do not believe that any court when this question is squarely presented will ever reverse the practice of the Patent Office and hold that an abandoned application can be used to defeat a patent, no matter what the pleadings may be. The whole patent bar would rise in opposition to a suggestion that this great mass of abandoned applications, no longer classified according to current classification and in no way practically accessible for search, should be released to act as a deterrent and discouragement to further development.

The question upon which the case of Lemley vs. Dobson turned was not whether an abandoned application could be relied upon as a defense but whether a patent there set up as a defense must be considered as effective from its date of filing in the patent office or as effective only from its date of grant as a patent (some nine months after it was filed). A closely related question arose in the same Circuit in Higgin Manufacturing Co. vs. Watson, (263 F. R. 378).

While an application is pending in the Patent Office it is preserved in secrecy. The patent is published at the date when it is granted. On that date, therefore, under our practice the invention is both patented and described in a printed publication. No distinction, finding support in authority or reason, which is based on the bare fact that the document exists and is on file in the Patent Office, can be drawn between an abandoned application and an application ultimately eventuating in a patent (See Thompson-Houston Electric Co. vs. Ohio Brass Co., 130 F. R. 542, at 546; General Elec. Co. vs. Allis-Chalmers Co., 190 about prior publications is satisfied by showing under proper pleadings that a manuscript was delivered to the printer a month before the publication occurred, and that therefore the publication spoke as a defense from the date a month prior to the date of publication. The right to carry the date of patents set up in defense back to their date of filing (which is not broadly denied) must have some other basis than the mere existence of the document.

The introduction of the names will be an aid to a clear statement
of the question actually presented in *Lemley vs. Dobson*. The patent there in suit was granted in May, 1906, to a man named Schade, who filed his application in January, 1905, and there was set up against it as a defense a patent to a man named McMillan which was granted in July, 1905, upon an application filed in October, 1904.

In determining whether McMillan's patent was a good defense against the Schade patent, Judge Denison pointed out that the defendant had by his pleading raised the issue whether Schade was the first inventor and concluded that McMillan defeated Schade because McMillan's application was filed before Schade filed his application. Thus he held that the McMillan patent was an anticipation of the Schade patent. He states that some cases draw a distinction between anticipation and priority of invention but says that he does not see the reason for this distinction. I believe the distinction between anticipation and priority of invention respecting the rights of the general public when sued for infringement, which Judge Denison states he failed to understand, is a matter of great importance and would lead to the ruling in *Lemley vs. Dobson* being applied in some cases and not in others. I shall endeavor to make plain what I think the distinction is.

**ANTICIPATION AND PRIORITY.**

*Anticipation.* The general public, through the statute as an encouragement to invention and an inducement to disclosure, offers a patent to anyone who comes forward with a new and useful thing which he has invented. New means new to the public, one party to the contract; just as useful means useful to the public. According to the terms of the offer to inventors made in Sec. 4886 on behalf of the public, if the invention is not already in the public knowledge, it is new as against the public. If the invention is already in the public knowledge, the consideration for the grant fails and the patent is therefore void. This is a clear case of anticipation. Under the terms of Sec. 4886, however, in order that this defense of anticipation may be established against a patentee, either the invention must have been given a physical embodiment by some one else before the date of his invention and have been in that sense known and the knowledge have been accessible to the public, or novelty must be negatived by the equivalent of public knowledge or use of the thing itself, viz., a patent or printed publication describing it.
Priority. But there may be a third party to be considered in connection with the contract which the government offers to enter into; for there may be rival inventors. The government must keep faith with all these parties. The statute (Sec. 4886) invites anyone, who has invented, to seek a patent. Where there are rival claimants the one must be preferred who has the best right.

Under our law where there are rival inventors the patent must be granted to the one who is first in date of invention. This is provided in Sec. 4904 of the Revised Statutes. And the owners of rival or interfering patents may each bring suit against the other, to have the rival patent declared void. This is provided in Sec. 4918 of the Revised Statutes.

These two sections are directed to priority of invention. They relate only to the private rights of rival inventors or patentees. In considering such rival rights, public knowledge of what has been done is of importance only insofar as it is necessary to provide against unreasonable delay, in putting the public in possession of the invention, or fraud which may be aided by concealment. Thus sketches which are closely guarded, workings in secret, applications for patent, all may be important and even controlling in determining the private right which is in controversy.

In order that proceedings may be brought under either of Sections 4904 and 4918 it is, of course, necessary that the parties claim the same invention. If the subject matter which is claimed in one application or patent is disclosed in another without any claim being made to it, the disclosure being merely incidental to the presentation of another invention for which the patent is sought or has been granted, no interference arises and no proceedings can be taken under either of the sections relating to interfering inventors or patentees (Hammond v. Hart, 1898 C. D., 52, 83 O. G. 743.)

THE RELATION OF THE GENERAL PUBLIC TO QUESTIONS OF PRIORITY

There is no section of the statute conferring upon the general public any rights similar to those provided for in Secs. 4904 and 4918. Whatever right a member of the general public has to set up one patent against another where the defense is not one of anticipation but of priority must be deduced from general considerations and not from any specific statutory provision.

The basis of the right of a stranger to two patents who is sued on
one of them to set up the other and rely on the filing date thereof is that the public must not be required to pay damages or royalties under two patents granted upon the same invention. The contract which the government tenders to inventors in the statute is that it will grant a patent for the disclosure of an invention. The grant will be made to any one who conforms to the conditions. But when the government has made one grant for the disclosure it has paid the full agreed price. (Reed vs. Landman, 55 O. G. 1275; 1891 C. D. 73, 79). Therefore there may not be two valid grants made in consideration of the disclosure of the same invention. Moreover, two valid grants for the same invention would be contrary to the principle that a patent confers a monopoly.

Since there is no provision in our statute by which a member of the general public may initiate a proceeding to have one of two rival patents declared void, the only way in which a stranger to both patents can relieve himself from the possibility of paying damages or royalty under both is to set up one against the other if sued on either. If in such a case it appears that the date of invention of the patentee suing is later than the filing date of the patent set up, the defense is good.

But this reasoning does not apply unless both patents claim the same invention; because if only one of them claims the invention that is at issue it cannot be said that the government has made two grants in consideration of the disclosure of the same invention and there is no danger of the public being mulcted twice in damages for the enjoyment thereof. It follows that, where the patent of earlier filing date does not contain a claim to the invention, the filing date may not be relied on, and the patent is a good defense only from its date of grant.

To sum up, patents speak from the date of filing with respect to such subject-matter as is claimed therein; and as to such subject-matter may be used to establish priority of invention whether this question be raised between rival inventors or by a stranger; as to all other matters patents speak only by way of anticipation and from the date of grant. This is the practical distinction between priority and anticipation, as defenses in patent suits.

The conclusion which I have set forth has been held specifically to be the law by the Court of Appeals of the Seventh Circuit, in the case of Farmers Handy Wagon Co., vs. Beaver Co., 236 Fed. Rep. 731, where the court, speaking by Judge Kohlsaat, said (p. 736):
"Crosby and Haag having filed their applications prior to McClure's date, must be deemed to have made their several inventions prior to the time that McClure made his. They are thus in the prior art as to McClure for whatever they disclose. This should, we hold, be limited to such matters as are included in their several claims, unaided by their specifications or by extrinsic evidence except where necessary to elucidate and make the same clear."

The court, finding that the claims of Crosby and Haag were not directed to the subject-matter which McClure claimed, sustained the McClure patent.

The Court of Appeals of the Second Circuit came to substantially the same conclusion at a much earlier date, 1912 (Sundh Electric Co. v. Interborough Rapid Transit Co., 198 Fed. 94.) Here the court held the patent to Sundh defeated by a patent to one Ihlder which was filed before Sundh filed but granted after Sundh filed. Judge Lacombe, speaking for the court, said that Ihlder's device was neither patented or published before Sundh's date of invention within the meaning of the Statute because the application of Ihlder had remained in the secret records of the Patent Office until after Sundh's application was filed. The Ihlder patent was therefore no part of the prior art. This disposed of the defense of prior patenting or publication. Judge Lacombe then took up the defense that the patentee was not the original and first inventor, and said that in order to maintain this defense it must appear "that the invention of the patent in suit and the invention of the prior application are the same." He states that the substantial invention of each patent is the invention set forth in the claims construed in the light of the specification, and comparing two claims, one from Sundh's patent, and the other from Ihlder's, says that each will read upon the device disclosed by the other.

He concludes:

"There seems to us to be such identity that we can account for the failure to declare interference only on the theory of oversight. If the claims of the Sundh patent are to be construed as covering an invention so broad as to include defendant's device then the invention they cover was reduced to practice by Ihlder's application of June 10, 1902 and claimant cannot maintain this suit because it has been shown that he
was not the original and first inventor of that invention."

A reference to Judge Hazel's opinion below, which the Court of Appeals reversed, will show that he was reversed because he failed to give due weight to the fact that Ihlder not only showed but claimed what Sundh claimed (Sundh Elec. Co v. Interborough Rapid Transit Co., 222 Fed. Rep. 334, at 338).
A THOUGHT UPON THE INJUSTICE OF OUR SYSTEM OF ADMINISTERING JUSTICE

Years of close association with the administration of the criminal law, and consequent familiarity with its workings, have carried the conviction that injustice is frequently done under our system of administering justice.

It is a matter of common knowledge with those charged with the enforcement of the law that the innocent suffer far more than the guilty. The mental distress of a mother when she is brought face to face with the fact that her child,—wayard if you please, but the object of her affection still,—has done something giving the State the right to take him from her, the agony of a father when the conviction is brought home to him that the son in whom he has centered his hopes is dishonest, are quite beyond the distress of the wrongdoers. The only remedy for that is the abstaining from wrongdoing by those who bring sorrow upon others,—a remedy quite beyond the power of the State to administer, and is not what we have in mind.

There are, however, frequent cases in which the State does an injustice to innocent women and children, because of its imperfect system of dealing with wrongdoers. A man, married, the father of children, the wage-earner of the family, with wife and children absolutely dependent upon him commits a serious crime. What is the result? The State says to him: “You have done this thing that is prohibited by law, and as a punishment I shall take you and put you in a penal institution for a number of years; there I shall shelter you and keep you warm, I shall feed you well, I shall look after your health, and I shall even provide for your amusement and permit you to indulge in healthful exercise; all this I do because you have committed a crime and made it necessary that I should restrain you of your liberty.” Not without justice does the State say this, but what is its message to the dependent wife and children? To them it says: You are entirely innocent, you have done no wrong; I am not going to punish you; I leave you to yourselves to do as you please; you have nothing; shelter yourselves and keep warm if you can; feed and clothe yourselves by your own efforts; and if you get sick, suffer in your poor abode until charity finds you there and relieves your distress.”
Is this fair? Is it just? Yet it happens in the conduct of human affairs often enough to emphasize the need of a remedy.

Recently in this District a man committed a robbery; he was a chauffeur; with a dissolute woman he picked up a wounded soldier; a bootlegger provided whiskey; and, finding that the soldier had money, the chauffeur and his companion took him to a secluded spot in the woods, robbed and abandoned him there. The offenders each received and merited a sentence of imprisonment in the penitentiary. Within a month thereafter a young woman, wife of the chauffeur, with his child born after his arrest, in her arms, in her distress went to the office of the District Attorney for information and, if possible, relief. She was a young woman of a good character, early in life thrown upon her own resources without training. While struggling for herself, she met and married the chauffeur about a year before his arrest. He had provided for her well, and treated her kindly. With his arrest her income was cut off, and her physical condition handicapped her as a wage-earner. After the child's birth the handicap continued, and she was unable to earn enough to keep herself and child alive. She feared when she appealed for aid that she might be driven to make her living on the street,—a danger fortunately averted by obtaining employment for her through others induced to take an interest in her case.

There is now pending in this District for disposition the case of a man charged with embezzlement. His offencings are serious, and, so far as he is concerned, merit the imposition of a prison term. He has a wife and five small children absolutely dependent upon what he earns. If he is sent to the penitentiary, the result as to them is certain distress and suffering.

Instances might easily be multiplied; but the two given serve to illustrate the point. Such cases are obviously distressing and the results to the innocent obviously unjust. Is there no remedy? Punishment must of course be inflicted upon those who violate the law, as a corrective to the wrongdoer and as a deterrent to others. One who has done a vicious or dishonest thing should not be permitted to climb out of the penitentiary on the shoulders of his dependents. But it would not be difficult to afford relief in meritorious cases. Every convict is potentially a wage-earner. The State is not called upon to support him in idleness, nor should it seek to profit by his labors. If a convict was
the support of dependents before committing crime, he had an earning capacity which can be kept active in the same or similar fields during his imprisonment, and what he earns can be turned over as earned to his dependents and their distress thereby relieved.

Such a remedy seems practicable; and if it be objected that it creates a means of unfair competition with honest labor, the answer is, the number of wrongdoers who at the time of committing crime were the support of dependents, and consequently within the benefits of the proposed remedy, is comparatively small, and the resulting competition would therefore be negligible and might be practically eliminated by having the State consume the product of the suggested system of relief.

If it be objected that the investigation necessary to a determination of the cases within the benefits and the establishment and maintenance of the system of relief would be expensive to the State, the answer is, far less expensive than to leave the dependents to become burdens upon the State and perhaps themselves participants in crime.

If it be contended that the suggested remedy is not feasible and will not cure the evil, it is confidently asserted the existence of the evil and the need of an adequate remedy can not be successfully denied; therefore in the process of readjustment which the world is now undergoing, some remedy must be found, if the goal of social justice to all is to be reached.

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DIVISIBILITY OF THE PATENT MONOPOLY

The first laws enacted in pursuance of the authority of the Constitution of the United States to the Congress to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" provided that the Secretary of State, the Secretary for the Department of War, and the Attorney General, or any two of them, cause letters patent to be made out in the name of the United States granting to the applicant "the sole and exclusive right and liberty of making, constructing, using, and vending to others to be used" the invention or discovery of any useful art, manufacture, engine, machine or device, or any improvement therein not before known or used. And so on through the various enactments preceding the Patent Statutes of today the monopoly of letters patents for inventions has been an exclusive one. Section 4884 of the Revised Statutes prescribes that every patent shall be "a grant to the patentee, his heirs and assigns, or the term of seventeen years, of the exclusive right to make, use and vend the invention or discovery throughout the United States and the Territories thereof."

It was recognized from the outset that the rights secured to an inventor might be vested by him in others, but the earliest law specific to this right of transferring the patent grant appears in the 4th Section of the Patent Act of February 21, 1793. That section gave no warrant for assignment of less than the whole title and interest in an invention and an action for infringement could not be maintained by one who was possessed of all the right, title and privilege under a patent excepting certain counties in a State. Tyler et al vs Tuel, 6 Cranch 324. Provision was made in the Patent Act of 1836 (Section II) for the assignment of the whole interest or an undivided part of such interest in a patent. The undivided part could only be an undivided portion of one entire interest, such a portion as would place the assignee upon an equal footing with the assignor for the part assigned. A transfer of anything short of this was but a license under the patent grant and, while a contract for purchase of any part of the patent right was
DIVISIBILITY OF THE PATENT MONOPOLY

recognized as good as between the parties, the portion so purchased was not such an undivided part as entitled the licensee to maintain suit for infringement of the patent. Gaylor vs. Wilder, 10 Howard 477. The authoritative interpretation of the law of 1836 by Chief Justice Taney in the case just cited was followed some forty years later by an equally clear definition of the divisibility of a patent grant under the Patent Laws of 1870 (Section 4898 R. S.) by Mr. Justice Gray in Waterman vs. Mackenzie, 138 U. S. 252. The exclusive right to make, use and vend—the monopoly of the patent grant—is one entire thing and it may be divided into parts, but only as authorized by the laws creating the monopoly. This last noted case still stands as the signpost of the various roads of transfer. The patentee may by an instrument in writing assign his whole right of excluding others from making, using and vending the patented invention throughout the United States, or he may convey an undivided part or share of such exclusive right, or, again, he may give the exclusive monopoly to another within and throughout a specified part of the United States, and whichever of these is his pleasure is an assignment under Section 4898 of the Revised Statutes. The assignee takes the whole of the specified interest and stands in the place of the assignor, or on an equal footing with him to the extent of the division. Any interest in or under a patent less than this is but a license and transfers no title. Such is a conveyance of the right to make and vend or to make and use or to use the thing patented, and such contract may be exclusive of all others. An action for trespass upon the tenancy of the licensee can only be brought in the name of the licensor unless the latter be the tort feasor. In such cases the courts have allowed the licensee to sue in his own name.

It is not uncommon to find the title of letters patent divided into a thousand parts or more and frequently it is noted that the owner of the patent has granted to another forty-nine one-hundredths, retaining in himself fifty-one one-hundredths of the entire monopoly. Unless there is agreement between the parties that the several owners shall not dispose of their interest or operate thereunder without leave of the other co-owner, it matters not that the undivided part acquired is but a thousandth part of the whole because the owner of that small portion may make and use and vend and grant to others the right so to do to the fullest limits of his capaci-
ty. And if his energy and business acumen enable him to build a profitable enterprise predicated of his patent right his co-owner is not entitled to share in his returns. Such is the law. Blackledge vs. Weir, 108 Fed. Rep. 71.

While from the many reported cases it might seem that all the skill of the legal surgeon had been used in dissecting patent title and preserving the assundered members to function as when created, the ingenuity of the patent lawyer to find a hidden living atom is disclosed in the case of Nye Tool & Machine Works vs. Crown Die & Tool Co., 270 Fed. Rep. 587. The Nye Company is engaged in the manufacture of dies used in cutting screw threads and the Crown Company is a competitor. A certain patent owned by a third party, the Reed Manufacturing Company, secured to that company the right to exclude others from making, using and vending a machine for forming screw thread cutting devices and the Nye Company in an effort to stifle competition of the Crown Company and being persuaded that this last named company was infringing the patent rights of the Reed Manufacturing Company acquired from the latter "all its rights of exclusion under said patent, so far as the same may be exercised against the Crown Die & Tool Company," and, specifically, "all claims recoverable in law or in equity, whether for damages, profits savings, or any other kind or description, which the Reed Manufacturing Company has against the Crown Die & Tool Company arising out of the infringement by the Crown Die & Tool Company of the Wright and Hubbard patent, No. 1,033,142, and for the same consideration, assigns and sets over all the rights which it now has arising from said patent of excluding the Crown Die & Tool Company from the practice of the intention of said patent." The intention of the transfer is clearly set forth as giving to the Nye Company the right to bring suit on said patent against the Crown Company, this and no more. A motion to dismiss the bill of the Nye Company was granted by Judge Carpenter to enable the parties to have speedy justice notwithstanding his expressed opinion that as a matter of law the motion should be overruled. As the court interprets the contract between the Reed Company and the Nye Company, the latter is an assignee of the former and has acquired every right which the Reed Company ever had under the patent as against the defendant, the Crown Die & Tool Company. The fact that a patentee receives
merely the right to exclude others leads the court to the conclusion that the contract under which the Nye Company acquired a right is an instrument in writing and conveys to such company an interest in a patent conformable with Section 4898 of the Revised Statutes. In the fullness of the expounded law upon the subject, there is naught but logic in the reasoning of the court. Certain it is, if we read aright the decisions in Gayler vs. Wilder and Waterman vs. Mackenzie, supra, we must accept as settled the right of the patentee to subdivide his monopoly territorially, and, inevitably, quoting Judge Carpenter, "if the right to exclude from all the states west of the Mississippi River is in the patentee, why not the right to exclude in any one state; if in any one state, why not in any one city; if in any one city, why not in any one street, if in any one street, why not in any one building; if in any one building, why not in any one office in that building; if in any office, why not any one individual in that office." And it is just the right of excluding the Crown Company from making and using and selling the dies of the patent which the Nye Company has purchased. By the deed of transfer it has acquired nothing more. If the Crown Company has infringed the patent it is liable—it may be enjoined, excluded from making, using and selling devices in infringement of the patent at the suit of the owner having the exclusive right.

Judge Carpenter's course on this motion is in consonance with the commendable efforts of bench and bar to speed litigation to an early conclusion, and, in this case, by dismissing the bill he paves the way for the matter being promptly presented for appellate consideration. It is not out of place to note the suggestion of the court for expediting causes, namely, that judges of the Federal courts of first instance should be invested with power "to certify questions of law to the various courts of appeal, in order that serious legal difference between the parties might be settled in advance of a great expenditure of time and money."

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UNITED STATES VS. ANN ROYAL

The criminal case of the *United States vs. Ann Royal* may be selected as a good illustration of the rich mine of information concerning the life of a community that lies ready to hand, for use of the historian, in the laws, court records, and judicial decisions. The laws of a people are the outcome of all the forces that have influenced the life of the people; instincts transmitted through countless ages, physical environments and conscious effort. So that we may, as Judge Holmes has suggested regard the law as a great anthropological document. It expresses the needs, the earnest desires, the hopes and aspirations of the people. It is quite natural therefore that the earliest written laws should come to be regarded as the direct gift of a Supreme Being to his earthly representative. So Moses is represented as receiving the Decalogue from Jehovah, and Hammurabi is depicted on the style that contains his Code as standing before Shamash the Sun-God who is seated on his throne in the act of delivering the Law.

The importance, dignity and often the sacred character ascribed to the laws ensured their preservation when other written testimonials respecting a nation's life have perished. So we are able to read today on bricks and stones and parchment the laws of Nations that have perished long ago leaving to future ages little evidence of their character except their laws. From these laws alone the historian is able to reconstruct the early periods in life of modern nations, and even to draw in considerable detail the picture of civilization that existed four thousand years ago among peoples that have passed away.

From the code of Hammurabi we can see reflected the highly developed social and commercial life of the ancient Babylonians. The Laws of Manu are our best evidence of the social castes of the Hindus.

When we read in the Lex Salica that the heaviest fine, with one exception, imposed in the code is for an injury done a woman, we know, without the evidence of Tacitus, the high esteem in which women were held by our Nordic ancestors on the Continent of Europe.

While statutes and codes are of great value to the historian, judicial proceedings and law suits are equally valuable, and they have an added importance in stimulating one's interest in the persons and events involved in the trials. Miss Klingelsmith, in the intro-
duction to her scholarly transaction of Statham's Abridgment, calls attention to the rich treasures available for the historian of the English people that lie hidden in the archaic records of the Year Books.

One does not need to leave Washington, however, to experience the fascination of reconstructing the social life of a community from the original records of its laws and judicial proceedings. We can form a pretty accurate idea of the character of the good people of Maryland from Chapter XVI of the laws of 1723:

"Be it enacted by the right honorable the Lord Proprietor, by and with the advice and consent of his Lordship's Governor, and the upper and lower Houses of Assembly and the authority of the same, that if any person shall hereafter, within this province, wittingly, maliciously and advisedly by writing or speaking blaspheme or curse God, or deny our Saviour Jesus Christ to the Son of God, or shall deny the Holy Trinity, the Father, Son and Holy Ghost, or Godhead of any of the Three Persons, or the Unity of the Godhead, or shall utter any profane words concerning the Holy Trinity, or any of the Persons thereof convicted by verdict or confession shall, for the first offense be bored through the tongue and fined twenty pounds sterling to the Lord Proprietor to be applied to the use of the county where the offence shall be committed, to be levied on the offender's body, goods and chattels, land or tenements, and in case the said fine cannot be levied the offender to suffer six months' imprisonment without bail or mainprise; and that for the second offense the offender being thereof convicted as aforesaid, shall be stigmatized by burning in the forehead with the letter B, and that for the third offence the offender being convicted as aforesaid, shall suffer death without benefit of clergy."

Among the good people of Maryland there were evidently some bad lawyers, or so we would infer from Chapter XXV of the Laws of 1699 entitled: "An Act for rectifying the ill practices of attorneys of this province." During the next twenty years these "ill practices" seem to have increased and Chapter XIV of the Laws of 1721 provided that "every attorney so neglecting his duty
shall be fined the sum of five thousand pounds of tobacco."

In 1777 Maryland passed a law (Chapter XX Section 10) "that if any subject or inhabitant of this State shall within or without this State counterfeit any of the tickets in the United States Lottery and shall be thereof convicted or shall stand mute or peremptorily challenge above the number of twenty of the panel, such person shall suffer death as a felon, without benefit of clergy."

Here we have evidence of the existence of quite a different sentiment from that which prevailed a hundred and twenty-five years later when Mr. Justice Harlan held that the United States mails should not be "polluted" by carrying lottery tickets.

Among the records of law suits of a hundred years ago preserved in the file room of the reconstructed Court House of the District of Columbia may be found rich material for the historian. A vivid picture of bygone days is recalled by this entry on the Minute Book of the Circuit Court of the United States for Washington County under date of Thursday, June 16th 1831: Negro Kitty v. Samuel McPherson, 371, before William Cranch, C. J. Jury sworn. Verdict that the petitioner was the property of Mary Brook at the time of her death and that she will be entitled to her freedom by the will of said Mary Brook on the 14th day of June, 1840."

It was while I was examining these old records that I came upon the original entry in the case of United States vs. Ann Royal. The defendant was indicted as a common scold, and the following is the form in which the indictment was found by the Grand Jury:

County of Washington:

The jurors of the United States for the county aforesaid, upon their oaths, present, that Ann Royal, late of the county aforesaid, widow, being an evil disposed person and a common slanderer and a disturber of the peace and happiness of her quiet and honest neighbors, on the first day of June, 1829, and on divers days and times as well before as afterwards, was and yet is, a common slanderer of the good people of the neighborhood in which the said Ann Royal resides, that is to say in the county aforesaid, and that the said Ann Royal, on the said first day of June, 1829, and on divers other days and times, as well before as afterwards, in the county
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aforesaid, in the open and public streets of the city of Washington, in the county aforesaid, in the presence and hearing of divers citizens of the county, did falsely and maliciously slander and abuse divers good citizens of said county to the common nuisance of the good citizens of the United States residing in the county aforesaid, to the evil example of all others in like case offending, and against the peace and government of the United States.

And the jurors aforesaid, upon their oaths aforesaid, do further present that the said Ann Royal being an evil disposed person as aforesaid, and a common scold and a disturber of the peace of her honest and quiet neighbors, on the first of June, 1829, as aforesaid, at the County of Washington aforesaid, and on divers other days and times, as well before as afterwards, was and is yet a common scold and disturber of the peace and happiness of her quiet and honest neighbors residing in the county aforesaid; and that the said Ann Royal on the said first of June, 1829, as aforesaid, and on divers other days before as afterwards, in the open and public streets of the city of Washington, in the county aforesaid, did annoy and disturb the good people of the United States residing in the County aforesaid, by her open, public, and common scolding to the common nuisance of the good citizens residing of the United States in the county aforesaid, to the evil example of all others in like cases offending against the peace and government of the United States.

And the jurors aforesaid, on their oaths as aforesaid, do further present that the said Ann Royal, being an evil disposed person as aforesaid, and a common disturber of the peace and happiness of her honest and quiet neighbors, on the first of June, 1829, and on divers other days and times, as well before as afterwards, is a common brawler and sower of discord among her quiet and honest neighbors; and that the said Ann Royal on the said first of June 1829, and on divers other days and times as well before as afterwards in the open and public streets as aforesaid, did annoy and disturb the good people of the United States residing in the county aforesaid, by her open and public brawling and public slander, to the common nuisance of the good citizens of the United States residing in the county aforesaid, and to the evil example of all others.
in like cases offending against the peace and government of the United States.

The trial stood place before Judge Cranch and a jury on Saturday July 18, 1829. The National Intelligencer gives an account of the trial.

The examination and cross examination of the numerous witnesses occupied nearly five hours. Being at length finished, Mrs. Royal arose and made a short but pathetic address to the jury: urging them to defend her against oppression; to prove themselves the protectors of liberty and of personal rights; warning them against sanctioning a system of clerical domination, which if not checked by freedom of spirit and independent juries, would produce a state of things which would endanger the judge on the bench and even the President himself; declaring that this system and this prosecution were part of a general scheme of which the attempt to stop the mails on the Sabbath was another feature. The counsel on both sides submitted the case without argument, and the jury then retired for a few minutes and returned with a verdict of guilty as indicted. Mr. Coxe for the defendant moved in arrest of judgment. The defendant gave security of $100 to appear to answer the judgment.

The motion in arrest of judgment was argued on the 28th of July by Mr. Coxe. He suggested to the Court that according to the authorities, there was no discretion in the court to adjudge any other punishment to a common scold than the ducking stool; and a learned English judge respited judgment in a case of this description because he was of the opinion that a ducking would only have the effect of hardening the offender. There was another consequence of this punishment to which he called attention of the country, which was the privilege, according to legal writers, that it conferred upon the delinquent of ever afterward scolding with impunity. He begged the court to weigh the matter and not be the first to introduce the ducking stool which had been obsolete in England since the time of Queen Anne, reminding him that the very introduction of such an engine of punishment might have the effect of increasing the crimes of this class. If the Greek legislators would not create a punishment for a crime not known to them, lest it should induce persons to commit such offences, the court might now suffer themselves to be
influenced against the introduction of the ducking stool, lest it might breed an increase of common scolds.

Mrs. Royal who seemed to be as much entertained by the argument as any other person, occupied herself in taking notes of the proceedings and smiled graciously when Mr. Swann expressly desired that she might enjoy the benefit of a cold bath with as much privacy as possible. She was informed that notice would be given her when the Court should have reached its opinion on the motion in arrest of judgment.

On the 31st, Judge Cranch delivered his opinion and gave his decision on the motion in arrest of judgment. It is probably the most exhaustive opinion that was ever delivered on the subject of punishment by ducking. The judge said:

In support of the motion to arrest the judgment, it is contended, that the law for the punishment of common scolds is quite obsolete in England, and never was in force in this country; that it is a barbarous and unusual punishment, and therefore is prohibited by the bill of rights, annexed to the constitution of Maryland under whose supposed common law this indictment is framed. That the punishment of ducking was the appropriate and only punishment by the common law of England—and as that mode of punishment is obsolete there, and never was in use here, the law which considered scolding as an indictable offence is obsolete also. That the term scold is of uncertain signification—that the offence is not well defined in any adjudged case, nor in any elementary writer. Jacobs, in his Law Dictionary, says, "scolds, in a legal sense, are "troubleome and angry women, who, by their brawling and wrangling amongst their neighbors, break the public peace, increase dis-cord, and become a public nuisance to the neighborhood. They "are indictable in the Sheriff's tourn, and punished by the ducking "stool." In order to show that such was the only punishment which could be inflicted upon a scold, the Counsel for the defendant cited Jacobs' Dictionary (Tomlin's title "Castigatory" for "scolds," where it is said, "a woman indicted for being a common scold, if convicted, shall be sentenced to be placed on a certain en-"gine of correction called the trebucket, tumbrel, tymbrella, cast-"igatory, or cucking stool, which in Saxon signifies the scolding-"stool; though now it is frequently corrupted into ducking stool;
because the residue of the judgment is, that when she is so placed therein, she shall be plunged in the water for her punishment.

And in the case of the Queen v. Foxby, 6 Mod. II, the reporter says, "Note: the punishment of a scold is ducking; and Holt, when "the exception was first made, said, 'it were better ducking in a "Trinity than in a Michaelmas terms.'" And in the same case in 6 Mod. 178, it is said "she was convicted by the Justices "of the Peace at their quarter sessions at Maidstone, upon an in- "dictment for being a common scold, and judgment that she "should be ducked whereupon she brought a writ of error," and "hereupon the Sheriff let her go at large, there being no fine or im- "prisonment in the judgment."

And again in the same case, 6 Mod. 213, upon affidavits that she was so ill that without danger of her life she could not come up to assign error in person according to the course of the Court, they en- "larged the time till next term, to see how she would behave herself "in the meantime for Holt, Ch. Just., ducking would rather "harden than cure her, and if she were "once ducked, she would "scold all the days of her life"—a consequence which the Court would hardly have inflicted upon the public, if they could have a- voided it by substituting fine and imprisonment for ducking. From these authorities the counsel for the defendant concluded that duck- ing was the only punishment which could ever have been inflicted upon a scold by the common law. And to show that the punish- ment was obsolete in England, he cited the following passage from "Jacobs' Law Dictionary, title "Castigatory."

"Though this punishment is now disused, a former Editor of "Jacob's Dictionary (Mr. Morgan) mentions that he remembers "to have seen the remains of one (a ducking stool) on the estate "of a relation of his in Warwickshire, consisting of a long beam or "rafter, moving on a fulcrum, and extending to the centre of a "large pond, on which end the stool used to be placed."

The only punishment which could be inflicted being obsolete, the counsel for the defendant contended that the offence was no longer indictable, and therefore the judgment ought to be arrested.

But it will be perceived that this argument rests upon the pro- position that ducking was the only punishment which could be in- flicted for the offence of being a common scold; and that prop- osition is supported only by uncertain inferences, drawn from a
few loose expressions in the books; and chiefly from the word
"shall," and the word "residue," in the first passage above cited
"from Tomlin's Jacob's Dictionary, title "Castigatory." That pas-

sage, and particularly those words "shall" and "residue," are copied
from 4 Bl. Com. 168, where Blackstone says: "Lastly, a common
"scold, communis rixatrix, (for our law Latin confines it to the fem-
inine gender) is a public nuisance to her neighborhood. For
"which offence she may be indicted, (6 Mod. 213); and if convicted,
"shall (1 Hawk. 198-200) be sentenced to be placed in a certain en-
gine of correction called the trebucket, castigatory, or cucking stool
"which in the Saxon language is said to signify the scolding stool:
"though now it is frequently corrupted into ducking stool, because
"the residue of the judgment is, that, when she is placed therein,
"she shall be plunged into the water for her punishment." 3 Inst. 219.

The authorities thus cited by Blackstone do not indicate any
opinion that ducking is the only punishment, nor even that it is an
indispensable part of the punishment. The argument drawn from
the playful expressions of Chief Justice Holt, in 6 Mod. 213, does
not warrant so grave a conclusion. They were intended, perhaps,
only to excite surprise by their exaggeration, for surprise is some-
times an approximation to wit. Nor can such a conclusion be
drawn from the language of Hawkins in the passage cited by
Blackstone, (I Hawk. 198, 200). The first of those passages is this:
Also it hath been said, that an indictment of a common scold, by
"the words communis rixatrix, which seems to be precisely neces-
sary in every indictment of this kind, is good, though it conclude
"ad commune nocumetum diversorum, instead of omnium, etc.,
"perhaps for this reason, because a common scold cannot but be a
"common nuisance." The other passage cited is, (Hawk. 200.)
"As to the third point, viz: in what manner common nuisances
"may be punished it is said, that a common scold is punishable by
"being put in the ducking stool, and there is no doubt but that
"whoever is convicted of another nuisance may be fined and impris-
oned.

And the passage cited from 3 Inst. 219, seems rather to justify a
contrary conclusion. Lord Coke, in speaking of the different
means of punishment, and after describing the pillory and trum-
brel, he says, "Trebucket, or castigary named in the statute of 51
H. 3. signifieth a cucking stool; and trebucket properly is a pitfall, "or down fall, and in law signifieth a stool that falleth down into a "pit of water, for the punishment of the party in it, and cuck or "guck, in the Saxon tongue signifieth to scold or brawl (taken "from cuckhaw, or guckhaw, a bird, quodiose jurgat et rixature) "and ing in that language (water) because she was for her punish-"ment sowsed in the water; and others fetch it from cuckquean, i. pellex." This citation does not justify an inference that the duck-"ing stool was an instrument appropriated to the punishment of scolds only. It says for the punishment of the party; and it refers to the statute of 51 H. 3, stat. 6, entitled "Judicium Pillorie—a "statute of the pillory and tumbrel, and of the assize of bread and "ale," “A.D. 1266,” by which it is stated that, “If a baker or brew-"er (braciatrix) be convicted because he hath not observed the assize "of bread and ale,” “patiatur judicium corporis, silicel, Pistor col-"istrigium et “Braciatrix trebchetum, vel. castigacionem.” The old translation in the statute book is, “Then he shall suffer punish-"ment of the body, that is, to wit, a baker to the pillory, and a brew-"er to the tumbrel, or some other correction.” It is therefore clear that the punishment of the tumbrel, or trebucket, which were the same instrument, was not confined to scolds, and that this citation from Lord Coke does not justify an inference that ducking was the only punishment which could be inflicted upon them. If it should be said that such an inference may be drawn from the ety-
mology of the word cucking stool, which he derives from a Saxon word signifying scold, that inference is rebutted by the more probable etymology given by Burns (3 Burn's Justice, p. 225.) who says: “The common people in the Northern parts “of England, amongst "whom the greatest remains of the ancient Saxon are to be found, pronounce it Ducking stool; which perhaps may have sprung from "the Belgic or Teutonic ducken, to dive under water; from "whence also probably we denominate our duck, the water fowl; or "rather, it is more agreeably to the analogy and progression of lang-
"uages to assert, that the substantive duck is the original, and the "verb made from thence; as much as to say, that to duck is to do as "that fowl does.” So that the name of the instrument may have been given to it because it is a plunging instrument, and not be-
cause it was used for the punishment of scolds only. The words
tumbrel, trebucket, castigatory, cucking stool, and ducking stool, are used synonymously by the old writers, as well as in the old statutes; so that the observations of Lord Coke, in the following passage from the page cited by Blackstone (3 Just. 219), is as applicable to the trebucket as to the tumbrel.

"Now for that the judgment to the pillory or tumbrel, (as hath appeared before) doth make the delinquent infamous, and that the rule of law is, Judicium de majore pana quam quod legibus statutm est non infamum facit, sed per breve de errare adnullari potest; and again, pena gravorit ultra legem posita estimationem conservat, that the justices of assize, oier and treminer, goal delivery and justices of the peace, would be well advised before they give judgment of any person to the pillory or tumbrel unless they have good warrant for their "judgment therein. Fine and imprisonment for offences finable by the "justices aforesaid is a fair and sure way."

It is said, however, that this last observation of Lord Coke is confined to offences finable by the justices, and to argue, from that passage, that a common scold was finable, is to beg the question; as the sentence admits, by implication, that some offences punishable by the pillory or tumbrel, might not be finable by the justices. In the next sentence in the same page, however, Lord Coke enumerates many statutes which authorize punishment by the pillory and tumbrel in some of which the courts are authorized to inflict that punishment in addition to fine and imprisonment, and in others to inflict the punishment alone; which will account for Lord Coke's advice being confined to offences finable by these Justices without admitting that there were any common law misdemeanors which could not be punished by fine and imprisonment.

Mr. Chitty (1 Crim. law 710) lays down the general rule; that "Every description of misdemeanor, or crime, for which an indictment will lie at common law, not subjecting the offenders to a "capital penalty, is within the discretion of the Judges." Thus in the case of The King v. Thomas and wife. (Hardwicke's cases 279) convicted of keeping a disorderly house, the wife was in prison, but the husband had run away from his bail. Affidavits were made that the prisoner was in so weak a condition, that a bodily punishment might kill her.—Per curiam—The ordinary punishment in this case is pillory but for misdemeanor the Court is not tied
"down to any particular punishment,—and being a married woman "has nothing to pay a fine withall, the punishment must be imprison- 
ment." The judgment was, that she be imprisoned a year, and then to "find security for her good behavior for seven years.

It may be observed also, in the case of Foxby, before cited 6 Mod. 178, that she was a married woman (as appears in p. 213 of the same book) which may account for the judgment not being fine and imprisonment as well as ducking.

In Bac. Ad. Tit, Nuisance. D. it is said "All common nuisance to the "public are regularly punishable by fine and imprisonment at the dis- "cretion of the Judges; but in some cases corporal punishment may "be inflicted, as in the case of a common scold, who is said to be prop-
"erly punishable by being put into a ducking stool. Also the offence "of keeping a disorderly house, is punishable not only with fine and "imprisonment, but also with such infamous punishment as to the "Court, in discretion, may deem proper."

We think that, by these authorities, it is clear, that Sir Wm. Black-
stone, in using the word "shall" in the passage cited, is not to be un-
derstood as having used it in its peremptory and obligatory sense, and as intimating that the Court was bound to inflict the punishment of ducking upon a common scold under all possible circumstances—and that in using the word "residue," it is not to be presumed that he in-
tended to be understood as denying the power of the court to punish any common law misdemeanor by fine and imprisonment. It is true that the court, in its discretion, might sentence the offender to be ducked only;—in which case it would be part of the judgment that she could be placed in the stool, and the residue, in that case, would be that she should be plunged in the water; and in this sense only can Blackstone be understood, consistently with the general principles of law and the authorities cited.

If a part of the common law punishment of the offence has become obsolete, the only effect is that the discretion of the court is so far lim-
ited. The offence is not obsolete, and cannot become obsolete so long as a common scold is a common nuisance. All the elementary writers upon criminal law admit that being a common scold, to the common nuisance of the neighborhood, is an indictable offence at common law.

The Court is therefore of opinion that although punishment by duck-
ing may have become obsolete, yet, that the offence still remains a common nuisance, and, as such, is punishable by fine and imprisonment like any other misdemeanor at common law; and that therefore the motion in arrest of judgment must be over-ruled.

The motion for a new trial rests upon two grounds:

1st. That a woman cannot be guilty of scolding unless the words were spoken in anger, and with turbulence; and that the Court permitted evidence to be given of insulting and provoking language uttered by the defendant in an insulting and provoking manner, but not in an angry and turbulent manner—and that there were only two or three instances proved of the language being used by the defendant in anger.

2nd. That the jury was permitted to take out the indictment which contained the two counts which the court had adjudged to be insufficient, without any information to the jury that those two counts were not to be considered by them.

1. As to the first ground of new trial the Court at the trial over-ruled the objection to the evidence, being of opinion that insulting and provoking language might be given in evidence, although not spoken in an angry or turbulent manner; which opinion, they still think, is correct—and that its admission is not a sufficient reason for granting a new trial.

2. The second reason is that the Jury took out with them the indictment containing the two counts which the Court, had, upon demurrer, adjudged to be insufficient.

These counts were not matter of evidence, nor could they have been so understood by the Jury; and they could not be separated from the good count upon which the issue was joined.

The indictment was, as usual, delivered to the Jury when they retired, without objection by the Defendant or her Counsel, and all the facts averred in those counts were matters which, if proved, were evidence upon the issue which the Jury were sworn to try.

If issue had been joined on all the three counts, and a general verdict of guilty had been rendered, the judgment could not have been arrested on account of the two bad counts—and yet the Jury might have given their verdict in fact upon evidence applicable only to one of the bad counts. It is true that it might be the ground of a motion for a new trial. But upon that motion, the Court, before they would
grant a new trial, must be satisfied that the evidence was not sufficient to support the good count. So here, although the Jury might have supposed they were trying an issue upon all the counts, and may have given their verdict because they thought one of the bad counts was supported, if the Court is satisfied that the evidence was sufficient to support the good count, the Court ought not in its discretion to grant a new trial.

The Court is perfectly satisfied that the evidence, in that respect, was sufficient, and must therefore overrule the motion. The Court after it had delivered its opinion gave judgment against the defendant that she be fined $10 and costs, and give security in the sum of $250 for good behavior for one year and stand committed to prison until the sentence be complied with. The last record of the case that could be found is an entry in the docket, criminal, for 1831. May 1831 280 Judicial. United States vs. Ann Royal. Fine $10. Costs $53.62. Additional costs, $3.64. Returned Nulla Bona.

Now what is the lesson that the record in this curious case teaches the historian? Edw. J. White, in his Legal Antiquities" published in 1913, on page 303 says:

"As late as the year 1811 in Georgia, one Miss Palmer was sentenced to be ducked, as a scold or slanderer, in the Oconee River, and in Washington, according to the interesting book on "Curious Punishments of By Gone Days" by Alice Morse Earle, almost in our own day, Mrs. Anne Royal, Editor of the "Washington Paul Pry" was sentenced before Judge William Cranch to suffer punishment by being ducked in the Potomac River."

Mrs. Earle on page 27, of her entertaining little book, referred to by Mr. White, says;

"One of the latest, and certainly the most notorious sentences to ducking was that of Mrs. Ann Royal, of Washington, D. C. almost in our own day. * * * She was arraigned as a common scold before Judge William Cranch, and he sentenced her to be ducked in the Potomac River."

It is not an uncommon failing for historians to sacrifice accuracy for the sake of entertainment. In constructing history from official records the only way to secure accuracy is to consult the original
sources. Every now and then I see in books, newspapers and magazines the fiction repeated that in 1829, in the City of Washington, Judge Cranch sentenced Ann Royall to be ducked in the Potomac; and sometimes the fiction is developed still farther, and the statement made that the sentence of ducking was carried out. Ann Royal was not ducked; she was not sentenced to be ducked; she was not imprisoned. The whole point of Judge Cranch's opinion, and it is a very interesting point to the student of the evolution of law, was that the defendant should not be ducked, because the punishment by ducking had become obsolete; but that the offense was still indictable and punishable by fine. So that Judge Cranch, instead of being censured, as he often has been by those who accept fiction for truth, for sentencing an elderly lady to be ducked in the river, deserves commendation for placing, by his formal opinion, the seal of judicial approval upon the popular opinion that ducking had become if not a cruel at least unusual punishment and should therefore be considered obsolete.

I have just spoken of Ann Royal as an elderly lady. At the time of her trial she was in her sixty-first year. She was a picturesque character and in many respects the most remarkable woman of her time. Some account of her long, active and variegated life is given by Miss Sarah Harvey Porter, in Volume X of the Records of the Columbia Historical Society. She was the daughter of William and Mary Newport and was born in Maryland June 11, 1769. Of herself she once wrote "I am of noble blood"—this was perhaps through decent from the Calverts and Charles II. In her early life she endured terrible hardships on the frontier. On November 18, 1797 she was married to William Royal of Virginia, who had been a captain in the War of the Revolution. He died in 1813. Mrs. Royal lived as a widow without children until her death in Washington, October 1, 1854.

Her husband left her by his will a large property but a nephew of Captain Royal contested the will and after ten years of litigation Mrs. Royal found herself dependent on her own resources. Thereafter she supported herself by writing. She was a great traveler, and intelligent and keen observer; a ready speaker, always eager for a dispute; and she wielded, to put it mildly, a caustic pen.
She wrote many books of travel, based on voluminous notes of men and events that she made in her journeys. The last twenty-five years of her life were spent in Washington where she edited a newspaper called *Paul Pry* that first appeared December 3, 1831, and was merged into *The Huntress* in 1836.

If her tongue was as active and flagellant as her pen, we are not surprised at the indictment. A few extracts from her books will show her manner of expression in the serenity of her editorial sanctum, and from these we may perhaps conjure up her method of attacking her opponents in the heat of personal encounter.

Judge Allen took part in the trial over her husband’s estate. She describes her meeting with him some years later and says of him and the lawyers (*Southern Tour*, Vol. I, p. 38):

“he ought to have been (so says report) impeached for something respecting my suit with Roane. There was a great deal of smuggling between the whole of these lawyers, judges, and all, they got the whole of my estate between them, which was the rogue I cannot tell, it is said they made an equal division.”

She was not pleased with the reception given her in Charleston and so she pays her respects to that town in a way that must have made the Pinckneys squirm. (*Southern Tour*, Vol. II, p. 4).

“Charleston, S.C., from being the garden spot of the United States is now a receptacle for the refuse of all nations on earth; not only nations, but of jails, penitentiaries, pirate-clans, etc.: the two ends of the earth appear to have met together in Charleston. Not a man of the ancient families is left, excepting one of the Rutledge family; two of these had shot themselves, another had drowned himself, no wonder, and the family now consists of two old maids and they are said to be deranged: The only reputable people I found in Charleston were Jews and a very few Yankees.”

Her *bête noire*, or perhaps I should say her blue terror, for she included all Calvinists in the epithet of blue-skins, was the Presbyterians, and she never lost an opportunity of loading them with whatever terms of opprobrium she could think of. In describing her visit to Staunton, Virginia, she says: (*Southern Tour*, Vol. I, p. 76)
“When I came in view of Staunton, I was surprised to see three large massy buildings, worth the balance of the town; whilst the town consisted of the same old, low, straggling, wooden houses, which I found there some years back.

I guessed these houses were the property of the Presbyterians, and I guessed right; one was a Church, one a seminary, and the third was the Western Hospital, all the property and under the control of the Presbyterians: Bravo! well done Old Dominion. Wherever a fertile spot is to be found, those ravenous sharers light upon it like so many ravens; and this once patriotic county (Augusta) is now held in worse than Egyptian bondage by those cormorants.”

Of the University of Virginia she writes, (Southern Tour, Vol. I, p. 86 and 92):

“The world must stand astonished to hear that this costly University has been completely overturned by the treachery of the faculty, through the Presbyterians, and at this moment is worse than nothing! A Presbyterian Priest has sat himself quietly down in the midst of it and rules the whole, as you shall hear.”

“Thus it has happened to the celebrated University (of vagabonds I was going to say) of Virginia! And the faculty have had the effrontery to apply to the legislature for more money.

I understood they were a parcel of low, dissipated Englishmen, who, like so many gluttons, spend their time in gormandizing—eating and drinking up the funds and suffering the students to run wild. How true the first part of this is, I cannot say, as the faculty took care not to show their faces, but the conduct of the students goes far to confirm it.

“Now that any man in his senses, would send his son to such a sink of wickedness, is astonishing: a gang of pirates could not have behaved worse. The people of Virginia are to blame, that they do not seek into the conduct of this faculty; drive off the Presbyterian Priest who is doubtless the cause of the whole, and the degeneracy of the Institu-
tion is no doubt the effect of bribery.

"The Presbyterians have the whole of Virginia under their thumb as will appear in the end. Now, this Presbyterian Priest would just as soon have put his head in the fire, as to have poked it into this University when Jefferson was living; and if the faculty are not bribed, why is he there now? If they were true to their trust, they would have kept this man away."

One more selection must suffice. Miss Porter, the author of the article on Mrs. Royal to which I have referred, says in speaking of the subject of her sketch (Records of the Columbia Historical Society, Vol. 10, page 28) "she never attacked women." Of her visit to Chapel Hill and the University of North Carolina, Mrs. Royal writes (Southern Tour, Vol. I, p. 132 et seq.)

"Chapel Hill is twenty seven miles from Raleigh and is the seat of the University of North Carolina. But I was sick of Universities, and particularly as this, like all our schools, was under the direction of blue skin teachers; I resolved, therefore not to venture my life among these monsters. I was told, that like Dickinson College, it had a woman, the President's wife, at the head of it. Shame on our men—shame on North Carolina, to cherish a den of vipers in her bosom. I walked into Mr. Alebrook's house when we stopped at Chapel Hill, where a laughable scene took place. Mrs. A met me at the door, when I remarked that I had been requested, by her husband, to call on her.

She eyed me with a scrutinizing look, and said "Have you no man with you?" No madam I am not so fortunate, I am too old; but I assure you it is not my fault that I have none!" Doubtless she meant was I unattended by a gentleman; but what did she mean by asking the question at all? I always have a bad opinion of women, when I find them suspicious of their own sex. She paid me no kind of attention but went to inquire of the driver who I was. I presume the account was quite satisfactory, as she looked very sheepish and asked me to sit down. Had I been a young woman, she might have been jealous, but to ask such a
vulgar question, "had I no man with me?—What did I want with men? I was no missionary; they have men. The lady's taste and mind differ very much, if she prefers ladies who carry men with them. There were several of these men women in the room then, I mean missionary madams—one was a shrivelled up, old sly Presbyterian who, as I afterwards learned, was very godly, and went to church and made a long face, but sold whisky to the students, every chance she had, the hypocrite. The other was an old maid, whom I challenged as such, I should not have reproached her with a fault which she could not help, had I not discovered at a glance, that she was a blue-skin. Yes, she said she was an old maid. She was small, and ugly enough to tree a wolf—the students call her Greasy Monkey. They or at least several of them, board with her. These she missionaries ought to keep out of my way."

"As I stated the University of North Carolina is 27 miles from Raleigh, at Chapel Hill, a most delightful situation, sitting upon an eminence, in the midst of a handsome grove—but to the disgrace of the State is under the influence of a WOMAN, the President's wife. She is ruled by priests, the priests are ruled by money, and she rules the University! Here, as at every other place of Education in the United States, virtue and liberty is banished; one would think the present race of Americans were born without hearts, as well as without souls. What man who has a heart not cased in steel but must be pierced to the core, to see the total prostration of Learning in our else happy land. What can we expect of the present generation but a set of ignorant tyrannical hypocrites; a set of bigots ready to cut the throats of all who differ in opinion from them! Instead of inculcating the principles of virtue, liberty, and the art of governing a free people, our youths are taught the religion of Tracts and Bible Societies— to go and hear some long-faced Presbyterian hold forth on spreading the gospel to the heathen, to hear that the sum for education
is to keep the Sabbath—give money to the Tract Society, make a long Prayer, and a gloomy face—in short an igno-
rant bigot, or a hypocritical knave—can men be in the use of their senses who wish to see their posterity sunk into a ferocious race of blood-spilling monsters—they are not, they cannot be sane.

Let any man not a Presbyterian, visit the University of Chapel Hill and let him judge for himself. He must blush to find an Institution which has cost so much, under the dominion of one of these she wild-cats, a Priest-loving woman, marshalling the students out into regular bands, to distribute Tracts, and fleecing the last cent of pocket money from those innocent unsuspecting young men! Meantime they are ruled by a rod of iron, by this she-wolf. They must by the rules attend church, prayer-meetings and all the round of hypocritical cant; and if one of them happen to smile at the infamous swindling course rung from the pulpit, he is reported and punished at the instance of this she dragon, who keeps her eyes on those innocent victims of her falsehood, treachery and deceit. Not a step, dare the hen-pecked President take without apprising this tyrannical woman. Can the noble and high-
minded sons of North Carolina hear this without a blush? This is a picture, and one which may serve for all our Sem-
inaries! Alas! that our women have placed their affection upon the vilest of mankind, and uniting with them to turn the United States into a nation of knaves and cut throats."

In order that there may be no doubt upon whom the vials of her Unitarian wrath are being poured the author prints WOMAN in large caps.

Now to call the wife of the President of a great University "Priest-ruled," "Priest-loving," a "she-wild-cat," a "she-wolf" a "she-
dragon" and accuse her of tyranny, hypocrisy, bigotry, falsehood, treachery and deceit, may not be considered an attack in the opinion of other women; but the epithets and the manner of hurling them are not conciliatory, nor are they words that tend to turn away wrath, at least the wrath of the victim's husband or brother. I suspect that
some of the witnesses before the grand jury that indicted Mrs. Royal were husband or brothers whose wives or sisters had suffered from, not an attack perhaps, but a demonstration in forcible language, a repetition of which they sought to prevent.

Assuming that the evidence in the case of Ann Royal warranted a conviction was Judge Cranch correct in his opinion that he was authorized under the common law to substitute punishment by fine for punishment by ducking? The cruel and unusual punishments that were a part of the administration of Justice in England and America down to quite recent times were unknown to early English and Teutonic law. The Galic Code, the earliest collection of laws that has come down to us from our continental ancestors, was reduced to writing about the time of the landing of Hengst and Horsa.

No punishments for offenses committed by freemen are mentioned except fines, with possibly one exception. For drowning and concealing in a well one in the King's service the fine is 1800 shillings.

For striking a free woman who is pregnant so that she dies the fine is 700 shillings.

Offenses akin to that of being a common scold are mentioned in the Galic Code. For calling a woman a harlot the fine is 45 shillings; for calling one a "fox" a "hare" a "coward," a "spy," a "perjurer," the fines range from 3 to 15 shillings.

The Dooms of Athelbert, A.D. 600, our earliest English Code provide for the punishment of numerous offenses, and all by fines alone, ranging from 1 shilling for destroying a man's finger nail to 100 shillings for murder. Judge Cranch might have fortified his opinion by referring to these codes among the other old sources of the common law to show that in substituting the ancient and honorable fine for the mediaeval and vulgar ducking stool he reverted to the earliest practices and best traditions of the English Common Law.

H. S. Boutell.

Professor of English Legal History and Constitutional Law.
DEATH BY LETHAL GAS

IS IT A CRUEL AND UNUSUAL PUNISHMENT?

A recent statute passed by the legislature of Nevada raises the speculative question of the constitutionality of a law providing for the execution of condemned persons by the use of lethal gas in that state. According to the new law, a week is designated by the death warrant within which time the gas is to be administered while the prisoner sleeps. Is the new form of execution “cruel and unusual punishment?”

The question of the constitutionality of a state law cannot, of course, be raised under the Eighth Amendment of the Federal Constitution prohibiting “cruel and unusual punishments,” inasmuch as the first ten amendments which constitute the Bill of Rights have been held to be limitations upon the Federal Government only. This prohibition, however, is found in most, if not in all of the state constitutions. To answer the question of the constitutionality of this new law under a state constitution, we must look for a definition of the term “cruel and unusual punishment.” This phrase was taken from an act of parliament of the seventeenth century directed against the barbarous methods of punishment which had come down from the Middle Ages, including disembowelling alive, beheading, quartering, etc.

The United States Supreme Court has had occasion to define “cruel and unusual punishment” in the case of Wilkerson vs. Utah, 99 U. S. 130. Here the question was directly raised under an act of the territorial legislature of Utah of 1852 providing that a person convicted of a capital offense “shall suffer death by being shot, hanged, or beheaded,” as the court directs, or “he shall have his option as to the manner of his execution.” In holding this act not to be in violation of the Amendment, the Court said, “Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishment shall not be inflicted: but it is safe to affirm that punishments of torture,—and all others in the same line of unnecessary cruelty, are forbidden by that Amendment of the Constitution.”
Again, in re Kemmler, 136 U. S.—436, 447, a case brought to determine the constitutionality of a death penalty by electrocution, ordered in New York State, the Supreme Court said, “the Courts of New York held that the mode adopted in this instance (electrocution) might be said to be unusual because it was new, but that it could not be assumed to be cruel in the light of that common knowledge which has stamped certain punishments as such: that it was for the legislature to say in what manner sentence of death should be executed: that this act was passed in the effort to devise a more humane method of reaching the result: that the courts were bound to presume that the legislature was possessed of the facts upon which to take action: and that by evidence taken aliunde the statute that presumption could not be overthrown.”

Commenting on the decision in Wilkerson vs. Utah (supra) the Court went on to say that, “Punishments are cruel when they involve torture or lingering death: but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.”

In the light of these decisions, it would appear that the Nevada statute would be upheld as another attempt by a legislature to find a still more humane method of execution than by electrocution and the other methods now in use, as an usual punishment, but not necessarily as a cruel punishment in the sense that it would “inflict torture or lingering death,” as inflicting no unnecessary cruelty. The action of the legislature would not be lightly upset by the courts, the presumption being that the legislature knew the facts as to the effect of administering lethal gas and it seems clear that here, as with electrocution in the past, an attempt is being made the death penalty more humane.

Robt. A. Maurer, '06.
Associate Professor Constitutional Law.
The present Editorial Staff of the Law Journal, with this issue automatically passes out of existence. At a future date the faculty will select a group of men from the Junior Class to succeed the present incumbents. Such selection will be based upon scholarship and adaptability to journalistic work.

Before passing on, it is but fitting that the Staff express appreciation for the wholehearted support extended by both faculty and student body, during the past year.
A law journal is an asset to a legal institution. It serves as notice to the world that students enrolled at such an institution are engaged in serious pursuits. It also encourages research into the field of jurisprudence. It publishes thoughts of leaders in the profession. It registers achievement. It fosters the collateral reading habit, which should be cultivated by all students of the law.

To most of us who are at present engaged in wading through countless pages of work assigned at school, collateral reading will at first blush appear out of the question. It is not, however, necessary that we immediately make of ourselves unremitting delvers into legal lore. It is merely the habit, that should be acquired. Some time ago several New York physicians decided to devote their spare time to the study of hereditary blindness. Accordingly, instead of the customary afternoon at the golf club, or at the polo grounds, they closeted themselves with material necessary for such investigation. The result of this sacrifice was recently published in a medical journal. A field that heretofore has been shrouded in darkness has been at least partly illuminated. A foundation has been laid upon which may be constructed machinery that will eventually conquer the dread malady attendant, in so many cases, upon child-birth. Just as these illustrious members of the medical profession have accomplished something that is of everlasting benefit to mankind, by sacrificing a few spare hours, so too can we by setting aside a few of our odd moments for collateral reading break ground for a structure that may in years to come, bring glory to our great profession, and good to humanity.

Plans have been perfected by which the Law Journal through its newly organized circulation department will be forwarded to even the most forgotten fringe of civilization. To men who are about to take up the practice in localities remote from Georgetown, this presents a golden opportunity to forge material connecting links with the Alma Mater. It also will help to spread the gospel of Georgetown throughout the land.

The Circulation Manager is prepared to take subscriptions for the year of 1922.

Frank E. Buckley.
EDITOR IN CHIEF.
NOTES AND COMMENTS

MEASURES OF DAMAGES IN ACTIONS FOR BREACH OF CONTRACT

Since the case of Hadley v. Baxendale the rule as to the amount of damages to be recovered in actions for breach of contract, is well settled. In that case the court said: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—i.e., according to the usual course of things, from such breach of contract itself—such as way reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

"Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."

It is not necessary in all cases that the special circumstances under which the contract was entered into should expressly be made known to the defendants. In some cases, from the very nature of the subject matter of the contract, the fact that such special circumstances were within the contemplation of the parties at the time they were made the contract, will be inferred.

While the phraseology of the rule as laid down in Hadley v. Baxendale has been criticised, on the ground that when parties enter into a contract they do not contemplate a breach thereof, but rather a performance, and that therefore, the phrase "such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it," is
obscure and inaccurate, and might better read that the damages recoverable are such as might arise from a breach of contract itself, or from a breach committed under such circumstances as were in the contemplation of both parties at the time of the contract, the rule of law enunciated in that case has become fixed and is applied in all the States as well as in England.

While the law is laid down in that case has become well settled, the application of the rule of law to the facts of a particular case has given rise to some difficulty. This is especially so where special circumstances are alleged to have been within the contemplation of the parties at the time the contract was made, but there is no express agreement taking into account these special circumstances.

Where the plaintiffs contracted with the defendant express company to carry an engine shaft, weighing about 650 pounds, and through the negligence of the defendant there was a delay of about two weeks in the delivery of the shaft, during which time and as a result of which plaintiff's factory was closed down, it was held that the plaintiff was entitled to recover for the lost profits due to the delay in delivering the machine. The court held that the special circumstances under which the contract was made need not be expressly communicated to the defendant, but they may, from the subject matter of the contract, be inferred as having been within the contemplation of the parties at the time the contract was entered into. It will be noted that the subject matter of this contract was similar to that in Hadley v. Baxendale, i. e., an engine shaft. The court adverted to this fact, and expressed the opinion that, while the English case laid down the proper rule of law, it failed to apply the law properly to the facts in the case.2

It has, however, been held that cotton-seed meal and hulls are not of such a character that a carrier undertaking their transportation will be held to have contemplated that the prompt delivery thereof was necessary to avoid loss of weight in the cattle for the feeding of which the consignment was intended.3 Therefore, to hold the carrier responsible for such loss, notice at the time of shipment must be given to the carrier as to the use for which the consignment is intended, and the circumstances which make prompt transportation necessary. And where the carrier which transported a portion of the machinery of the machinery of a saw-mill for repairs and return had no notice at the time the contract was made that the machinery was necessary to
the operation of the mill, the loss of the customers in case of delay was not a probability in the minds of the parties, so that the carrier cannot be held liable for loss of profits on sales of lumber to such customers, in an action for damages for the delay. And the freezing of plaintiff's oranges on the trees is not so direct, natural and proximate a result of the failure of a railroad company to deliver to the plaintiff within a reasonable time orange boxes accepted by it for transportation as to make the company liable therefor by reason of such delay, where the contract of carriage did not fix any specific time for the transportation and delivery of the boxes, and the company was not informed that the plaintiff would leave the oranges on the trees exposed to the danger of cold, until the boxes were delivered.

In a recent case decided by the Supreme Court of Massachusetts, it was held that where an ice company contracted that ice should be furnished a dairy company on the contingency of the destruction of the dairy company's icehouse, the dairy company could not recover for breach of such contract, damages to its business from the ice company's failure to furnish ice, such special circumstances not having been within the contemplation of the parties, either expressly or impliedly, at the time the contract was made.

In summing up the requirement that special circumstances cannot be taken into consideration in assessing the damages unless such special facts were within the contemplation of the parties at the time the contract was made, it may be said that such requirement should receive a reasonable interpretation with reference to the subject to which it is applied. As a rule, such special circumstances must be brought home to the party to be charged so that he must know that the opposite party reasonably believes that he accepts the contract with the special condition. Exact knowledge is not required, nor is detailed information as to just what loss will result necessary; it is sufficient if the special circumstances may be fairly supposed to have been within the contemplation of the parties at the time the contract was made.

W.N.M.

1. 9 Exch. 341.
VALIDITY OF ANTE-NUPTIAL AGREEMENTS.

Whether a woman may enter into an anti-nuptial agreement whereby she agrees to accept something in lieu of dower without being deprived of the exemptions provided by statute, depends largely, if not altogether on the attendant circumstances and conditions under which it is executed. If it is fair, reasonable, equitable, and just, and in no way contravenes public policy, it would seem that it might be legally entered into and become a binding contract.

Quite a number of cases are found which support the proposition that a woman waives her right to the statutory allowance by executing an ante-nuptial agreement "relinquishing all right of dower, and all interests of any kind whatsoever, to which she may be entitled in the estate of her intended husband by reason by her marriage." Other cases take into consideration the effect such contract will have on the children of the contractors. In Reiger vs. Schaible, it was decided that an ante-nuptial contract made in good faith between parties, each of whom had real and personal property not disproportionate in value, providing that each thereby released and renounced all dower and other interests in the estate which the other party had or should thereafter acquire, with the intent that the property of each should descend to his or her lawful heirs, divested of claims of dower or other interest that the other contracting party might have as husband or wife, widower or widow, under the laws, was sufficient to bar the wife's statutory allowance; the rights of children not being involved. And also under the statute in Illinois, a "widow's award," where there are no children by the marriage, is her separate property, and may be barred by her by an ante-nuptial contract. Also, where a poor widow, 63 years old being about to marry a wealthy widower of 57, with 11 children, agreed, in consideration of one dollar, a comfortable support during her life, and a decent Christian burial to claim no rights in the husband's estate. Fourteen years afterwards he died. It was held that she was not entitled to three hundred dollars from his estate.

1. Appeal of Staub, 66 Conn. 127; Edwards vs. Martin, 39 Ill. App. 145; Schaffer vs. Matthews Adm'r., 77 Ind. 83; In re Heald, 22 N. H. (2 Foster) 265; Young vs. Hicks, 92 N. Y. 35, affirming judgment 27 Hun 54; Tieren vs. Binns, 92 Pa. St. 248; In re Venus' Est. 2 York Leg Rec. 193; Contra Mahaffy vs. Mahaffy 61 Iowa 679; Wentworth vs. Wentworth, 69 Me. 247; Blackinton vs. Blackinton 110 Mass. 461; and Pulling vs. Durfee, 85 Mich. 34.
2. Reger vs. Schaible 115 N. W. 560; Rehearing denied in Re Reger's Est. 116 N. W. 953.
3. McMahlil vs. McMahlil 113 Ill. 461.
hand it was said that the special statutory allowance for widows of
decedents, being as much for the advantage of the children as for the
widow, cannot be effected by an ante-nuptial agreement.5

Other cases hold that the award is barred where the widow is paid
the amount specified in the ante-nuptial contract. For instance, where
a husband and wife agree that in case of her survival she shall have
out of his estate a specified sum in full of her share of his estate, she
cannot claim the exemption allowed her by the Act of April 14, 1851
(Pa.), out of her husband’s estate, after she has already received the
amount given to her by such agreement.6 An ante-nuptial contract
fairly made, wherein a woman, for a consideration to be paid her after
her husband’s death, relinquishes all claim against his estate, while not
binding on her, so long as executory, does bind her from claiming the
statutory widow’s award if she accepts from her husband’s executors
the sum specified in the contract.7 And an ante-nuptial agreement
that the wife at the husband’s death shall receive from his estate a
certain sum, which shall be received by her in full satisfaction of all
other claims which she might have does not bar her claim to the widow’s
award, since it is the receipt of the money that has such effect, and
until it is paid she has the right to have appraisers appointed to set off
her award.8

In a recent case in North Dakota, it was held that a widow who had
entered into an ante-nuptial contract was entitled to her exemptions
under the statute.9 In this case Jacob Herr and Susanna Munsch Herr,
prior to the time of their marriage, entered into a written ante-nuptial
agreement, whereby she agreed that, in case of his death prior to hers,
she should receive out of his estate the use of the homestead during
her life and the sum of two thousand dollars and no more. The stipu-
lations entered into were, in substance, and neither party should take
any right, title, or interest in the property of the other; that at the time
of their respective deaths, the property of each should vest in the re-
spective heirs of each; that neither should take property or rights in
the property of the other; that in the event the husband should die first,
the surviving wife should have the right of occupancy of the home-

5. Phelps vs. Phelps, 72 Ill. 545; 22 Am. Rep. 149.
7. Weaver vs. Weaver, 109 Ill. 225;
8. Brenner vs. Gauch, 85 Ill. 368;
stead, and, in addition thereto, receive two thousand dollars in cash and no more. It was claimed by appellant that the administrator tendered the surviving widow the two thousand dollars provided in the contract which she denies, saying that the tender was made conditional upon her releasing all other rights in the estate, she claims the two thousand dollars unconditionally. The court says "That part of one's property which after his death the law sets aside as an exemption to those dependant upon him, as in this case his surviving wife, is no part of the property which passes by descent and distribution. The law, so to speak, reserves the exemptions ont of his property, and it is the duty of the court under the law to set those exemptions aside to those entitled to them. The purpose of the exemption law is to set aside a certain portion of decedent's property for the use and benefit of those entitled to it, in order that they may not become dependent; that they may have support sufficient to provide them for a time with the necessities of life, and for the further purpose that they may not become a public charge to the state, thus perhaps imposing unnecessary burdens on it.

This view is supported in whole or in part by a great number of cases in this country and it appears to be sound. An ante-nuptial contract, by which, in consideration of the conveyance to the wife of a life estate in certain property, she relinquishes all her interest in other real estate of the husband, cannot be extended so to prevent the wife from claiming her statutory allowance of five hundred dollars, under Revised Statutes, Section 2269, in the estate of her husband or from compelling a sale of his real estate in order to pay such allowance. The Married Persons Property Act of 1893, (Pa.) providing that a married woman shall have the same right and power as an unmarried person to own or dispose of any property, and may exercise such right in the same manner and to the same extent as to an unmarried person, does not empower a married woman, by contract with her husband, to release her rights to her widow's exemption after his death. Where an ante-nuptial contract provides that it shall not apply to property acquired after marriage, it cannot operate to defeat the widow's right to allowance for support from her husband's estate, where the marriage has

subsisted for twenty years, and, the decedent having been a farmer, his estate consisted largely of farm products, machinery, and stock, acquired subsequent to the marriage, although it may have been partly acquired by the conservation of property owned previously. But where an ante-nuptial contract provides that during marriage neither party should be restricted in the disposition of their property, real and personal, and authorizing either to execute deeds without the consent or signature of the other, it does not include the right of disposal by will, so as to defeat the widow's right to an allowance for a year's support, given by Code 1873, Section 23:5 (Iowa), though she may have relinquished by such contract her right to dower and homestead. Under the Revised Statutes of Missouri, Section 107, entitling a widow to personal property to the value of four hundred dollars in her deceased husband's estate, an ante-nuptial agreement between husband and wife that the survivor should claim no interest in the estate of the other did not bar her from the statutory allowance where there was no consideration for the agreement.

An executor to whom lands are devised in trust, treating certain marriage articles providing for the payment of an annuity to the wife after the husband's death as void, and paying the widow one-third of the income of the estate as dower, in quarterly payments for three years, is thereafter estopped to deny the widow's right to receive such income; she having married in the meantime, and the marriage articles precluding her from receiving anything after a re-marriage. Also where, in an ante-nuptial agreement, the husband had engaged to provide for his wife by will and annuity of fifty dollars for her life, in lieu of dower and of any other portion of his estate, such engagement is not fulfilled by providing an annuity of the same sum during her widowhood, and does not preclude her from claiming the property directed to be omitted from the inventory and set apart for her use. On the other hand an ante-nuptial contract entered into between decedent and his widow having been found by the court in another proceeding to be fraudulent, it was held that the widow could not claim an annuity given by the contract in addition to the amount of her claim under intestate laws.

Whether an ante-nuptial contract making provision for the wife in

13. In Re Peets Est., 79 Iowa, 185; 44 NW. 354.
14. Mowser vs. Mowser, 87 Mo., 437; McCartee vs. Teller, 8 Wend 267;
15. Sheldon vs. Bliss, 8 N. Y. (4 Seld) 31; affirming judgment Bliss vs. Sheldon 7 Barb 152.
16. Appeal of Bean, 2 Leg Gaz. 244.
case of her survivorship, and expressed to be "in bar and full satisfac-
tion of all such part or share of the personal estate of the 'husband' which she may claim or be entitled unto by law," will operate as a bar in equity to her claim under the statute to an allowance for a year's support after the death of her husband, quaere. ¹⁸ But it was held that an agreement in contemplation of marriage, that neither party, after the death of the other, should claim anything that belonged to the other before marriage, is sufficient in equity to exclude the woman's claim for a distributive share. ¹⁹

¹⁸. Philips vs. Philips 14 Ohio St. 308.
¹⁹. Cauley vs. Lawson, 58 NC. (5 Jones Eq) 132.
RECENT CASES

Wills—Cancellation with Present Intention of Making New Disposition—Not a Revocation of new Disposition Fails.

Observe the formalities and observe them strictly—that is the first and basic principle of the law of wills. A recent Wisconsin decision again reminds us forcibly of this. In this case one Ellen Marvin died leaving four grand-children. By her will as originally drawn she left all her property to Earl Johnson, one of these grandchildren. When the will was found, pencil marks had been drawn through the words giving the property to Johnson and below the attestation clause in the handwriting of the deceased, the following words were written: “I, Ella Marvin, give all that I have left after paying all debts to the Orphan’s Home.” There were no witnesses to the bequest set forth in this clause. When the will was offered for probate the guardian ad litem of the three grandchildren not mentioned in the will on their behalf objected, contending that the pencil marks drawn through the clauses giving the property to Johnson and the added clause failed for lack of witnesses and that, therefore, the four grandchildren should inherit as heirs at law as Mrs. Marvin had died intestate. He offered testimony to show that the will had always been in the possession of the testatrix and that she had frequently expressed her intention of revoking the bequest to Johnson. The county court held and its decision was affirmed by the Supreme Court of the state, that at the time of crossing out the bequest to Johnson, Mrs. Marvin had in mind making a change in the testamentary disposition of her property; that there was no evidence to show that she first and separately and absolutely revoked the bequest to Johnson; that the fact that she deliberately made the original will and left the writing in the form it was when she died indicated that she at all times intended to dispose of her property by the instrument; that while she believed she had changed her bequest from Johnson to the Orphan’s Home, the attempted change had failed and by the settled rule of law, where the testator
cancels or destroys a will with the present intention of making a new disposition and the new disposition fails, the presumption in favor of a revocation by the cancelling is repelled and the will stands as originally made, and Johnson therefore should receive as under the will. (In re Marvin's Will - Supreme Court, Wisconsin, October 19, 1920, 179 N. W. 508.) In support of its decision the Court cited Gardiner vs. Gardiner 65 N. H. 230, Re Penniman 20 Minn. 245, and In re Korapen's will 75 Vermont 146.

B. E. S.
An interesting case decided in our local Court of Appeals illustrates one of the fundamental principles of the law of property as expressed in the caption. The appellant brought an action at law to recover the penalty on a consular bond, to which a demurrer was interposed by the defendants who were the principal and sureties under the bond. The demurrer was sustained by the Supreme Court of the District of Columbia and plaintiff appealed.

The defendant was the consul general of the United States at Shanghai, China. In 1905, one Henry H. Cunningham died in Shanghai leaving a brother, the plaintiff, a resident of the District of Columbia, and another brother and two sisters, residents of Maine. A paper, purporting to be a will of the deceased, was produced before the consul by Mr. Dunning, who was named as executor therein, and the consul issued letters testamentary to Dunning. The declaration avers that the will was invalid under the laws of Maine, the testator's domicile, it having but two witnesses instead of the required three, and that the consul had no jurisdiction to admit the will to probate, but should have notified the Secretary of State of decedent's death and transmitted to the same official, his estate after payment of debts, unless a duly qualified legal representative had appeared to claim the right of administration. It further averred that Dunning had not so qualified and that plaintiff had not received a one-fourth distributive share of the estate, which he claimed on the basis of deceased's intestacy. The plaintiff relied upon Section 1709 of the Revised Statutes, the fifth paragraph of which provided for the transmission of the personal estate of a United States citizen dying intestate in a foreign country, to the Treasury of the United States to be held in trust for the legal claimant unless, in the meantime, a legal representative of deceased appeared to demand such property.

The Appellate Court held (a) that at the common law, which
prevails in the District of Columbia, personal property descends to the administrator, and (b) the title to personality being in the administrator, he alone can bring an action for its recovery, before the final distribution to the parties entitled thereto, also (c) this being an action at law, it cannot be maintained by the plaintiff, as owner of a distributive share, claiming as the next of kin. The Court further held that the "legal claimant" referred to in the statute cited, was clearly the personal representative, who alone would have been entitled to receive the estate from the Treasury Department, and that the plaintiff could not have framed an action charging the defendant as an executor de son tort (one acting without lawful authority, assuming the will to be invalid,) the personal representative alone being vested with this right. The plaintiff could establish his right to an interest in the real estate by an appropriate action in the proper forum.

(Cunningham vs. Rogers, et al - 267 Fed. 609.)

A. L. T.

Homicide— Interventon of 27 days between statement and death did not render incompetent as dying declaration.

One T. J. Jackson charged with murder of Ed. Dixon was convicted of manslaughter and sentenced to eight years imprisonment. He appealed, assigning as error the admission of certain testimony purporting to be the dying declaration of Dixon. Dixon was shot by appellant on December 18, 1919, in Oldham County, Kentucky, and the next day taken to a hospital in Louisville. He died from peritonitis as a result of his wounds on January 22, 1920. Dr. R. B. Pryor who was called to see the deceased shortly after the shooting, visited him at the hospital on December 26th and again on January 19th. The statement admitted as a dying declaration was made by the deceased to the doctor on December 26th, during his visit, after Dixon was told that he probably would not live and after Dixon had said he didn't, think he was going to get well. Dixon told the doctor his version of the shooting and it was this that the state used to convict. On the 19th of January, Dr. Pryor was present when Dr. H. H. Grant, surgeon, told Dixon he would live perhaps 10 or 12 hours. Dixon asked to be taken to his mother's home in Louisville to die, and on being further questioned by Pryor stated he "had
nothing to add to what he had told on the 26th day of December."

The appellate court sustained the trial court in holding the evidence admissible, deciding that the statement of the 26th independent of what occurred on the 19th would have been admissible as made under consciousness of impending death; that the mere fact that 27 days had intervened before death would not necessarily render it incompetent and that the statement was clearly reaffirmed on the 19th, citing in support of its decision Greenleaf on Evidence p. 158, Barton vs. Commonwealth 70 S. W. 831, and numerous other cases. (Jackson vs. Commonwealth, Court of Appeals of Kentucky, September 24, 1920, 224 S. W. 649).

B. E. S.
Novation-Burden of showing Release by Novation rest on Defendant Corporations—President's Release of Debtor and substitution of his own obligation too antagonistic to be upheld.

Action by plaintiff corporation against defendants, Grignon and Milles to recover for balance due for supplies furnished. Defendants set up that defendant Zachow, who was President and Director of plaintiff corporation and who owed a sum of money to Grignon and Milles, agreed to release them from liability to plaintiff corporation and to assume their debt to corporation in return for release of his debt to them. Plaintiff's contend that he had no authority to act in suchwise as it was not within the scope of corporate authority for the president to release debtor's and substitute for the indebtedness his own obligation.

HELD: The court sustained the plaintiff's contention that the president could not substitute his own obligation for that of another debtor without authority and the evidence showed that there was no authority for or ratification of the substitution. The contract was too antagonistic to the interests of the corporation to be upheld. The court said that the burden of proof lies on the person claiming release by novation and the defendants had failed to prove a binding agreement by which the plaintiffs released the defendants Grignon and Milles and agreed to accept the obligation of defendant Zachow and therefore affirmed opinion in favor of the plaintiff. Sup. Ct. Wisconsin, Oct. 19, 1926

B. E. G.
Mortgages—Owner can recover full value after sale under power after satisfaction.

Estoppel—Attendance of owner at wrongful sale held not to prevent recovery from mortgagee.

Plaintiff executed a mortgage on his land to Defendant. The mortgage contained a power of sale. After mortgage had been fully satisfied the defendant sold the property under the power of sale. Plaintiff elects to ratify the sale and seeks to recover for full value of property. Defendant contends that the plaintiff is estopped to recover on account of his attendance at the sale and also contends that plaintiff could only recover for sale price.

HELD: The plaintiff may ratify the sale and accept the proceeds, sue to vacate the sale or repudiating the sale, sue the mortgagee for the wrong done. Plaintiff has pursued last course and well considered authority is unanimous in holding that he can recover for full value of property. Warren v. Sussman, 168 N. C. 457. Prior to sale plaintiff repeatedly contended that the mortgage was satisfied and his mere attendance at sale, especially in view of the fact that he was an ignorant colored man, would estop him from recovering for the wrong done him. Judgment for the plaintiff affirmed.

Supreme Court of North Carolina, Oct. 6, 1920.

B. E. G.