unqualified proposition, I enter my protest. Suppose an indictment for blasphemy, or a trial where indecent evidence was necessarily introduced, would

trate dismissed the summons. We do not see how, on principle, this is to be distinguished from the daily report in a newspaper of a criminal trial, which lasts several days, before the Court of Queen's Bench or the Central Criminal Court, or at the assizes. . . . . The decision of Lord Chief Justice Eyre in Curry v. Walter (1 Bos. & P. 525), rested on sound legal principles, and is now almost universally approved of. On the same principles, we think, we ought to hold in this case that no action can be maintained for any part of the impartial and correct and bona fide report of the proceedings against the plaintiff before the magistrate, which ended in the charge being dismissed; although, the proceedings being adjourned from day to day, the report appeared in portions in different numbers of the defendant's journal."

In Duncan v. Thwaites (3 B. & C. 556) the plaintiff had been charged before a magistrate with indecently assaulting a female child, and the report contained a statement that the evidence of the child herself and her cousin "displayed such a complication of disgusting indecencies that we cannot detail it," held (on demurrer to a plea) that the report could not be justified on the ground of being a correct report of the proceedings which took place in the course of a preliminary inquiry before a magistrate; and there is no doubt that the judgment of the court, was delivered by Abbott, C.J., proceeds on the general ground that any publication of such proceedings is unlawful. Rex v. Fleet (1 B. & Ald. 379), was also one in which comments on the conduct of the parties were added to the report. A riot having taken place at Brighton, the high constable called forthe assistance of the military, who charged the mob, and one person was killed. An inquest was held before the coroner, which lasted some days and ended in a verdict of wilful murder against the high constable, one of his assistants, and the soldier who caused the death of the deceased. The defendant, before the jury had finished their labors, published in his newspaper a statement of the evidence, accompanied with remarks tending to cast blame on the high constable and the other peace officers for imprudently and unnecessarily calling out the military for the purpose of suppressing the tumult which had arisen. The court made absolute a rule for a criminal information.

everyone be at liberty to poison the minds of the public by circulating that which, for the purposes of justice, the court is bound to hear? I should think not; and it is not true, therefore, that, in all instances, the proceedings of a court of justice may be published."

A publication of reports of proceedings before magistrates, in cases over which they have no jurisdiction, cannot be justified as a correct and fair report of legal proceedings, if it contain defamatory matter. If magistrates, while, occupying a bench from which justice is intended to be administered, under pretense of giving advice or making suggestions, publicly hear slanderous complaints which they have no jurisdiction to hear judicially, the proceedings derive no privilege from the place where they are taken, no more than if they were sitting in a club-room or on the curbstone.[1]

[1] In the English case of McGregor v. Thwaites (3 B. & C. 556), a Mr. Prince and a Captain Antrim waited upon the lord mayor elect (who sat for the lord mayor) to request his advice as to three orphan children who had been brought home to England by Captain Antrim from Poyais on the Mosquito Coast in America, to which place a large number of persons had emigrated from Great Britain. A report of what occurred before the magistrate was published in a newspaper, of which the following was the important part: "Mr. Prince stated that about 200 of the victims of delusion had returned from the Mosquito Coast to Honduras in a state of utter destitution, and of disease, which terminated the sufferings of a great part of them soon after. They must have all died but for the charity of the people and the authorities of Honduras. The poor creatures had been led by Mr. McGregor to expect a land where they would live in the greatest plenty, where everything was flourishing, and but little labor would be required: it was mentioned to them as a mark of the improvement of the place, that a fine theatre had been established and other establishments formed, indicative, not merely of civilization and comfort, but of luxury. Captain Antrim

376. If the due administration of justice is supposed so to require, the court has authority to make an order against publishing any part of the trial till the whole

mentioned a charge which the poor creatures had preferred to him against McGregor. Most of those who sailed from Leith were poor people, who had by their frugality saved small sums of money of from £15 to £30; McGregor learned the property which the settlers had with them, and, telling them that Scotch money would not pass at the settlement, persuaded them to give it all up to him, and take his drafts for the amounts upon his bankers at Poyais. The savings were all given up to him, and it is perhaps unnecessary to add, that the settlers, on their arrival at the houseless wilds of Poyais, found that no such thing as a banking-house was in existence. Captain Antrim regretted that he had not arrived sooner, as another ship had sailed with settlers for the same place just before his arrival, who, he feared, would also fall a sacrifice. He had thought it his duty to make the statement publicly, that the poor might be put on their guard." To an action of libel for the publication of this report, the publisher pleaded that Mr. Prince and Captain Antrim did go before the magistrate and make the statements charged as libelous, and that the alleged libel contained a correct and fair account of the proceedings before the magistrate, and that the facts charged in it were true. The jury having found that the report was a true, fair, and correct report of the proceedings before the lord mayor elect, but that the facts charged in it were not true, the court held that the publication could not be justified on the ground of its being a correct and fair report of what took place before the lord mayor elect, as the matter was not brought before him in his judicial character, or in the discharge of his magisterial functions. "I think," said Littledale, J., "that the lord mayor elect had no legal authority to inquire into the matter brought before him by Captain Antrim; that he was not then exercising his office of magistrate, and that this case is to be considered in the same light as if the communication had been made to him in his private room. It is unnecessary, therefore, to decide in this case whether the defendant would have been justified in publishing this matter in a newspaper, if it had contained a correct report of a proceeding which had taken place before a magistrate acting in a judicial capacity."

is concluded. Nevertheless, where no such order has been made, the practice has long existed of daily publishing, without any disapprobation from the court, each day's proceedings till the trial is concluded. And in several instances this practice, which, in reality, only extends the area of the court, has been found highly beneficial in the discovery of material evidence. . . . The law must bend to the approved usages of society, though still resting upon the same principle, that what is hurtful and indicates malice should be punished, and that what is beneficial and bona fide should be protected."[1]

The reason for allowing this liberty of publication is stated[2] to be—that the balance of public benefit from the publicity is great: it is of great consequence that the public should know what takes place in court, and the proceedings are under the control of the judges; the inconvenience, therefore, arising from the chance of the injury to private character, is infinitesimally small as compared to the convenience of publicity. To the same effect is Rex v. Wright:[3] "The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to private persons whose conduct may be the subject of such proceedings."

377. Fair and candid and bona fide comments upon matters of public interest will be protected as privileged, but furnishing the public with the opinions or reflections of an editor or reporter, upon facts which are equally at the disposition of the public to draw their own conclusions from, are not necessarily fair and candid and bona fide comments. Such comments,

[1] Campbell, C. J., in Hunter v. Sharpe, 4 F. & F. 983.
[2] 4 F. & F. 1005.
[3] 2 Chitty, 162.

if defamatory in their nature, will require a justification. Some comments are little more than another mode of stating what has gone before. "It would be extravagant to say that in cases of libel, every comment upon facts requires a justification, but a comment may introduce independent facts, a justification of which is necessary. A comment may be the mere shadow of the previous imputation; but if it infers a new fact the defendant must abide by that inference of fact, and the fairness of the comment must be decided upon by the jury."[1]

If a newspaper takes occasion to say that the examination "fully established the facts as stated by the counsel for one of the parties," it does so at its peril. And it will state at its own peril, also, that "such and such" were the circumstances of the case "as stated by the counsel for" one of the parties, and does not give the evidence. Such a report does not even profess to be an account taken from evidence given at the trial, nor even to be an account taken from counsel's statement, but afterwards corrected by the evidence given in the cause. Statements of counsel are of course ex parte, and they not unfrequently make allegations, of which there is a failure in the proof. Such a proceeding is privileged, on the part of counsel, because they are discharging their duty; but a newspaper is not dis-

[1] Cooper v. Lawson, 8 A. & El. 753. Where the report of a trial professed to give a short summary of the facts of the case, and stated that the counsel for the defendant was both extremely severe and amusing at the expense of the plaintiff's attorney; and then, without setting out the evidence, professed to give an outline of the speech of defendant's counsel, the part set out containing some very severe reflections on the conduct of the plaintiff's attorney in advising the form of action with a view to his own profit, a plea justifying the report as being in substance a true report of the trial was held bad on demurrer. Flint v. Pike, 4 B. & C. 473.

charging any duty in repeating them, and it is not privileged. "Would it be either safe or proper that after a cause has been tried, a statement which the evidence has not at all supported, should be published in a newspaper; and then, merely because that statement has been made by counsel, it should be held to be privileged? Ought such a publication to be considered a fair report of what had passed in court, although the evidence afterwards given might not only not support, but might even to some extent contradict it? Ought such a publication to be privileged? I conceive not; and I think that such will not be held to be the law of the land."[1]

Still less can a report be justified which not only does not give the evidence, but adds to the speech of counsel, which it sets out, that all that he stated was proved.[2]

And even if on a final trial the defamatory suppositions of the newspaper proved to be correct, we doubt if it would change their libelous character, for a question as to whether defamatory matter is or is not libelous, can be met by a plea that such question must remain in abeyance for a man's lifetime, on the presumption that, "as nobody knows what may happen," it might at some day or other prove true. Such a view would be manifestly absurd.

The case of Curry v. Waller[3] has generally been regarded in England as determining that the report of

[1] Per Tindal, J., in Saunders v. Mills, 6 Bing. 218.

[2] Shortt, L. L. p. 477.

[3] 1 Bos. & P. 525. The legality of publishing an accurate and impartial report of the preliminary proceeding, where it has ended in the dismissal of the charge, must, as before stated, be taken to be now settled by the decision in Lewis v. Levy (El. Bl. & El. 537; 27 L. J. 287, Q. B.), and some eminent judges have recently refused to join in unqualified disappro-

a preliminary trial may be published without an abuse of the privilege of newspapers in regard to matters of public interest. But the report, in order to be protected, must be not only bona fide, but also accurate, or at least substantially accurate. It need not be a verbatim report, or set out fully all that occurred at the trial; but, if it summarizes or abridges, it must do so fairly, and not give a one-sided complexion to the narrative.

"The privilege—a valuable privilege for the public—of publishing reports of proceedings in courts of justice would be useless if it were necessary to set out every word of the evidence and of the speeches, and of what was said by the judge. That is not necessary; if what is stated is substantially a fair account of what took place, there is an entire immunity for those who publish it."[1]

378. Newspapers have a full right to publish, either a verbatim or an abridged or condensed report of what passes in courts of justice; and, however it may affect the character of an individual, he has no ground for an action of libel, unless it be an unfair report.[2] In reporting the proceedings of courts of justice, omissions and abridgments are often essential, but they must not be such as to change the complexion of the proceedings; if they do, they do not constitute the fair and just report which they are privileged to make.

379. A newspaper will be liable if it put a general heading of a libelous character to what may be, in bation of accurate and impartial reports of proceedings which do not so end, but in which the accused is held to bail or committed for trial.—Shortt, L. Lit. p. 469.

[1] Andrews v. Chapman, 3 C. & Kir. 289.

[2] Blake v. Stevens, 11 L. T. N. S. 544; 4 F. & F. 237. See Ackerman v. Jones, *ante*, this chapter, p. 459.

other respects, a fair report of a judicial proceeding. A particular case, in which an attorney has treated his client badly, will not justify the prefixing to the report of that case a general heading in the words, "How Lawyer B. Treats His Clients."[1]

So, where a newspaper published a report of proceedings in the insolvent debtors' court, headed "Shameful Conduct of an Attorney," a plea that the alleged libel contained a correct account of what took place in court was, even after verdict for the defendant, held bad, on the ground that, by the prefatory words, the defendant had taken upon himself to make an allegation of shameful conduct against the plaintiff.[2]

[1] Bishop v. Latimer, 4 L. T. N. S. 775.

[2] Lewis v. Clement, 3 B. & Ald. 702; *vid.* also Lewis v. Levy, El. Bl. & El. 537; 27 L. J. 287, Q. B.

In Lewis v. Walter (4 B. & Ald. 605), where a report of the trial of the plaintiff (an attorney) and two other persons for a conspiracy to defraud the under-sheriff of Hants, set out the speech of the counsel for the prosecution, and then continued: "The first witness was R. P., who proved all that had been stated by the counsel for the prosecution; Mr. J. G., the attesting witness to the bill of sale from the sheriff to Messrs. W., was next called, but not being able to prove a deputation from the under-sheriff for that year, the jury, under the direction of the learned judge, were obliged to give a verdict of acquittal, to the great regret of a crowded court, on whom the statement and the evidence, so far as it went, made a strong impression of their guilt;" a plea justifying the report on the ground that in fact such a speech had been made, and that the witness called proved all that had been so stated, but not setting out the evidence or justifying the truth of the charges made in the counsel's speech, was held bad on demurrer. "The objection," said Abbott, C. J., "taken to the plea seems to me to be unanswerable. It is asserted in the libel that a certain witness proved the allegations contained in a speech made by counsel in stating a case to the jury. Now that justification cannot be supported. The defendant ought to have detailed and transcribed in the publication the evi-

380. If a decision or sentence be pronounced upon any person by a competent authority, in a matter of public interest and observation, a public writer may

dence of the witness. If he had done so, his readers might then have judged for themselves. If a party is to be allowed to publish what passes in a court of justice, he must publish the whole case, and not merely state the conclusion which he himself draws from the evidence." "It is no justification," said Bayley, J., "that a defendant has truly stated, in his publication, the speech made by counsel in stating a case to the jury; he must go further and show the truth of the facts there stated. It is the duty of a counsel to state facts, although they may be injurious to the character of individuals, and he is privileged so to do, if he speaks conscientiously according to his instructions, but if it were to follow that others might repeat what he says, it might be most injurious to the character of individuals; for, as to them, the reason for the privilege, which is the advancement of public justice, does not apply." *Vid.* also Hodgson v. Scarlett, 1 B. & Ald. 232.

In Stockdale v. Tarte (4 A. & El. 1016), where the plaintiff and another had been convicted of a conspiracy to extort money from a third person, an action of libel was brought against the publisher of a report of the trial, for publishing that the counsel who moved for judgment had stated the plaintiff to have been the writer of one letter, which was not in fact written by him, but by his co-conspirator. The plaintiff's evidence on the trial proving the great probability of the counsel alluded to having in fact made the statement reported, it was held that it was properly left to the jury to say whether the publication was a libel, and, the jury having found a verdict of not guilty, that this was not contrary to the evidence.

In Chambers v. Payne (5 Tyrw. 766), an action of libel was brought against the proprietors of a newspaper for publishing what purported to be a report of the trial of another action of libel, brought by the same plaintiff against the proprietors of another newspaper, who justified the libel on the ground of its truth. The report stated the libel on which the original action was brought, the defendant's proofs on the justification, and the judge's summing up, and ended by stating that the plaintiff had a verdict for £30. No proof was given that such a trial had taken place, or whether, if it had, the report in question was a fair and impartial report of it. Lord Abinger, C. B., told the jury that if, in their opinion,

comment upon it, and assume it to be correct; and it will make no difference if the sentence be afterwards reversed; for it would be manifestly unfair and unreasonable that the public writer should be held responsible for the results of a review of the decision or sentence.[1]

So, the hearing of a case upon a charge of felony, or a fair report of it in a newspaper, is a proper subject for comment in the press; and a public writer would not be liable to an action for discussing the conduct of the magistrates, in dismissing the charge without fully hearing the evidence, or even in commenting upon the evidence given in support of his view. If the report was so worded as to indicate a malicious motive against the plaintiff, or to be injurious to his character by misstatement, or by conveying an insinuation of his being actually guilty of the matter originally imputed, notwithstanding he was stated to have obtained damages for the imputation, or if the report of such a trial having taken place was pure fiction, invented by the defendants, their verdict should be for the plaintiff; but if they thought otherwise, or, that the report, though containing some allegations prejudicial to the plaintiff, yet when taken altogether, with the alleged verdict in his favor, was not on the whole injurious to him, the verdict should be for the defendants. The jury having found for the defendants, the court refused a new trial on the ground of misdirection.

In Rex v. Lofield (2 Barn. Rep. 128), decided in 1732, one Lofield, having recovered £1,100 damages in an action against a person named Bancroft for maliciously charging him with felony, published in the news "that Bancroft had conspired to charge him with this felony, that in vindication of his character he had brought an action against Bancroft for so doing, and had recovered £1,100 damages against him." The Court of King's Bench made absolute a rule for a criminal information against Lofield for this publication, because it falsely represented the fact; for Lofield did not bring his action for a conspiracy, but for Bancroft's maliciously charging him with felony, and a conspiracy requires an infamous judgment.

[1] Seymour v. Butterworth, 3 F. & F. 385.

however, he goes further, and not only argues upon the effect of the evidence given, but speaks of "evidence which might have been adduced," and makes statements of matters of fact not in evidence, and tending to show that the accused was guilty of the felony, the publication is a libel.[1]

381. Comments may be made by the press, on the evidence given by a particular witness in any inquiry on a matter of public interest, even, it seems, to the extent of imputing that the evidence is unfounded, incautious, or careless; but an unfounded imputation that the evidence is "maliciously" or "recklessly" false, would be libelous.[2]

382. It has been seen that a newspaper may be responsible for a libel contained in matter printed by it as an advertisement, though this has been doubted. It is clear, however, that the individual inserting the matter will be responsible.[3] It may even be libelous in a newspaper to record, under certain circumstances, the fact that a man is unpopular. A Mr. Hennesey, having received the ap-

[1] Hibbins v. Lee, 4 F. & F. 243.

[2] Hedley v. Barlow, Id. 224. In New York the publication of judicial proceedings is protected by statute, which enacts: No reporter, editor, or proprietor of any newspaper shall be liable to any action or prosecution, civil or criminal, for a fair and true report in such newspaper of any judicial, legislative, or other public official proceedings of any statement, speech, argument, or debate, in the course of the same, except upon actual proof of malice in making such report, which shall in no case be implied from the fact of publication (Laws 1854, c. 130, § 1). Nothing in the preceding section contained shall be so construed as to protect any such reporter, editor, or proprietor, from an action or indictment for any libelous comments or remarks superadded to and interposed or connected with such report (Id. § 2).

[3] Simpson v. Downs, 16 L. T. N. S. 391; and see Finden v. Westlake, 1 Mo. & Malk. 461; Gasset v. Gilbert, 6 Gray (Mass.) 94.

pointment of professor of mathematics in the Royal College of Science, Dublin, the appointment was unpopular with the students, who sent in a petition against it, charging him with incompetency; but, on inquiry, the committee of council justly confirmed the appointment, and the result fully confirms their opinion of the unjustness of the charge. The "Educational Reporter," a small monthly paper, in mentioning the dispute, in a paragraph of eight lines, appeared to indorse the opinion of the students, and Hennesey commenced an action. Not satisfied with the apology offered by the editor of that sheet, the action was tried in London, the jury giving the plaintiff a verdict, with seventy-five pounds damages.[1]

383. The proprietor of a newspaper is responsible for whatever appears in it, and it need not appear that he knew of or authorized it.[2] He is liable even if it is published against his express instructions.[3] And one who had been appointed by a court receiver of a newspaper, will be liable for libelous matter published during his control of the same;[4] but if one holds the

[1] Reported in The Bookseller, London, July 3, 1875.

[2] Huff v. Bennett, 4 Sandf. 130.

[3] Dunn v. Hall, 1 Carter Ind. 345; 1 Smith, 288; Curtis v. Mussey, 6 Gray (Mass.) 261; Andres v. Wells, 7 Johns. 260; but this is not undisputed; see per contra Commonwealth v. Kneeland, Thatcher Crim. Cases, 346; Rex v. Fisher, 1 Moo. & M. 433. In Rex v. Almon, and in Woodfalls' Case, where the publication was by a servant of the defendant, while the defendant was in prison. Rex v. Fisher, 1 Moo. & Mal. 433, held that the presumption arising from proprietorship of a newspaper may be rebutted, and an exemption established. If the publication is made without the consent of the writer, the offense is not complete as to him (Weir v. Hoss, 6 Ala. 881; see Holt on Libel, 294). As if the writing be stolen from him (Mayne v. Fletcher, 9 B. & C. 382). Townshend on Libel and Slander, p.

[4] Marten v. Van Schaick, 4 Paige, 477.

newspaper and its presses merely as an assignment for a debt, the property continuing to be worked and conducted by the assignor, the assignee would not be liable for libelous matter uttered by the newspaper.[1]

Where defendant published a pamphlet, entitled "Truth Vindicated," and alleged libels were contained in a review of that pamphlet published in a newspaper preceding the trial, Erle, J., said: "Where the plaintiff and defendant have both had recourse to the press, and the libel has been published in the course of a discussion in which both parties have been before the public, and in which the plaintiff first had recourse to the press, and made the matter public, it is important to see if malice has been made out against the party sued, or if he has published only what he believed was required for the interests of truth."[2]

384. "The right," it was said in Kane v. Mulvany,[3] "to criticise is not a peculiar privilege of the press, nor is a man any the less liable for wrongful or malicious acts, because he happens to conduct a public press."[4]

The constitution of New York provides: Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press (Constitution of 1846, art. 7, § 8). This is repeated in the bill of rights of that state, and similar provisions are,

[1] Andres v. Wells, 7 Johns. 260. This appears to be analagous to the case of the attorney who introduced defamatory matter into a pleading without his client's knowledge. And the client was held not to be responsible therefor. Hardin v. Comstock, 3 A. K. Marsh. 480.

[2] Hobbs v. Wilkinson, 1 Fost. & F. 608; and see Sheckell v. Jackson, 10 Cush. 25; Campbell v. Spottiswoode, 8 Law Times Rep. N. S. 201; Davison v. Duncan, 7 El. & B. 231.

[3] 2 Ir. C. L. 402.

[4] See cases cited supra, note 1.

we believe, to be found in the constitution of every state in the Union.[1]

385. Where matter reflecting upon the character of an individual is published in a newspaper, it will not be libelous for the attorney of the individual characterized to publish statements honestly intended to vindicate him.[2]

[1] Townshend on Libel and Slander, p. . March 14, 1859, in the New York Senate, Mr. Ely introduced a bill to amend chapter 130 of the Laws of 1854, by providing that no publication in any newspaper, respecting any person holding office, shall be deemed a libel, and providing that any assault upon the person of an editor who has made any such publication shall not be illegal or punishable, unless resulting in the death or maiming of the person assaulted. Id.

[2] Reg. v. Velley, 4 Fost. & F. 1117.

The preparation by M. Dufaure of a law for the regulation of the French press affords the Paris correspondent of the "London Times" an opportunity to speak of the rigorous character of the German press laws, and to fortify his description by a number of examples. Formerly the only punishment inflicted on a Prussian editor who published an obnoxious article was a small fine, provided that he had not read the article before printing it. In case, however, the government attempted to ascertain who wrote the article, and in the course of its investigation was met by the refusal of the editor, or any of the men employed by him, to make disclosures, such persons as refused so to testify could be imprisoned for a term not exceeding two years. This inquisition into the authorship of articles was very distasteful, and in 1862 an unsuccessful attempt was made in the Reichstag to abolish it. In May, 1874, a new press law was established, which was regarded on the whole as a concession to the freedom of the press. In this law, as proposed, a clause was inserted forbidding the inquisition into the authorship of articles, but at the last moment the government announced that its assent to the bill would depend upon the omission of this clause and the sanction of the right of the police to seize the edition of any journal. The new law concentrated responsibility upon the editor. This feature was thought to be a great improvement on the old law, because it tends to preserve contributors from the vexations and punishments which result from

In France, the penalty visited on a newspaper for publishing false news is very severe, and very few excuses are allowed.[1]

official supervision, and it was regarded moreover as a substantial guaranty that the government would not exercise the legal right which it retained to inquire into the authorship of articles. Within a few months, however, this right has been revived, and the correspondent of the "Times" mentions two attempts to enforce it. The first case is that of the editor of the "Frankfort Zeitung," who uniformly assumes full responsibility for whatever he publishes. He is now undergoing two sentences of three months' imprisonment for articles published in his journal, and several other prosecutions are still pending against him. The government has made a systematic attempt to find out who wrote these articles, and the entire office staff, including even the men employed in the mechanical departments, have been questioned as to their authorship. The writers have not been discovered yet, and no one has been imprisoned for refusing to give the desired information, but in case the authors were discovered the law would permit them to be punished, and as construed would not release the editor. Thus under the press laws of Germany two persons may be made to suffer for the same offense. The other case is that of an ultramontane journal at Berlin, whose account-books were seized recently by the government, to find out the source of certain articles. The information was not obtained, and the editor has announced that hereafter no accounts or other written evidence of connection with his journal will be kept by him.

The "Times" correspondent points out that one result of this close censorship of the German press is that the government will be held responsible abroad for whatever the German newspapers say.—N. Y. Evening Post.

[1] "Le Progrès du Nord," a radical newspaper, published at Lille, whose chief editor is M. Masure, formerly Chef de Cabinet to M. Gambetta during the Tours dictatorship, has been, June 19, condemned to 2,000 francs fine and 500 francs damages for propagating false news and publishing libelous articles against the Jesuits and Dominicans. "L'Echo du Nord," also published at Lille, has been condemned to 500 francs fine and 500 francs damages for similar offenses. These judgments carry costs

The relations of newspapers with the post-office have been already discussed.[1]

386. In 1874, a bill, supposed to have especial ref-

[1] *Ante*, vol. I. pp. 489–503. In October, 1874, a treaty was signed at Berne, in Switzerland, by the representatives of the United States, of all the states in Europe, and Egypt, goes into operation July 1, 1875. It stipulates that the countries between which the treaty was concluded shall form "a single postal territory for the reciprocal exchange of correspondence between their post offices." It establishes five cents as the general Union rate of postage for each prepaid letter not exceeding half an ounce in weight, and provides that a single rate shall be imposed for every additional half-ounce or fraction thereof. The Union charge for newspapers, books, or other parcels is a cent and a half for every two ounces, though, in the case of newspapers, countries so desiring it may fix the rate for a single copy weighing not more than four ounces at two cents. When either letters, newspapers, or parcels are carried more than three hundred nautical miles by sea within the territory of the Union, an additional charge not exceeding half the general Union rate may be levied. The general Union rate in regard to letters may be so far modified as to be reduced to four cents or raised to six cents per half ounce, according to the monetary or other requirements of the country fixing the rate. In the case of other postage, the general rate may be lowered to one cent or raised to two cents per two ounces. The country from which letters or other postal packets are dispatched —technically known as the "country of origin"—keeps all the sums collected under these rules, and the country of destination cannot levy any additional charge upon such prepaid letters or packages. In cases where they are unpaid, the country of destination keeps the money collected on them.

The necessity for an International Office of Account—to be established and organized in Switzerland—arises under the article which guarantees the right of transit through the entire territory of the Union. The liberty of sending "in transit through intermediate countries, closed mails as well as correspondence in open mails," involves the right to demand the supply of transit as well as the obligation of paying for it. The dispatching office must pay to the office of the territory providing such transit, at the rate of two francs per kilogramme—say twenty cents per pound—for letters, and twenty-five centimes per kilogramme—say two and one-half cents per pound, for newspapers and other postal packets. This pay-

erence to the growing power and audacity of the press of the country, was introduced into the senate of the United States. The word "newspapers" did not occur in the text of the bill, which provided merely that, for any crime committed against the United States—committed in the District of Columbia—the offender might be arrested in any state, and removed to the District of Columbia for trial; but the measure, which newspapers dubbed, from the name of its mover, the "Poland Gag-law," provoked great animadversion and criticism. The bill, however, became a law,[1] and it has been held thereunder that for a libel composed and published in the District of Columbia, an indictment

ment may be doubled when the transit provided is more than four hundred and sixty-six miles in length over the territory of one office. The members of the Union engage to reduce the expenses of sea service as much as possible, and the office providing ocean transit of over three hundred nautical miles cannot claim from the dispatching office more than seventy-five cents per pound for letters, or more than twenty-five cents per pound for other postal packets. The mail to British India, and the mails conveyed between New York and San Francisco, are to continue to be regulated by special arrangements between the post offices concerned.

The international postal system defined in the treaty is detailed with a good deal of minuteness in the regulations for its execution, which were signed along with the treaty itself. These are followed by a series of carefully drafted schedules and tables for the purpose of carrying out the uniform system of international postal administration which it was the purpose of the Berne congress to institute. The treaty is to be binding for three years from the first of July last, and a meeting of plenipotentiaries of the countries forming the Union is to be held every three years, with the view of perfecting the system now adopted and of discussing the common affairs of the Union. When the first term of three years has been passed, the treaty shall be considered as binding in perpetuity, but any contracting party may withdraw from the Union by giving notice one year in advance.

[1] Rev. Stat. U. S. § 3014.

may be found there, against the author and publisher; and if convicted, they may be there removed, wherever arrested, and punished accordingly; but the indictment must strictly aver a publication within the district, and an offense against the laws of the United States; otherwise it would be the duty of a federal court to refuse a warrant in any state for the removal of the alleged offender to the District of Columbia.[1]

[1] Re Buell, reported in Central Law Journal, vol. 2, p. 312 (May 14, 1875), which appears to be the first authoritative decision under the act alluded to, was an appeal by the United States from an order of the United States district court for the eastern district of Missouri, March 9, 1875, in a proceeding by habeas corpus, discharging one Buell from the custody of the marshal for said district, and refusing to issue its warrant for the removal fo said Buell for trial to the District of Columbia.

The defendant, Augustus C. Buell, was indicted July 2, 1874, in the supreme court of the District of Columbia, for a criminal libel on one Zachariah Chandler, a senator of the United States, contained in an article in the "Detroit Free Press," printed in the city of Detroit and state of Michigan, February 19th, 1874.

Buell was apprehended in the eastern district of Missouri, and committed by a commissioner to the custody of a United States marshal. Said Dillon, Circuit Judge, "In the argument before me the counsel for Mr. Buell has not maintained that the matter charged in the indictment to have been composed and published by him concerning Mr. Chandler is not in its nature libelous, and there is no doubt that it is so. Nor has the counsel for Mr. Buell controverted the position that for a libel composed and published in the District of Columbia, the offender may there be indicted and punished as for an offense against the laws of the United States. And of this opinion was the learned judge of the district court—that opinion resting upon the act of congress of February 27, 1801 (2 Stats. at Large, 103), adopting and continuing in force within the District of Columbia the laws of Maryland; the act of February 25, 1865 (13 Stats. at Large, 439), recognizing libel as an indictable offense against the United States in the District of Columbia, and the decisions of the supreme court of the United States concerning the effect of the above mentioned

387. The subject of contracts between newspapers, where essentially different from other contracts, will be treated in a following chapter, when we come to consider Contracts in Relation to Literary Property.[1]

act of February 27, 1801. Rhodes v. Bell, 2 How. 397; United States v. Simms, 1 Cranch, 258; Stelle v. Carroll, 12 Peters, 205; Kendall v. United States, Id. 524; ex parte Watkins, 7 Id. 575.

By the act of 1801, says Chief Justice Taney, "the common law in civil and criminal cases, as it existed in Maryland at the date of this act of congress (February 27, 1801), became the law of the District of Columbia, on the Maryland side of the Potomac." The Virginia portion was retroceded in 1846. 9 Stat. at Large, 33.

It will therefore be assumed that the offense of libel in the District of Columbia is an offense against the United States, for which the offender may be there indicted as at common law and punished.

This being so, and Mr. Buell having been there indicted for such an offense, our inquiry is, whether there is any law authorizing the removal of persons found beyond the District of Columbia to that district for trial, for offenses committed therein. In this respect there is no difference between libel

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[1] A novel point came before the court of chancery for decision in the case of Platt v. Walter, 17 L. T. N. S. 157. The defendant's grandfather had established both the "Times" and "Evening Mail" newspapers, the former in 1788, and the latter in 1789. The "Evening Mail," as described in the answer of the defendant, consisted of "a republication, on the evenings of the Mondays, Wednesdays, and Fridays in each week, of the matter (other than the advertisements) contained in the two preceding numbers of the 'Times,' with such omissions and abridgments as were considered desirable, but with the addition of a postscript containing the latest market intelligence, and also such advertisements as had been separately bespoken and paid for, for the 'Evening Mail.'" This mode of publishing both newspapers continued down to the year 1864, although in 1820 one-fourth share in the "Evening Mail" became, by purchase from a son of the original founder, vested in a stranger, from whom the plaintiffs derived their title. The object of the suit instituted in chancery was to have it declared that the arrangement which had been so long in existence gave the proprietors of the "Evening Mail"

388. It is not competent, in an action for services rendered, in preparing certain reports for a newspaper, to ask a witness if, in his opinion (founded upon his

and other offenses, and the question is a general one, whether for any offense committed in the District of Columbia, against the laws of the United States, the offender found elsewhere can be removed there for trial. On this point, under the law as it stands, I have no doubt. The authority is ample, and the language of the revised statutes (sec. 1,014) in connection with the act of June 22, 1874, removes the doubts arising on the words "such court of the United States as by this act (the judiciary act of 1789), has cognizance of the offense."

The District of Columbia is not a sanctuary to which persons committing offenses against the United States may fly and be beyond the reach of justice, nor is the law so defective that persons there committing such offenses and escaping or found elsewhere, cannot be taken back there for trial. I agree to the views in general of the district judge on this point, as expressed in his opinion, which accompanied the record in the case, and do not think it necessary to enlarge upon it.

The statute provides that United States commissioners and certain magistrates "for any crime or offense against the United States," may "arrest and imprison, or bail the offender

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certain rights and interests in and over the "Times," which the proprietors of the latter newspaper could not at their mere will determine, viz.: the right of republishing the matter of the two last preceding numbers of the "Times," or any selection and abridgment of it, and the right of causing to be edited, printed, and published the "Evening Mail" whenever the "Times" should from time to time be edited, printed, and published. The bill further prayed that, in case a notice given by defendant for the dissolution of the partnership had been properly given, it might be declared to be dissolved, and directions should be given for the sale as a going concern of the "Evening Mail," and the copyright and good-will thereof, including particularly the rights and interests in and over the "Times," and the copyright and good-will and other property thereof; and in case the proprietors of the "Times" should be unwilling to carry it on subject to such rights and interests of the "Evening Mail," then that the proprietors of the latter paper should be declared entitled to have the "Times" and the copyright, &c., thereof sold, subject to such rights and interest. The Vice-Chancellor (Stuart) dismissed the plaintiff's

having read the articles, and upon his familiarity with the author's style), the reports were written by the plaintiff;[1] but, under certain circumstances, handwritings may be compared.[2]

for trial before such court of the United States as by law has cognizance of the offense." Rev. Stat. sec. 1,014. An information was filed before Commissioner Clarke, who committed the prisoner to the custody of the marshal. In such a case the further provision is that "where any offender is committed in any district, other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender is imprisoned, seasonably to issue, and the marshal to execute a warrant for his removal to the district where the trial is to be had." Rev. Stat. sec. 1,014. On the proceedings before him the district judge refused to issue the warrant of removal and discharged the prisoner; and the question is whether his action in this case ought to be reversed.

The district judge, in making this order, proceeded upon the ground that he might properly look into the indictment, and if it was fatally defective in essential averments to con-

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bill, except so much of it as prayed a dissolution of the partnership and an account; and the Lord Chancellor (Chelmsford) confirmed this decision.

It was contended for the plaintiffs that, although so long as the original founder continued to be sole proprietor of both newspapers, no rights or interests could be said to belong to the "Evening Mail" either in connection with or independently of the "Times;" yet when the original founder had made a separate grant to one of his sons of one-fourth share in the "Evening Mail," he thereby not only gave birth to rights in that paper, but also created a kind of servitude over the "Times:" *i. e.*, he took upon himself an irrevocable obligation to allow the matter in its columns to be copied into the "Evening Mail," and to permit it to be printed at the same place and with the same types as the "Times." In reply to this, Lord Chelmsford says: "Suppose a covenant to this

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[1] Lee v. Bennett, How. Ct. App. Cas. 202.

[2] Tarpley v. Blabey, 2 Bing. N. S. 437; 2 Sc. 642; 7 Car. & P. 395; May v. Brown, 3 B. & Cr. 123; Finnerty v. Tipper, 2 Camp. 72; Wakley v. Johnson, 1 Ry. & M. 422; Stark. Sland. 429, 3 ed.; and see Morgan's Best on Evidence, vol. i. p. 437, as to handwriting.

389. A witness may testify to the contents of a paper not produced, if it is a printed one, always issued in the same form. To prove the publication in a news-

stitute an offense triable in the District of Columbia, he might refuse to issue the warrant for the prisoner's removal. It is argued that the question of the sufficiency of the indictment is for the court in which it was found, and not for the district judge on such an application. Re Clarke, 2 Benedict, 540. I cannot agree to this proposition in the breadth claimed for it in the present case. This provision devolves on a high judicial officer of the government, a useful and important duty. In a country of such vast extent as ours it is no light matter to arrest a supposed offender, and on the mere order of an inferior magistrate remove him hundreds, it may be thousands of miles, for trial. The law wisely requires the previous sanction of the district judge to such a removal. Mere technical defects in an indictment should not be regarded; but a district judge who should order the removal of a prisoner when the only probable cause relied on or shown was an indictment, and that indictment failed to show any offense against the laws of the United States, or showed an offense not committed or triable in the district to which the removal is sought, would misconceive his duty and fail to protect the liberty of the citizen.

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effect to be good against the grantor, who was sole proprietor and also printer of the 'Times,' how could it bind the future proprietors and printers of that newspaper? The covenant relates not to the property granted, but it imposes what may be properly described as a servitude upon the property, which is of a personal nature. It is at the utmost, therefore, a mere personal covenant, binding upon the covenantor and his personal representatives, but the burden of it not running with the property of the 'Times' against assigns."

In answering to a further argument on behalf of the plaintiffs, based on the length of time during which the arrangement had continued, the lord chancellor observed: "The presumption of a grant from long contiuned usage arises only where the origin of the usage is unknown. But in the present case, if the right claimed by the plaintiffs originated in the grant to William Walter [the founder's son], the usage is not required to establish it; and if it did not so originate, the usage is of no avail. The claim of the plaintiffs makes it necessary for them to prove that, either by the original grant of the shares in the 'Evening Mail' to Wil-

paper, it is not necessary to produce a copy actually published. 'It is sufficient to produce a copy, and prove that papers of the same kind were published.'

It is the constitutional right of the citizen to be tried in the district in which the offense imputed to him is alleged to have been committed, and not elsewhere. Article 2, section 2.

In this case the district judge discharged the prisoner, on the ground that the indictment failed to show that the alleged libel was published in the District of Columbia, but showed rather that the offense charged therein was an offense, if at all, against the laws of Michigan. If this is a proper view of the indictment, his action was unquestionably proper. The language of the indictment is peculiar. It was only necessary for the pleader to have averred that the defendant did not compose and publish the libelous matter, setting it out, within the District of Columbia. Such are the precedents. Why is it alleged out of the ordinary course, that the libel was composed and written in the form of a newspaper article, and printed in the Detroit Free Press, in the state of Michigan,

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liam Walter, or by some subsequent right obtained by the plaintiffs against the proprietors of the 'Times,' a perpetual benefit to the 'Evening Mail,' and a perpetual burden on the 'Times' were established, however prejudicial it might prove to the interests of the proprietors of the 'Times;' and that upon the dissolution of the partnership in the 'Evening Mail,' and the consequent sale of the property in that newspaper, the proprietors of the 'Times' were bound to give a value to the good-will by continuing the arrangement for its publication as long as the 'Times' should continue to be published. There is certainly no express contract to anything like this effect between John Walter, the grandfather, and his sons, when the separate interests in the 'Evening Mail' were first created; and it would be a strong implication to draw from the transaction, that the burden of such an obligation was intended to be assumed by Mr. Walter for himself and for all future proprietors of the 'Times.'" Finally, the lord chancellor said: "What are called in the bill the rights and interests of the 'Evening Mail' over the 'Times'

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[1] Simmons v. Holster, 13 Min. 249; and see Cook v. Ward, 6 Bing. 409; Rex v. Pearce, Peakes. Cas. 75; as to proving the time the publication took place, see Wright v. Britton, 1 Morris, 286; Richardson v. Roberts, 23 Geo. 215.

Newspapers, as a rule, are not evidence in courts of justice of the publication of matters advertised therein.[1] As, for instance, an advertisement, in a news-

and afterwards, to wit, on the day and year aforesaid, published in the District of Columbia?

The district attorney, notwithstanding some old English cases, very properly admitted that publication by the defendant in the District of Columbia was essential to the offense, and that if this libel was published in Michigan, by the procurement of the defendant, he could be there indicted for it. But he contended that if the paper containing the libelous article was afterwards published (in the legal sense) by the defendant in the District of Columbia, he could also be there indicted for it as an offense against the United States, and he claimed that in this aspect of the question, the indictment was sufficient to charge such an offense. Whatever may be the correctness of the contention of counsel in these respects, it seems to me quite doubtful whether the indictment intended to charge a substantive publication by the defendant in the District of Columbia, or any publication in that district, except so far as composing a libel there for publication in a newspaper elsewhere, is in law a publication in the district. This without more would not be a publication in the district. Upon the authorities it seems clear that if the defendant composed a libel in the District of Columbia, with intent to have it published in a newspaper in Michigan, and it was there published by the defendant's procurment or consent, he would be liable to indictment in the latter state (1 Russell on Crimes 258 and cases cited; 3 Chitty Cr. Law 872; Rex v. Johnson, 7 East, 68; Commonwealth v. Blanding, 3 Pick. 304). But the indictment would then be for an offense against the laws of the state of Michigan, and not of the United States.

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appear to me to have begun in will and pleasure, and to have continued throughout upon the same footing. They could at no time have been enforced; and upon the dissolution of the partnership in the 'Evening Mail' and its consequent sale, the court has no power to direct that they shall be included in the good-will and property of that newspaper."—Shortt, p. 286.

[1] Sweet v. Avenant, 2 Bay (S. C.) 492. Advertisements in a newspaper are improper evidence to go to a jury except to prove a notice under a statute, or the publishing of a libel, &c. Id.; and see Payson v. Everett, 12 Minn. 216.

paper, that a note for the payment of money had been illegally obtained, and was void, was no evidence of those facts.[1] Nor would an obituary notice, in a news-

Therefore the present indictment states facts which show a violation of the laws of Michigan. But it is contended that it also shows an offense against the laws of the United States in the District of Columbia. Merely composing the libel in the district would not be sufficient, as the whole corpus delicti, which includes publication in the district, is essential. If it had been intended to charge that the defendant not only wrote the libel in the District of Columbia, but after its publication in the "Detroit Free Press" he had also published it in the District of Columbia, in any manner which in law constitutes a publication, the pleader should either have followed the precedents and omitted all reference to the publication in Michigan, or, if he alleged such publication, he should have made a positive and plain allegation of a substantive and distinct publication by the defendant of the libel, in the District of Columbia.

As above remarked, the most natural construction of the indictment, is that it is framed upon the erroneous legal notion that if a libel is composed within the District of Columbia for publication elsewhere, and it is accordingly published, this, without more, is a publication in the district, and makes the offense complete. But suppose that it can be deduced that the pleader intended to charge a distinct, substantive publication of the libel by the defendant, in the District of Columbia, it can hardly be expected that the well-known requirements of certainty in the allegations of an indictment can be disregarded, and that the court will supply by inference and argument the defects or omissions in the indictment. The most essential ingredient of libel is the publication; and the all-essential element of the offense charged in the present indictment is the publication by the defendant within the District of Columbia. The uncertainty of the indictment in the latter respect is sufficient to vitiate it. As the grand jury have not plainly said that the defendant published the article in the District of Columbia, in addition to the publication in Michigan, the court cannot intend that they meant to say it. It is a fundamental doctrine in English and American law, that there can be no constructive offenses; that before a man can be punished, his case must be clearly within the law: the

[1] Ring v. Huntington, 1 Mill. (S. C.) Const. R. 162.

paper, be admissible in evidence to prove the fact of a person's death.[1] In any such cases, the manuscript of the advertisment or notice would first have to be accounted for.[2] But various matters of public knowledge, but of which courts could not take judicial charge is to be unmistakably set forth in the indictment, and if there be uncertainty or fair doubt, whether the law embraces the act, or the indictment sufficiently charges the offense, the doubt is to be resolved in favor of the accused. United States v. Morris, 14 Pet. 464. United States v. Wiltberger, 5 Wheat. 76.

I have no hesitation in applying these liberal and just principles to the present case, because if libel in the District of Columbia be an indictable offense against the United States, it is an exception, curiously brought about, to the general rule that there are no common-law offenses against the general government, and because the defect in the present indictment is not merely formal or technical, but goes to the gist of the offense for which the prisoner is sought to be removed.

The provision (Rev. Stat. sec. 731) that when any offense is commenced in one district and terminated in another, the trial might be had in either, and the offense may be deemed to have been committed in both, although urged by the district attorney, has, in my judgment, no application to this case. The argument is, that if the defendant composed the libel in Washington, and sent it to Michigan for publication, and it was there published, he may be tried in either place in the courts of the United States. Such an extension of the law of libel can hardly be said to have the sanction of the English courts, where prosecutions for libel have been carried very far, and it can not be very seriously expected that a court in this country will assert any such alarming and dangerous doctrine.

Not to mention other fatal objections to the argument, it is sufficient to advert to the fact that, in the case supposed, there is no law in the state of Michigan where the offense is said to have been "terminated," making libel an offense against the United States. The order of the district court is affirmed and the prisoner discharged.

[1] At least, in the State of New York, Fosgate v. Herkimer Mfg. Co., 9 Barb. 287.

[2] Sweigart v. Lowmarter, 14 Serg. & R. 200; Man v. Russell, 11 Ill. 586; Somerwell v. Hart, 3 Har. & M. (Md.) 546.

cognizance, have been allowed to be proved by the production of newspaper advertisements. As, for instance, the times of the arrival of a stagecoach; the state of the market at a certain date;[2] or that a certain establishment was a hotel;[3] or the offering of a reward,[4] or the like; or a comparison of the printing in two newspapers might be allowed, to show that they were printed by the same person.[5] The general rule in regard to other matters contained in newspapers will, as in the case of books, fall under the general rule that such publications, when not concerning things of which judicial cognizance is taken,[6] may be read to the jury, by permission of the judge, but as matter of argument, and not of evidence.[7]

[1] Commonwealth v. Robinson, 1 Gray, (Mass.) 555.

[2] Cliquot's Champagne, 3 Wall. 114; Sisson v. Cleveland, &c. R. R. Co., 14 Mich. 489; Henkle v. Smith, 21 Ill. 238.

[3] Stringer v. Davis, 35 Cal. 25.

[4] Lee v. Flemingsburg, 7 Dana, (Ky.) 28.

[5] McCorkle v. Binns, 5 Binn. (Pa.) 340.

[6] See Morgan's Best on Evidence vol. 1, p. ; and a late curious case in New York, where it was held error to instruct a jury that they might take notice that the Fifth-avenue, in the city of New York, was comparatively deserted and very quiet at midnight. Lanahan v. People, N. Y. Court of Appeals.

[7] See, as to books, Laning v. State, 1 Chand. (Wis.) 178; Wale v. DeWitt, 20 Tex. 378; Harmer v. Morris, 1 McLean, 44; Stondenmeier v. Williamson, 29 Ala. 558; Meckle v. State, 37 Id. 139; Bowman v. Woods, 1 Greene, (Iowa.) 441; Beebe v. DeBaun, 8 Ark. 510; Bostwick v. Bogardus, 2 Root. (Conn.) 250; Canfield v. Squire, Id. 300; Spaulding v. Hedges, 2 Pa. St. 240; McKinnon, 21 N. Y. 206; Fowler v. Lewis, 25 Tex. 380; Harris v. Panama R. R. Co., 3 Bosw. (N. Y.) 7; Bogardus v. Trinity Church, 4 Sandf. (N. Y.) 633; Denn v. Pond, 1 N. J. L. (Coxe) 379; State v. Daniels, 44 N. H. 383; Wood v. Banks, 14 Id. 101; Charlotte v. Choutean, 33 Mo. 194; Pettyjohn v. Pettyjohn, 1 Houst. (Del.) 332; Donaldson v. Mississippi, &c. R. R. Co. 18 Iowa, 280; Barbour v. Archer, 2 A. K. Marsh. 9; Green v. Croce, 17 La. Ann. 3;

390. Any manuscript letter or communication sent to any newspaper or periodical for the purpose, expressed or implied, of publication therein, becomes, upon its receipt by an editor or proprietor, the property of that newspaper or periodical, and should it fall into the hands of any other person, could not be lawfully published by him.[1]

391. It was held in Cooper v. Barber,[2] that where a party is sued for re-publishing a libelous article in a newspaper, and the re-publication is accompanied by remarks tending to a justification of the article, but not amounting to it, the defendant will not be permitted to prove the truth of the remarks in mitigation of damages, because the evidence would tend to prove the charge well founded. Evidence in mitigation must be such as admits the charge to be false.

392. While, as we have seen, newspapers are responsible to the parties themselves for negligent, wrongful, and injurious statements, they are not responsible to others; and one who, relying upon a newspaper report of the price of gold, or the state of the market, or the trial of a prisoner, the bankruptcy of a merchant, or upon any subject, should find himself damaged, could not recover from the newspaper. The reasons for this are many and obvious. In the first place, there is no privity of contract between the newspaper and the

Purchase v. Call, 1 Mass. 483; Ashworth v. Kittridge, 12 Cush. 193; Carter v. State, 2 Ind. 617. The writings of a living author upon historical subjects are not competent as evidence in a court, if the author is at the time within reach of the process of the court (Mowris v. Harmer, 7 Pet. 554). As to the authority of textual works, see a very interesting chapter of "Ram's Legal Judgment," and some very curious notes thereto by Mr. Townshend.

[1] Copinger on Copyright, p. 32; Hogg v. Kirby, 8 Ves. 215.

[2] 24 Wend. 104.

reader who purchases it. He is not obliged to buy it, and if he were, he could only reasonably expect to find the latest reports concerning matters in which if he was particularly interested, it was his duty to find out for himself. And in the second place, if any such rule should obtain, no newspapers could be published at all. They certainly could insert no tradesman's advertisement without becoming strictly liable to the world for that tradesman's statement that his wares were the best, the cheapest, or the most durable, or for any other extravagant or laudatory statement he might feel moved to make.

393. The newspaper has done everything for the United States. Nowhere else in the world has it undertaken, and nowhere else has it accomplished, so much, and the country has recognized in its law the debt she owes to it for the almost universal intelligence and education of her citizens. The laws of every one of the United States have not only been uniformly lenient in its treatment of the press, but invariably eager to guard the fulness and the sanctity of its freedom, and to carry that sanctity and freedom to their utmost limit. But, for all that, there are some things which even the press must not attempt, and some lessons which even the press must learn. We cannot too highly commend the late enunciation of a gentleman, himself an editor, which seems not only to express the spirit of all the law, but to say in a word all that can well be said upon the subject of this chapter: "There are no privileges of the press that are not the privileges of the people. Any citizen has a right to tell the truth—to speak it or write it—for his own advantage or the general welfare. No editor can properly claim, in a court or on the street, more than that. Our equality in rights with our neighbors is

positive. But if we have the means of addressing a larger audience than others, there is an increase of responsibility, and not an enlargement of right."[1]

[1] Mr. Halsted, of the Cincinnati Commercial, an address delivered before the Kentucky State Press Association, May 20, 1874. The circumstances under which editors and proprietors of newspapers may become liable to proceedings for a contempt of court, have been already considered. State v. Galloway, 5 Coldw. 326; case of the Memphis Avalanche, contempt; and see Lewis v. Levy, El. Bl. & El. 534; 4 Jur. N. S. 970; 27 L. J. Q. B. 282; Turner v. Sullivan, 6 L. T. N. S. 130; Delegal v. Highley, 5 Scott, 154; 3 Bing. (N. C.) 950; 8 C. & P. 444; 3 Hodges, 158; Lewis v. Clement, 3 B. & A. 702; 57 Moore, 200; 3 B. & B. 297; Lewis v. Walter, 4 B. & A. 605; Smith v. Scott, 2 C. & K. 580; 5 Caldw. 326. As to privileged communications and contempt of court, see the novel and interesting cases of Reg. v. Onslow and Whalley, 12 Cox's Criminal Cases, 358; and Reg. v. Skipworth, Reg. v. DeCastro, Id. 371, reported since the pages on Contempt of Court in the first volume were printed. These cases grew out of the famous Tichborne trial in England, that first cited holding that the making of speeches by two members of parliament and a barrister-at-law (at meetings convened by them for the purpose of raising money for the Tichborne claimant's defense), wherein the speakers imputed perjury and conspiracy to certain witnesses, and prejudice and partiality to the lord chief justice presiding (whom they asserted to have proved himself unfitted to preside thereat), was contemptuous of the court then pending (namely, a trial of the indictments against the claimant for forgery and perjury), and that, although the speeches might be the subject of a criminal information, the parties making them might also be prosecuted for a contempt of court, the remarks being an unwarrantable interference with the course of justice, an attempt to discourage and intimidate witnesses, to influence public opinion, and to deter the lord chief justice from presiding; and that it made no difference that the object of the meetings (*i. e.*, to raise money for the defense) was not illegal. The members of parliament proceeded against, upon apologizing and submitting themselves to the court, were fined one hundred pounds and discharged; but the case is positive to the effect that a privilege attaching to members of parliament would not prevent an imprisonment

of its members for contempt of court upon occasion. The second of the cases above cited held to the same effect, that while it was not a contempt of court to solicit subscriptions to enable a defendant on his trial on a criminal charge to carry on his defense, it was a contempt to impugn the impartiality or honesty of the judge before whom the trial was being had, or to attempt, by exciting public prejudice, to obstruct or resist the course of justice. See these cases reported in Mr. Moak's Reprint of English Cases, pp. 443–456.

CHAPTER V.

OF LEGAL REPORTS.

394. In primitive times, the question of jurisdiction and of the settlement of disputes was a very simple one, involving merely the calling in of a third party, to give an opinion concerning the claims of two adversely interested persons. The earliest form of jurisdiction was, undoubtedly, arbitration. As times advanced, however, this jurisdiction began, from the nature of things, to involve more. There seemed to be a moral reason why, when an opinion had been sought by the two opposing parties, and had been delivered by the third, that the two should abide by it. And so, the next step was to give the arbitrator authority to command obedience. This power being too great to be allowed indiscriminately to mere third persons, however, a sort of standing arbitrator, or arbitrator-in-chief, was sought. And so, the chief who led the clan, horde, or settlement to war, was naturally appealed to, to decide controversies. Cæsar, describing the Germans, and their manners, tells us, that "Quum bellum civitas aut illatum defendit aut infert, magistratus, qui ei bello præsint, ut vitæ necisque habeant potestatem delinguntur. In pace nullus communis est magistratus, sed principes regionum atque pagorum inter suos jus dicunt, controversiasque menuunt."[1] And his jurisdiction soon came to involve, not only the giving of an opinion as a third party, at

[1] Commentaria, lib. 6.

the request of two other adversely interested parties, but a privilege to declare what was law, and authority to compel obedience to his decrees—precisely what we understand by jurisdiction to-day. It followed soon, as a matter of course, that the chief ruler, or king, finding it impossible to sit personally in every difference or dispute between two subjects, was obliged to proceed vicariously to this branch of his duties. And so, judges were first appointed. Their appointment naturally suggested the next step, namely, the appointment of a place wherein they might sit, to hear disputes. And so, courts were established, which, in time, subdivided themselves into civil and criminal; and these, again, into higher and lower grades.

It is observable, however, that for a long time, and even among the most enlightened civilizations, that the functions of a judge continued to be, mainly, those of an arbitrator, or umpire; and all litigation was, in fact, more or less of an arbitration, or submission. Even under the admirable and codified laws of the Romans, the definition of "litis contestation" appears to have been a "judicial contract." The earliest analogy to a jury probably exists in the appointment of the dicasts at Athens, to the number of six thousand, who appear to have been judges both of law and fact. Certain it is, that the style used by counsel in addressing them, "*Οι ανδρες δικαστες*" is best translated by our modern formula of "Gentlemen of the Jury." But these dicasts were, in fact, only arbitrators, from whose decision there was no appeal.[1]

395. The actual appearance of a trial by a jury of twelve men is accredited to Great Britain, but his-

[1] See Aristophanes' Comedy of the Wasps, and Forsyth's admirable History of Lawyers, Ed. New York, James Cockcroft & Co., 1875, p. 26.

torians have never precisely settled its locality. In Woodward's "History of Wales from the Earliest Times," accounts are given of several sovereign Welsh princes and kings of the name of Morgan, warlike, and who constituted themselves formidable barriers against Anglo-Saxon domination and encroachment, some of them living as far back as A. D. 400. "To one of these ancient kings, Morgan, of Gla-Morgan, about A. D. 725, is accredited the invention and adoption of the trial by jury, which he called 'the apostolic law,' since, as Christ and his twelve apostles were finally to judge the world, so human tribunals should be composed of the king and twelve wise men!" And this was a century and a half prior to the reign of Alfred the Great, to whom is generally accredited the invention of juries.[1]

396. Courts, then, being organized and permanent, and open to all litigants, the next necessity which arose was the necessity of a record. For, as it was natural that the same or similar questions[2] should continually arise between suitors, it became vital that these courts should not stultify themselves by deciding a certain

[1] The curious student is particularly referred to "A History of Trial by Jury, by William Forsyth" (New York, James Cockcroft & Co., 1875), a work of great learning and research, for a careful examination of the merits of the various theories and traditions.

[2] The Roman law recognized this order very early in their history. They established certain forms of cases, formulæ actionem, and decreed that if the litigant could not bring his case under one or another of them, he could have no remedy. New cases, however, arising in the progress of things, they ordained still another form, actiones in factum, in which the fact might be set forth without any reference to form. The common law followed the Roman precisely, and ordained certain actions, such as trespass, trover, assumpsit, replevin, &c., answering to the formulæ, while the action on the case exactly corresponded to the Roman,—actiones in factum.

question in one way one day, and in another way the next. Hence arose the doctrine of precedents or reports of the decisions of the court, preserved for their own guidance in case of the recurrence of the same question. The more civilization advances, and commercial and social relations and interests magnify and commingle, the faster these reports will increase. And the number and volume of legal reports within its borders will be found to be an infallible test of the wealth, the importance, and the prosperity, much more than of the antiquity or the culture or refinement, of the realm or state.[1]

397. We shall have constant occasion to allude to the scrupulous fidelity with which the law has preserved its own records. It would seem worthy of notice, at least, in this connection, that even in traditional times the records of a forensic contest were deemed worthy of collection, and that even in the most fragmentary portions and desjecta membra of literature, such have been embalmed for us.

So in Homer,[2] in that earliest account of a trial, where inquisition is made for blood, in the description of the shield made by Hephæstus, at the request of Thetis, for Achilles, the parties are represented as pleading, each as his own advocate, before the judges:

[1] So in Abbott's United States Digest for 1874, we find digested for that year, eighteen volumes of reports of cases decided in the State of New York, and one each of cases decided in the States of Delaware and South Carolina. So of the Western States, we find three from Illinois, four from Wisconsin, five from Indiana to one from Texas. These figures undoubtedly depend somewhat upon the convenience or resources of the compiler, but the general idea which they convey of the relative commercial importance of States of about the same age and standing, otherwise, is tolerably accurate.

[2] Iliad, xviii. 497–508.

"The people thronged the forum, where arose
The strife of tongues, and two, contending, stood:
The one asserting he had paid the mulct,
The price of blood for having slain a man;
The other claiming still the fine as due.
Both eager, to the judges made appeal.
The crowd, by heralds scarce kept back, with shouts
And cheers applauded loudly each in turn.
On smooth and polished stones, a sacred ring,
The elders sat, and in their hands their staves
Of office held, to hear and judge the cause;
While in the midst two golden talents lay,
The prize of him who should most justly plead."

The Old Testament scriptures have preserved the trial of Susanna, at which the first bill of particulars was demanded by the defense;[1] and of the trial of title to an infant, before Soloman, and Diodorus Seculus, gives a very interesting account of a trial in ancient Egypt. "From each of the great cities of Egypt—Heliopolis, Thebes, and Memphis—ten of the most eminent persons were selected to form the court; these thirty, meeting, chose one of their number as president (*ἀρχιδικαστής*). In order to supply the vacancy thus occasioned among the puisnes, the city from whence he had come then sent another in his place. These judges were supported by the king, but the more ample maintenance fell to the lot of the president, who wore suspended around his neck by a gold chain (like that of the Lord Chief Justice or Chief Baron of England), a small image, made of precious stones. The name of this image was Truth, and whenever the president put it on, it was the signal for the commencement of the trial. The whole of the laws of the realm were contained in eight books, which, for the convenience of reference, lay before the judges. The proceedings were all conducted in

[1] See Mr. Shearman's argument on a motion for a bill of particulars in the case of Tilton v. Beecher, New York, 1874.

writing. The plaintiff first wrote down the nature of his cause of action, and the amount of damages which he claimed. The defendant then pleaded to the declaration, either by denying the facts alleged, or by confessing and avowing them, or pleading in mitigation of damages. Upon this, the plaintiff replied, and the defendant rejoined. The cause now being at issue, and the court, taking the proper books, proceeded to consider the case, and judgment was delivered by the president placing his image of Truth upon the written pleadings of the party in whose favor the court finally determined."[1]

We are told of a law-suit at Athens, involving a bottomry bond, a barratry, and a question of equity, in which Demosthenes appeared as counsel,[2] and

[1] History of Lawyers, Forsyth, p. 15.

[2] Hegestratus, who was master of an Athenian vessel, on a voyage to Syracuse and return, had a partner named Zenothemis. These two, when in Syracuse, conspired to borrow money on a bottomry bond, that is on the security of the vessel, and then to sink her, in order to avoid the necessity of payment. The ship was at the time loading a cargo of corn on account of Protus, an Athenian, who had bought it with money borrowed from Demon. Hegestratus and Zenothemis obtained the loan by representing themselves as owners of the cargo, and having put the money on board of another ship sailed homeward. During the voyage, Hegestratus, went below and began to knock a hole in the bottom of the vessel, while Zenothemis remained on deck with the passengers. The noise, however, attracted attention, and Hegestratus was caught in the act, and to escape seizure leapt overboard and was drowned. Zenothemis then tried to work on the fears of the crew to induce them to abandon the ship, she being in a sinking state. But the supercargo, by promises of large reward if they brought the ship into port, induced them to exert themselves, and she finally reached Cephallenia, "thanks," says Demosthenes, "first to the good providence of the gods, and next to the skill and bravery of the crew." After being repaired she proceeded to Athens, but on her safe arrival at the Peraius, Zenothemis claimed a lien on the corn.

there is an authentic report of the trial, at Athens, more than two thousand years ago, of Euphiletus, who had killed the seducer of his wife, one Eratosthenes, who had been surprised in the very act. Euphiletus was defended by Lysias, and—in reading the report of the trial, and of the latter's speech (composed for the defendant to deliver), in the account of the by-play in which the guilty wife attempted to accuse her husband of infidelity with her own maid, and in the circumstances of the discovery of the crime—it is difficult to believe in its great antiquity.[1]

The records of trials at Rome are too numerous and easy of access to render the recapitulation of instances necessary here. The trials of Jesus and of St. Paul[2] have received careful analysis and treatment at

alleging that it had been purchased by Hegestratus, with money which he had lent to him, and it was in this litigation that Demosthenes appeared as counsel.—Forsyth's History of Lawyers, p. 23.

[1] See this case reported in Forsyth (History of Lawyers, p. 44). Following this case (p. 48), is the report of an Athenian will case, where the testator (Cleonymus) when dying, sent for his will, in order that he might alter or cancel it, but the archion who brought it was prevented by the defendant from entering the house, and so Cleonymus died without destroying it, and the next of kin disputed the will which was thus preserved from cancellation. And see Inst. Quinct. Orat. ii. 15; and an amusing account of a mock trial in Lucians. Bis. Accusatis, quoted by Forsyth, p. 21 (note).

[2] See Greenleaf's Examination of the Testimony of the Evangelists (New York, James Cockcroft & Co., 1874), pp. 551, 613.

When the Apostle Paul was seized by the Jews, and delivered into the hands of authority, he, claiming the prerogative of his birth, said unto Festus, the Roman governor: "I stand at Cæsar's judgment-seat, where I ought to be judged, I appeal unto Cæsar." "Hast thou appealed unto Cæsar?" said Festus; "unto Cæsar shalt thou go!" After a time, when King Agrippa came to visit Festus, he sent for the technical prisoner, who stood on his rights as a citizen, and, hav-

the hands of learned commentators and students, M. Salvador, a learned Jew, having contended that the former trial was strictly in accordance with the law

ing heard St. Paul's defense, said: "This man might have been set at liberty, if he had not appealed unto Cæsar."

Agrippa spoke like a lawyer. St. Paul stood convicted of no crime or misdemeanor. There was nothing in the merits of his case on which to hold him in fetters, but he had blindly butted against a dangerous technicality, which, had he been a lawyer, he would have avoided. Had he been a lawyer himself, or had he employed counsel, he would have been apprised that his surest, swiftest way to a release, was to throw himself on the naked merits of his case; but, in his ignorance, he had appealed to the appellate court—the ultimate resort—unmindful of the weary distance between the subject and his emperor, which distance he must spend in prison and in bonds. Festus might have discharged him, Agrippa might have discharged him; but there was this theory, that every Roman citizen, by appeal to the emperor, gave the emperor jurisdiction of his case; and to have set St. Paul at liberty, he having invoked the throne, would have been to deny the imperial prerogative, and to have been guilty of præmunire and of treason. Were it not for these malevolent technicalities, lawyers might be drones in the hive; bare right would meet bare justice, unassisted by these intermediaries, and the unhappy apostolic mistake, in the matter of St. Paul (reported in Acts xxv., xxvi.), a warning to nobody.

"The law is a benignant mother to her busy children. She does not ask them to toil and fret in her service, and then force them outside of her pale for their recreation; she has her own grim humor, and often does she fetch a smile to the stern student's face as he pores over her black-lettered lore. Jurisprudence is perhaps the only system in the world that has scrupulously preserved its own record. Since its inception, there is no hiatus in its history; from smallest to greatest, every ruling of the court, every point of counsel, every dictum of the judge, she has written down for the guidance of her children, and bound in mighty tomes for their instruction. And there is much there, too, to entertain as well as to instruct, when, often and often, weary bench and tired bar have reanimated their flagging interest with interlocutory joke and jest, as dragged along some interminable case."

"Nothing will persuade the lawyer that he does not possess in his library the original of Shakespeare's inimitable grave-

and practice of the Jews at the time, and with the ordinary course of the administration of the Roman supervision, under which the Jews were held, while

digger's argument about "crowner's quest law" in "Hamlet" —the famous case of Hales v. Pettit, reported in old Plowden, A. D. 1550. Sir James Hales, a justice of the common pleas, committed suicide by throwing himself into a water-course. The coroner sat upon his body, and this being before the days of "moral insanity," presented that, "passing through ways and streets of the said city of Canterbury, he, the said James Hales, did voluntarily enter the same, and did himself therein, voluntarily and feloniously, drown." Suicide being a felony, this felony worked a forfeiture of his estates. But, in answer to this, his successors pleaded that Sir James did not commit suicide; he only threw himself into the water, and suicide implying death, as he did not die during his life, he committed no suicide. The question was, then, did Sir James commit suicide during his life? For, if he only threw himself into the water in his lifetime, throwing himself into the water is no felony, and the suicide not being complete until his death—it being impossible for him to have died during his life—ergo, he committed no felony. This perplexing proposition was argued by six sergeants-at-law, and their wearying dialectics, here recorded in solemn black-letter, are fully as mirth-provoking as in Shakespeare's travesty. The question arose in the course of a suit for trespass brought by Lady Hales, claiming, as survivor in joint-tenancy of her husband, against one Pettit, attempting to enter by virtue of a crown-grant of the forfeited estates. The lawyers worked themselves into a hopeless desperation, which it was left for William Shakespeare to disentangle for the public verdict.

"1st Clown. It must be se offendendo; it cannot be else; for here lies the point: if I drown myself wittingly, it argues an act, and an act has three branches, it is, to act, to do, and to perform: argal, she drowned herself wittingly.

"2nd Clown. Nay, but hear you, goodman delver.

"1st Clown. Give me leave. Here lies the water; good. Here stands the man; good. If the man go to this water, and drown himself, it is, will he, nil he, he goes; mark you that: but if the water come to him, and drown him, he drowns not himself: argal, he that is not guilty of his own death, shortens not his own life.

"2nd Clown. But is this law?

"1st Clown. Ay, marry is't; crowner's quest law."

M. Dupin has criticised the same, contending that, by certain irregularities in the trial, they are liable to the imputation of having put Jesus to death unjustly.

That which purges of the felony in Hales v. Pettit entitles to Christian burial in re Ophelia (reported in "Hamlet," vol. 1), and in either, if the water did the deed, the human being was unaccountable.

This almost equals the burlesque case of "Straddling against Stiles," written by Dr. Arbuthnot, and whose humor, says Warren, "is not greater than its fidelity." Here a testator bequeathed to his friend, Matthew Straddling, "all my black and white horses." Said testator left six white, six black, and six pied horses. His executor, Stiles, delivered to Straddling the six white and the six black, but the latter demanded the six pied horses as well, and brought suit therefor. Learned counsel for the plaintiff contended that "white and black are the two extremes of colors, and, therefore, include all colors whatsoever. By a bequest, therefore, of black and white horses, gray or pied horses are passed; for, when two extremes or remotest ends of anything are devised, the law, by common consent, will intend whatsoever is contained between them. But the present case is still stronger; since, by the word black, all black horses are devised; and, by the word white, all white horses are devised; and by the same words, with the conjunction copulative between them, the white and black, *i. e.*, the pied, are devised; for whatever is black and white is pied; and whatever is pied is white and black." This reasoning appears to have carried the court with it: for although the defendant's sergeant stoutly maintained that "a pied horse is not a black horse, neither is a pied horse a white horse," "Le court après grand déliberation eu-judgment fuit donner le plaintiff, nisi causa."

"Motion, in arrest of judgment, that the pied horses were mares! Thereupon, an inspection was prayed. Et sur le court advisare vult."

Half a dozen years ago, we had the spectacle of an entire court, bench, and bar, turned into lexicographers and philologists, buzzing over dictionaries, dragging down the classical masters, and pulling over the poets with a most exemplary energy.

The duke of Cornwall had leased one of his farms, under an agreement which provided, among other things, that the tenant should "perform work and service for his grace, at the rate of one day's team-work, with two horses and one proper

398. A reported case is an authority.[1] "Our book-cases," says Coke, "are the best proofs of what is law."[2] "A report," he continues, "is a memorial or remem-

person for every fifty pounds of rent." One day, his grace's steward requested the tenant to sent a cart to transport some coals. "I will furnish you a team and a man, according to my agreement," said the latter, "but am not bound to send any cart." His grace thereupon brought an action in ejectment against his tenant for failure to comply with the condition, and consequent forfeiture of his lease. Tenant denied the non-performance, and plead readiness to comply, &c. The question was, of course, the construction to be placed upon the word "team;" does "team" mean horses and vehicle, or only the horses? If the first, judgment for the duke; if the second, judgment for the farmer. The case was tried before a jury at Oxford, who found for the duke. A rule was obtained, and the question of the definition of the word team brought before the judges of the Queen's Bench. Before this tribunal, the complainant contended that a team was both the horses and the vehicle; that such must surely be the sense of the word in the lease, since "team-work" cannot be done by horses without a wagon, and work done by horses without a wagon is not team-work: *e. g.*, two horses drawing a wagon are doing team-work; two horses grinding corn are not doing team-work. So Gray:

> "Oft did the harvest to their sickle yield,
> The furrow oft their stubborn glebe hath broke;
> How jocund did they drive their team afield,
> How bowed the wood beneath their sturdy stroke!"

Johnson and Walker both define team, "A number of horses drawing the same carriage;" then, too, a teamster is a man who drives a team. Clearly, a man who drives horses in droves, or working a tread-mill, is not a teamster; but, if he drives horses pulling a wagon, then he is, per se, a teamster.

But now comes defendant's counsel, armed with Bosworth's "Anglo-Saxon Dictionary," Richardson's "English Dictionary," and the whole library of poets. To prove that team means only the horses, and not the carriage, he reads from Spenser:

> "Thee a ploughman, all unmeeting, found
> As he his toilsome team the way did guide
> And brought thee up a ploughman's state to bide."

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[1] Litt. Mon. §§ 420–514; Co. Lit. 11 a, 24 a, 293 a, 2936; 3 Co. Pref; 4 Inst. 4; 1 Black. Com. 71.

[2] Co. Lit. 254 a; and see Id. 260 a.

brance, in rolls of parchment, of the acts and proceedings of courts of justice, which hath power to hold pleas, according to the course of the common law."

Again, from his "Virgil":

"By this the night, forth from her darksome bower
Of Erebus, her teamed steed you call."

From Roscommon:

"After the declining sun
Had changed the shadows, and their task was done,
How with their weary team they took their way."

Shakespeare, too, was evidently for the defendant, saying:

"We fairies that do run
By the triple Hecate's team,
From the presence of the sun,
Following darkness like a dream."

And again:

"I am love, but a team of horses
Shall not pluck that from me, nor who 'tis I love."

Dryden, too:

"He heaved with more than human force to move
A weighty straw, the labor of a team."

And, in another place:

"Like a long team of snowy swans on high
Which clap their wings, and cleave the liquid sky."

Says Martineau: "On stiff clays they may plough an acre of ground with a team of horses."

"I do not consider," said one of the judges, "that the duke has proved a forfeiture; the word team does not clearly imply the cart as well as the horses. Says Wordsworth:

'My jolly team will work alone for me;'

and this discretion Wordsworth would not apply to the cart, even if he did the adjective 'jolly,' while both may be predicated of horses. I remember this:

'Giles Jelt was sleeping, in his cart he lay:
Some waggish pilfrers stole his team away;
Giles wakes, and cries, "Ods bodikins! what is here?
Why, how now? am I Giles or not?
If he, I've lost six geldings to my smart—
If not, ods bodikins, I've found a cart!'

And, as to the meaning of the word in the lease, it would seem impossible that the tenant should be expected to bring a vehicle before he knew the quality of work required of him; whereas, when he brought horses, they could be attached to the vehicle the necessity demanded." And so their honors

In the first instance these reports were a mere memoranda of the judge's disposition of the case. "In the records the reasons or causes of the judgment are not

held that team means the horses, and not the horses and carriage together.

Perhaps a more curious case than any of these was that of the brothers who claimed a legacy of two hundred thousand francs apiece under their uncle's will; whereas, the residuary legatee denied, in the French courts, their right to more than half that sum. The will was written in French. The writing giving the legacies was: "A chacun d eux cent mille francs." But, between the d and the eux, there occurred a speck of ink. Here the litigants put themselves upon the country; for, if this speck were made by the pen intentionally, it was an apostrophe, and reduced each legacy to one-half the amount claimed, giving them each one hundred thousand francs; but, if it were merely an accidental blot, made in folding the paper before the ink was dry, they were each entitled to two hundred thousand francs. The two readings were:

1. A chacun deux cent mille francs.
2. A chacun d'eux cent mille francs.

The first interpretation is: "To each one two hundred thousand francs;" the second, "To each one of them one hundred thousand francs." Being a question of fact, this, while fully as entertaining as the others, would hardly have been as profitable to counsel employed. And see Morgan's Best on the Principles of Evidence, p. 451.

"In the rude origin of law, such a dispute as this last would have been settled by the contestants in open field, vi et armis. Even questions of law were once thus arbitrated. In Germany, there was a long dispute whether a man's children should inherit his effects during the life of their grandfather. At last, it was agreed at the diet of Arensburg, about the middle of the tenth century, that the point should be decided by combat. Accordingly, an equal number of champions being chosen on both sides, those of the children obtained the victory, and so the law was established in their favor, that the issue of a person deceased should be entitled to his goods and chattels in preference to his parents" (Mod. Un. Hist. xxix., 28). The wager of battle is treated of by Blackstone (as obsolete), though, on the authority of "The Diary, Reminiscences, and Correspondence of Henry Crabb Robinson," it was (once) resorted to as lately as 1817."

"Retainers are among the least understood amenities of law-

expressed," says Coke, "for wise and learned men do, before they judge, labor to reach to the depths of all the reasons of the cause in question, but in their judgment express not any; and in troth, if judges should should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the commonwealth, and their records should grow to be like elephantini libri, of infinite length, and, in my opinion, lose somewhat of their present authority and reverence." It is to be regretted, that in these days of stenographic reporters and law-book makers, the old lawyer's prophecy has come to be literally true, and the evils which we shall presently notice, are thick upon us.

399. "Sir Edward Coke," says Ram,[1] "mentions the

yers. No lawyer works for a prospective fee—making his renumeration contingent upon his success—yet most laymen fail to see that such a course would result in the utter uselessness of the profession. And why? Surely because you cannot be unprejudiced where your interests are at stake; it is not human that you should be; hence you go to your lawyer for a clear, unbiassed brain. But if you make his fee depend upon your own and his prevailing,—if, in other words, you make him as interested as yourself,—how can he give you that clear, unbiassed judgment, that cool instruction, you so imperatively require?"

"Nothing so abundantly preserves the ancient and majestic origin of the profession as this very custom of taking the retainer. So exalted and valuable a privilege was it held to be to speak for the oppressed, that the Roman client would have as soon thought of feeing the Pontifex Maximus for a sight of his sacrifice to Jupiter as the proctor for pleading his case.

"Under the tables, the lawyer could take neither fee nor reward, but his client would present him beforehand with a token (honorarium) of his regard and confidence."—Appleton's Journal, vol. 2, No. 38, Dec. 18, 1869.

[1] 3 Co. Preface, 3.

[2] The Science of Legal Judgment, p. 77; and see, for valu-

fact that the kings of this realm, that is to say, Edward the Third, Henrys the Fourth and Fifth, Edward the Fourth, Richard the Third, and Henry the Seventh, did select and appoint four discreet and learned professors of law, to report the judgments and opinions of the reverend judges." And by this consideration, among others, it may be observed, appear how profitable and necessary the reports of the judgments and cases in law, published in former ages, have been. And, according to Sir W. Blackstone, the reports are extant, in a regular series, from the reign of Edward the Second, inclusive; and from his time to that of Henry the Eighth, were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown, and published annually, whence they are known under the name of the year-books.[1] And the same learned writer, in continuation, says, "It is much to be wished that this beneficial custom had, under proper regulations, been continued to this day; for though James the First, at the instance of Lord Bacon, appointed two reporters, with a handsome stipend, yet that wise institution was soon neglected; and from the reign of Henry the Eighth to the present time this task has been executed by many private and contemporary hands, who, sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect, perhaps contradictory accounts of one and the same determination.[2] And yet, with all these difficulties and acknowledged evils, the great library of the reports is distinguished as an example of faithful records and

able commentaries on the reports, see Wallace's admirable treatise on "The Reporters."

[1] 4 Ves. 24

[2] 1 Black. Com. 72.

minute memorials, such as no other earthly institution can exhibit.

400. There is no literature that can compare for extent, magnitude, and scrupulous and accurate perpetuation of its records, parts, and fragments, with the literature of the law.[1] Of making many books there is

[1] Neither is there any branch of general literature which does not owe a large debt to lawyers. That there is an intimate connection between the law and literature there can be very little doubt. "Petrarch was a law student—and an idle one—at Bologna. Bocaccio began life with the intention of being a lawyer, Goldini, till he turned strolling player, was an advocate at Venice. Metastasio was for many years a diligent law student. Tasso and Ariosto both studied law at Padua. Politian was a doctor of law. Schiller was a law student for two years, before taking to medicine. Goethe was sent to Leipsic, and Heine to Bonn, to study jurisprudence. Uhland was a practicing advocate, and held a post in the ministry of justice at Stuttgart. Ruckert was a law student at Jena. Mickiewicz, the greatest of Polish poets, belonged to a family of lawyers. Kacinczy, the Hungarian poet and creator of his country's literature, studied law at Kaschau. Corneille was an advocate, and the son of an advocate. Voltaire was, for a time, in the office of a procureur. Chaucer was a student of the Inner Temple. Gower is thought to have studied law; it has been alleged that he was chief justice of the common pleas. Nicholas Rowe studied for the bar. Cowper was articled to an attorney, called to the bar, and appointed a commissioner of bankrupts. Butler was clerk to a justice of the peace. The profession of Scott need not be stated. Moore was a student of the Middle Temple, Gray, until he graduated, intended himself for the bar. Campbell was in the office of a lawyer at Edinburgh. Longfellow, a lawyer's son, spent some years in the office of his father. . . . . Milton was the son of a scrivener. There is no need to indorse the fancy that Shakespeare may have been a law clerk; he certainly, from some source or other, introduces into his plays an extraordinary amount of legal knowledge, and, if a lawyer at all, was certainly a very sound one, since he appears to have stated no single proposition which, so far as we have proceeded in the three hundred years since, we have found occasion to reverse. Dante passed many years in residence at the great legal university of Bologna. But there is

no end Poets, historians, philosophers, and casuals live and write and die, and their thoughts sometimes survive them. They all toil for a hard mistress, who now and then rewards them with a few brief years of immortality. Now and then there have been favored sons of hers whose usefulness has turned a century, but how few! Homer, and Shakespeare, and Bacon, and perhaps as many more, but beyond them, who? The grand army of authors, no less than "the mob of gentlemen who wrote with ease," who were their stragglers and camp followers, have come to find their immortality with the bookworm, while the world listens to its own contemporaries.

Look, on the other hand, at the law. For eight hundred years she has written down in records more lasting than brass, every utterance from her bench. Not one syllable has escaped her. Nations have been born and shattered, have been rebuilded and lost, and sunk from history and tradition; but the words uttered from the judicial bench in the days of Moses (who, according to Lord Coke, was the first law reporter)[1] of the judges of Israel, of Solomon, of Tiberius and Augustus Cæsar; in the crude days of King Stephen, and of King Henry the Second, stand side by side on the shelves of the lawyer with reports of the term that adjourned yesterday, and he reads from the Rotuli Curiæ Regis, 1194—of the days of King Richard and King John—and from the last volume of

another list strikingly to the purpose—the long roll of great lawyers who, like Cicero, Sir Thomas More, Lord Somers, Blackstone, Sir William Jones, Lord Campbell, and in later days Samuel Warren, Thomas Hughes, Saxe, Mr. Butler, and a host of others, have found flirtation with the Muses no impediment to their marriage with the law."

[1] Preface to 6 Rep. p. xv.

the report of his own state, alike, when he constructs his brief. Jurisprudence is the only human system that has from first to last scrupulously preserved its own record. Since its inception, there has been no hiatus in its history; from smallest to greatest, every ruling of the court, every point of counsel, every dictum of the judge, it has written down for the guidance of those that should come after. And it has come to pass that the law is, perhaps, the only learned profession to which books are an absolute necessity. Other men of letters might, upon an emergency, manufacture their authorities, but scarcely the lawyer.[1]

401. And yet, it is but candid to confess that in all this mass of literature there is much of error, misquotation, mistake, and incorrection. Says Mr. Wallace, in his most valuable and interesting treatise:[2] "We have, up to this date, nearly thirty scores of different persons who have acted as reporters, nearly all of them self-constituted, and without having been subjected to any antecedent test of integrity, education, or general capacity.[3]

[1] The French law requires that a lawyer shall have "a decent lodging, and a library of books," before he can be admitted to plead.

[2] Wallace on the Reporters, p. 5.

[3] As illustrative both of the magnitude of the undertaking which aims to report everything coming from the bench, and of the lax and unreliable records produced by incompetent, careless, and hasty reporting, we annex the following interesting and valuable report of a committee of the Bar Association of the city of New York, to whom this subject was lately referred.

At a meeting of the Association of the Bar, held on the 13th day of May, 1873, Mr. Delafield, as chairman of the committee on law reporting, made their report as follows:

To the Association of the Bar of the City of New York:

The undersigned to whom the subject of law reporting

402. This system, mighty and admirable as it is, however, has its disadvantages. It must be confessed that the grand problem with which the learned pro-

was referred by the Association of the Bar of the city of New York, respectfully report:

That there are at present seven independent Reporters in this State, editing the seven series of regular reports mentioned below, and each of them issuing, annually, about the following number of volumes:

Sickles' New York Reports	.....	4
Lansing's Supreme Court Reports	.....	3
Barbour's " " "	.....	3
Abbott's Practice "	.....	2
Howard's " "	.....	3
Daly's Common Pleas "	.....	1
The Superior Court "	.....	2

The Reports of the Surrogate's Court are published irregularly, and are not included in this list. Besides this, there are the various law periodicals, and the irregular reports, such as Keyes' Reports, and the Transcript Appeal Reports. The last two belong to a class of reports which the profession is likely to have forced upon it whenever it is supposed that a profit can be made from them. They occupy a position in reporting very similar to that of mercenary troops in war—the sole object of both being personal gain.

It was evident, from a very superficial examination of these reports, that grave faults were to be found with them, and with the system which fostered them.

Your committee were so impressed with the fact that they determined to undertake the great labor of a critical examination of all the reports of the State during the last five years.

This mode of procedure recommended itself as being the fairest to the reporters whose works came under review, excluding, as it did, the possibility of a judgment based upon defects in any one or two volumes.

Besides this they have generally examined all the reports, and carefully considered their faults.

Although the resolution appointing your committee condemns the pretent system of law reporting, and declares that it requires amendment, it is believed that very few of the profession have any adequate idea of the extent of the evils complained of, and as your committee are of the opinion that radical changes are necessary, they think it best to detail the results of their examination somewhat at length.

From the year 1307 to 1872—a period of 565 years—there

fession is to grapple, is how to curtail in future this vast body of decided law, which is rolling up in such unwieldy proportions. Under our present system, it were published in England 1,036 volumes of reports. The great increase of these books claimed the attention of the British bar at various times during the past century.

They felt that they would be overwhelmed if the evil were not checked, and this conviction culminated in the reform inaugurated by the Council of Law Reporting.

Our plight, however, is infinitely worse than theirs ever was. From the year 1794 to 1873—a period of 79 years—there were published in the State of New York alone 400 volumes of reports; more than one-third of the reports of Great Britain for 565 years.

If the 190 volumes of the decisions of the United States courts are added—which should be done to make a fair comparison with the number of English Reports—there are 590 volumes in 79 years; more than one-half of all the reports of England.

A table of the American Reports, prepared by the librarian of the Albany Library, in 1871, shows 2,012 volumes—nearly twice as many as the reports of Great Britain in seven times as long a period—and of this number, the reports of the State of New York were 348, or one-sixth of those of the whole country.

Judge Story, in noticing the fact that between the revolution and the year 1821, more than 150 volumes of law reports had been published in the United States, said: "The danger indeed seems to be, not that we shall want able reports, but that we shall be overwhelmed by their number and variety."

If anything could draw the spirit of the great commentator back to the earth, it might well be a wish to retract his opinion as to the ability of the reporters; and if anything were needed to keep it away, the 2,000 volumes of our decisions might have this effect.

Your committee find that the number of the reports is due to the fact that law reporting has become a distinct business, conducted by private individuals for their own emolument; that book-making is the interest of those engaged in this traffic, and that their profits depend, not upon the excellence, but upon the number of the volumes they edit; the profession having been found ready to buy whatever the publisher would print.

is not difficult to see that, in a few years, no libraries will contain the law reports of the world. Let us suppose that a point, which is first decided in the Year-

This general charge is fully sustained by an examination of the reports under the following heads :

Multiplication of reports of the same case.

Indiscriminate publication of whatever is presented.

Prolixity.

Reckless reporting.

The extent to which reports of the same case are multiplied can be best appreciated by an examination of the tables which are annexed to this report.

These tables include the number of times each case is reported in all its stages. Thus, the reports of the same cases, six, seven, and eight times, are not always the same opinion, but present the actions in their different conditions. Many motions are made and appeals taken in the progress of causes, the decisions of which, although utterly unimportant as precedents, find their way into the reports.

It was thought best to include them all under this head, for the purpose of showing how the wholesale business of manufacturing reports is carried on.

The tables, therefore, only show approximately how many times precisely the same decisions are reprinted in the various reports.

On this point, your committee find that it is common to find four reports of the same case differing very little from each other, three reports of the same case are numerous, and there are two of every important case and of many unimportant cases. The editor who first reports a case is not responsible for its republication by others, and its subsequent multiplication is chargeable upon the system and not upon him.

The following general summary of the examinations made under this head may not prove uninteresting.

The ten volumes of Howard's Practice Reports, from volumes 34 to 43, contain reports of 770 cases.

In these volumes there are 89 cases again reported in the Superior Court Reports, 87 cases again reported in Abbott's Pr. Reports, 15 cases again reported in the Common Pleas Reports, and 52 cases are decisions of the Courts of the United States.

There are 72 decisions of the Court of Appeals, and of this number 49 are again reported in the New York Reports.

books, occurs to-day. If the case approach a hearing hurriedly, it is fair to suppose that the briefs of counsel on either side will cite a fair proportion of modern

The table shows that in volumes 35 to 43 of Howard's Pr. Reports there are—

1 case which is reported 7 times in the various reports.
2 cases which are reported 6 times in the various reports.
7 " " " 5 " " "
33 " " " 4 " " "
73 " " " 3 " " "
199 " " " twice " " "

In volumes 5 to 10 of Abbott's Pr. Reports, N. S., there are:

1 case which is reported 7 times in the various reports.
1 " " 6 " " "
8 cases which are reported 5 times in the various reports.
11 " " " 4 " " "
39 " " " 3 " " "
77 " " " twice " " "

In these volumes there are 41 cases again reported in the Court of Appeals Reports, 41 cases again reported in the Supreme Court Reports, 12 cases again reported in the Superior Court Reports, 57 cases again reported in Howard's Practice Reports, and none again reported in the Common Pleas Reports.

In volumes 55 to 62 of Barbour's Reports, there are:

1 case which is reported 8 times in the various reports.
1 " " " 6 " " "
7 cases which are reported 5 times in the various reports.
5 " " " 4 " " "
26 " " " 3 " " "
58 " " " twice " " "

There are 41 cases reported in Barbour's Reports which are also reported in Lansing's Reports.

The first 5 volumes of Lansing's Reports contain 41 cases again reported in Barbour's Reports, 4 cases again reported in Abbott's Pr. Reports, and 7 cases again reported in Howard's Pr. Reports.

Two hundred and four pages of Redfield's Surrogate's Reports, issued in 1864, are devoted to a single case which had been reported at length the year before in the New York Reports.

Your committee find that little or no discrimination is used by any of the present reporters (except Judge Daly) in the character of the cases they report.

That reports are constantly published which enunciate no new principle, and give no useful illustration of the applica-

decisions, say within the ten years immediately preceding. Upon its decision, the majority of these will be noticed by the judge in his written opinion, which

tion of an old principle, which are not worthy of preservation, and only furnish false lights to be reversed by the appellate courts. They have no hesitation in saying, that two-thirds of all the reported cases are of this character, and should not be reported at all.

There will, of course, always be room for a fair difference of opinion as to what should and what should not be reported.

There is no room, however, for any doubt as to the worthlessness of two-thirds of our reports, as herein explained.

The tables appended to this report show the number of cases affirmed or reversed on appeal in the volumes specified. An examination of the cases reversed will satisfy any lawyer that a large proportion of them should not have been reported, that they are opposed to well-known principles of law, and were such as must have been reversed on appeal. A similar examination of the affirmed cases discloses the fact that many of the appeals were taken for the purpose of delay; the questions involved present nothing new, the judgments were such as must have been affirmed, and the decisions of both the inferior and appellate courts are, for this reason, unworthy of preservation for citation or reference.

The small number of reversed and affirmed cases shown on the tables in the last volumes of each series of reports, is not to be attributed to any decay in the spirit of litigation, but to the fact that some of the cases there reported are still before the courts.

It is a common practice of the reporters to publish the opinion of the inferior court at the same time with that of the appellate court. Where the judgment above affirms that below, the opinion of the inferior court is generally useless, and merges in that of the appellate court. Where the judgment is reversed, the opinion below is absolutely valueless. The necessity of book-making, however, disregards all scruples of this kind. It is no uncommon thing to find the opinion of the courts of first resort reported years after they have been reversed by the appellate courts.

The following are a few samples:

Cases in which the opinions of the special term and general term are reported together.

is at once printed in a volume of reports. Just in proportion as the tribunal is higher or the time longer, or the counsel more eminent and scrupulous, the

People v. Norton, 59 Barb. 174.
Id. v. Gardner, 59 Barb. 203.
Cary v. Grant, 59 Barb. 575.
Marshall v. McGregor, 59 Barb. 519.
Cleveland v. Barrows, 59 Barb. 366.
Clark v. Holdridge, 58 Barb. 64.
Robinson v. Flint, 58 Barb. 112.
Hubbard v. Schoening, 58 Barb. 500.
Matter of Egan, 58 Barb. 560.

Cases in which the opinions of the supreme court were reported after their affirmance by the Court of Appeals.

Parks v. Comstock, 59 Barb. 37.
Tracy v. Troy 55 Barb. 529.
Comstock v. Buchanan, 57 Barb. 146.
Finnegan v. Carahar, 61 Barb. 252.

Cases in which the opinion of the special term are reported after their affirmance by the general term.

Gaskin v. Anderson, 55 Barb. 259.
People v. Gates, 57 Barb. 291.

Cases in which the opinions of the courts below were reported, after they were reversed by the appellate courts

Townsend v. Hendricks, 2 Sweeny, 503.
Wright v. Rowland, 36 How. Pr. 115.
Reversed, 36 How. Pr. 248.
Re Mary Smith, 40 How. Pr. 124.
Reversed, 40 How. Pr. 318.
Trustees &c. v. Calhoun, 62 Barb. 381.
Reversed, 25 N. Y. 422.
Sweetman v. Prince, 62 Barb. 256.
Reversed, 26 N. Y. 224.

The practice of reporting special term, nisi prius, county court, marine court, court of sessions, and sometimes referees' decisions and opinions, although generally to be condemned, is, in their zeal for book-making, universally followed by the reporters.

All such cases are thrown together in the annexed tables, under the head of special term decisions.

The six volumes of Abbott's Pr. R., N. S., examined contain 121 such reports.

The eight volumes of Barbour's reports contain 55 such reports.

The ten volumes of Howard's Pr. R. contain 221 such reports.

Your committee find that the reports, with few exceptions, are carelessly prepared.

citations will increase in number, the judge's opinion will be longer, the report more comprehensive, and the volume bulkier. And so, the decision in the Year-

In the more important and intricate cases, involving difficult questions of fact as well as law, and labor on the part of the reporter to condense the facts, it is a common practice to report the opinions alone without any statement of facts or points, sometimes adding "the facts appear sufficiently in the opinion of the court," while in other, and generally the simpler cases, the pleadings, testimony, and arguments are spread, with needless prolixity, upon the record. Striking instances of the latter fault will be found in—

Brand v. Brand, 39 How. Pr. 193–287.
People v. Mallon, 39 How. Pr. 454.
Keeney v. Grand Trunk Railroad, 59 Barb. 104.
People v. Hurlbert, 59 Barb. 447.
Hayden v. Crane, 1 Lansing, 181.
Crossman v. Bradley, 53 Barb. 125.
Erie and Susquehanna Suit, 38 How. Pr. 192.
Farnham v. Mallory, 5 Abb. Pr. N. S. 380.

Your committee respectfully call the attention of the Bench to the unnecessary length of some of the opinions. Prolixity is one of the great defects of our system, and so long as it is indulged in by the judges, the bar and the reporters will follow suit. It is unnecessary to point out cases in which opinions of from twenty-five to fifty pages in length have been written, and some of them largely made up of copious quotations from other decisions, when a bare reference would serve every purpose. The labor of condensation is indeed great, but we feel confident that when the extent of the evil is appreciated, the courts will themselves apply the remedy.

The reports of the older English reporters present a striking contrast to ours in this particular. Instead of a long statement of facts, the nature of the action is denoted by a symbol abbreviated from a few Latin words; the defense is briefly stated; then follows the names of counsel, and those points alone on which the case turned The opinion of the court, often taking no more than a page, and rarely over half a dozen, completes the record.

The result is that a volume of English reports contains many more cases than one of ours.

The volumes of Law Reports, of about 670 pages, contain on an average about ninety decisions of the Queen's Bench, and 130 of the equity decisions.

The English law and equity reports, of about 600 pages,

book of 1307 will be reviewed, together with innumerable ones between, to make a volume in 1875; and these, again, with the one additional, to make a

contain on an average about 130 cases. Beavan's volumes, of 660 pages, contain on an average about 150 decisions; Best and Smith's, about 119; Barnwell and Alderson's, about 140 decisions.

The contrast with our reports is striking. The New York Reports, of about 608 pages, contain on an average about 79 cases. Lansing's Reports of about 530 pages, about 85 cases.

Barbour's Reports, of about 670 pages, about 67 decisions.

Howard's Practice Reports, of about 500 pages, about 76 cases.

Abbott's Practice Reports, of 450 pages, about 72 cases

Our old reporters were much less diffuse than their successors. The early volumes of Johnson's Reports, containing about 600 pages, have about 150 cases.

Each volume of Howard's and Abbott's Practice Reports contains a digest of from 100 to 150 pages of points of practice, embraced in other reports, issued during the period covered by the volume. One such digest might be useful; two can only be attributed to the desire of book-making.

The following are a few miscellaneous instances of reckless reporting which have come under our observation:

The Trustees of the Auburn Theological Seminary v. Calhoun, was reported by Barbour in 1872.

65 Barb. 381.

It was decided in 1862. The length of time that elapsed between the decision and the report, ten years, is bad enough. But Barbour had reported the same case in almost the same words in 1863.

38 Barb. 148.

And to make the matter worse, the decision had been reversed by the Court of Appeals a year before Barbour first reported it.

25 N. Y. 522.

Sweetman v. Prince,

62 Barb. 256,

was decided in 1862, and reported by Barbour in 1872. It had been unanimously reversed by the Court of Appeals in 1863.

26 N. Y 224.

volume in 1876; and so on, literally, without end. In 1874 there were one thousand four hundred and seventy-eight volumes of English, Scotch, and Irish, and two thousand eight hundred and thirty-seven

Matteson v. N. Y. Central R. R.,
62 Barb. 364.

was decided in 1862. Barbour reported it in 1872. It had been affirmed by the Court of Appeals in 1866.

35 N. Y. 487.

Wait v. Green,
62 Barb. 241,
Vickery v. Dickson,
62 Barb. 272, and,
Crain v. Cavana,
62 Barb. 109,

were decided in 1862. They were reported by Barbour in 1872. He had reported the same cases in 1872, only giving the opinions of other justices as those of the court.

35 Barb. 585,
35 Barb. 96,
36 Barb. 410.

The former was affirmed by the Court of Appeals in 1867,

36 N. Y. 556.

Spaulding v. Strang,
Was reported by Tiffany in

37 N. Y. 135.

He reports the same again, giving another opinion in

38 N. Y. 1,

without any reference to the first report.

Beach v. Bay State,
at Special Term, is reported in

6 Abb. Pr. 415,
16 How. Pr. 1,
27 Barb. 248.

This decision was reversed at General Term and the opinion is reported.

30 Barb. 433,
18 How. Pr. 335,
10 Abb. Pr. 71.

Matter of Douglass at Special Term is reported in—

58 Barb. 174; 9 Abb. Pr. N. S. 84, and 40 How. Pr. 201.

It was reversed by the Court of Appeals, and is reported in—

46 N. Y. 42, and 12 Abb. Pr. N. S. 161.

The decision of the general term of the Superior Court in—
Mayor, &c. v. Erben,

10 Bosw. 189, and 24 How. Pr. 358,

volumes of United States reports, while Canada adds more than two hundred and fifty-six volumes; India, one hundred and ten volumes; the Cape of Good

was affirmed by the Court of Appeals. The opinion published in—

38 N. Y. (11 Tiffany) 305,

was a dissenting opinion. It is printed as the decision of the court.

The digest in—

37 How. Pr. 574, and Abbott's Digest, Supp. 8,

are misled by the above report, and give as the law established by the Court of Appeals the reverse of what was in reality decided.

Eight decisions of the Court of Appeals, reported in Keyes' Reports are published in Howard's Reports the year after they appeared in Keyes.

In Schuchardt v. Mayor, &c.,

59 Barb. 295,

Joslyn v. Fiske,

59 Barb. 308,

there were no judgments, the two judges who heard the cases having disagreed, and yet the cases are reported at length.

Mullford v. Muller,

1 Keyes, 31,

has a note-head, containing a single proposition which the court distinctly said they did not determine.

Alexander v. Hard,

42 How. Pr. 131,

was carelessly reported. The error is corrected at page 384, at the request of a justice of the Supreme Court.

Little v. Dean,

1 Keyes, 235, and 31 How. Pr. 68,

report the opinion of Johnson, J., as that of the court. After this opinion was prepared the cause was re-argued and a different decision reached, which is reported in—

34 N. Y. 452.

This is the final decision of the court on the questions involved.

Gilbert v. Gilbert,

1 Keyes, 159, and 34 How. Pr. 142.

This case is misreported, the opinion being a dissenting opinion. The order of the general term was reversed, and the judgment on the report of the referee affirmed.

Hartly v. Tatham,

24 How. Pr. 505, and 10 Bosw. 273.

Hope, five volumes; and other common-law colonies, too numerous and unimportant to detain us here, swell the list.' And the annual increase in the United

On the second trial, the defendant prevailed and judgment was affirmed in—

1 Rob. 246, and 26 How. Pr. 158,

and this decision was modified by the Court of Appeals. This decision is misreported in—

1 Keyes, 222.

Wilcox v. Green,

23 Barb. 639,

was decided in 1854; it was reported in 1859; it had been affirmed by the Court of Appeals in 1856.

Mills v. Stewart,

62 Barb. 444,

was decided in 1862; it was reported in 1872; it had been affirmed in effect by the Court of Appeals in 1869.

41 N. Y. 384.

Grant v. Johnson,

5 Barb. 161, and 6 Barb. 337,

was reported in 1858. This decision had been reversed by the Court of Appeals in 1851.

5 N. Y. 247.

Davis v. Peabody,

10 Barb. 91,

is misreported. Instead of a new trial being granted, the judgment was affirmed.

See 1 Commissioner's Draft,

R. S., p. 581.

Burgher v. Columbia Fire Ins. Co.,

17 Barb. 274,

is misreported. The opinion of Edmonds, J., printed, was a dissenting opinion. The opinion of the court was by Roosevelt, J., and instead of a new trial being ordered, the judgment was affirmed.

Griggs v. Howe,

2 Keyes, 574, and

Johnson v. Hathorn,

2 Keyes, 476,

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[1] Of these the State of New York alone furnishes 447 volumes, but, as we have seen from Mr. Delafield's report, the fact is to be accounted for upon the supposition that in that state the temptation to "book-making" is stronger than perhaps anywhere in the world.

States alone, is from one hundred to one hundred and twenty volumes annually.

This evil has not failed to attract the serious con-

were reported a second time by Keyes in the same words.

3 Keyes, 168.
3 Keyes, 126.

The opinion reported in

Day v. Saunders,

3 Keyes, 347,

was not only never adopted by the court, but was never delivered.

The opinion of Wright, J., in

Smart v. Bement,

3 Keyes, 241,

was not adopted by the court. They modified the judgment to some extent in accordance with the opinion of Leonard, J.

The opinion in

Clark v. Mayor, &c.,

1 Keyes, 9,

was not adopted by the court. The only point determined in the case was that discussed in the unreported opinion of Selden, J.

Passing from the number of the reports to the manner in which they are edited, the attention is at once arrested by the delay in publishing the reports of decisions.

There is no reason why an energetic reporter should not publish opinions in pamphlet form within thirty days after they are delivered. With us, however, years often elapse after the rendition of opinions before they are reported. Taking the last two volumes of some of the reports for examples, it will be found that 61 Barb. issued in July, 1872, contains reports of some cases decided in 1868; 62 Barb. issued in November, 1872, contains 70 cases, 31 of which were decided in 1861, 1862 and 1863; 4 Lansing, issued in April, 1872, and 5 Lansing, issued in November, 1872, contain decisions made in 1869, early in 1871, and a few in 1872; 47 N. Y. issued in 1872, contains cases decided from December, 1871, to March, 1872, and 48 N. Y. issued in 1872, contains cases decided from September, 1871, to May, 1872.

The Practice Reports are issued in phamphlets, the intention being to report cases as fast as decided; but to show how lamentably they fail in this, it is only necessary to state that 11 Abb. Pr. N. S. issued in 1871 and 1872, contains decisions made in 1869 and 1870, several early in 1871, and none in 1872.

sideration of lawyers; and suggestions as to a remedy have been many and thoughtful. It has been proposed that no case be officially reported, without the concur-

12 Abb. Pr. N. S. issued in 1872, contains decisions in 1871 and early in 1872.

42 How. Pr. has the unusual merit of being able to foresee the opinions of judges, and to report them before their delivery. It appears by its title-page to have been issued in 1871, and it reports several decisions rendered in 1872, also cases of 1866.

43 How. Pr. was issued in 1872, and contains decisions of 1871 and 1872.

The reporters of the Court of Appeals Reports, have generally failed to comply with the direction of 3 R. S. 263, § 39 (5th ed.), which requires them to issue their reports in pamphlets of 250 pages each as fast as they are compiled.

One of the evils which is experienced by late reporting illustrated by the case of—

Ferren v. O'Hara, 62 Barb. 517,

decided in 1862 and reported in 1872. The authorities on which the decision rested, were declared, in the interval between the rendition of the opinion and its report, to be of no force.

See Passaic Manuf. Co. v. Hoffman, 3 Daly, 495.

It is said that Lord Mansfield absolutely forbade the citing of Barnardiston's Reports before him, and said "it would only be misleading students to put them upon reading it." He added, "it was marvelous, however, to those who know the sergeant and his manner of taking notes, that he should so often stumble upon what was right; but yet that there was not one case in his book which was so throughout."

This criticism might well be extended to the reports and the reporters of the present day.

Before approaching the remedies for the evil which have been indicated, it will be well to review the legislation now existing upon the subject of reporting.

The constitution directs that "the legislature shall provide for the speedy publication of all statute laws, and of such judicial decisions as it may deem expedient. And all laws and judicial decisions shall be free for publication by any person," art. 6, § 22. Under this provision the office of State Reporter, and Supreme Court Reporter have been created.

The Court of Appeals has an official reporter, appointed for three years, at a salary of $2,000 per annum. It is made

rence of certain judges; but judges are not indifferent to the publication of their own opinions; and even should they exclude them from official volumes, the

his duty to report every cause which the court shall order reported, and such others as the public interests shall, in his judgment, require. The judges are directed to deliver their opinions to him. The reporter has no pecuniary interest in the reports, which are reported under his supervision, by contract between him and the secretary of state and comptroller, with that publisher who offers to comply with the prescribed conditions, one of which is to sell the reports at not exceeding $3 per volume.

Laws 1847, ch. 280.
" 1848, ch. 224.

Under the early and last reporters, these volumes have been generally well edited. Your committee regret that they can not say the same of Tiffany's Reports. Besides other criticisms to which they are open, a number of cases were omitted, which should have been reported. This afforded an excuse for the publication of the five volumes of Keyes' Reports, which, considering the existence of an official reporter, and the practice of the court to designate what cases should be reported, can only be regarded as an audacious attempt to foist another set of generally worthless reports upon the profession, for the sole benefit of the reporter, and without the provision regulating the price of the regular reports prescribed by statute. Many cases in Keyes' Reports are incorrectly reported; in several instances the dissenting opinion is given as the opinion of the court, and in others, the report is presented in such a form as to make it impossible to know what was decided.

In 1869, the legislature provided for the appointment of a supreme court reporter. He was to hold office for five years, and it was made his duty to report from among the decisions forwarded to him by any general or special term, such as he should think expedient.

To enable him to perform this duty, the judges of the supreme court were directed to deliver to him their opinions in all cases in which they should order the opinion to be reported.

Not more than three volumes were to be published annually. The reporter was to receive no salary, and the cost of the reports was limited to $2.50 per volume of 500 pages.

1 Laws 1869, p. 176.

large number of unofficial volumes would be sure to contain whatever they exclude.

403. The law relating to the copyright of legal

Mr. Lansing was appointed reporter in June, 1869, and since that time has issued six volumes. They are reported intelligently and clearly, and are superior to those of his competitor, Mr. Barbour.

Since the year 1848, Mr. Barbour has reported the decisions of the supreme court, and has now issued his 63d volume. Notwithstanding the act of 1869, he continued the publication of these reports, as he had a legal right to do, and since then has issued eleven volumes. The existence of two sets of supreme court reports is unnecessary, and an unmixed evil, entailing great labor and expense upon the bar.

While there is no law to prevent Mr. Barbour publishing reports, there is a law requiring judges to deliver all the opinions which they think should be reported, to the supreme court reporter. If this law had not been very generally disregarded, it would have been impossible for Mr. Barbour to continue his reports.

An examination of his volumes show many cases decided by one court or judge reported seriatim, from which it would appear that certain judges are in the habit of sending him all their decisions.

It can hardly be necessary for us to combat the idea that judges have a proprietary right to their opinions, that they may retain them, or give them exclusively to their favorites, that reporters depend upon their courtesy, and not upon their own rights. "Judge-made law" is as much the law of the land as the acts of the legislature, and is. on principle, entitled to the same publicity.

It cannot be supposed that judges would permit any feeling of favoritism to induce them to send their opinions to an unauthorized reporter, after a law requiring their transmission to the official reporter had been brought to their notice, and it is hoped that this suggestion will lead to the abandonment of any practice of this kind which may have heretofore existed. The present method, or rather want of method, in the transmission of opinions by the judges to the various reporters for publication, sometimes leads to unexpected results. And even the care that judges take to insure the reporting of their opinions may, in the absence of any system throughout the state for collecting them, increase the difficulty. Thus one reporter may receive the opinion of the court from the

reports and text-books is somewhat complicated, from the fact of the public nature of the subject-matter, and the theory that, the law being laid down by the judge who prepared it, while another reporter receives the dissenting opinion in the same case from its author. Both reporters naturally suppose the opinions sent to them express the decision of the court, and publish them as such. A curious case of this kind may be found in Ballou v. Cunningham, 4 Lansing's R., 74, where the dissenting opinion is published under the idea that it is the opinion of the court. The true opinion is reported in 60 Barb. 425.

The character and quality of Barbour's volumes sufficiently appear under other heads of this report. The general conclusion to which your committee have arrived respecting them is that they present some of the worst features possible in law reporting.

The two reporters of the Practice Reports have no official position. And as long as the bar will buy their reports, no blame can attach to them for publishing them. These volumes constantly contain the same decisions; they often contain cases which are also reported in Barbour, Lansing, and the New York Reports. Thus it happens that we habitually have two reports, often three, and sometimes four, of the same case. This evil is more particularly noticed under another head. The Practice Reports, however, have ceased to contain practice cases exclusively. Some of them appear to be made up of whatever comes to hand, without reference to its quality or authenticity. Instances of the latter may be found in White v. Delaware and Lack. R. R., 39 How. Pr. R. 479, and in the note at 16 Howard Pr. R. 288, which are reported upon the authority of newspaper articles. Howard's Practice Reports contain many decisions of the supreme court of the United States, and of the circuit court and district court of the United States, most of which are quite out of place in practice reports.

The syllabus in The People v. Parkes, 15 How. Pr. R. 551, commencing, "This little case shows what a justice of the peace can do, when he tries," and the disquisition on "cider" in the foot-note in 19 How. Pr. R. 266, are quite out of place in reports of any standing. There is a letter in 20 How. Pr. R. 96, from a former judge of the common pleas to Mr. Howard, acknowledging writing an opinion in the case of Fox v. Lewis, but denying that in any sense it resembles the one attributed to him in 19 How. Pr. R. 561.

In 16 How. Pr. R. 288, there is a similar letter from a judge

king or the people, from the mouths of judges paid by the state, the king, or the people, became thereupon their property. In England, from time immemorial, the

of the supreme court, adding that the publication of unauthorized opinions injures the authority of the reports; a conclusion in which your committee entirely concur.

The reporters of the superior court and common pleas have no official position.

Daly's Reports are not subject to the general criticisms contained in this report, and are models of conscientious care. They contain many important decisions, and, as appears by the tables, comparatively few that are reported elsewhere.

On the 2nd of December, 1863, a meeting of the Bar of England was held in Lincoln's Inn Hall, convened by Sir Roundell Palmer, now the lord chancellor, to consider the subject of law reporting. At that time there were in England fourteen independent series of reports, besides the weekly serials, and the evils complained of were identical with those felt here. They were also embarrassed by the habit of judges delivering oral opinions, so that the reporters were not only editors and digesters, as with us, but actually reported the words which fell from the lips of the court.

Resolutions similar to those passed by the Bar Association were adopted, and a committee appointed to consider the subject.

Lord St. Leonards proposed a scheme which was, with some modification, adopted by the committee, and recommended to the bar. They reported, "the multiplicity of the reports, apart from the cost (£50 per annum), occasions the evils of which the profession complain. The remedy proposed is the establishment, under the management and control of the profession, of one set of standard reports, upon the basis of a fair regard for existing interests. One complete set of reports, prepared with the requisite learning, skill, and care, and published with expedition, regularity, and at moderate cost, is all that is required for citation as authority.

"It needs, surely, no argument to prove how deeply the interests of the public are concerned in the certainty of the law, or how important it is that the judge who decides, the counsel who advises, and the solicitor under whose guidance the client acts, should all be regulated by one and the same standard of authority."

They recommended that a set of reports should be prepared and published, under the management of a counsel, representing the whole bar, who should be appointed as follows:

copyright of the reports of decisions of the various courts and judicial tribunals has inhered in the crown, on the ground of the payment by the king of the

2 By Lincoln's Inn.
2 By the Inner Temple.
2 By the Middle Temple.
2 By Gray's Inn.
2 By Sergeants' Inn; and
2 By the Incorporated Law Society.

The government was to be represented by the attorney-general, the solicitor-general, and the queen's advocate, who were ex-officio members.

The council were to act gratitously, but were to have the services of a paid secretary, who should be an experienced man of business. The objection that the duties of the council would not be properly performed, without adequate remuneration, was considered and left to the future. It is best answered by the result of their work.

The report of this committee was made after great deliberation, and having in view the systems of all other countries.

A very large meeting of the bar was held to consider the report, at which the cost of the proposed undertaking was anxiously discussed, formed the principal topic of consideration, and led to an adjournment for the purpose of further consideration.

On the 28th of November, 1864, another meeting was held, and the report adopted.

In 1865, the report was submitted to the inns of court, the Incorporated Law Socicty, and the Benchers of the Temples.

Gray's Inn passed a resolution, that "they had not sufficient confidence in the scheme to induce them to join it."

Sergeants' Inn, under the influence of some of the common-law judges, declined to co-operate.

The Incorporated Law Society at once signified their approval of the scheme, but declined to share the responsibility of carrying it out until they were satisfied with the soundness of the financial details. After being satisfied of this, they signified to the attorney-general their entire adherence, and not only appointed two members to the council, but voluntarily added their guarantee to those of the inns of the court to provide for the preliminary expenses.

The then lord chancellor, although sympathizing heartily with the movement, did not signify his approval until Mr.

salaries of the judges who pronounce the law, and the payment also, in former times, of the costs of compiling and publishing the volumes of reports. The Beavan ceased reporting the decisions of his court, after which he gave it his unqualified support.

All the other law societies and courts united with the enterprise from the start.

Sergeants' Inn and Gray's Inn signified their adherence to the scheme, after witnessing its success for a few months.

In March, 1865, Sir Fitzroy Kelly issued a circular to the profession, detailing what had been done, and inviting their assistance and co-operation for the purpose of accomplishing the object involved in the resolutions of the bar.

The subscription for the entire series of the proposed reports was fixed at £5 5s. per annum.

It was considered necessary that there should be 2,000 subscribers to insure success, and it was determined not to commence operations until this number was obtained. The council met from the start the opposition of the irregular reporters and law journals, such as the "Jurist" and the "Law Times," whose commercial interests would be prejudiced by its success. Their plans, however, matured so rapidly that in August, 1865, they accepted an offer made to them by the printing firm of Clowes & Sons for the printing, publication, sale and distribution, of the proposed series of reports for a period of three years, upon terms which absolved the council from all pecuniary liability, while it left to them the receipt and application of all subscriptions. This employment of a firm, not engaged in the business, led to remonstrances from the regular law publishers, who had been previously applied to by the council, but refused to give the statistics of the profits of law publishing.

The council undertook to pay out of the subscriptions the first moiety of the salaries of the editors and reporters, amounting to £5,350.

Clowes & Sons looked to the surplus amount of subscriptions for the payment of their charges, which had been determined beforehand.

As a further security to the editors and reporters, a guarantee fund of over £2,000 per annum, for three years, was established, and signed by most of the practitioners of the chancery bar. headed by the lord chancellor, for a larger amount than any of the other subscribers.

A sub-committee of three was appointed to receive pro-

right was twice affirmed by the House of Lords, in the reign of Charles II., with respect to Rolle's Abridgment[1] and Croke's Reports[2] Shortly after the

posals for the appointment of editors and reporters, subject to the approval of the council.

The council offered an appointment to every member of the bar, who was then engaged as reporter, in any of the fourteen series of authorized reports, and all accepted but three. Within the first year of the establishment of the law reports all of the fourteen series of reports previously existing were discontinued but one, that of Best and Smith, which ceased in 1869. Of the weekly serial reports all were discontinued but three.

The first volume published under the supervision of the council appeared in 1866. It was issued in monthly numbers, and gave general satisfaction.

Since then the council has published forty-six volumes, which, if not perfect, are better than any that preceded them.

At the end of its first year, the council made a report of its proceedings. From this it appears that there were 4,000 subscribers. The success was so great that they felt justified in establishing "The Weekly Notes," an ephemeral paper, to inform the profession of the current decisions of the courts. In addition to this, they published the statutes as fast as issued. Thus, for the small sum of five guineas, they supplied the profession with the complete body of the case law and statute law for the year, which before had cost more than ten times that sum. Five thousand copies of the law reports and statutes were printed.

In July, 1868, the council made their second annual report; from this it appears that the prepaid subscriptions for the first year were £20,334 18s.; for the second year, £21,860 16s. 4d.; and for the first half of the third year, £21,102 6s.

This report gives a full statement of the business part of the enterprise, and of its financial condition in detail. The receipts were such that besides the reports, weekly notes, and statutes, they determined to publish a digest.

The third annual report appeared in April, 1870, and showed the same sound financial condition.

It may be doubted whether, even if reporters had greater and more varied professional ability, there would be any great

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[1] Carter, 89; Bac. Abr. Prer. F. 5; 4 Burr. 2315.

[2] Skin. 234; 1 Moo. 217; 4 Burr. 2316.

Restoration, an act of parliament having prohibited the printing of law-books without the license of the lord chancellor, the two chief justices, and the chief

improvement while the present system continues. So long as reporting is conducted by private enterprise, for the sole purpose of making as much money out of it as possible—so long as lawyers must buy all the reports, and pay for the chaff in order to get the wheat—the temptation of printing worthless cases and of mere book-making will exist.

Your committee are of the opinion that all reporting should be official, that the reporters should be responsible to some supervisory body, and should be paid by salaries, and thus made independent of the number of volumes they may be able to publish annually.

Your committee entertain no doubt that it is the duty of the state to inform its citizens of its laws; and that this duty is not fulfilled so long as it makes only partial provision for reporting judicial decisions.

There are, however, serious objections to committing the practical work of law reporting to any state officer under our form of government. The work is not of a kind to be well done by an elective officer, nor is it likely to be well done by an officer, who, if appointed, goes out of office with changing administrations. A first-class reporter requires particular qualities, and should have a permanent position. If undertaken by the state, and the profits of the office went to the reporter, the place would soon be sought by political aspirants, and if they went to the state the work would be badly done, and soon relapse into the present evils.

Nor should the reporter be in any way dependent upon the courts, whose favor and friendship it is his privilege to win and enjoy. In a free country, it is well that courts should feel that they are acting before an intelligent and reading public, to whom their decisions will certainly become known through fearless and independent reporters.

Your committee are of opinion that the provision of the constitution permitting any person to publish the laws and judicial decisions is a wise one, and that counsel should be at liberty to cite any authority from the whole range of literature, leaving the weight of the citations to be judged of by the court. If these views are sound, any new series of reports that it may be thought wise to edit must depend for their success upon their merits alone, and must, in the first instance, compete with the reports now in the field. But your committee are

baron of the exchequer, it became the practice to prefix such a license to all reports published after that period, in which it was usual for the rest of the judges to concur, and to add to the imprimatur a testimonial of the great judgment and learning of the author. That act was renewed from time to time, but finally dis-

> convinced that a new series of reports, properly edited, and based upon sound principles, would, within a year, compel the withdrawal of all the existing reports; and that while the publication of the reports should be legally free to whoever will undertake it, the state might aid, by necessary legislation, or by reasonable appropriations, any responsible body that would relieve it of the duty imposed upon it by the constitution of making known its laws to its citizens.
>
> Your committee, after the thorough examination they have given to this subject, and the knowledge they have acquired of the great success of the English Council of Law Reporting—as shown by the admirable volumes which form the fruit of their labors, and by their financial resources—would have no difficulty in recommending a scheme which, in their opinion, would ensure the desired reform.
>
> But inasmuch as it is apparent that certain legislation will be needed, and the subject is one which is of deep importance to the bench and the bar throughout the state, and it is desirable that the plan to be adopted should comprehend all interests, and have the hearty support and sympathy of all, and is also likely, if successful, to be followed in other states, your committee have concluded not to recommend at present any definite scheme, but to suggest that this report be published and circulated among the judges and profession generally throughout the state, with a request that they communicate to this committee any recommendations or suggestions which may occur to them as valuable, and after considering the suggestions which it is hoped this course will elicit, your committee will be prepared to report the definite plan of action called for by the resolution under which they were appointed.
>
> All of which is respectfully submitted.
> New York, May 12, 1873.
>
> LEWIS L. DELAFIELD,
> Chairman Committee on Law Reporting.

appeared in the reign of William III. The same form of license and testimonial, however, continued in use for a long time after, until the judges refused to grant them any longer, which they did some time before the appearance of Douglas's Reports." [1] The reports since then have appeared without them. The court regarded as a contempt the publication of their proceedings without their authority; and Sir James Burrow, in the preface to his "Reports of Cases Decided in the King's Bench," apologizes for publishing them without an imprimatur, stating that if he gives

Accompanying this report was the following tabular resumé of the same:

BARBOUR'S REPORTS.

Volume.	Number of Cases reported 5 times.	Do. 4 times.	Do. 3 times.	Do. twice.	Special Term Decisions.	Affirmed.	Reversed.	Remarks.
55	1	2	5	11	12	5	4	This vol. contains one case reported six times, and one reported eight times.
56	..	..	1	2	1	4	4	This vol. contains eleven cases decided in 1865–66 not reported until 1870.
57	2	2	10	6	9	7	9	
58	3	1	2	6	4	3	5	
59	..	..	2	3	1	6	2	In this vol. points and arguments are very much extended.
60	1	..	2	12	16	3	..	
61	..	..	2	9	5	1	2	Cases decided in 1868–9 are here reported in 1872.
62	..	..	2	9	5	3	3	This vol. contains thirty-one cases decided in 1861–3, and reported in 1872.

[1] Preface to Doug. p. 7. With reference to these licenses, Sir Jas. Burrow says (preface, p. v.): "I have been assured that some now possessed of judicial offices have declared that they would never sign one, because it hangs out false colors, and misleads those that think it gives the least approbation or authority to the work."—Shortt, p. 42

offense in doing so, he will stop and suppress his work.[1]

404. So far was this crown right insisted on, that

HOWARD'S PRACTICE REPORTS.

VOLUME.	Number of Cases reported 5 times.	Do. 4 times.	Do. 3 times.	Do. twice.	Special Term Decisions.	AFFIRMED.	REVERSED.	REMARKS.
35	4	3	18	30	25	8	3	67 cases in this vol.; 1 case reported 6 times; 10 cases reported in N. Y. R.; 16 cases reported in Superior Court R.
36	1	7	13	24	20	4	4	72 cases in this vol.; 14 cases reported in N. Y. R.; 1 case reported 7 times; 8 cases reported in Superior Court R.; 13 decisions of U. S. Courts.
37	1	11	16	17	32	5	3	80 cases in this vol.; 8 cases reported in N. Y. R.; 19 cases reported in Superior Court R.
38	..	2	9	15	24	4	4	58 cases reported in this vol.; 1 case reported 6 times; 8 cases reported in Superior Court R.
39	..	5	4	10	18	4	7	54 cases in this vol.; 5 cases reported in Superior Court R.
40	1	1	6	2	32	4	4	73 cases in this vol.; 16 cases reported in Superior Court R.
41	..	1	2	4	22	1	3	73 cases in this vol.; 1 reference reported; 5 cases reported in Superior Court R.
42	..	3	4	5	25	3	1	7 decisions in U. S. Courts in this vol.
43	..	..	1	2	23	2	..	8 decisions of U. S. Courts in this vol.

Since this report, however, many of these evils have been remedied.

The committee having been continued, a second report was presented, December 3rd, 1873, as follows:

In compliance with the resolution of the association, passed on the 13th day of May, 1873, they caused 2,500 copies of their report upon law reporting to be printed and circulated among all the judges and judicial officers, and a large part of the law-

[1] Since the "Year Books," no judicial proceedings have been published under authoritative care and inspection, either by the House of Lords or by any court in Westminster Hall, except State trials.—Doug. preface, p. 5.

the English courts have, not unfrequently, punished as a contempt, the unauthorized reports by newspapers of their proceedings.

yers and public men of the state. The report was also sent to the principal libraries, newspapers, and periodicals, and every effort made to secure for it a wide circulation. Accompanying the report was a note calling attention to the importance of the subject, and requesting the suggestions and co-operation of the bench and bar.

The favor with which the report was received has been most gratifying to your committee, and inspires them with the liveliest hopes for the reform they contemplate.

They have received letters from judges, lawyers, and public men from all parts of the state, deploring the evils of the present system, and advocating an entire change in the manner of reporting judicial decisions. The press has been unanimous in its commendation and earnest in its call for reform.

Having considered the suggestions received, and thoroughly examined the system of law reporting adopted by the council of law reporting in Great Britain, your committee are now prepared to recommend a scheme which will, in their judgment, solve all the difficulties of the position. In considering the many different methods by which the desired result might be attained, they could not be indifferent to the precedent set by the English council. This council met, contended with, and overcame almost every difficulty in our path. Their reports are a great literary and financial success. It seemed that by following the same path we might have the benefit of their experience and share their success. Besides this the more carefully your committee examined the general outline of their plan, the better did it seem adapted, by intrinsic merit, to our necessities.

Your committee have, therefore prepared a plan based upon that of the English council of law reporting, with such modifications as the judicial system, constitution, and laws of our state required. By adopting this course they secure the great advantage of precedent for every step they take. They follow no doubtful paths, they tread the "vias attritas," which lawyers love.

This appeared especially important, as it proposed to ask the members of the bar to unite in guaranteeing the expense of the undertaking in the sum of $250 each per annum, for a period of three years.

The issue of a new series of reports involves a great ex-

405. Though, perhaps, the so treating them may have proceeded, not so much on the ground of a sole right of property, as on the expediency, with

penditure of money, and some one must be responsible for its first expenses. Your committee are satisfied, from their inquiries, estimates, and examination, that the reports will be self-sustaining, and that those uniting in the guarantee will never be required to respond to it. But as it was unavoidable that some one should assume this responsibility, your committee wished to furnish a precedent of the little risk that will be incurred by pointing to the facts and figures of the English council which they have had before them, and a general summary of which is given in their last report.

The importance of prompt action is best illustrated by the fact that the strictures contained in the first report have had no effect upon the existing reporters, whose recent volumes show little improvement over those criticised, and by the fecundity of the reports and reporters of these times. In the six months that have elapsed since the report of your committee, two new series of reports have been begun, and one digest, making nine series of running reports, and adding twenty-three volumes annually to our over-burdened shelves.

How many more will appear during the coming six months it is impossible to foresee.

It is evident that the reports are hydra-headed—as fast as one is destroyed two others spring up in its stead. If the monster can be exterminated at all, it must be by the united effort of the bar. No single blow can accomplish it.

Your committee submit the following scheme as capable of effecting the desired object:

1. The reports recommended by this committee shall be placed under the general management and control of a council composed of members to be appointed as follows:

1 by the court of appeals.
1 by the justices of the supreme court designated to hold general terms.
6 by the association of the bar of the city of New York.

The chief judge of the court of appeals and the attorney-general for the time being shall be ex officio members.

In the event of bar associations having the same general objects and of the same general character as that of the city of New York, being formed in the cities of Brooklyn, Albany, Buffalo, Rochester, and Syracuse, the said associations may each appoint one member of said council.

a view to the due administration of justice, of having careful and accurate reports of the decisions which serve as precedents for future cases; this, at any rate,

2. The members of the council shall act gratuitously. The term of office shall be for five years. All members retiring shall be eligible for re-appointment.

3. Any occasional vacancy in the council by death, resignation or otherwise may be filled by a new appointment by the body which originally appointed the retiring member, and the member so appointed shall retire at the time when the member occasioning the vacancy would, in the ordinary course, have retired.

4. It is desirable that the council be incorporated by act of the legislature.

The council may have the assistance of a secretary or executive officer. The payment of his salary, and the office and other expenses of the council shall not exceed together $4,000 per annum.

5. The reports shall be prepared by reporters under the supervision of the council, or an editor, if they see fit to employ one, and the cases to be reported shall be carefully selected upon the principle of rejecting all cases useless as precedents.

6. The reports shall be divided into series, viz.:

1. The court of appeals reports.
2. The supreme court reports.
3. The superior court reports.
4. The common pleas reports.
5. The surrogate's court and miscellaneous reports, with such subdivisions (if any) of such series, and with such additions of the opinions of other courts as the council may think desirable.

7. The council shall have power, if they should find it desirable, to establish in connection with the permanent reports a set of daily or weekly reports, and from time to time to prepare such digests or other publications as may be deemed expedient.

9. The staff of reporters and their salaries shall be as follows:

1 Court of appeals and commission of appeals reporter	$6,000 00
1 Assistant for court of appeals	1,000 00
1 Assistant for commission of appeals	1,000 00
1 Supreme court reporter	4,000 00
4 Assistants for the supreme court reporter, $1,000 00 each	4,000 00

is the ground on which the House of Lords claims the right of prohibiting the publication, otherwise than as it directs, of the report of any trial on im-

1 Reporter for the superior court of the city of New York, court of common pleas of the city of New York, and surrogate's courts.....	$3,000 00
1 Assistant.....	1,000 00

These salaries shall be paid semi-annually. One moiety thereof (hereinafter referred to as the first moiety) shall be paid in all events at the end of the first six months' employment. The other, or second moiety, shall be paid at the end of a year's employment. But for this second moiety, the reporters and other employers shall look, in the first instance, to the proceeds of the sales of the reports, and afterwards to the guarantee hereinafter mentioned.

The members of the bar shall be requested to unite in a guarantee of $250 per annum apiece for three years, of all the expenses and liabilities that may be incurred by the council, including the salaries of all employees, the cost of producing the reports, and all expenses and liabilities connected therewith or resulting therefrom.

10. The court of appeals possessing under the constitution the power of appointment and of removal of its reporter, shall appoint the said reporter and remove him at its pleasure.

The legislature shall be petitioned to repeal all laws providing any compensation for the reporter of the court of appeals, and for his clerical help, and his compensation shall be paid by the council.

11. It being intended by the constitution that the judges of the supreme court designated to hold general terms should appoint a reporter for the supreme court, the legislature shall be requested to provide for such appointmeut, but not for any compensation of such reporter, which shall be paid by the council.

The legislature shall also be requested to repeal the act of 1869, providing for the appointment of a supreme court reporter.

12. The legislature shall be petitioned to grant to the council of law reporting $20,000 per annum to pay the above salaries.

13. One of the assistants of the supreme court reporter shall be attached to each department thereof, and shall reside in the department to which he is attached.

14. The legislature shall be requested to enact that every

peachment or indictment that takes place before it. In Gurney v. Longman,[1] where an injunction was granted until the hearing, restraining the publication,

general and special term of the courts herein mentioned, on rendering an opinion, shall cause to be endorsed thereon a recommendation of "To be reported" or "Not to be reported;" and that suitable laws may be enacted committing the custody of all opinions to the council of law reporting immediately after their rendition.

15. The editor and reporters shall be lawyers. The reporter of the court of appeals and of the supreme court shall be appointed and removable by those courts. The editor, all the other reporters, all the assistant reporters, and all employees, shall be appointed and removable by the council.

16. It is suggested that in justice to the existing reporter of the court of appeals, the official supreme court reporter, and the editor of Daly's common pleas reports, the appointing power request them to fill the positions under the present scheme corresponding to those they now occupy. In other appointments of reporters, a preference may, if the council think fit, be given to the reporters of any publication which may be discontinued in consequence of the issue of the reports recommended by the committee.

17. Subject to Rule 15, the editor and reporters shall be appointed for a term of five years, and shall be eligible for reappointment.

18. The particular duties of the editor, reporters, assistants, and secretary, and of all employees, shall be prescribed by the council, who shall have full power to increase or diminish the number engaged, establish and vary their duties and adjust or alter their salaries, regard being had to existing interests for the time being under Rule 9.

19. The reporter of the court of appeals and of the supreme court, shall not practice in any court of record. The other reporters and all their assistants may practice, but it must be a fundamental requirement that their duties be faithfully and punctually discharged.

20. The judges of the several courts shall be requested to appoint convenient places to be occupied by the reporters, to allow the reporters access to all such papers as they can control and to their written opinions.

21. The bar shall be requested to afford the reporters all

[1] 13 Ves. 495–501.

by the defendant, of an unauthorized report of Lord Melville's trial, Lord Erskine said: "Upon the case of Bathurst v. Kearsley,[1] and the practice of the House

the assistance in their power, for the better discharge of their duties, by communicating information, and by permitting the use of briefs and papers and short-hand writers' notes.

22. The profession shall be invited to subscribe to the reports (which it is supposed will be about eleven volumes per annum) at the following price. For the entire set $50.00 per annum, to be paid in advance in such sums as the council shall determine.

23. Such invitation shall contain an announcement that it is considered essential for carrying out the scheme that the aggregate amount of subscriptions, including what may be allowed by the state, shall reach $65,000 per annum at the least, but that the council may commence their work whenever the prepaid subscription is, in their opinion, sufficiently large, and the guarantee executed by enough members of the bar to do so with prudence.

24. The prices to non-subscribers shall be one-third more than those charged to subscribers.

26. The council shall have power to make such arrangements as will lead to the discontinuance of any set of existing reports, and for discharging the consideration of the same by payments out of the profits.

27. The council shall make such arrangements for obtaining and collecting subscriptions for the reports, and disbursing the same, and for obtaining the guarantee of the bar, referred to in Rule 9, and for naming, publishing, selling and distributing the reports, as in their judgment, shall seem best.

28. The proceeds of the sale of reports and other publications, and other profits therefrom, shall be applied as follows:

1. In defraying the expenses of the publication, sale, and distribution, including the commission or other remuneration agreed to be given to the publishers or printers.

2. In payment of the secretary's salary and other expenses of the council under Rule 4, and the first moiety of the salaries under Rule 9.

3. The payment of the second moiety of the salaries under Rule 9, and of the consideration, if any, agreed to be given

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[1] This was the case of the publication of a report of the trial of the Duchess of Kingston.

of Lords, I may grant the injunction; which I do, not upon anything like literary property, but upon this only, that these plaintiffs are in the same situation as to this particular subject, as the king's printer exercising the right of the crown as to the prerogative copies. I shall not state anything as to other courts, but shall act upon this precedent." His lordship desired that it should be understood that he had not delivered any judgment of this case, further than by granting the injunction until the hearing, upon the precedent of Bathurst v. Kearsley; and that he should therefore consider the questions as open in any future stage.[1]

for the discontinuance of any existing reports under Rule 26, in such order and priority as the council shall have arranged.

4. In making good to the members of the bar who have united in the guarantee of any moneys which they may have paid under the same.

Lastly, in augmenting the salaries of the reporters, or of such of them (if any) as the council shall consider proper to be augmented, or in constituting a reserve fund to meet future contingencies, or in such other way as the council, in their discretion, shall decide best calculated to improve the system of reporting and for the interest of the bar.

29. The council shall have power, so far as they may not be fettered by any subsisting engagement, to lessen the subscription price of the reports, if found practicable.

30. The council shall prepare and publish annually a financial statement and report of the working of the system.

The difficulties here suggested appear to have very lately attracted the attention of the New Hampshire legislature—one case in the last volume of the reports of that state, having occupied over 270 pages, the legislature found it necessary to intervene and provide "that each judge should state briefly his reasons for his" judgment." Albany Law Journal, Aug. 7, 1875.

[1] The practice of the House of Lords has been to make an order that the lord chancellor or lord speaker do cause the trial to be published; and that no other person do presume to print or publish the same; and, with the exception of

But the English courts[1] have not for a long time asserted a claim to the exclusive publication of their own reports; and in two modern cases—Butterworth v. Robinson,[2] and Saunders v. Smith[3]—the plaintiffs were held by the court of chancery, to possess a copyright in certain law reports published by them. In the former case an injunction was granted to restrain the defendant from publishing a colorable abridgment of the Term Reports, of which the plaintiff was proprietor; and in the second, an injunction was refused, only because the plaintiff's conduct was such as misled the defendant into the publication.

406. Courts have not, however, abandoned their right to restrain the publication of their proceedings in cases where such publication would be likely to hinder an impartial trial, or otherwise defeat the ends of justice. On the trial of Thistlewood and others for treason, in 1820, the court prohibited the publication of any of the proceedings until the trial of all the prisoners should be concluded, and upon a report of the trial of the prisoners being thereafter published by a newspaper, its proprietor was fined for the offense, on failing to appear to answer for contemptuously publishing such proceedings. The court observed: "It is argued that if the court have this power of

Lord Oxford's case and a few others, such an order appears to have been made in almost every instance of a trial before them, whether upon impeachment or indictment. The lord chancellor or lord speaker, upon this order, appoints a publisher of the trial. See the case of the Earl of Cardigan, tried before the House of Peers in 1841, and the order made by the House on the 19th February of that year (Lords' Journals vol. 73, p. 46).—Shortt, p. 44.

[1] Ib.

[2] Ves. 709,

[3] 3 My. & Cr. 711.

prohibiting publication, there is no limit to it, and that they may prohibit altogether any publication of the trial. I think that does not follow. All that has been done in this case is very different, for the prohibition here has only been till the whole trial was completed." Courts of record have a right to make orders for regulating their proceedings, and for the furtherance of justice in the proceedings before them, which are to continue in force during the time that such proceedings are pending, leaving every person at liberty to publish the report of the proceedings subsequently to their termination.[1]

407. The rule in the United States is the same; and the decisions of courts are a sort of common property, which may be appropriated and printed by whoever wishes to do so. The case of Wheaton v. Peters[2] is leading on this point in the United States. Said McLean, J.: "It may be proper to remark, that the court are unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this court, and that the judges thereof cannot confer on any reporter any such right."

However, if a reporter publish them, combined with the product of any labor of his own, as if, for instance, he annotate, or abridge, or amplify them, he can copyright the work, decisions and all, as a whole.

And if he prefix to each case a syllabus or resumé of the points therein passed upon by the court, he will of course have a copyright in such resumés;

[1] For a more recent examination of this principle in England, see the case of Tichborne v. Tichborne, quoted in the chapter on Contempts of Court, and as to the right of newspapers generally, see chapter on Newspapers.

[2] 8 Pet. 591–593. As to legal reports see also the cases of Atwill v. Ferrett, 2 Blatchf. 39; Little v. Gould, Id. 362; Paige v. Bank, 7 Id. 152.

and one who appropriates them, either in the form of a digest, or otherwise, is liable for an infringement of his copyright.

Precisely the same rule which we have noticed in England and in this country, as to reports of judicial proceedings, may be affirmed as applying to statutes of states, ordinances of cities, and all public acts of public, judicial, deliberative, or administrative bodies, proclamations, memorials, messages of the president of the United States, and governors of the different states, and speeches delivered by members of deliberative bodies; though an edition of any of these, arranged for publication by their authors, or others, might be copyrighted.

408. "In England the crown," says Shortt,[1] "still possesses the exclusive right of printing and publishing acts of parliament. Blackstone rests the right on grounds of political and public convenience; the king, as executive magistrate, possessing the right of promulgating to the people all acts of state and government.[2] Grierson v. Jackson[3] recognized the right, because it is necessary that there should be a responsibility for correct printing, and because copy can only be had from the rolls of parliament, which are within the authority of the crown. At one time the king's officers transmitted authentic copies of all state ordinances to the sheriffs, who proclaimed them in their county courts. When the demand for authentic copies began to increase, and when the introduction of printing facilitated the multiplication of copies, the king's patentee, by command of the king, supplied copies to the people, this seeming an obvious and reasonable

[1] P. 41.
[2] 2 Bl. Com. 410.
[3] Ridg. Rep. 304.

extent of that duty which lay upon the crown, to furnish the people with the authentic text of their ordinances.[1]

"The right of the crown was recognized in repeated decisions.[2] The right of the patentees of the crown to the sole printing of the statutes, as now recognized, must depend upon usage, and the force of the decision of the court of king's bench, in Basket v. The University of Cambridge,[3] in 1758, and upon the recognition of the doctrine of prerogative copies by the house of lords in the case of Manners v. Blair,[4] in 1828.[5] The former case did not present for direct decision the question of the validity of patents for the exclusive printing of the statutes, as between the crown and the public, the dispute there being between rival patentees, under patents from different sovereigns, each party therefore being interested in upholding the general prerogative. The court of chancery sent the case into the king's bench, for the opinion of that court; and, after argument, the validity of the patents given to both the parties litigant was upheld. This of course assumes the validity of the claim of the crown.

"If bona fide notes accompany statutes printed by others than those having the patent right, the copyright of the latter, it seems, is not infringed;[6] but there is no express decision on this subject. The notes must,

[1] Eyre v. Carnan, 6 Bac. Abr. 511.

[2] Atkins's case, Carter, 89, Bac. Abr. Prer. F. 4 Burr. 2315; Roper v. Streater, Skin. 234; Stationers' Company v. Parker, Id. 233; Eyre v. Carnan, 6 Bac. Abr. 509; Basket v. University of Cambridge, 1 W. Bl. 105; Basket v. Cunningham, Id. 370; 2 Eden, 137.

[3] 1 W. Bl. 105.

[4] 3 Bligh, N. S. 391.

[5] Curtis on Copyright, 126.

[6] Maugham, 106; 2 Evans's Statutes, 19.

however, be bona fide, and not merely colorable or collusive. In Baskett v. Cunningham,[1] the defendant was publishing, in weekly numbers, a digest of the statute law, methodized under alphabetical heads, with large notes from Coke and other writers on the law. He had contracted with the proprietors of the patent for printing law-books, to print this work, and it was printed at their press. Baskett, the king's printer (whose patent extended to all statutes), filed a bill for an injunction. It was urged for the defendant, that the work was not within the meaning of the letters patent, being a work of labor and industry, and the method entirely new. The lord chancellor, however, was of opinion that the work was within the patent of the king's printer, and that the notes were merely collusive; and he ordered an injunction to issue, restraining the proprietors from printing at any other than at a patent press.

"Except in case of editions of the statutes published with bona fide notes, the right to print and publish the statutes is vested in the universities of Oxford and Cambridge, concurrently with the king's patentees. It seems that the concurrent authority which the two universities have with the patentees of the crown, to print acts of parliament, and abridgments of them, has not been extended to the sovereign's proclamations, orders in council, and other state papers, which would accordingly appear to be vested in the king's printer solely."[2]

409. Law reports, then, are to be considered, as to copyright, the same as any other literary works, except that there can be no copyright in the opinions of judges who are enjoying a salary paid by

[1] 1 W. Bl. 370.

[2] Shortt, p. 42; and *vid.* Maugham, p. 106.

the people or the state. But it seems that it would be piracy, where a publisher has printed a series of law reports, and obtained a copyright in the same, for a subsequent publisher to collect therefrom all the cases contained upon a particular subject, and to republish them, even though differently arranged and added to new cases upon that subject, though the writer of a treatise, perhaps, might take certain cases from the reports in question and print them at length.[1]

410. An examination of all the reported cases warrants us in the conclusion that the reason why a judge can have no literary property in opinions, pronounced by himself, upon legal questions presented or discussed before him, is simply and solely because he is but the mouth-piece of the state, paid by the people, or the state, to utter and construe their law. We have seen that courts are the distributors of the justice of the people, and that, by theory of law, the state hears all disputes of its citizens.[2]

But, if the reason is a good one, it would seem to apply equally to a reporter, who also receives a salary from the people, to catch the opinions as they fall from the lips of the judges appointed by the people, and to arrange and publish them for the use of the people, and that there would, therefore, be no copyright in the labors of an official reporter appointed by the court or elected by the people, provided his salary or the compensation for his services be paid from the public treasury.

In Little v. Hall[3] it was held that, under a statute

[1] Hodges v. Welsh, 2 I. E. R. 266.

[2] *Ante*, vol. i. p. 223.

[3] 18 Howard, U. S. 165; 1 Miller's Decisions of the U. S. Supreme Court, p. 143.

of the state of New York—by virtue of which Judge Comstock was appointed reporter of the decisions of the court of appeals—no copyright could be had in the reports.

411. And the same principle will hold as applied to a publisher. In Chase v. Sanborn [1] it was held that publishers of decisions of a state court, where the judges of the state not only furnished the opinions, but also the head-notes, can acquire no copyright in either. Said the court (Clifford, J.):

"Briefly stated, the claim of the complainant is that one Lyon, deceased, became, by purchase of the authors, the proprietor of the copyrights of the judicial reports mentioned in the bill of complaint, and also of the copyright of the digest therein named; and that, by means of the said purchases, he became the true and lawful owner of the exclusive right and liberty of printing, reprinting, publishing, and vending the same; and that the complainant, subsequently, and by means alleged, became and is the true and lawful owner of the said several copyrights, and he charges that the respondents have infringed the same, as fully set forth in the bill of complaint, which, as he claims, is contrary to equity and good conscience; wherefore, he prays for process, and for an account, and for an injunction. Process was issued and served, and the respondents appeared and filed an answer. They admit that the original purchaser of the copyrights of the judicial reports published the digest mentioned in the bill of complaint; that he caused, what purports to be the proper entry, to be inserted in the title-page thereof; but they do not admit that the required formula was ever entered in the clerk's office of the dis-

[1] Official Gazette of the U. S. Patent Office, vol. 6, p. 932.

trict court, as required by the act of congress. Certain other defenses are also set up, as follows: First, that the digest in question is made up almost exclusively of the language of the head-notes of the cases included in it, and that it follows the language of the head-notes; that the state law made it the duty of each justice of the superior court of that state to prepare for the press correct reports of the decisions of the court thereafter pronounced by him; and that the state statute also created the office of a state reporter, and made it his duty to edit the reports so furnished, and to provide for their sale by selling the copyright, or by such other means as he might deem expedient, and directed that he should pay into the treasury of the state the net proceeds of such sale.[1] All of the reports mentioned, the answer alleges, were published at the several times stated in the bill of complaint; but the respondents allege that they have no knowledge of what the arrangement was between the publishers and the reporter, though they believe that the former acquired all the rights of the state and of the reporter; and that the complainant purchased from him or his executor whatever rights he acquired under that arrangement. Second, that the title-page of the digest contains a statement that the required entry was made in the clerk's office of the district court, but they do not admit that such an entry was ever made in the clerk's office. Third, that the respondents published the digest as charged in the bill of complaint, but they deny that it is any infringement of any copyrights owned by the complainant, for several reasons: First, because the digest in question was made by the author, upon an examination, by him, of each case in relation to which the respondents are charged with

[1] Rev. Stat. U. S. 405.

infringement, and that it is a new, separate, independent, and much-needed work ; second, because the head-notes in the digest published by them, if in any instances they are the same as in the digest of the complainant, are taken from the opinions of the court from the head-notes of the opinions prepared by the judge who delivered it, as the author had a right to do, even if the proprietor of the older digest has a copyright of the same, which is denied, and they deny that the digest published by them has incorporated any part of the former digest, except as herein stated."

"Evidence was taken on both sides, when the complainant moved the court to send the cause to a master ; but the respondents resisted that motion, insisting that the complainant showed no equity in the bill of complaint, and that the same should be dismissed."

"Hearing was had, but inasmuch as the usual course in such cases is to send the case to a master before determining the merits, the court came to the conclusion that it was not proper in this case to depart from the usual course. Accordingly, the cause was sent to a master, with directions to report, as set forth in the decretal order. Since that time the master has made his report, and the parties have again been fully heard upon all the questions in the case. Among other things, the master was directed to report whether the use, in the respondents' said book, of the parts or features taken from the complainant's books, and original therein, tended to prejudice, and, if so, to what extent, the sale of the complainant's books. Opportunity for a full hearing was granted to the complainant, but the master reports that no evidence was introduced by him tending to show any such preju-

dice, and the court is of the opinion that the report of the master is correct, and that it be, and hereby is, confirmed. Viewed in the light of that report, it is clear that the complainant is not entitled to an account nor to an injunction. Nothing remains for consideration except the question whether the complainant is entitled to nominal damages, as it is very clear that substantial damages cannot be allowed in a case where it appears that the matters charged have not worked any prejudice to the complaining party. Nominal damages may perhaps be allowed, unless some one or more of the defenses are sustained, which remains to be considered.

"First. Evidence to show that the vendor of the complainant ever had a valid copyright of the digest which it is charged the respondents have infringed, is entirely wanting, which is all that need be said upon the subject. Damages cannot be recovered of a party for having used the matters published in a book which was never copyrighted, nor can a suit be maintained against a party for infringement in a case where there is no evidence of copyright introduced by the complainant.

"Second. Sufficient evidence was introduced by the complainant to show that a printed copy of the title-page was deposited in the clerk's office of the district court of the district wherein the author or proprietor of the several volumes of reports mentioned in the bill of complaint, resided, but there was no evidence in the case that such deposit was made before publication, as required by the fourth section of the copyright act.[1] Proof was also introduced sufficient to show that the author or proprietor did deliver, or cause to be delivered, a copy of the said several vol-

[1] 4 Stats. at L. U. S. 437.

umes to the clerk of the said district court, but there is no evidence that the same were in any case delivered within three months from the publication of the book; nor are there any facts or circumstances from which the court can supply by inference the want of direct evidence upon the subject, as there is no evidence whatever when publication was made. Persons claiming that they own the copyright of a book, in a suit for infringement must prove their ownership by competent evidence, else their suit cannot be maintained, as the burden is upon the complainant to prove his title to copyright, as well as to prove infringement. Power is vested in congress to secure to authors and inventors, for a limited time, the exclusive right to their respective writings and discoveries; and congress having exercised that power, authors as well as inventors must comply with the conditions which congress has seen fit to annex to the enjoyment of such exclusive right. Deposit of the printed copy of the title of the book must be made before publication, in the clerk's office of the district court of the district wherein the author or proprietor shall reside; and he (the author or proprietor) must deliver a copy of the book to the clerk of said district court within three months from the publication of the same, else he is not entitled to the benefit of the act. Such are the absolute requirements of the act of congress; nor is it competent for the circuit court to disregard the requirements.[1]

"Third. Suppose it were otherwise, still the court is of the opinion that the complainant is not entitled to recover even nominal damages, as by the statute law of the state the judges of the court, respectively, were the authors of their opinions. Reporters of the de-

[1] Wheaton v. Peters, 8 Pet. 653; Reade v. Conquest, 9 C. B. (N. S.) 755.

cisions of the superior court are appointed by the governor, with the advice of the council; but the second section of the same statute provides that each justice of said court shall prepare for the press, and furnish to the reporter, concise reports of the cases in which the judgment or opinion of the court in matters of law pending at the law terms was pronounced by him, within six months after the same is pronounced (Rev. Stats. 405). Section 5 of the same statute enacts that the said reporter shall edit said reports as early as practicable, provide for the sale thereof by disposing of the copyright, or otherwise, as he may deem expedient, and the direction is that he shall pay into the state treasury the net proceeds, after deducting the reasonable and necessary expenses of publishing and selling. Of course the judges, respectively, prepare the opinions, and the proof is equally full and decisive that they also prepared the head-notes to each of the cases reported in the several volumes of reports in question. Even grant that the copyright is not defective, still it cannot secure to the complainant what he does not own, nor could their vendors convey to them what they never owned. Nemo dat quod non habet. Persons, therefore, who buy from one not the owner acquire no property whatever in the thing purchased, as no one in such a case can convey any better title than he owns, unless the sale is made in market overt, or under circumstances which show that the seller lawfully represented the owner.[1]

"None of the reporters were the authors of the opinions, nor of the head-notes, and, of course, they

[1] Foxley's Case, 5 Coke, 109; 2 Black. Com. 449; 2 Kent. Com. (11th ed.) 224; Marsh v. Keating, 2 Cl. & Fen. 250; Benjamin on Sales, 4; 1 Pars. Con. (5th ed.) 520; Mitchell v. Hawley, 16 Wall. 550.

had no copyright in the same; and it follows that, inasmuch as they had no such copyright in the opinions or head-notes, they could not convey any title to the grantor of the complainant, and that the latter acquired nothing in that regard by virtue of the several conveyances under which he claims.

"Having come to this conclusion, it is not necessary to decide whether the proofs introduced by the complainant show an infringement or not, as it is quite plain that the bill of complaint must be dismissed."

412. The custom, so common among students in the legal profession, of annotating old and reliable law-texts, with reference to later decisions and precedents, often involves a careful discrimination between the proprietary rights of subsequent annotators of received and standard texts. An examination of the rights involved in such preparations was most carefully and thoroughly made in the case of Lawrence v. Dana,[1] which held that where the owner of a copyright

[1] Official Gazette of the United States Patent Office, vol. 7, p. 81.

The case of Lawrence v. Dana, was tried in the U. S. circuit court for the district of Massachusetts, at the May term, 1869, before Judges Clifford and Lowell. The following is the elaborate opinion of Clifford, J.:

Complainant alleges in substance and effect that Catharine Wheaton, deceased, widow of the late Henry Wheaton, in the year 1853, then in full life, requested him to prepare a new edition of "Wheaton's Elements of International Law," and that he, in pursuance of that request, prepared such notes for that purpose as seemed to him fit, and also an appendix and introductory remarks, with a full and careful memoir of the life of the deceased author; that, so far as the edition contained matters not previously published in this country, it was duly copyrighted by the said Catharine as proprietor thereof; that the same was subsequently published by the firm of Little, Brown & Co., and that all the profits arising out of the contract with the publishers were enjoyed by the said Catharine, as the complainant intended they should be when he

in a text, who agreed with the author of certain notes, and additions thereto, to make no use of such notes and additions in any subsequent editions of the undertook to prepare the edition; that he afterwards, in pursuance of a similar request from the same source, prepared other annotations of the same work, which were also copyrighted by the same person, and that they were published in 1863 by the same publishers; that he is advised and believes that the transactions as recited, in respect to those two editions, operated to convey to the said Catharine no other beneficial interest in the said annotations and additions to the work than the right to use the same in those editions; that in fact it was always understood and agreed by and between them that the beneficial interest in the same, except as aforesaid, belonged to the complainant, and that the copyrights were taken out and held in trust by the said Catharine in accordance with that understanding and agreement. Prior to that period the author, as the complainant alleges, had caused four several editions of the work to be published, two at Philadelphia, one at London, and one, in 1848, at Leipzig, in two volumes, by F. A. Brockhaüs, in the French language; that in the edition of 1848 the author inserted and published, both in the text and notes, many new matters never before published by him in the English language; that the author died in 1848; that the French editionwas re-printed by the said Brockhaüs in 1853, and that the complainant in 1860 ascertained that the said Brockhaüs had published another edition of the work in French, without the knowledge or consent of the representatives of the author, and that he contemplated publishing further editions of the same without paying anything to those representatives for copyright; that in view of these circumstances, and at the request of the said Catharine, he commenced negotiations with the said Brockhaüs upon the subject; and he alleges that the result was, that the parties came to an agreement that the complainant should revise and translate his annotations and adapt the same for a work to be sold in Europe, making such additions thereto as should render the work as complete as possible down to the time of publication; that the representatives of the deceased author should give up all claim on the said Brockhaüs in respect to the editions published and to be published; and that in consideration thereof the said Brockhaüs agreed to pay to the said Catharine, if the complainant so directed, the sum of six thousand francs, together with the sum

work, had assigned any claim such owner might have had in the notes and additions, by reason of their attachment to the text, that each subsequent editor of of four hundred and fifty dollars, to be paid to the complainant to defray in part the expenses to be incurred in preparing the translations; that the complainant, before the agreement was completed, stated to the said Catharine or her agent, Martha B. Wheaton, that he would do no more work on any book over which he did not possess exclusive control; that he would only undertake the work required of him in the proposed arrangement on the condition that the entire copyright should be assigned to him; that the said Catharine, manifesting a great desire to retain the legal title to the copyrights of the book, requested him to confer with Professor Parsons in her behalf, in order that some arrangement might be made which should substantially secure to the complainant what he desired, and be at the same time acceptable to the said Catharine; and the complainant alleges that he assented to that proposition, that he had one or more interviews with Mr. Parsons, and made an agreement with him as to the title to the copyrights and other matters, as expressed in the memorandum set forth in the bill of complaint, as follows: "*Memorandum.*—Mr. Lawrence will write to Mr. Brockhaüs in terms to bring to Mrs. Wheaton the right to draw on Mr. Brockhaüs at once for 6,000 francs. He will also endeavor to get from Mr. Brockhaüs as much as he can toward the actual expense of having the translation into French made here, and so much of that expense as he fails to get from Brockhaüs, Mrs. Wheaton will pay from the proceeds of the draft on Brockhaüs. Mrs. Wheaton will, on the paymemt of her draft on Brockhaüs, agree formally to make no use of Mr. Lawrence's notes in a new edition without his written consent, and Mrs. Wheaton will give to Mr. Lawrence the right to make any use he wishes to of his own notes."

That the said Parsons, for the purpose of being more certain that the memorandum would be approved by the said Catnarine, wrote on the same sheet of paper to the respondent, Martha B. Wheaton, that he and the complainant had come to a perfectly amicable result, as expressed generally in the memorandum, and suggested to her that she should make a copy of the same for herself, if the result was satisfactory; and the complainant also alleges that the said Martha afterward, in behalf of her mother and herself, and to signify their approval

the same text, so far as his annotations can be distinguished and separated, has a sole property in them; but that, if they cannot be so distinguished and

of the result, signed the said memorandum, and wrote the date, "June 14, 1863," thereon, and caused the same to be delivered to the complainant. Additions were subsequently made to the agreement, and the terms of it were in some respects varied, as appears by the correspondence between the parties; but the complainant alleges that he is advised and believes that the amendments to the same do not vary any such parts of the same as relate to the copyrights in this country; and he also alleges that the consideration of the agreement of the said Brockhaüs to pay said amount to the said Catharine was the promise of the complainant to furnish new and additional notes for the future editions of the work, as was well known and understood by the parties; that he, the complainant, wrote to said Brockhaüs, as agreed; that the letter was approved by the other parties, and was by the said Martha and Catharine sent to the said Brockhaüs, and that the said Catharine, on the 17th of June, 1863, drew a bill of exchange on him for the amount specified in the memorandum; and that the same, in consequence of said letter and of the promises and undertakings of the complainant, was duly honored and paid.

The theory of the complainant is, and he accordingly alleges, that there was not, on the first day of January, 1865, any valid subsisting copyrights of the editions published, respectively, in 1836 and 1846; that the copyrights of the editions published in 1855 and 1863 secured the exclusive right to the same only so far as those editions differed from the aforesaid antecedent editions; that it was a part of the agreement made through the agency of the said Parsons, that the said Catharine should execute and deliver to the complainant a formal instrument, securing to him all his rights in the premises, of such a nature as to admit of being recorded, as required by the acts of congress relating to copyrights; and he avers that the other respondents had full notice and knowledge of the agreement, and that he, in a court of equity, by virtue of that agreement, is taken and deemed to be the owner and proprietor of the last-mentioned copyrights, in and as to all matters contributed by him as aforesaid; and that, by reason thereof, the respondents are bound not to make any use of any such matters so contributed by him to either of the

separated, he cannot use them without violating the copyright of former editors in their annotations, and that an injunction will lie to restrain such use. The

said editions of the said work. Based upon these and other allegations, as more fully set forth in the record, the claim of the complainant is, that he is in equity the exclusive owner and proprietor of the copyrights for all the matters which he contributed to those two editions; and he charges that the said firm of Little, Brown & Co. procured and induced the said Martha, in her own behalf and that of her mother, to consent and agree that the said publishing firm of Little, Brown & Co. should publish an edition of that work, and procure the same to be edited and notes to be prepared for the same by some person other than the complainant; that thereupon the said firm procured and employed Richard H. Dana, Jr., one of the respondents, to edit the proposed edition, and to prepare the notes as aforesaid; and the complainant further shows that the respondents, without his consent, have caused the proposed edition to be printed, published, and publicly sold. Reference is also made to certain alleged pretenses set up by the respondents; and the complainant prays for an account and for an injunction, and that the respondents may be decreed to surrender and deliver up all copies of the book on hand, and to make and deliver to the complainant a good and sufficient deed of the copyrights of 1855 and 1863, in accordance with his equitable title.

Questions of intrinsic importance and of great difficulty are presented for decision in respect to the title of the complainant, and as they are in their nature preliminary, they will be first considered. Briefly stated, his claim of title, considered broadly, is to the additions to and emendations of the text of two editions as published under his supervision, to the memoir of the author, as contained in those editions, to the annotations prepared by him and published in those editions, and to the arrangement of the same, and the mode in which they are therein combined and connected with the text, and to the indices as published in those editions. He rests his claim upon the following grounds, as substantially stated in the bill of complaint: First, upon a contract or agreement between Catharine Wheaton and himself, that she should make no use of his notes aforesaid in any new edition of the work without his written consent; and that she would convey to him, by a formal instrument, the right to make any use he might see fit to make of his own notes. Secondly, upon the ground

court further held, that the editor of a subsequent edition may not borrow from citations used in the previous ones by the former editor, without infringing that, in the consideration of a court of equity, he is taken and deemed to be the owner and proprietor of the copyrights in and as to all the matters contributed by him and published in those two editions. Evidently both claims, as presented, have respect to the agreement as expressed in the memorandum of June 14, 1863, and the subsequent correspondence upon that subject, as the first is founded in covenant or contract, and the second in an equitable title to the copyright, as derived from the original arrangement and by virtue of the agreement expressed in that written paper. Confirmation of that proposition is not needed, as the language employed in the stating part of the bill of complaint is too plain for controversy; but if it were not so, every vestige of ambiguity is removed by the principal prayers of the bill of complaint, which are for an injunction and an account, and for a good and sufficient deed conveying the legal title to the coprights.

The respondents contend that the complainant is not entitled to any relief, for several reasons:

1. Because the memorandum, as they contend, is not a perfected contract, but merely a note or memorandum of the stipulations of a proposed agreement as to the true understanding and definite terms of which the parties never actually agreed, and on which their minds never in fact met.

2. Because, the parties having failed to agree as to the true understanding of the memorandum and the terms of the formal agreement which it contemplated, the complainant relinquished and abandoned the whole subject-matter of the instrument, and so notified the respondents.

3. They also contend that the agreement cannot be enforced, because the same was procured by fraudulent misrepresentations and concealments of the complainant.

4. That the agreement cannot be enforced, because the memorandum is without consideration.

5. Because the basis of the memorandum and the negotiations which led to it were the supposed legal copyrights held by the said Catharine; and they insist that those copyrights are void, and consequently that the agreement is inoperative, inasmuch as the parties entered into the same through mutual mistake.

6. Because the memorandum containing the agreement does not transfer nor assign any copyright to the complain-

ment of the latter's copyright; nor can he borrow citations of authorities, without remarks or comments, even when prefixed or appended to notes not otherant, or provide for or contemplate any such transfer or assignment.

I. Search is made in vain for any support to the first proposition of the defense, as applied to the terms or execution of the memorandum.

Interviews took place between the complainant and Professor Parsons, and they conferred together upon the subject-matter embraced in that memorandum, as suggested by the said Catharine; and the proofs show that they came to a perfectly amicable result; that the memorandum was drawn by the latter and delivered to the complainant, to be transmitted to the said Martha B., for her examination; and that she afterwards, on behalf of her mother and herself, and to signify their approval, signed the memorandum, and wrote the date thereon, and caused the same to be delivered to the complainant. Expressed in intelligible terms, as the memorandum is, the construction and effect of the language are questions of law, which cannot be controlled or influenced by the opinion of any witness, not even by that of the person employed to prepare the draft for the consideration of the parties. He may not at the time have regarded it as a contract, but they were at liberty to adopt it as such; and if they did so, and it was duly and understandingly executed as such, their rights under it must be ascertained from the language employed, as applied, in view of the surrounding circumstances, to the subject-matter of the negotiation.

They subsequently differed, as the correspondence shows, as to the proper terms of the formal agreement, for which the memorandum provides; but it was not denied, throughout that period, that the said Catharine had agreed "to make no use of Mr. Lawrence's notes in a new edition, without his written consent;" nor that she had also agreed to give him "the right to make any use he wishes of his own notes." Attempt was made, it is true, to ingraft the qualification into the latter branch of the stipulation, that the complainant should not publish in the United States a new edition of the notes and other matter of his own composition, "which he had added to the said two editions of said book, until the last edition is sold;" but it is clear to a demonstration that the agreement, as expressed in the memorandum, contains no such qualification. Properly considered, it is equally clear also that there is

wise objectionable. But the learned judge is not to be understood, of course, as saying, what would be manifestly absurd, that a mere list of cases used by nothing in the correspondence to sustain the theory of the respondents, as presented in their first proposition. "On reflection," said the complainant, in his letter to Mr. Parsons, dated June 14, 1863, "the suggestion you made yesterday offers many advantages over my proposed plan, ... as it settles at once, and forever, all questions in regard to the book." Influenced by those considerations, as he represents, he wrote a second letter of that date, as a substitute, if preferred by the other party, for the one previously prepared, to be forwarded to Mr. Brockhaüs, and submitted it to the approval of Mr. Parsons, as the friend of the said Catharine; but he expressly stated therein that, in sending it, he did not wish to recede from the former arrangement. On the contrary, he stated in the inclosed letter that, having made an arrangement with the said Catharine, which gave him the entire control over his notes as published in English, and any claim she might have to the editions published by his correspondent, he had advised her to the effect that she might draw for the whole six thousand francs. He proposed in that letter to Mr. Parsons, that the said Catharine might retain the copyright to the text, and to relinquish all claim for the expenses of the stipulated translation; but he did not propose to vary the agreement, as expressed in the memorandum, as to his own notes, and he also made claim to the right, if any, that the said Catharine had to the text and notes of the foreign editions.

Full consultation took place between Mr. Parsons and the said Martha, as the agent of the said Catharine; and Mr. Parsons, under date of June 16, 1863, wrote to the complainant that—"1. Mrs. Wheaton will send your last letter to Mr. Brockhaüs, and returns you your former letter. 2. Mrs. Wheaton will draw at once on Mr. Brockhaüs, at twenty days, for 6,000 francs. 3. When Mrs. Wheaton learns that the bill is paid, she will execute instruments satisfactory to you, which shall in the first place bind her not to use your notes without your written consent, and in the next place give you all her claims and interests in respect to the whole book, text and notes, for continental Europe, in future."

Inadvertently Mr. Parsons omitted to restate the second clause of the agreement as expressed in the memorandum, that Mrs. Wheaton would give to the complainant the right to make any use he wished of his own notes; but, his attention

one writer cannot be used by another, who happens to find occasion to illustrate a principle involved in them all. Cases are the materials from which law-books are

having been called to the omission by the complainant on the following day, he replied, on the 19th of the same month, that the complainant was certainly right in his construction of their arrangement, that the complainant under it could make any use he saw fit of the matter which he had contributed. Appended to that letter is a note in the nature of a postscript, dated four days later, in which the writer suggests that Mrs. Wheaton was bound by her contract with Little, Brown & Co., as the publishers of the then current edition of the work, and that she could not convey to him anything covered by her copyright in any way detrimental to that edition; but he proposed no alterations of the agreement, and confirmed the same by his two letters, and none was made or proposed by the parties. Prior to the 31st of August, 1863, the complainant received intelligence that the bill of exchange drawn by the said Catharine had been duly honored, and on that day he wrote to Mr. Parsons, requesting him to cause the agreement of June 14, 1863, to be carried into effect. Delay ensued before any response was received to that request; but when it came, October 17, 1863, it brought with it a draft for the formal agreement, as stipulated in the memorandum. As originally prepared, the draft contained three several stipulations. First, that the said Catharine should retain unimpaired the full legal exclusive copyright in the text of the book. Second, that she should in all ways respect the rights of the complainant to all the notes and other matter of his own composition which he had added to the book, in the same manner and to the same extent as if he had a full legal copyright of the same. Third, that she thereby transferred and assigned to him thereafter the whole title, text, and notes, to the editions published in continental Europe.

Besides these several stipulations, there was interlined in pencil at the close of the second stipulation the words following, to wit: "But the said W. B. Lawrence shall not publish a new edition thereof until the last edition is sold."

Beyond the doubt the draft was prepared without the words in pencil, and the explanations of Mr. Parsons upon the subject are that he probably exhibited the paper after it was drafted to the said Martha B., or to the respondent, Charles C. Little, and that he made the interpolation at their suggestion. Dissatisfied with the draft as prepared, the complainant re-

made; and if the first person using them can acquire a right to their names, the compiling of legal works must cease with the first comer. Take, for example,

turned it to Mr. Parsons. His objections were twofold, as expressed in the letter returning the paper. First, because it made no reference to the "Historie du Droit des Gens;" but, chiefly, on account of the stipulation that he should not publish a new edition until the last edition was sold, which he declared to be wholly inadmissible, as it would lead to new embarrassments. Alterations were subsequently made in the form of the draft, obviating the first objection, and limiting the restriction constituting the second and principal one, so that the complainant might publish a new edition before the last was sold anywhere except in the United States; but he declined to adopt it, insisting that the agreement, as expressed in the memorandum, contained no such stipulation. Determined not to involve himself in new complications, the complainant returned the last draft, as amended, to Mr. Parsons, stating to him at the same time that he had concluded, on reflection, to decline accepting ar · paper from Mrs. Wheaton. He had previously given hi .o understand that no such arrangement could be accepted, and more than intimated that if Mrs. Wheaton did not accede to his views in that behalf, matters must rest as they were in the original agreement. Contention, however, arose by some means between the parties in respect to what was quite unimportant, and what was not probably thought of by them or by Mr. Parsons when the memorandum was framed and executed.

Stipulations for the protection of the contract with the publishers of the prior editions were unnecessary, as their remaining interests, if any, were vested, and, being antecedent to the negotiations between these parties, could not be impaired by the agreement contained in the memorandum, for the reason, as clearly stated by the complainant, that Mrs. Wheaton could not convey what she did not own.

Viewed in any light, the correspondence shows nothing more than that the parties disagreed as to the extent of the obligation imposed by the memorandum, which is a question of construction; but it was never even suggested that it did not contain a complete valid agreement. Conclusive proof that neither Mr. Parsons nor Mrs. Wheaton entertained any such views during that period, is found in the drafts for the formal instrument, as prepared by the former, executed by the latter, and forwarded to the complainant for his acceptance.

the lists of cases published in a digest, for the convenience of law-writers, as well as law-students and practitioners. Now, a digest is invaluable to them

Both were prepared and signed, as therein recited, "in execution of an agreement heretofore made by and between" Mrs. Wheaton and the complainant, which is plenary evidence that up to that time the agreement expressed in the memorandum as to the notes was regarded as complete and obligatory.

II. Abandonment is the next defense to be considered; but the proposition must be examined in view of the conclusion announced, that the stipulations contained in the memorandum, as to the notes contributed by the complainant, are a perfected agreement, and not a mere proposal, as suggested by the respondents. Mere proposals may in general be withdrawn at any time before they are accepted by the party to whom they are made; and ordinary contracts, executory on both sides, may in certain cases be regarded as forfeited, as where the reciprocal stipulations are dependent, and where a party seeking to enforce performance has himself omitted to do something which he was required to perform as a condition precedent to his right of action. Cases may arise also where a party is estopped to set up a particular contract, as where he has subsequently agreed, in due form of law, and for a valuable consideration, to relinquish its benefits, or not to enforce its provisions, or where he has, by his representations and conduct, designedly caused the other party to believe that the contract had been discharged, or that it would not be enforced, and has intentionally induced that party to act on that belief, to his pecuniary prejudice. If the belief so induced is unfounded, the party in fault in such a case is estopped to allege or prove the falsity of his representations, as evidenced by his words and conduct. Pickard v. Sears, 6 Ad. & Ell. 474; Freeman v. Cooke, 2 Exch. 654; Van Rensselaer v. Kearney, 11 How. 326; Hawes v. Marchant, 1 Curt. 144; Moore v. Crofton, 3 Jones & La. T. 446.

Argument to show that the case is not one of forfeiture is unnecessary, as the proposition finds no support whatever in the evidence. Contracts executed on one side and unperformed on the other stand upon a very different principle from those where nothing has been done by either, so far as respects the party who has fulfilled his obligation and paid the stipulated consideration. Rights and obligations secured or imposed under such circumstances have become vested and absolute; and if the delinquent party seeks to avoid the obliga-

both: nay, it is this very universality of usefulness that makes digests valuable at all, or that creates a demand for them. And if every lawyer who printed

tion imposed on him, he must allege and prove a new contract, for a valuable consideration, amounting to a valid release, or that the other party is estopped to enforce the obligation by virtue of some operative binding agreement to relinquish the benefits from the same, or not to enforce the stipulation; or he must allege and prove that he has been deceived and designedly misled by the admissions and representations of the other party, as before explained (Foster v. Dawber, 6 Exch. 854; Edwards v. Chapman, 1 Mees. & Wels. 231; Wildes v. Fessenden, 4 Met. 12; 1 Smith Lea. Cas., 5th Am. ed. 462; Bank of Virginia v. Groves, 12 How. 51). None of the elements of estoppel exist in this branch of the case, as the complainant did not agree that he would discharge the memorandum or that he would not enforce its provisions. Nothing approximating to such an agreement is exhibited in the record, nor do the respondents in fact set up any such defense. What they do set up is that the complainant relinquished and abandoned any agreement in the premises, and so notified the respondents, by which it is understood they refer to the letter of the complainant, addressed to Mr. Parsons, of the 2d of November, 1863, in which he says—"On reflection, I have determined to decline accepting any paper whatever from Mrs. Wheaton, and therefore return the inclosed," meaning the amended draft for the formal agreement. Disconnected from the circumstances and the other correspondence, it might be possible to misunderstand the meaning of the writer of that letter; but it must be construed in view of what preceded it, and of the subject-matter to which it related. Since the 31st of August preceding the date of that letter, the complainant had been more or less engaged in efforts to procure the formal agreement in respect to the notes as stipulated in the memorandum; but all his efforts proved fruitless. Only eight days before, he prepared the draft of the letter exhibited in the record as one intended for the same correspondent, in which he stated to the effect that his sole object in asking for the formal agreement was to prevent any further litigation, saying that he was satisfied that without it he could restrain any attempt to use these notes by Mrs. Wheaton, or any one else, in a future edition; adding, at the same time, that if she "does not sign the paper as now suggested," meaning one of the drafts for the formal agreement, without any restriction as to the use of the notes,

authorities from a digest in his brief, or in his treatise, infringed upon the copyright of the digest-maker, they would be very cautiously employed. But this is

then "matters can rest as they are." Although never sent to his correspondent, the exhibit may well be referred to as tending to show the real intent of the complainant at the time it was written.

Weighed in view of the antecedent correspondence and the surrounding circumstances, it certainly would be a perversion of the language of the complainant to regard what he wrote on that occasion either as an agreement to relinquish or not to enforce that stipulation; and, even when separately considered, the language falls far short of what is necessary to justify any such conclusion. He made no admission by that statement inconsistent with the claim he now sets up; nor did he say anything to induce the said Catharine, or any one of the respondents, so to act that either she or they will be injured if the agreement expressed in the memorandum is held valid and enforced (Howard v. Hudson, 2 El. & Bl. 10; Audenried v. Betteley, 5 Allen, 385; Pierrepont v. Barnard, 2 Seld. 291; Rich v. Atwater, 16 Conn. 416; Plumer v. Lord, 9 Allen, 458). Expressions of a doubtful character are not sufficient to support such a defense as against a contract fully executed on the part of the complainant; but the meaning of the language employed must be clearly such that a man of ordinary prudence would take the representation to be true, and believe that it was meant that he should act upon it; and it must also appear that he did act upon it as true, so that he will be pecuniarily injured if it be allowed to be disproved. Rich v. Atwater, 16 Conn. 415; Mowry v. Sheldon, 2 R. I. 379; Flagg v. Mann, 2 Sum. 516; Langdon v. Doud, 10 Allen, 435; Moore v. Crofton, 3 Jones & La. T. 446.

Estoppels are allowed to shut out the truth only when it is necessary to protect a party setting up such a claim or defense against an injury or liability to which he is exposed without his own fault, and by reason of having trusted to the statements designedly made by the other party to expose him to such injury or liability, and which were of such a character that a man of ordinary prudence would take the representations to be true, and believe it was meant that he should act upon them as presenting the true state of the case. They must be proved, and will not be extended by implication beyond the plain import of the deceptive act, admission, agreement, or representation. When the request was made by the

perhaps an extreme case. An elementary work is valuable only in so far as it is an authority upon a given subject. A digest is valuable only in so far as it

complainant for the formal agreement he doubtless expected that it would include the "Histoire," as well as the notes specified in the memorandum, and perhaps the memoir of the author and the indices; but the better opinion is, that, when he wrote the letter of June 14, 1863, he surrendered all claim to everything mentioned in the antecedent negotiations, except the claim to the notes as already secured, including, of course, the arrangement of the same, and the mode in which they are therein combined and connected with the text. All claim to the copyright of the text was abandoned by the complainant at a very early period of the negotiations, and it does not appear that it was ever after renewed.

Abundant evidence exists in the record to show that Mrs. Wheaton, as well as Mr. Parsons and Miss Wheaton, was willing to concede the claim of the complainant as to the history; but inasmuch as it was not included in the memorandum, the conclusion of the court is, that the complainant, when he elected to stand upon the original agreement, relinquished that claim. He had previously described it as a matter of little or no value; and when he gave notice that he had determined not to accept any paper whatever from Mrs. Wheaton, it must be understood that he was content with what was secured to him in the memorandum. His right to the notes is therein plainly expressed, and there is no evidence in the record which shows that Mrs. Wheaton, or any one of the respondents was ever misled by the language of the letter giving that notice. Conclusive evidence to the contrary is found in the several answers of the respondents, and their subsequent conduct confirms that conclusion.

III. Grant that the memorandum was regarded by the parties thereto as a contract, still the respondents contend that it cannot be enforced, because, as they allege, it was procured by the fraudulent misrepresentations and concealments of the complainant. They submit that general proposition, and under it they make the following specific accusations: First, that when the negotiation as to the notes was commenced there was not, in fact, any understanding between the complainant and Mr. Brockhaüs that the former should perform for the latter any editorial labor, either of revision or of translation. Second, that the foreign publisher was ready at that time to pay the six thousand francs to Mrs. Wheaton, without

disclaims any authority as to any given subject, but groups under the heads of all, or of a certain class of given subjects, reference to every case within a certain

requiring any such labor from the complainant. Third, that the said publisher had not then made a final proposal to the complainant to pay anything to any one in that behalf, as appears by his letters addressed to the complainant. Fourth, that the complainant concealed the contents of those letters from Mrs. Wheaton, and those acting in her behalf. Fifth, that he falsely represented to her and those acting for her that the said publisher would not pay the sum specified, except upon his undertaking to revise his annotations, and make such additions to the same as would adapt them to a new edition to be sold in Europe, and the general charge is that she was induced to assent to the memorandum by reason of those false representations.

Accusations of fraud amount to nothing as a defense to a contract otherwise legal and binding, unless they are satisfactorily proved; and the burden of proof to establish such a defense is upon the party who makes such a charge (Attwood v. Small, 6 Cl. and Fin., 447; 1 Story, Eq. Jur., § 200; Park v. Johnson, 4 Allen, 266; Jennings v. Broughton, 5 De G., M., & G., 132; Campbell v. Fleming, 1 Ad. & Ell., 41). Apart from the inferences attempted to be drawn from the correspondence between the complainant and the foreign publisher, it is scarcely pretended that those accusations find any substantial support in the record; and the court is of the opinion that the several letters, when properly construed and considered in their proper connection, show that every one of the specific suggestions of fraud is unfounded. Correspondence, between the complainant and the foreign publisher, in relation to a new edition of the work for the foreign market, commenced more than three years before the date of the memorandum; and in the first letter written by the complainant, he stated that he did not expect any compensation for his services, but that he should desire to obtain what he could for the widow of the author; and it is a mistake to suppose that the negotiation as to the notes commenced before there was any understanding upon that subject between those parties. Enough certainly had been learned to satisfy any reasonable person that the arrangement could be made if desired, and that was sufficient to justify the complainant in ascertaining what would be conceded as to the notes. Equally unfounded also is the charge that Mr. Brockhaüs was ready at that time,

range, or scope, or period, which in any way affects all subjects in common. Text-books are valuable, if at all, as authority upon the subjects of which they treat.

or at any time before or afterwards, to pay the six thousand francs without any stipulation from the complainant to revise the notes and superintend their publication. His letter of the 29th of April, 1863, is a complete refutation of both those charges, and shows to a demonstration that the services to be rendered by the complainant really constituted the chief inducement to the arrangement. Convinced that the "rich emendations" made to the work by the complainant would, if adapted to his proposed new edition, be of great value, he was desirous to secure his services to accomplish that object, and in order to do that, he was willing to pay the described amount. By his letter of June 12, 1860, Mr. Brockhaüs called for a definite proposal; and the complainant, in his letter of August 25, 1862, complied with that request, and made the proposal, which, with slight modifications, was subsequently accepted; but whether before or after the commencement of the negotiations as to the notes, is wholly immaterial. The charge that the letter of the 29th of April, 1863, or any of the others, was concealed from Mrs. Wheaton, or those acting in her behalf, is disproved by the correspondence from which the inference is attempted to be drawn. Taken as a whole, the correspondence satisfies the court that the foreign publisher never did agree to pay the six thousand francs, except upon the undertaking of the complainant to revise his annotations and to adapt the same to the proposed new edition for the foreign market, and that the respondents have failed to prove that the complainant was guilty of any fraudulent misrepresentations or concealment.

IV. Extended argument to show that the fourth proposition of the respondents cannot be sustained, is unnecessary, as it finds no support in the evidence. Founded as the proposition is upon the theory that the foreign publisher was willing to pay the money for antecedent obligations, or as a gratuity to the family of the author, it is sufficient answer to it to refer to what is said in response to the preceding proposition, without entering into details.

V. The next proposition of the respondents is that the copyrights of the editions of 1855 and 1863 are void, and consequently that the agreement expressed in the memorandum is inoperative, inasmuch as the parties entered into the same through mutual mistake. They insist that the copyrights are

A digest is valuable, if at all, only as an index to the material of which the text-books are composed. The only copyright possessed by a digest-maker is in the

void for several reasons, which will be separately considered: First, because no written assignment of copyright, or of the inchoate right of the complainant thereto, as the author, was ever made to Mrs. Wheaton. Second, because the "notice of copyright inserted in the several copies published of said editions" is defective "in the omission to give notice in said editions of the copyright secured in the" original edition of the work. Third, because, upon the facts alleged and proved by the complainant, the copyrights of the editions in question were not taken out by the proper person nor in the proper district.

Copyright may be granted, under the copyright act, to the author of any book falling within the classes described in the first section of the act, if the author is a citizen of the United States, or permanently resident therein; and the first section also provides that such author shall have "the sole right and liberty of printing, reprinting, publishing, and vending such book," for the term of twenty-eight years from the time of recording the title of the same, as therein required. Executors, administrators, and legal assigns of the author are also included in the purview of the section; but the fourth section provides that no person shall be entitled to the benefit of the act unless he shall, before publication, deposit a printed copy of the title of such book in the clerk's office of the district court of the district where the author or proprietor shall reside; and the provision is that the clerk of such court shall record such printed copy forthwith in a book to be kept for that purpose, and in the form therein prescribed (4 Stat. at Large, 437). Where the author continues to be the owner he is entitled to a copy of the title; but if he has parted with the ownership, the requirement is that the clerk of such district shall give a copy of the title, under the seal of the court, to the proprietor (Ibid. 437). Proprietors of any such book, though not authors, are also recognized as entitled to the benefits of the act in another provision of the fourth section, in which they are required, within three months from the publication of said book, to deliver, or cause to be delivered, a copy of the same to the clerk of the said district. Legal proprietors, though not authors, may also recover of persons who print or publish any manuscript, the property of which is in them, without their consent, all damages occasioned by such

originality displayed in his grouping of his authorities, and in his statement of the point or points involved in each particular case. He is working in matter not

injury. Stevens v. Gladding, 17 How. 447. See, also, 4 Stat. at Large, 437, 439, §§ 6, 15.

Left in moderate circumstances, Mrs. Wheaton very properly desired to obtain something from the literary publications of her late husband, and with that view she sought the advice of the complainant, as the intimate friend of the author and of his family. Consultations accordingly took place between them upon the subject. Suggestion was first made that his reports of the decisions of the supreme court might be republished; but their attention was soon directed to a new edition of the "Elements of International Law," as affording more promise of profit beyond mere remuneration. Editorial labors were necessary to such an undertaking, and the complainant tendered his services, and the same were gladly accepted by Mrs. Wheaton and her children.

Pursuant to that arrangement, the complainant edited in succession the two editions in question—that is, he made some additions to and emendations of the text, prepared the notes, composed the memoir, and made the indices. Alterations were made in the arrangement as first concluded; but it is unnecessary to enter into details, as the proofs are clear that the complainant acted throughout that entire period with the distinct understanding that his services in editing those editions were to be gratuitous and without any charge. Speaking of the first annotated edition, the agreement was distinct that the contributions were to be furnished without charge, and the edition of 1863 was prepared with the same explicit understanding between the parties. Although the services were gratuitous, the contributions of the complainant became the property of the proprietor of the book, as the work was done just as effectually as they would if the complainant had been paid daily an agreed price for his labor. He gave the contributions to the proprietor for those two editions of the work, and the title to the same vested in the proprietor, as the work was done, to the extent of the gift, and subject to the trust in favor of the donor, as necessarily implied by the terms of the arrangement (Sweet v. Benning, 16 C. B. 480; Mayhew v. Maxwell, 1 Johns. & H. 315). Delivery was made as the work was done, and the proprietor of the book needed no other muniment of title than what was acquired when the agreement was executed (Sweet v. Cater, 11 Sim. 572; Simms v. Marryat,

only publici juris, as does the compiler of a work on mathematics or astronomy or the languages, but with matter which, besides being publici juris, is actually

7 Eng. L. & Eq. 337; Woods v. Russell, 5 Barn. & Ald. 942; Atkinson v. Bell, 8 Barn. & Cress. 277). Vested as the title and property of the contributions were in Mrs. Wheaton, she would not acquire anything by an assignment from the contributor, as he had neither the immediate title to the contributions nor any inchoate right of copyright in those editions. He could not assign anything, because he owned nothing in præsenti, as the title to his contributions, and the inchoate right of copyright for those editions had become vested in Mrs. Wheaton as proprietor of the book (Clarke v. Spence, 4 Ad. & Ell. 448; Laidler v. Burlinson, 2 Mees. & Wels. 602). Guided by these views, the court is of the opinion that none of the authorities cited by the respondents to show that a written assignment from the complainant to Mrs. Wheaton was necessary have any proper application to the question under consideration, because the complainant never acquired any right to demand a copyright in his contributions to those two editions, but the contributions as they were made and composed, or put in form, became vested in the proprietor (Shepherd et al. v. Conquest, 17 C. B. 443, 444; Chitty on Con. 10th Am. ed. 401; Tonson v. Walker, 3 Swanst. 672). Certain remarks are found in the opinion of the court in the case of Pierpont v. Fowle, 2 W. & M. 46, apparently inconsistent with the views here expressed; but the decision of the court in that case is a sufficient answer to those remarks. Contrary views, it is sometimes supposed, are also expressed in the case of Atwill v. Ferrett, 2 Blatch. 46; but the learned judge admits that an equitable title may vest in one person to the labors of another where the relations of the parties are such that the former is entitled to an assignment of the production, which is the precise point involved in the case before the court; and many other authorities than those cited in that case sustain the same principle. Sweet v. Shaw, 3 Jurist, 217; Colburn v. Duncomb, 9 Sim. 155; Little v. Gould, 2 Blatch. 362; Sweet v. Cater, 11 Sim. 572; Mawman v. Tegg, 2 Russ. 385; Nicol v. Stockdale, 3 Swanst. 687; Cary v. Longman, 3 Esp. R. 273.

Second defect in the copyright, as alleged in argument by the respondent, "consists in the omission to give notice in said editions of the copyright secured in the original edition." Persons desirous of securing a copyright must comply with

the property, by right of purchase, of the People. He has a right, indeed, to claim the language in which he states the law which the people have pronounced

the conditions of the copyright act, and if they fail to do so they are not entitled to the benefit of its provisions. Authorities to support that proposition are not necessary, as those conditions are prescribed by an act of Congress. Deposit must be made before publication, if the subject-matter is a book, of a copy of such book in the clerk's office of the district court, as before explained; and the applicant must give information of copyright being secured, by causing to be inserted, in the several copies of each and every edition published during the term secured, on the title-page or the page succeeding, the following words, viz.: "Entered according to act of Congress in the year —— by A. B., in the clerk's office of the district court of ——" (as the case may be). Beyond doubt, the omission to comply with those requirements renders the copyright invalid, as the act provides that no person shall be entitled to the benefit of the act unless he fulfills those conditions; but the important inquiry arises, What are those conditions? (Wheaton v. Peters, 8 Pet. 591; Ewer v. Coxe, 4 Wash. 487). Full compliance with the conditions prescribed in the fourth section of the act is conceded; but the theory of the respondents is that the fifth section of the act requires that the same notice in totidem verbis must be inserted in the several copies of each and every edition published during the term secured, so that the second and every subsequent edition shall correctly specify the date of the original entry. They cite no authorities which support the proposition, and they assign no reasons in support of it, except that the act makes no provision for a change of the date in the successive notices to be given, and that the omission to give notice of the original copyright in subsequent editions tends to mislead the public. Acts of Congress are to be construed by the rules of the common law, and the construction should be such as will carry into effect the true intent and meaning of the legislature; but the province of construction can never extend beyond the language employed as applied to the subject-matter and the surrounding circumstances (Rice v. Railroad, 1 Black, 359; Binney v. Canal Co., 8 Pet. 201). Change of date in the notice required in case of successive editions of the same book, it may be conceded, is not contemplated by the fifth section of the copyright act; but the meaning of the provisions that a new notice in the same prescribed form shall be given in

through their mouthpieces, the courts. He has a right to group, systematize, and arrange that law under any headings, or topics, or principles that he thinks fit

every improved edition published during the term. Compliance with that requirement, when the original edition is published, is a full protection for that edition throughout the term; but it is no protection to a second edition with notes, nor to any succeeding edition with improvements, because the requirement is that the "information of copyright secured" shall be "inserted in the several copies of each and every edition." Neglect to comply with that condition in a second edition will not vitiate the copyright of the original edition if it was regularly secured, nor will a valid copyright of a second edition cure material defects in the copyright of the original edition. Copyrights of the editions of a work other than the original edition are granted for additions to, emendations of, or improvements in the work, and every copyright should bear date of the day when it was secured. Authors or proprietors of a book for which a copyright is secured are required by the second section of the act of the 3rd of March, 1865, "within one month of the date of publication" to transmit, free of postage or other expense, a printed copy of the book to the library of congress at Washington, for the use of said library; and the fourth section provides that, in the construction of that act the word "book" shall be construed to mean every volume and part of a volume, together with all maps, prints, or other engravings belonging thereto, and shall include a copy of any second or subsequent edition which shall be published with any additions; but the proviso enacts that the author or proprietor shall not be required to deliver to the said library any copy of the second or any subsequent edition of any book, unless the same shall contain additions as aforesaid, nor of any book not the subject of copyright (13 Statutes at Large, 540). Prior to the passage of that act, the courts had decided that the "information of copyright being secured," if duly entered in the first volume of a work of several volumes, was sufficient; but all the residue of the provision is merely in affirmance of the true intent and meaning of the copyright act (Dwight v. Appleton, 1 N. Y. Leg. Obs. 198). Subsequent editions without alterations or additions should have the same entry, because they find their only protection in the original copyright; but second or subsequent editions, with notes or other improvements, are new books within the meaning of the copyright act, and the authors or

(that is, unless the arrangement be so simple or ordinary as to involve no invention or ingenuity; as, for instance, an alphabetical arrangement, or an proprietors of the same are required to "deposit a printed copy of such book," and "give information of copyright being secured," as if no prior edition of the work had ever been published; and the term of the copyright as to the notes or improvements is computed from the time of recording the title thereof, and not from the time of recording the title of the original work. Copyrights, like letters-patent, afford no protection to what was not in existence at the time when they were granted. Improvements in an invention not made when the original letters-patent were issued are not protected by the letters-patent, nor are the improvements in a book not made or composed when the printed copy of the book was deposited and the title thereof recorded as required in the fourth section of the copyright act. Protection is afforded by virtue of a copyright of a book, if duly granted, to all the matter which the book contained when the printed copy of the same was deposited in the office of the clerk of the district court, as required by the fourth section of the copyright act; but new matter made or composed afterward requires a new copyright, and if none is taken out, the matter becomes public property, just as the original book would have become if a copyright for it had never been secured Publishers may be in the habit of inserting more than one notice in new editions, but there is no act of congress prescribing any such condition. Whenever a renewal is obtained under the second section of the copyright act, the requirement is that the title of the work so secured shall be a second time recorded, and that the applicant must comply with all the other regulations in regard to original copyrights; but there is nothing in any act of congress to show that each successive edition must specify the date of the original copyright, as contended by the respondents. Tendency to mislead the public cannot be successfully predicated of a copyright in due form of law, where it appears that the party who secured it complied with all the conditions prescribed in the copyright act, which is all that need be remarked in reply to the suggestion of the respondents upon that subject.

Special examination of the third objection made by the respondents to the copyrights in question, is unnecessary, as it is clear that if the property and title of the matter contributed by the complainant vested in Mrs. Wheaton as the work

arrangement by states, or by years or by other familiar divisions of time). But if he go further, and claim a right to the mere titles of cases cited by him, his claim

was done, she was the proper person to take out the copyright; and it is not controverted that, if she was the proper person, she took it out in the proper district.

Based as the objections to the validity of the copyrights are upon an assumed construction of the fifth section of the copyright act, the court thought it right to examine the several questions presented upon their merits; but it would be a sufficient answer to the entire proposition to say that no such defense is set up in the answer (Foster v. Goddard, 1 Black, 518). Other answers are made by the complainant to the proposition; but the court having come to the conclusion that it is founded in a misconstruction of the copyright act, do not find it necessary to give the other suggestions much consideration. Stated in brief words the conclusions of the court are that the copyrights are valid, and that the agreement set forth in the memorandum is binding.

VI. Unexecuted. however, as the agreement is, it does not transfer nor assign the copyrights in question to the complainant. Both parties agree to that proposition; but the respondents err in supposing that the agreement does not provide for nor contemplate any such transfer or assignment, as is plainly shown by the very terms of the memorandum. Copyright of a book, when taken out in due form, secures to the author or proprietor the sole right and liberty of printing, reprinting, publishing, and vending such book during the term for which it is granted; but it secures nothing more; and the agreement was that Mrs. Wheaton, who held the legal title of the copyrights, should make no use of the notes in a new edition without the written consent of the complainant, and that she would give him the right to make any use of the same he might see fit, which was in all respects equivalent to a contract to transfer and assign to him the legal title to the copyrights. Equity would have compelled the execution of the formal instrument therein stipulated if the right to demand it had not been waived by the complainant. His claim as now presented is twofold, and in the judgment of the court it may be sustained upon both grounds (Curtis on C., 315; Mawman v. Tegg, 2 Russ., 385; Sweet v. Shaw, 3 Jurist, 217; Colburn v. Duncombe, 9 Sim., 155). The legal title to the copyrights is in Mrs. Wheaton or her legal representative, and the complainant claims in the first place that the same is held in trust

will be construed very strictly, as against the right of the people, and of the very persons for whom his work is printed, and from whom it derives its support.

for him as the equitable owner of the notes by virtue of the original arrangement under which the same were prepared. Secondly, the complainant claims that the negative as well as the affirmative promise contained in the agreement in regard to the use of the notes was binding upon Mrs. Wheaton, and that both are obligatory upon her legal representative, and all others having notice of the existence of those covenants (Barfield v. Kelly, 4 Russ., 355).

Two principal objections are taken by the respondents to the claim of the complainant that he is the equitable owner of the notes under the original arrangement. First, they deny that the proofs in the case warrant any such finding, especially as the theory is denied in the answer. Second, they contend that Mrs. Wheaton, if such was the agreement, could not legally copyright the notes, as it would show that she was but a mere licensee, and that the copyrights in that state of the case would be void on that account.

First, conclusive proof to show what was the original understanding between the parties is found in the correspondence upon the subject. Unaided by any one, the complainant prepared the notes, but with the express understanding that he would do so without any charge, and that the property of the same, so far as respected the new edition, should vest in the proprietor of the book, and that she should take out the copyright and remain, as she was, the sole and exclusive owner of the entire book. Liberal, however, as the agreement was toward the proprietor of the book, yet it did not include anything except that edition; and when the second annotated edition was prepared under a similar arrangement, as conceded by both parties, the agreement was not extended beyond that publication. Confirmation of those propositions is unnecessary, as they are not controverted by the respondents. They deny that it was agreed between the parties that the notes should ever afterward become the property of the complainant, but they do not allege, nor offer any proof tending to show, that his agreement with Mrs. Wheaton extended beyond the annotated editions. Tested by these indubitable facts, the rights of the parties are plain, and easy to be understood. As the proprietor of the book, Mrs. Wheaton, by virtue of that arrangement, became the absolute owner of the notes as they were prepared, so far as respects the editions in ques-

413. It is to be observed that the case of Lawrence v. Dana was a case involving the construction of a contract, and did not proceed solely and entirely upon the principles governing piracy.

tion; and she also acquired therewith the right to copyright the same for the protection of the property; but she did not acquire thereby any right or title, legal or equitable, to use the notes in a third edition of the annotated work without the consent of the complainant. Proof to support any such right or title is entirely wanting in the record, and no such right or title is set up in the answer (Sweet v. Cater, 11 Sim. 572). Such omission confirms the view that no such right or title was intended to be conveyed, and the subsequent conduct of the parties in executing the memorandum tends strongly to the same conclusion.

Second: suppose the facts to be so, then the respondents contend that the copyrights are void, because, as they insist, the applicant for the same was a mere licensee of the author of the notes; but the court is of a different opinion, for the reasons already given, as well as for others yet to be mentioned. Literary property, even when secured by copyright, differs in many aspects from property in personal chattels, and the tenure of the property is governed by somewhat different rules; but the difference in the nature and tenure of the property is much greater before copyright is taken out, and while the right to that protection for the same remains entirely inchoate. Title to the notes or improvements prepared for a new edition of a book previously copyrighted may, in certain cases, be acquired by the proprietor of a book from an employé, by virtue of the contract of employment, without any written assignment; and, when so acquired, the tenure of the property depends upon the terms of the contract, but it cannot be held to be a mere license where, as in this case, the contract was that the proprietor of the book should take the exclusive right to the contributions for two successive editions, together with the right to copyright the same for the protection of the property, as the inchoate right of copyright unquestionably passed to the proprietor of the book by the same arrangement (Agawam Co. v. Jordan, 7 Wall. 603; Fletcher v. Morey, 2 Story, 564). Such inchoate right is incapable of any other limitation than that prescribed by the copyright act, so that the proprietor of the book necessarily took out the copyright in the usual form. Beyond controversy, she took it out by

The principle upon which an injunction against the publication of a work is granted, is that it interferes with the rightful value of a preceding work. But the consent of the complainant; and it is equally clear, in the judgment of the court, that she took it out for the protection of her own property in the notes, and in trust for the complainant when her property in the notes should cease (Mawman v. Tegg, 2 Russ. 385; Little v. Gould, 2 Blatch. 365). Arrangements of the kind, it is believed, are frequently made between the proprietors of books and editors employed to prepare notes or other improvements to successive editions; and it is not perceived that there is any legal difficulty in upholding such a contract where, as in this case, it violates the rights of no one, and is entirely consistent with the public right (Fletcher et al. v. Morey, 2 Story, 566). Entered into as it was in good faith, and with a full knowledge of all the facts, it was not void; and neither the representative of the proprietor of the book, nor any other person having notice of the same, is at liberty to repudiate it, as it appears it was knowingly acted upon in a way that the complainant would suffer serious pecuniary injury to allow it to be disproved (Farina v. Silverlock, 39 Eng. L. & Eq. 516; Eicolt v. Bannister, 17 C. B. (N. S.) 708; Sherman v. Champlain Co., 31 Vt. 175; Cairncross v. Lorimer, 3 Law Times, 130).

Covenant is the second ground of claim, as set forth in the bill of complainant, and it is undoubtedly true, as contended by the respondents, that the theory of the claim as presented in allegation and in proof is that the legal title to the copyrights vested in the proprietor of the book. The respondents in argument deny that proposition, and insist that the copyrights are void; but the objections they make to their validity have already been examined and overruled, and the reasons assigned for the conclusions need not be repeated. Expressed as the promises are. both the negative and affirmative, in plain and unambiguous language, they require neither construction nor explanation; and it is clear that they are binding upon the legal representative of the proprietor of the book, and all others having notice of the rights of the complainant (Colby v. Duncombe, 9 Sim. 155). Mrs. Wheaton died March 5, 1866, leaving two children; but it is alleged and conceded that the respondent, Martha B. Wheaton, is the administratrix of her estate, and so far as respects the book in question her sole heir. Controlled by these reasons, the court is of the opinion that the complainant, in the view of a court of equity, is the

the value of an elementary work depends upon its exposition of principles, without which the most extended list of cases is valueless, and could not suffer

equitable owner of the notes, including the arrangement of the same, and the mode in which they are therein combined and connected with the text, and of the copyrights taken out by the proprietor of the book for the protection of the property, including the equitable ownership of the complainant (Fletcher v. Morey, 2 Story, 564; Parker v. Muggridge, 2 Id. 342; Clark v. Southwick, 1 Curt. 299; Rerick v. Kern, 14 S. & R. 271; Simms v. Marryat, 7 Eng. L. & Eq. 337; Curt. on C. 315; Mayhew v. Maxwell, 1 Johns. & Hem. 345).

Grant that the several conclusions announced by the court are correct, still the respondents insist that the complainant is not entitled to a decree, because they contend that they have not infringed the equitable right of the complainant to the exclusive use of the notes in question, nor violated the terms of the agreement as expressed in the memorandum.

Before proceeding to examine the question of infringement, it will be necessary to reproduce, as concisely as possible, some of the principal issues upon the subject as presented in the pleadings.

Statement of the complainant is that, prior to the last edition annotated by him, there was no book of international law in which all the authorities bearing upon the different questions discussed or referred to in the original work of the author, or in his antecedent annotations, were collected and presented in a convenient form for reference. Such authorities as he represents consisted of judicial decisions, diplomatic discussions by distinguished diplomatists, and dissertations, treatises, and lectures of learned publicists and writers upon the law of nations; that he undertook to collect and present, and by a considerable amount of labor and intellectual exertion did collect and present, in his notes and in a convenient form, with reference to each question so discussed, the discussions and opinions as aforesaid, translating such as were in any foreign language, and giving them in full where they seemed sufficiently important to be so presented, and in other cases referring to them giving the name of the book and the page where the passage could be found; that many of the authorities so collected, and particularly those relating to diplomatic discussions and negotiations, and those showing the way in which cases involving principles of international law have arisen between different nations and been determined,

from the appearance of the names of the same cases, even if repeated in the same order, in another elementary work, while the value of a digest depends

are to be found in newspapers, gazettes, legislative debates, the series of books such as the Annual Register and others named or referred to in the bill of complaint, not treatises on international law; that there is no book which can serve as an index or digest to assist an author in any material respect in collecting such authorities; that the number of books and papers of that nature examined by him in searching for the authorities and matters cited by him is so great that it is only possible to make such collection by devoting much attention to the subject for many years, and by making and preserving memoranda of such matters bearing upon the subject as from time to time they come to the knowledge of a person giving large share of his attention to such matters, and reading all such books as relate to the subject, and availing himself of much intercourse with persons conversant with such matters. Corresponding statement of the respondent is that the plan of work he adopted was to take the text of the author of the book with his notes and annotate the same with original notes of his own, in the same manner as if they had never before been annotated; that it was no part of his plan to revise, reduce, or alter the complainant's notes, even in such manner as the law of copyright would have permitted if the complainant had had a copyright therein; but that his course was after reading a topic in the text, if he thought it required annotation, to examine all the works to which he had access bearing upon the topic, and, among others, but not more or differently than others, the contributions of the complainant. When he had made all the examination he thought necessary, the allegation is that he then gave the subject the best reflection he could, and subsequently wrote out a new and original note in every instance, in manuscript throughout, in his own hand or that of an amanuensis, and without other reference to, or assistance from, any notes of the complainant than as above stated.

The complainant also alleges that in preparing the text of his edition he exercised a considerable amount of skill and judgment in the arrangement of his annotations, and in combining and connecting them with the text, and that he prepared a complete index to the same; and he charges that the respondents, in their book, have copied, conformed to, and pirated the said annotated book and the annotations of the

upon its list of cases upon all subjects, together with its statement of the points as to which each case may furnish light or illustration, and could not suffer from

same, which he prepared; and that they have used and availed themselves of the said book and annotations and the said labors of the complainant. Responsive to the charge that his notes are in a great part taken and copied from those of the complainant, and that he has pirated and unduly used the contributions of the complainant, the respondent totally denies the same and every part thereof. Evidence to show that the notes in the two annotated editions of Wheaton's Elements of International Law, as prepared by the complainant, involved great research and labor beyond what appears in those two works, is unnecessary, especially as the allegations in the bill of complaint to that effect are not directly denied in the answer; and it is equally obvious and clear that the results of the research and labor there exhibited could not well have accomplished by any person other than one of great learning, reading, and experience in such studies and investigations. Such a comprehensive collection of authorities, explanations, and well-considered suggestions is nowhere, in the judgment of the court, to be found in our language, unless it be in the text and notes of the author of the original work. Uncontradicted as these propositions are, it would be an act of supererogation to add anything further in their support. Much, also, has been accomplished by the last editor of the work in the same direction, and in the collection and presentation of similar matters wholly distinct and separate from what was antecedently collected and presented by the complainant. But the review and comparison of the merits of the respective books are not matters within the province of the court, except so far as the same become necessary, in order to decide the issues involved in the pleadings. Stripped of all mere form, the charge against the respondent is that he has infringed the rights of the complainant; and that question is the only one of much importance which remains to be considered. Apart from the testimony of the parties themselves, and the comparison of the books, the evidence in the case consists mainly of the testimony of the two experts, and the result of the respective comparisons made by them, of the notes and citations of authorities contained in one of the books with those of a corresponding character contained in the other, together with the opinion of each expert witness, whether the several notes and citations so examined and compared are or are not of the

the copying of its list of cases upon a single topic, or from anything less than a borrowing of the whole work, or of such a large or important portion or

same character. Though admissible in all such cases, the opinions of experts are nevertheless in their nature secondary evidence; but the comparisons made by them in this case have very much facilitated the investigations made by the court. Considerable aid has been derived from that source, and from the testimony of the parties; but the court has found it necessary to re-examine the comparisons made by the witnesses, and to make others for themselves, in order to come to a satisfactory conclusion. Regarded as a basis to enable the court to compare one book with the other, the results given by the experts as exhibited in their depositions, have proved to be of great service to the court in estimating the weight to be given to their respective opinions. Complicated as the facts are, the examination of the case has imposed much labor upon the judges; but the investigation has been made with care, and continued from time to time until both are satisfied that the court is prepared to render a just decision. Like other controversies of a similar character, the issue upon the merits presents two questions, one of fact and the other of law. Stated in brief terms, the question of fact is, What use did the respondents who edited the edition in question make of the complainant's notes? And the question of law presented, inasmuch as it is conceded that he used the same to some extent, is, Was that use allowable, or was it of a character and to such an extent that it infringed the complainant's rights? Direct evidence upon the subject is unattainable, as the respondent states that he cannot remember nor undertake to give the authors from whom he derived any particular class of citations. Difficult though it be to make proof, still the complainant is not entitled to any decree unless he proves infringement, as alleged, to the satisfaction of the court, as the burden in that issue is always upon the party making the charge. Except that the burden is upon the complainant, the same difficulty is experienced by the respondents in their efforts to prove the affirmative allegations of the answer, and consequently both parties are obliged to rely chiefly upon a comparison of the contents of the respective books, as the best evidence which either party is able to produce. Examination of the notes contained in the respective books will show that the description given of them by one of the respondents' witnesses is quite accurate. He states to the effect that they

feature thereof, as to render the borrowed work a substitute for the work itself.

Except in reference to the somewhat delicate ques-

are either statements of historical events, accounts of legislative debates, narratives of diplomatic discussions, negotiations, or correspondence, abstracts of cases in the courts or judicial tribunals of different countries, or summaries of other text-writers or essayists on international law and other kindred topics, accompanied with references to the books and documents where the matters are to be found. Such authorities and references of the kind mentioned are very numerous in the edition containing the notes of the complainant, and he contends that the respondent has made a much larger use of such notes, references, and authorities, including those collected and presented by him to illustrate particular topics of international law, than the law of copyright or the agreement between him and Mrs. Wheaton, as expressed in the memorandum will permit. Numerous instances are given where the same topics are illustrated in the two works by reference to the same historical facts or diplomatic negotiations, and where the views expressed are supported by the citation of the same books, pamphlets, debates, and newspapers; and the complainant contends that these coincidences occur in instances so numerous that it is past belief that they could be accidental; and he insists that the just inferences to be drawn from these coincidences, when taken in connection with the admission of the respondent that he did make some use of the complainant's book for the purposes of reference, fully sustain the burden of proof on his part, and justify the conclusion that, in each particular instance in which the citations and authorities are the same, they were in fact taken from his book, unless the respondent can explain these coincidences, or show that the citations and authorities were derived from some other quarter. Weighed as required by the rules of circumstantial evidence, the complainant contends that these coincidences of fact, as exhibited in the two books, are not only consistent with the charge of infringement, but that they, taken as a whole, are absolutely inconsistent with any other theory, which is the test usually applied in cases where proof is required beyond any reasonable doubt. Great latitude is justly allowed by the law to the reception of indirect or circumstantial evidence, the aid of which is constantly required in the administration of justice; and whenever the necessity for a resort to such evidence arises either from the

tion of the paramount right of the State to its common law, the infringement upon copyrights of legal works becomes a question of ordinary piracy of literary

nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy, even in common-law suits, are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially if corroborated by moral coincidences, be sufficient to constitute full and conclusive proof (Castle et al. v. Ballard, 23 How., 187; 1 Stark Ev., 58, 862).

Instances quite numerous are also given where clerical and typographical errors and peculiarities, including special translations, are reproduced in the edition prepared by the respondent; and the court is reminded in argument that cases have arisen where the strongest proof of copying consisted "in the coincidence of errors" (Jeremy, Eq. Jurisd., 322). W re the question is whether the defendant, in preparing his book, had before him and copied or imitated the book of the plaintiff, it is manifest, says Mr. Curtis, that this kind of evidence is the strongest proof, short of direct evidence, of which the fact is capable (Curtis on C., 255; Murray v. Bogue, 1 Drewry, 367; Spiers v. Brown, 6 W. R., 353). Other authorities may be cited where the presumptions arising from the identity of inaccuracies is carried much further, and where it is held that when a considerable number of passages are proved to have been copied by the copying of the blunders in them, other passages which are the same with passages in the original book must be presumed prima facie to be likewise copied, though no blunders occur in them (Mawman v. Tegg, 2 Russ., 394; Longman v. Winchester, 16 Ves. Jr., 269).

Coincidence of citation is also invoked by the complainant as evidence of copying; and the instances given as examples are many where the authorities are cited in the same way—that is, by volume and page, or by chapter and section, as the case may be, and from the same edition of the work, and from the same place.

Identity in the plan and arrangement of the notes, and in the mode of combining and connecting the same with the text, is also invoked by the complainant, as strongly supporting the charge of infringement; and it is quite apparent, on a comparison of the two books, that the instances of identity in that

matter, such as will be found treated of in the chapter upon that subject.

respect are numerous and pervading. Copyright may justly be claimed by an author of a book who has taken existing materials from sources common to all writers, and arranged and combined them in a new form, and given them an application unknown before, for the reason that in so doing he has exercised skill and discretion in making the selections, arrangement, and combination, and having presented something that is new and useful, he is entitled to the exclusive enjoyment of his improvement, as provided in the copyright act (Gray v. Russell, 1 Story, 11; Lewis v. Fullarton, 2 Beav., 6; Greene v. Bishop, 1 Cliff, 199; Emerson v. Davies, 3 Story, 758; Story v. Holcombe, 4 McLean, 309). Books "made and composed" in that manner are the proper subjects of copyright; and the author of such a book has as much right in his plan, arrangement, and combination of the materials collected and presented, as he has in his thoughts, sentiments, reflections, and opinions, or in the modes in which they are therein expressed and illustrated; but he cannot prevent others from using the old material for a different purpose. All he acquires by virtue of the copyright is "the sole right and liberty of printing, reprinting, publishing, and vending such book" for the period prescribed by law. Others may use the old materials for a different purpose, but they cannot copy and use his improvement, which includes his plan, arrangement, and combination of the materials, as well as the materials themselves, of which the book is made and composed (Emerson v. Davies, 3 Story, 768; Curtis on C., 180; Gray v. Russell, 1 Story, 17).

But the respondent contends that, even if it be true that matters of fact, citations, and authorities have been borrowed to a considerable extent, he had a right to take them, as the use he made of them was substantially new, and different from that made by the complainant in the two prior annotated editions of the work, because they were used by him in illustrations of new and original propositions. Secondly, he contends that the complainant is not entitled to any decree on account of any use he has made of the matters of fact, citations, and authorities exhibited in those editions, because, as he insists, the use he so made amounts to no more than a fair and original abridgment of the former editions. The doctrine of new and different use in the law of copyright applies more particularly to the old materials and not to the materials of a work like

that of the last annotated edition of the complainant, where the materials collected are much abridged, and sometimes paraphrased and newly arranged, and combined with the text of the original work. Beyond all doubt he might take the old materials as found in the sources from which the matters of fact, citations, and authorities of the complainant were drawn, and use them as he pleased in illustration of new and original propositions, or for any other purpose not substantially the same as that to which they are applied in the annotated editions edited by the complainant; but he could not borrow the materials as therein collected and furnished, nor could he rightfully use the plan and arrangement or the mode by which they are combined with the text, beyond the extent falling within the definition of fair use, which rule is only applicable to the materials, and not to the plan, arrangement, and mode of operation. Proper attention to the nature of the charge in the bill of complaint will show that the doctrine of new and different use is wholly inapplicable to the matter in issue between the parties, because the charge is that the respondent has borrowed the matters of fact, citations, and authorities collected and presented in the notes of the complainant, and not that he has made the same use of the old materials. On the contrary, the charge is that he has not consulted the old materials at all, but that he has borrowed the matters of fact, citations, and authorities exhibited in his book from the matters of fact, citations, and authorities as collected, arranged and combined with the text in those two annotated editions. Even supposing the rule to be otherwise, and that a second writer may take bodily the matters of fact, citations, and authorities collected, arranged, and combined, as in the two annotated editions before the court, if the use he makes of the materials is substantially new and different, still the concession will not benefit the respondent, as his edition of the work, except the new materials collected and presented, occupies the same field and was designed for the same class of readers, and was "made and composed" for the same general purpose. Unsupported by the evidence, as the theory of fact involved in the proposition is, it is quite clear that it cannot furnish any defense for the respondent, even if the principle is correct. Argument to show that an author may have a copyright in his notes to an older work, though the materials collected are not new, is unnecessary, as the proposition is elementary, if it appear that they have never before been collected and embodied (Gray v. Russell, 1 Story, 11).

The respondent's second proposition deserves more consid-

cration, as it presents a defense applicable to the main issue involved in the pleadings. Concisely stated, the proposition is that, even conceding that he borrowed materials from the prior annotated editions to a considerable extent, still the quantity so taken and used did not amount to more than a fair and original abridgment of the former annotated editions

Third persons cannot make any use of a patented invention without the consent or license of the patentee, because he acquires, by virtue of his letters-patent issued under the patent act, the full and exclusive right and liberty of making and using his invention, as well as of vending it to others to be used, for the term allowed by law; but the right secured to the author or proprietor of a book is only "the sole right and liberty of printing, reprinting, publishing, and vending such book," which, as construed by the courts, means the exclusive right to multiply copies for the benefit of the author or his assigns (Stephens v. Cady, 14 How. 330; Reade v. Lacy, 1 Johns. & Hem. 526; Millar v. Taylor, 4 Burr. 2311; Stowe v. Thomas, 5 Am. L. Reg. 228). Courts have sometimes supposed that the same rule of decision should be applied to a copyright as to a patent for a machine, and consequently that an abridgment of an original work made and condensed by another person without the consent of the author of the original work ought to be regarded as an infringement; but the language of the respective acts of congress making provision for the protection of such rights is different; and the opposite doctrine has been too long established to be considered at the present time as open to controversy (Story v. Holcombe, 4 McLean, 309). Whatever might be thought if the question was an open one, it is too late to agitate it at the present time, as the rule is settled that the publication of an unauthorized but bona fide abridgment or digest of a published literary copyright, in a certain class of cases at least, is no infringement on the original (Phillips on C. 171; Newsbery's Case, Llofft R. 775; Dodsley v. Kinnersley, Ambler, 403; Whittingham v. Wooler, 2 Swanst. 428; Giles v. Wilcox, 2 Atk. 141).

Strong doubts are expressed by Mr. Curtis, whether the definition of an allowable abridgment, as given in the earlier cases, can be sustained, except as applied to such works as histories, or works composed of translations, and others of like kind; but it was decided in this court, in the case of Folsom v. Marsh, 2 Story, 105, that an abridgment in which there is a substantial condensation of the materials of the original work, and which required intellectual labor and judgment to

make the same, does not constitute an infringement of the copyright of the original author; and the court, as now constituted, is inclined to adopt that rule in cases where it also appears that the abridgment was made bona fide as such, and that it is not of a character to supersede the copyrighted publication. Unless it be denied that a legal copyright secures to the author "the sole right and liberty of printing, reprinting, publishing, and vending the book" copyrighted, it cannot be held that an abridgment, or digest of any kind, of the contents of the copyrighted publication, which is of a character to supersede the original work, is not an infringement of the franchise secured by the copyright. What constitutes a fair and bona fide abridgment in the sense of the law is, or may be, under particular circumstances, one of the most difficult questions which can well arise for judicial consideration; but it is well settled that a mere selection or different arrangement of parts of the original work into a smaller compass will not be held to be such an abridgment (Campbell v. Scott, 11 Sim. 38 and note; Gyles v. Wilcox, 2 Atk. 141; Folsom v. Marsh, 2 Story, 107). Substantially the same views are expressed in the case of Tinsley v. Lacy, 1 Hem. and Miller, 753; and the vice-chancellor in that case, in speaking of the authorities by which fair abridgments have been sustained, goes on to say that the courts have gone far enough in that direction, and adds that it is difficult to acquiesce in the reason sometimes given, that the compiler of an abridgment is a benefactor to mankind, by assisting in the diffusion of knowledge. Viewed in the light of these principles, it is quite clear that the book of the respondent, even if it could be regarded as an abridgment of the prior editions, must still be held to be an infringement of the same; but the court is of the opinion that it is not an abridgment of those editions in any sense known to the law of copyright. Instead of being an abridgment of the prior editions, it is precisely what it purports to be, a reprint of the text of the author, with notes by a new editor; and the proofs are full to the point that he was employed to edit a new edition of the work, to supersede the antecedent editions annotated by the complainant. Instructed as he was to make no use of the complainant's notes, his principal defense still is that he complied with those instructions, and that he did not make any use of the notes in his edition beyond what is allowable as fair quotations from the published work of a prior author treating upon the same subject. Copying is not confined to literal repetition, but includes also the various modes in which the matter of any publication may be

adopted, imitated, or transferred, with more or less colorable alterations to disguise the source from which the material was derived; nor is it necessary that the whole or even the larger portion of a work should be taken, in order to constitute an invasion of a copyright. Some use may be made by a subsequent writer of the contents of a book or treatise antecedently made, composed, and copyrighted by another person, in making and composing a new book upon the same subject, whether the contents of the antecedent book or treatise were wholly original, or were partly original, and partly made up of selections from other authors. Copyright differs in this respect from patent right, which admits of no use of the patented thing without the consent or license of the patentee. Persons making, using, or vending to others to be used, the patented article are guilty of infringing the letters patent, even though they may have subsequently invented the same thing without any knowledge of the existence of the letters patent; but the recomposition of the same book without copying, though not likely to occur, would not be an infringement. Coincidence if perfect, is sufficient to prove the infringement of a patent, as the charge is that the defendant, if it be a machine, has made machines in the similitude of the patented machine, and with the same mode of operation. Copying is essential to constitute an infringement of copyright, but identity of contents, arrangement, and combination, is strong evidence that the second book was borrowed from the first, as it is highly improbable that two authors would express their thoughts and sentiments in the same language throughout a book or treatise of any considerable size, or adopt the same arrangement or combination in their publication (Reade v. Lacy, 1 Johns. & Hem., 526). Great difficulty attends every attempt to define in definite terms the privilege allowed by law to a subsequent writer to use without consent or license the contents of a book or treatise antecedently made, composed, and copyrighted by another author; or to mark the boundaries of the privilege of such subsequent writer to borrow the materials in a book like the annotated editions of the complainant, where the materials have been selected from such a variety of sources, and where the materials so selected are arranged and combined with certain chosen passages of the text of the original work, and in a manner showing the exercise of discretion, skill, learning, experience, and judgment. Decided cases are referred to where the principal criterion of determination is held to be the intent with which the person acted who is charged with infringement. Remarks to that effect are to be found in the

opinion of the court in the case of Carey v. Kearsley, 4 Esp. R., 170, and the decision in the case of Spiers v. Brown, 6 W. R., 353, refusing the application for an injunction, turned to some extent upon the same consideration; but the vice-chancellor (now chancellor) refused to apply that doctrine in the subsequent case of Scott v. Stanford, Law Rep., 3 Eq., 722, and explained the grounds of his ruling in the former case, which show that he would not sanction that rule in any case unless it appeared that the defendant had bestowed such mental labor upon what he had taken as to produce an original result. Evidence of innocent intention may have a bearing upon the question of "fair use"; and where it appeared that the amount taken was small, it would doubtless have some probative force in a court of equity in determining whether an application for an injunction should be granted or refused; but it cannot be admitted that it is a legal defense where it appears that the party setting it up has invaded a copyright (Cary v. Faden, 5 Ves., 23; Reade v. Lacy, 1 Johns. & Hem., 526; Bramwell v. Halcomb, 3 Myl. & Cr., 738). Few judges have devised safer rules upon the subject than Judge Story. He held that, to constitute an invasion of copyright, it was not necessary that the whole of a work should be copied, nor even a large portion of it, in form or substance; that if so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient in point of law to constitute an infringement; that, in deciding questions of this sort, courts must "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale or diminish the profits, or supersede the objects of the original work" (Folsom v. Marsh, 2 Story, 116). Mere honest intention on the part of the appropriator will not suffice, said Vice-Chancellor Wood, as the court can only look at the result, and not at the intention in the man's mind at the time of doing the act complained of, and he must be presumed to intend all that the publication of his work effects (Scott v. Stanford, Law Rep., 3 Eq., 723; Hodges v. Welsh, 2 Irish Eq. R., 266). Twenty years before that decision was made, Mr. Curtis, in his valuable work on the law of copyright, expressed the same views, and this court entertains no doubt they are correct (Curtis on C., 240). Recent decisions afford more ample protection to copyright than those of an earlier date, and they also restrict the privilege of the subsequent writer or compiler in respect to the

use of the matter protected by the copyright within narrower limits. Express decision in Kelley v. Morris, Law Rep., 1 Eq., 697, is, that in the case of a map, guide-book or directory, or the like, where there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to do for himself that which was done by the first compiler; that he is not entitled to take one word of the information published without independently working out the matter for himself so as to arrive at the same result from the same common sources of information, and that the only use he can make of a previous publication of that kind is to verify his own calculations and results when obtained. Rights secured by copyright are property within the meaning of the law of copyright, and whoever invades that property beyond the privilege conceded to subsequent authors commits a tort, and is liable to an action. None of these rules of decision are inconsistent with the privilege of a subsequent writer to make what is called a fair use of a prior publication; but their effect undoubtedly is to limit that privilege so that it shall not be exercised to an extent to work substantial injury to the property which is under the legal protection of copyright. Reviewers may make extracts sufficient to show the merits or demerits of the work, but they cannot so exercise the privilege as to supersede the original book. Sufficient may be taken to give a correct view of the whole, but the privilege of making extracts is limited to those objects, and cannot be exercised to such an extent that the review shall become a substitute for the book reviewed (Story v. Holcombe, 4 McLean, 309). Examined as a question of strict law, apart from exceptional cases, the privilege of fair use accorded to a subsequent writer must be such, and such only, as will not cause substantial injury to the proprietor of the first publication; but cases frequently arise in which, though there is some injury, yet equity will not interpose by injunction to prevent the further use, as where the amount copied is small and of little value, if there is no proof of bad motive, or where there is a well-founded doubt as to the legal title, or where there has been long acquiescence in the infringement, or culpable laches and negligence in seeking redress, especially if it appear that the delay has misled the respondent (Sweet v. Cater, 11 Sim., 580; Tinsley v. Lacy, 1 H. & M., 752; Spiers v. Brown, 6 W. R., 353; Strahan v. Graham, 15 W. R., 487; Bramwell v. Halcomb, 3 Myl. & Cr., 738; Reade v. Lacy, 1 Johns. & Hem., 527; Jarrold v. Houlston, 3 Kay & Johns., 717; Lewis v. Fullarton, 2 Beav.

6; Bell v. Whitehead, 17 L. T., 141; Curtis on C., 326; Saunders v. Smith, 3 Myl. & Cr., 711).

Guided by the rules of law, as already explained, the court, after having examined the whole case with care, is of the opinion that many of the notes presented in the edition edited by the respondent, whose case is under consideration, do infringe the corresponding notes in the two editions edited and annotated by the complainant, and that the respondent borrowed very largely the arrangement of the antecedent edition, as well as the mode in which the notes in that edition are combined and connected with the text. Judge Story held, in the case of Emerson v. Davies (3 Story, 780), that every author had a copyright in the plan, arrangement, and combination of his materials, and in his mode of illustrating his subject, if it be new and original; and it was also held, in Greene v. Bishop (1 Cliff. 199), that there may be a valid copyright in the plan of a book, as connected with the arrangement and combination of the materials; and no doubt is entertained that both those decisions were correct; but it is a mistake to suppose that a subsequent writer can be held to have infringed a book where he has not borrowed any of the materials of which the book is composed. New materials are certainly the proper objects of copyright; and old materials when subsequently collected, arranged, and combined in a new and original form, are equally so; and in either case the plan, arrangement, and combination of the materials are as fully protected by the copyright as the materials embodied in the plan, arrangement, and combination. Damages may be recovered in either of the supposed cases for the infringement of the property protected by the copyright; but the property in the latter case consists chiefly, if not entirely, in the plan, arrangement, and combination of the materials collected and presented in the book, as any other person may collect from the original sources the same materials, and arrange and combine them in any other manner not substantially the same as that of the antecedent author (Barfield v. Nicholson, 2 Sim. & Stu. 6).

Detailed specification of the instances of infringement, as shown by a comparison of the two books, would be impracticable, and will not be attempted; as the settled practice in equity is, where the works are voluminous and of a complex character, containing, as in this case, much original matter mixed with common property, the cause will, at some stage of the case, be referred to a master to state the facts, together with his opinion, for the consideration of the court. Much

the better course is to make the references before the final hearing; but the parties in this case waived any reference at that stage of the cause, and elected to proceed to final hearing without any such report. Cases arise where the court, under such circumstances, would not order a reference, but would proceed to compare the books and ascertain the details of the infringement; but the case before the court is far too complex to admit of that course of action (Curtis on C. 325; Mawman v. Tegg, 2 Russ. 400; 2 Story Eq. Jur. § 941). Details have been examined, as far as practicable, consistent with the claims of other official duties, but the judges are of the opinion that they should be further examined, and the results classified, before the court proceeds to determine the extent of the infringement, as the danger of injustice cannot well be avoided in any other way. New matter of value has been collected and presented by the respondent, and he has added much that is valuable in his references to events which have occurred since the publication of the last preceding annotated edition. Whatever may have been the rule in the earlier history of equity jurisprudence, it is now settled law in this court that a book may in one part of it infringe the copyright of another, while in other parts it may be entirely original and the proper object of a copyright; and in such a case it was held, in Greene v. Bishop (1 Cliff. 201), that remedy will not be extended beyond the injury. Preceding that decision, the same rule had been adopted in Story v. Halcombe (4 McLean, 315), in which the opinion was given by the late Mr. Justice McLean. Modern practice in the chancery courts of England is the same, as appears in the case of Jarrold v. Houlston (3 Kay & Johns. 721), in which the opinion was given by Vice-Chancellor Wood, since promoted to the office of chancellor (Kelly v. Morris, Law Rep. 1 Eq. 701; Carnan v. Bowles, 2 Brò. Ch. 80; Curtis on C. 325). Suggestion is made that it will be impossible to separate that which is original from that which is borrowed, and to some extent the suggestion may be of weight; but the court is of the opinion that the difficulties in that behalf, when the matters pass under the searching examination of a master, will be much less than is apprehended by the parties. Should the difficulty in any instance or class prove to be insurmountable, then the rule in equity is, that if the parts which have been copied cannot be separated from those which are original without destroying the use of the original matter, he who made the improper use of that which did not belong to him must suffer the consequences of so doing. If a second writer mixes the

literary matter of another, which is under the protection of a copyright, with his own, without the license or consent of the proprietor, he must nevertheless be restrained from publishing what does not belong to him; and if the parts of the work cannot be separated, so that the injunction prevents also the publication of his own literary production so mixed with that of another, he has only himself to blame (Mawman v. Tegg, 2 Russ. 390; Lewis v. Fullarton, 2 Beav. 11). Extended application of that rule, it is believed, will not be required, in view of the proofs exhibited in the record, and of the facilities afforded by the comparison of the notes in the respective editions to separate what is original from that which has been copied.

Attention is called by the respondent to the fact that some of the notes in the edition edited by him are entirely original; that in others the material copied is much condensed, or the notes reduced to a mere reproduction of the authorities cited in the prior edition, and that other notes have been enlarged and improved by the addition of new matter, and, in view of those circumstances, he contends that the edition edited by him should be regarded as a new and original work; but the decisive answer to the first and last suggestion is, that no man is entitled to avail himself of the previous labors of another for the purpose of conveying to the public the same information, even though he may append additional information to that already published (Scott v. Stanford, Law Rep., 3 Eq 724; 2 Story, Eq. Jurisp. § 940; 2 Kent, Com. 382 and 383 Cary v. Faden, 5 Ves. 25 and note; Wheaton v. Peters, 8 Pet. 591; Bramwell v. Halcomb, 3 Myl. and Cr. 737).

Additional remarks in respect to the alleged fact that the contents of the notes copied were condensed is unnecessary, as it is quite clear, as before explained, that the change made in that behalf is not of a character to afford the respondent any defense.

Supported by these reasons, the conclusions of the court are as follows:

1. That the complainant in a court of equity is the equitable owner of the notes in the two annotated editions described in the pleadings as arranged, and the mode in which they are combined and connected with the text.

2. That the title to the entire text, together with the title to the memoir and indices, is in the proprietor of the book, and not in the complainant, as alleged in the bill of complaint.

3. That there are notes in the edition edited by the respondent of substantial importance in point of number and

the value of the materials which do infringe the equitable rights of the complainant, as explained and defined by the court.

4. That all the respondents had notice of the claim of the complainant, as explained and defined by the court.

5. That there are notes in that edition of substantial importance in point of number and the value of the materials which do not infringe any rights of the complainant.

6. That the notes in that edition consisting wholly of citations found in the corresponding notes of the complainant do infringe his rights, as explained and defined by the court, though many of them are unaccompanied by the extracts collected and presented in the next preceding edition.

7. That notes consisting of authorities or collections of authorities copied in like manner as described in the preceding proposition, and without remarks or comments, do also infringe the complainant's rights, though they are found inserted in, or prefixed or appended to, notes otherwise not objectionable.

8. That notes of which the whole or some substantial and material part is condensed from the corresponding notes in the preceding edition or from the extracts therein printed and published, without any marks of original labor, or of any such labor except the study of the note copied and adopted, do also infringe the complainant's rights, as explained and defined.

9. That notes wholly original do not infringe.

10. That notes partly original and partly copied from the preceding edition do not infringe except for the matter copied, if it be practiable to ascertain and define the separate proportions and make the separation of the same; but if not, still the respondent, at the proper stage of the case, must be restrained from using the part copied.

11. That the cause must be referred to a master to examine the pleadings and proofs and report the extent of the infringement as adjuged by the court in this investigation, and also to examine and ascertain what, if any, other instances of the alleged infringements within the principles here explained are proved; and if any, to classify the same, and report the details, together with the reasons for his conclusions, for the consideration of the court.

12. That all other matters in the cause will be reserved until the coming in of the master's report.

CHAPTER VI.

OF CONTRACTS CONCERNING LITERARY PROPERTY.

414. Lord Camden, in his famous speech against literary property, declared that "glory" was the reward of authorship, and that the putting of a value in coin upon such labors would encourage the wretched scribblers and charlatans of literature, while it could not add an inducement to genius, or make that worthy of print which was not so before. But, while this may be very true in theory, its practical working, as a principle for the guidance of book-sellers and book-buyers, would be very awkward, and probably as unsatisfactory in its results; for we must have primary arithmetics, and grammars, and spelling-books, as well as The Canterbury Tales, or Hamlet, or Paradise Lost. "And since," as Mr. Curtis very justly observes, "no man ever wrote a spelling-book for glory," as long as a spelling-book is a necessity, there must be some inducement for its production. No man ever did write a spelling-book for "glory," and yet there are very few works compiled of greater utility than a spelling-book, and it would be very poor policy to discourage their production.

The fact is, that the list of authors who write for pure glory is growing smaller and smaller every day, and the majority make no secret of their writing for gain. Publishers, at any rate, regard the works of authors in purely a commercial light, estimating their value solely by the profit or loss presumably conse

quent upon their manufacture and sale in book form.[1] And it is well to reflect that, separate as they are in theory, "glory" and "gain" move hand-in-hand; and the cold commercial judgment of the publisher as to the amount of profit in the book, though not possibly infallible, is, after all, the only practical criterion of the fame that may ensue. The book, nowadays, that brings no gain to its publisher, very rarely brings "glory" to its author.[2] "When we say," said Sergeant Talfourd, "that one has obtained immense wealth by writing, what do we assert but that he has multiplied the sources of enjoyment to countless readers, and lightened thousands of else sad, or weary, or dissolute hours."[3] And, unromantic as it may sound, this is the sort of composition that sells in the market.

[1] To write for money was once held to be disgraceful; and Byron, as we know, taunted Scott because his publishers combined

"To yield his muse just half-a-crown per line,"

while Scott seems half to admit that his conduct requires justification, and urges that he sacrificed to literature very fair chances in his original profession. Many people might, perhaps, be disposed to take a bolder line of defense. Cut out of English fiction all that which has owed its birth more or less to a desire of earning money honorably, and the residue would be painfully small. The truth, indeed, seems to be simple. No good work is done when the one impelling motive is the desire of making a little money; but some of the best work that has ever been done has been indirectly due to the impecuniosity of the laborers. When a man is empty he makes a very poor job of it in straining colorless trash from his hard-bound brains; but when his mind is full to bursting, he may still require the spur of a moderate craving for cash to induce him to take the decisive plunge.—Hours in a Library, Leslie Stephen.

[2] We cannot decide the abstract question of genius and money, but the question of how much the author ought to receive is easily answered—so much as his readers are delighted to pay him.—Speech of Sergeant Talfourd.

[3] Id.

So, it is to the advantage of the public that the value of a book to its publisher depends entirely upon its value to them, and that the interests of the author and the publisher are, in reality, identical.

415. It certainly is true, as we have seen at every step in this inquiry, that so long as there has been any such thing as literary composition, there has been such a thing as parting with it for value. When encouraged in no other way,—when society was too crude and illiterate to buy poetry,—monarchs encouraged it by rewards, and favors, and emolument. Before the poet secured publication, he secured, at least, a place.

Poets were first crowned in Greece, and afterwards by the Romans, under the empire. In the twelfth century, the emperor of Germany adopted the custom, and invented the title and office of poet laureate. Henry the Fifth crowned his historian, and Frederic the First his monkish Gunther, who celebrated him in epic strains. Petrarch was crowned laureate in the fourteenth century, in Rome, and Tasso died just as he was to have received the honor. Frederic the Third of Germany crowned with his own hands Æneas Sylvius Piccolomini, and in 1491 Conradus Celtes, whose distich, in which he pronounces himself the first to hold that office, is still preserved.

> Primus ego titulum gessi nomenque poetæ,
> Cæsareis manibus laurea nexa mihi.

And so, Ulrich von Hutten was crowned by Maximilian the First, who degraded the office, by giving to the Counts Pataline the right of creating their own poets. Both under him and under Ferdinand the Second, the counts multiplied poets, until their place had no value or importance whatever. About this time the German and English universities appear to have granted the degree of "poeta laureatus" without much

stint. In France the favored bards were known as "royal poets," though in Spain they retained the name of Laureates,—at least Cervantes, whether as reflecting upon the office or its incumbents, or not, does not appear, makes Sancho Panza, who with his ass has tumbled into a ditch, console the animal, by saying to it, "I promise to give thee double feed, and to place a crown of laurel on thy head, so that thou mayest look like a poet laureate!"

Edward the Third, of England, in imitation of the crowning of Petrarch at Rome, granted the office to Chaucer, with a yearly pension of one hundred marks and a tierce of Malvoisie wine.[1] Henry Scogan is alluded to by Ben Jonson as the laureate of Henry the Fourth. John Kay was court poet under Edward the Fourth, and Andrew Bernard held the same office under Henry the Seventh and Henry the Eighth. John Skelton received from Oxford, and subsequently from Cambridge, the title of poet laureate; and Spenser is spoken of as the laureate of Queen Elizabeth, on the ground of having received a pension of fifty pounds a year, upon presenting her the first books of the "Faery Queen." Samuel Daniel and Michael Drayton were also laureates, "the latter being one of the poets," says Southey, "to whom the title of laureate was given in that age, not as holding the office, but as a mark of honor, to which they were entitled." The introduction of masques into England from Italy during the reign of Elizabeth, rendered necessary the

[1] Though this is mainly traditional, there is, however, a record of an annuity of 20 marks granted by that monarch to his "valet Geoffrey Chaucer," with the controllership of the wool and petty wine revenues for the port of London, the duties of which he was to perform in person. There is in reality no evidence that this office was conferred on the ground of poetical merit.

employ ment of poets, and, in 1619, James the First, probably to save expense, secured the services of Ben Jonson, by granting him by patent an annuity for life of one hundred marks. In 1630 the laureateship was made a patent office in the gift of the lord chamberlain, and the salary increased from one hundred marks to one hundred pounds and a tierce of Canary wine, which latter was commuted in the time of Southey for twenty-seven pounds a year. From that time until the present there has been a regular succession of laureates.'

[1] The following is a list of those who have held the office, with the dates of their accession and withdrawal: Ben Jonson, 1630–1637; William Davenant, 1638–1668; John Dryden, 1670–1689; Thomas Shadwell, 1689–1692; Nahum Tate, 1693–1714; Nicholas Rowe, 1714–1718; Lawrence Eusden, 1719-1730; Colley Cibber, 1730–1757; William Whitehead, 1758–1785; Thomas Warton, 1785–1790; Henry James Pye, 1790–1813; Robert Southey, 1813–1843; William Wordsworth, 1843–1850; Alfred Tennyson, 1850. As might be inferred from many of the names in this list, political considerations often controlled the appointment to the office. Such considerations removed Dryden and substituted in his place Shadwell, whose appointment the Earl of Dorset vindicated, "not because he was a poet, but an honest man." To such an extent was the degradation of the office carried by its connection with unworthy names, that a strong feeling was raised in favor of its abolition. After the derangement of George III., in 1810, the performance of the annual odes was suspended, and subsequently fell completely into disuse. Upon the death of Pye, the office was offered to Walter Scott, who declined it, but recommended Southey; and the latter was appointed with the virtual concession, which has since become the rule, that he should write only when and what he chose. Wordsworth wrote nothing in return for the distinction, and Tennyson has written but little.—American Encyclopedia.

It has been held by the House of Lords, in England, that in the case of a sinecure granted by government for meritorious services in the past, that the consideration for the office has already been paid, and the incumbent, therefore, entitled to the office without the performance of any further labor or duty.

416. Literary property can only be a source of profit to its author, according to his power of parting with it, either in whole or in part, for value, and of specifying the uses for which it is so alienated; and these rights the ownership of literary property, as of all other, involves. We have seen that in the eye of the law such property, either before or after copyright, is personal property,[1] and subject to all the rules of personal property as to its alienation, transfer, and descent. In general, therefore, all contracts relating to such alienation or transfer will be governed by the familiar principles of the law of contracts. A few exceptions, arising from the peculiar nature of literary property, remain to be considered here.

417. We have before remarked that courts of equity will not decree a specific performance, by an author, of a contract to write or compose[2] a literary composition, though an ordinary action at law for damages for breach of contract might lie.

Equity, however, might prevent the author, who has contracted to write certain matter for a certain publisher, from writing the same matter for a rival publisher.[3] So, where a young lady agreed to sing at the Queen's theatre for a certain number of nights,

[1] In England this is, besides being common law, expressly enacted by statute 5 & 6 Vict. c. 45, § 25, which provides "that all copyright shall be deemed personal property, and shall be transmissible by bequest, or, in case of intestacy, shall be subject to the same law of distribution as other personal property, and in Scotland shall be deemed to be personal and movable estate." Sect. 3 of 25 & 26 Vict. c. 68, has a similar enactment as to the nature of the property in paintings, drawings, and photographs.

[2] *Ante*, vol. ii., p. 353, and cases cited; Clarke v. Price, 2 Wils. Ch. Cas. 157; Morgan's Addison on Contracts, vol. 1, p. 755; Brace v. Wehnert, 25 Beav. 351; 27 L. J. Ch. 527.

[3] Morris v. Colman, 18 Ves. 437.

and that she would not during the period sing anywhere else, but afterwards accepted an engagement and agreed to sing at a rival theatre, the court, by injunction, restrained her from singing at the rival theatre, although it had no power to compel her to sing at the Queen's theatre.[1]

If an author contracts not to write or edit any other work, on the subject treated in a work already written by him, a court of equity will not interfere until there is a violation of the agreement by actual printing and publication. And accordingly, in the case of the famous law-writer, Mr. Chitty, where a publisher purchased of him the copyright of a treatise written by him upon the criminal law, he undertaking not to write or edit any other work upon that subject, and an advertisement appeared that the defendant was about to edit "Burn's Justice," Lord Brougham refused a motion to restrain him from editing articles on the criminal law in that book, saying that the defendant was at liberty to write in his closet what he pleased.[2]

418. And though this rule might work hardship in many cases, yet it is founded in reason, and in the nature of things; for the intellectual labor which was performed under the coercion of a court of justice, or of the officers of the law, would hardly be very valuable to anybody; besides which consideration, the law would be very careful to avoid making a decree which it could not, by any possibility or prowess, enforce. Courts of equity, therefore, will not assume

[1] Lumley v. Wagner, 21 L. J. Ch. 898; 1 De G., M. & G. 638; Webster v. Dillon, 3 Jur. N. S. 432; Catt v. Tourle, L. R 4 Ch. 654; 38 L. J. Ch. 665; and see Daly v. Smith, 38 N. Y Superior Ct. (J. & S.) 158.

[2] Brooke v. Chitty, 2 Cowp. 216.

jurisdiction to decree the specific performance of such contracts between auth rs and publishers.[1]

"I have no jurisdiction," said the court, in Clark v. Price,[2] "to compel Mr. Price to write reports for the plaintiffs. I cannot, as in Morris v. Colman,[3] say that I will induce him to write for the plaintiffs by preventing him from writing for any other person, for that is not the nature of the agreement. The only means of enforcing the execution of this agreement would be to make an order compelling Mr. Price to write reports for the plaintiffs, which I have not the means of doing. If there be any remedy in this case, it is at law. If I cannot compel Mr. Price to remain in the court of exchequer for the purpose of taking notes, I can do nothing. I cannot indirectly, and for the purpose of compelling him to perform the agreement, compel him to do something which is merely incidental to the agreement. It is also quite clear that there is no mutuality in this agreement. I am of opinion that I have no jurisdiction in this case."

The case of Morris v. Colman, alluded to in the above, held that a covenant in articles of partnership, by which a dramatic writer undertook not to compose pieces for any other than a particular theatre, was a legal covenant. Such a covenant was compared, in argument before Lord Eldon, to contracts in restraint of trade, which are void on principles of public policy; but his lordship said, "I cannot perceive any violation of public policy in this provision. The case of trade to which it has been compared is perfectly distinct. The contract is not unreasonable upon either construction; whether it is that Mr. Colman shall not

[1] Hazlitt v. Templeman, 13 L. T. N. S. 593.
[2] And see Wils. Ch. Cas. 157.
[3] 18 Ves. 437.

write for any other theatre without the license of the proprietors of the Haymarket theatre, or whether it gives to those proprietors merely a right of pre-emption."

The court could not compel Colman to write for the Haymarket theatre; but it did the only thing in its power—it induced him indirectly to do one thing by prohibiting him from doing another.

419. Courts will continue to recognize the difference between intellectual and other labor, not only by declining to coerce it, but even to accelerate it when once begun. A contract between a publisher and a printer, wherein the latter undertakes to print a work within six months, does not bind the former to furnish the materials within the six months, in the absence of an express stipulation to that effect. Such an engagement to print within six months is only conditional upon the copy being supplied to the printer fast enough; but it does not create, by inference, an engagement by the employer to furnish it within that time. It would, however, be an answer to any action that might be brought against the defendant for not printing the work within the six months, to say that the copy was not supplied fast enough.[1]

We have already seen that no degree of usefulness, or of value, must be shown to exist in a work, in order to entitle it to a copyright. An inventor in the United States, before a patent is granted to him for seventeen years, must prove to the satisfaction of the commissioner of patents, not merely the originality, but the usefulness of his invention, and only receives his patent upon the payment of considerable fees to the patent office; often too, additionally large ones to agent and solicitors. A copyright, on the contrary, is granted for a nominal fee, and without any represent

[1] Mawman v. Gillett, 2 Taunt. 325.

ations or affidavit whatever, of course in the same measure to a book run together with paste and scissors, as to one the result of a lifetime of labor, research, and isolation. But if an author, under a contract with his publisher to supply him the manuscript of a work for a particular treatise or work of reference, produce a work utterly useless or valueless for the publisher's purpose, an action for damages might lie, but this question does not appear to have ever directly arisen.

420. In the case of an agreement between an author and a publisher, that the latter should publish at his own risk and expense the work of the former, on the terms that the profits should be equally divided, and that the author should, if a subsequent edition were required, prepare it for the press, and the publisher should print it on the same terms, Knight Bruce, L. J., was of opinion that the duties on neither side were of such a nature that their performance could be specifically enforced by a court of equity.[1]

Either party may, however, in such a case, be made liable in damages for breach of contract. Thus, where a person was employed to write a treatise on a particular subject, to be published in the "Juvenile Library," but before he had completed the treatise the "Juvenile Library" was abandoned by the defendants, who had employed him, he was entitled to recover damages for the breach of contract on the part of the defendants, without any tender or delivery of the treatise on his own part.[2]

[1] Stevens v. Benning, 6 De G. M. & G. 229.

[2] Planché v. Colburn, 8 Bing. 14; 5 C. & P. 58; and see Colnaghi v. Ward, 6 Jur. 969, where an action was brought for breach of contract to deliver an engraved plate to be published by the plaintiff.

And the publisher may maintain an action against the author for breach of contract to deliver the manuscript of a work to be published, provided the work is of an innocent character.[1]

421. Though the terms of the contract between author and publisher be, that the latter should bring out the work at his own expense, and that the profits should be divided between both, this does not prevent the bringing of such an action as last referred to, because it is not brought to recover partnership profits from the author, but to make him liable for not contributing his labor towards the attainment of profits, to be subsequently divided between the parties. Lord Ellenborough indicated the amount of damages to be given in such a case as that which would include the expenses of publication, and the profits which would probably have been derived from it.[2]

422. It seems that, if an author has agreed with a publisher for the publication of his book, and the publisher has in consequence made advances of money, an injunction would, be granted to restrain the publication of the work by another publisher until the former had been repaid.[3]

But a court of equity will not interfere to restrain an author, who has written a work for one publisher, from writing a similar work, or a continuation of the first, for another, in the absence of any stipulation in the matter.

So, where a bookseller agreed with an author for an edition of a new translation of Buchanan's "History of Scotland," with a continuation to the time of the Union, to be contained in four volumes, and had

[1] Gale v. Leckie, 2 Stark. N. P. 107.
[2] Id.
[3] Brook v. Wentworth, 3 Austr. 381.

obtained subscriptions for all that could fall within his edition, he was held by the court of session not entitled to prevent the author from publishing in a fifth volume a continuation of the history, which embraced part of the period, and also some of the matter contained in the last of the four volumes, this being repeated in order to keep up the connection.[1]

Nor, on the other side, will a court grant an injunction to restrain the publication of a manuscript on the ground that the sum agreed to be paid to its author for contributing it has not been paid; but such payment may be enforced at law.[2]

423. But when the actual printing or publishing has taken place, equity will no longer have the same grounds for non-interference. Either party, in such a case, may have an action for damages for the breach of contract. And the publisher may maintain an action against the author for breach of contract to deliver the manuscript of a work to be published, provided the work is of an innocent character.[3]

424. Where one contracts to supply another with a composition in such a form as to enable the latter to publish it as his own, a court of equity will not restrain the publication of the manuscript in an altered or mutilated form, unless there is a special contract, express or implied, reserving to the author a qualified copyright, the purchaser of a manuscript is at liberty to alter and deal with it as he thinks proper.[4]

But it seems that if a publisher puts forth an inaccurate edition of an author's work, purporting to be executed by him, the author may maintain an action

[1] Blackie v. Aikman, 5 Scotch Sess. Cas. 719 (1827).
[2] Cox v. Cox, 11 Hare, 118.
[3] Gale v. Leckie, 3 Stark, N. P. 107.
[4] Cox v. Cox, 11 Hare, 118.

against the publisher for injury to his reputation, even where the publisher is the owner of the copright.[1]

425. Contracts between authors and publishers, for the joint or other participation in their copyrights, are perhaps as frequently presented for interpretation by courts as contracts having other subject-matters. Equity will take jurisdiction to enforce specific performance of a contract for the sale of a copyright, and it will make no difference that other matters are mixed up with it.[2]

But where joint owners in a copyright make a contract between themselves as to it, neither will be permitted to set up, as against the other, any original rights as joint owner of such copyright, in violation of such contract.

This was the ruling in Gould v. Banks.[3] "There is no principle or authority," said the court in that case, "which will inhibit such a contract between parties, because they may be partners in the subject-matter of it. They may bind themselves by a private agreement concerning the partnership business, but so far as third persons may be interested, it would be inoperative as to them."[4]

426. It is important, in the draughting of agreements between authors and publishers, that they should express, beyond a doubt, whether they are to operate as assignments of the copyright in the work, or merely as licenses to publish.[5]

If an author sell and dispose of his manuscript in

[1] Archbold v. Sweet, 1 M. & Rob. 162.

[2] Simms v. Marryat, 17 Q. B. 281.

[3] 8 Wend. 568.

[4] *Vid.* also Lindley on Partnership, 2 Ed. pp. 869, 870.

[5] This was the difficulty in the cases of Stevens v. Benning (6 DeG. M. & G. 223), and Reade v. Bentley (3 K. & J. 276), in which case the vice-chancellor refused to allow costs to

specie to a publisher, with the express understanding that the latter is to publish it, he cannot afterwards copyright it in his own name, but the copyright belongs to the publisher.

If the author dispose of his manuscript in specie to a publisher, with the intention that he shall publish it, he cannot copyright the work so published. So, where a reporter agreed to furnish a law-publisher for five years, in manuscript, the reports of a certain court, the publisher agreeing on his part to publish the same, and to pay the reporter one thousand dollars for every volume of such reports that he should publish, the court held, that the publisher had the perpetual right, as against the reporter, to print, publish, and sell copies of a volume issued in accordance with the above agreement, without paying anything further than the one thousand dollars, and that the reporter could not copyright the volume so issued by the publisher.[1]

427. As in the purchase of other property, the rule caveat emptor would seem to apply. It has been held, that the purchaser or contractor of literary property cannot afterwards disclaim his purchase, and withhold payment, on the ground that he did not know its character.[2]

Neither equity nor law will, of course, protect or

either party, considering each of them responsible for the defective form of the agreement.—Shortt, L. Lit. p. 270.

[1] Paige v. Banks, 7 Blatchf. 152.

[2] "The Swiss Times," a newspaper published in Geneva, Switzerland, employed Gen. Cluseret, the French communist leader, to write his souvenirs for its columns, but discovering that the circulation of their paper was about to be suppressed on that account, in Paris, cancelled the contract with him and discontinued the publication. In a suit by Cluseret for such breach, held that the newspaper must be held to have known the character of matter which would be furnished by Cluseret.—Albany Law Journal, September 12, 1874.

enforce any contracts of which the subject-matter is immoral, or otherwise non-innocent literary productions, though such non-innocence will never be presumed, but must be proved by profert of the work itself.[1] Nor will the publication of an advertisement of a work, which advertisement disparages a rival work, be non-innocent in such a sense that it will be interfered with by equity.[2]

As to all other contracts, the statute of frauds applies to contracts between authors and publishers having the preparation or publication of literary matter for their subject.[3]

428. Where an agreement between an author and his publisher is, that the publisher shall take the whole charge and risk, and the whole duty of bringing out the work as he thinks best for the interest of both parties, it seems to be necessarily incident to the duty which the publisher has to perform, that he shall also have the right of fixing the price at which the work is to be brought out.[4] And, in such a case also, the

[1] Gale v. Leckie, 2 Stark. N. P. 110; Fores v. Johnes, 4 Esp. 97; Poplett v. Stockdale, Ry. & M. 338.

[2] Seeley v. Fisher, 11 Dim. 581.

[3] Sweet v. Lee, 4 Scotts. N. R. 77; 3 M. & Gr. 452; Jackson v. Lowe, 1 Bing. 9; Phillimore v. Barry, 1 Camp. 513; Saunderson v. Jackson, 2 B. & P. 398; Johnson v. Dodgson; 2 M. & W. 653; *vid.* also the famous case of Boydel v. Drummond, 11 East. 142.

[4] Reade v. Bentley, 3 K. & J. 276. In an agreement like the foregoing, where the work was to be brought out at the publisher's expense and the profits to be divided, the addition of a clause providing that the books sold should be "accounted for at the trade-sale price, reckoning twenty-five copies as twenty-four, unless it be thought advisable to dispose of any copies, or of the remainder at a lower price, which is left to the judgment and discretion" of the publisher, does not justify an inference that the publisher has no discretion in fixing the price except in the particular case there mentioned. The

publisher is the proper party to determine upon the time and mode of publication.

"An agreement," says Shortt,[1] "between an author and a publisher, that the latter should publish, at his own risk and expense, a work belonging to the former, on the terms of an equal division of the profits after all expenses had been paid, may be regarded in the double light of a license and a partnership—a license for the publication of the work, and then a joint adventure between the author and publisher in the copies so to be published. The publisher cannot be considered, in such a case, as merely the agent of the author—a mere agent seldom embarking in the risk of the undertaking."[2]

429. The sale of stereotype plates of a quarto edition of the Bible, with copyrighted notes appended, —by the proprietor of the notes,—these plates being

meaning of such a clause is explained by Lord Hatherley, (when vice-chancellor) in Reade v. Bentley. "It is quite obvious that this clause was introduced with no such view, but because Mr. Bentley is to bring out the work, and in bringing it out, he is to fix a certain price to the trade; he is aware that there are persons who are in the habit of purchasing all these works for re-sale; there is a certain quantity in the first instance offered to the trade, as it is called, who send in their orders, each buyer for a certain quantity of copies, and it is brought out to the trade at a price which is fixed upon each edition. Then it might happen that some copies would remain unsold. Mr. Bentley first agrees to account with the author for all copies at the trade price; but then, as that might be too hard upon the publisher, who has had all the expense of bringing out the work, it is agreed that, if any copies remain unsold, he is to have liberty, as regards that edition, to dispose of the unsold copies at a lower price. That is the obvious meaning of this clause, and it has no reference to the general question of fixing or not fixing the price."—Shortt, L. Lit. p. 271; Id. and Reade v. Bentley, 4 K. & J. 276.

[1] P. 272.

[2] Id. and Stevens v. Benning, 6 DeG. M. & G. 231.

afterwards sold to a third party at public sale, was held not to allow the last purchaser to publish therefrom a folio Bible, with commentaries at the foot of each page—such a use being not contemplated when the sale was made.[1]

Where it has been agreed that the publisher shall choose embellishments, and everything else connected with the publication, for all editions which should be brought out during the subsistence of the agreement,[2] a clause in such an agreement that the books sold should be "accounted for at the trade-sale price, reckoning twenty-five copies as twenty-four, unless it be thought advisable to dispose of any copies, or of the remainder at a lower price, which is left to the judgment and discretion" of the publisher, does not justify an inference that the publisher has no discretion in fixing the price, except in the particular case there mentioned.[3]

430. Where an agreement between author and publisher states that, after payment of the expenses of publication, &c., "the profits remaining of every edition that should be printed of the work are to be divided into two equal parts," one moiety to go to the author, and the other to the publisher, this points out certain

[1] Fullarton v. McPhun, 13 Scotch Sess. Cas. (2d ser.) 219.

[2] Reade v. Bentley, 3 K. & J. 276.

[3] Id. "It is," said the vice-chancellor, "obvious that this clause was introduced with no such view, but because Mr. Bentley is to bring out the work, and in bringing it out, he is to fix a certain price to the trade; he is aware that there are persons who are in the habit of purchasing all these works for re-sale; there is a certain quantity in the first instance offered to the trade, as it is called, who send in their orders, each buyer for a certain quantity of copies, and it is brought out to the trade at a price which is fixed upon each edition. Then it might happen that some copies would remain unsold. Mr.

definite times for the adjustment of the accounts, and at which the author becomes entitled to terminate his agreement with the publisher.[1]

Nor would the contract of a reporter with a publishing house, for the exclusive right to publish for his five years of office, confer on him any right to the manuscripts prepared by him for such reports, and no injunction could be issued by a federal court, by

Bentley first agrees to account with the author for all copies at the trade price; but then, as that might be too hard upon the publisher, who has had all the expense of bringing out the work, it is agreed that, if any copies remain unsold, he is to have liberty, as regards that edition, to dispose of the unsold copies at a lower price. That is the obvious meaning of this clause, and it has no reference to the general question of fixing or not fixing the price."

[1] Nor can the publisher by stereotyping the work deprive the author of this right. It was objected in Reade v. Bentley, that when a work has once been stereotyped, the term "edition" is no longer applicable; that when a work is published in what is called "thousands," twenty thousand or thirty thousand being circulated, each thousand could not properly be called an edition. To this, Lord Hatherley replied: "I apprehend that not merely in point of etymology, but having regard to what actually takes place in the publication of any work, an 'edition' of a work is the putting of it forth before the public, and if this be done in batches at successive periods, each successive batch is a new edition; and the question whether the individual copies have been printed by means of movable type or by stereotype, does not seem to me to be material. If movable type is used, the type having been broken up, the new edition is prepared by setting up the type afresh, printing afresh, and repeating all the other necessary steps to obtain a new circulation of the work. In that case the contemplated break between the two editions is more complete, because, until the type is again set up, nothing further can be done. But I apprehend it makes no substantial difference, as regards the meaning of the term 'edition,' whether the new 'thousand' have been printed by a re-setting of movable type, or by stereotype, or whether they have been printed at the same time with the former thousand or subsequently."

virtue of the copyright acts of congress, to prevent others from publishing them.[1]

431. As to what is a new edition, the court in the same case held, that a "new edition is published whenever, having in his storehouse a certain number of copies, the publisher issues a fresh batch of them to the public; so that if, after printing the copies, a publisher should think it expedient, for the purpose of keeping up the price of the work, to issue them in installments of a thousand at a time, each successive issue would be a new edition, in every sense of the word."

And in the Scotch case of Blackwood v. Brewster,[2] it was held, that the reprint of a portion of a book, to replace copies destroyed by fire while in the publisher's hands, was not "an edition."

This question is not unfrequently of great importance, in cases where it becomes necessary to cancel or discontinue an agreement between an author and a publisher.[3] If such an undertaking be determinable at the mere option of either party thereto, it might not unfrequently work great hardship.

For, on the one hand it might be said, on behalf of the publisher, that he had given to the undertaking the benefit of his talents and position as a publisher, and had incurred expenses in bringing out the first edition, in the expectation of being reimbursed for the cost of the first by the sale of the second and subsequent editions; and that to hold the author entitled, at his own instance, to determine the agreement when the first edition had been published, would be to

[1] Little v. Hall, 18 H., 365; 1 Decisions of U. S. Sup. Ct., Miller, 143.

[2] 23 Scotch Sess. Cas. 2d ser. 142 (Dec. 2, 1860). And see Black v. Murray, *ante*, vol. i. pp. 375 et seq.

[3] Shortt, p. 272.

enable him, by an arbitrary and unreasonable exercise of his option, to deprive the publisher of all his profits. On the other hand, it may be urged, on the part of the author, that, unless he has the power of determining the agreement, the consequence would be that he may be under an obligation to the publisher during the whole of the publisher's life, while the publisher will be under no reciprocal obligation to him. The publisher could compel the author to abstain from publishing a single copy of the work, so long as he expressed his readiness to continue publishing, while the author has no reciprocal power. He could never compel the publisher to publish more than a single edition of the work. Further, the publisher, in the bona fide exercise of his discretion as to the fitting time and mode of publication, might decline indefinitely to publish, but without resigning his contract; while the author might, at the same time, be of a contrary opinion, and yet for months, or even years, might be kept in suspense, and be prevented from publishing on his own account, until his publisher should be of opinion that the time had come for the revival of the public interest in the work.

The decision of this question, in the case of Reade v. Bentley, appears to have held, that the position of the author, under such circumstances, is one of so great hardship and difficulty; that unless it were clearly shown to have been contemplated by both parties to the agreement, it should not be forced upon him.

If an author sells his copyright in a work, for a limited term, to a publisher, the publisher may, except in case of actual fraud, continue, after the expiration of the term, to sell copies of the work printed during its continuance.[1]

[1] Howitt v. Hall, 10 W. R. 381; 6 L. T. N. S. 348.

432. In Pulte v. Derby,[1] where a contract in writing was entered into between an author and a firm of publishers, whereby the former agreed to give the latter "the exclusive right to print and publish an edition of one thousand copies of a work to be written" by the author, in consideration whereof, the publishers agreed "to print and publish an edition above mentioned (one thousand copies), at their own cost and expense, and pay the author the sum of fifteen cents each for all and every copy sold;" and that, if the publishers "find a second edition called for, the said author should revise and correct a copy of the first edition ready for the press, which the said publishers agree to have stereotyped at their own cost, having the exclusive use and control of the plates, printing as many copies as they can sell, paying to the said author the sum of twenty cents for each and every copy sold; settlement to be made semi-annually from the day of publication, on their note, at four months from the date of settlement;" and where the publishers, with the author's knowledge and acquiescence had themselves recorded as proprietors of the copyright, it was held, that they had the legal title to the copyright in them, but only for the purposes of the contract. "The right," said the courts, "covers their interest, and protects it so long as they shall be engaged in the publication and sale of the work, and no further. They cannot transfer or assign the copyright, nor publish the work, except upon the terms of the contract."

The first edition of the work in .at case having been exhausted, the publishers stereotyped the corrected manuscript of the second edition, but printed only one thousand five hundred copies of the first im

[1] 5 McLean, 337.

pression; and, when these were sold, two thousand more copies were published, being called, in the title-page, the third edition. The author then revised a third edition, caused it to be stereotyped and printed, took out a copyright in his own name, and filed a bill for an injunction to prevent the publishers from further printing, publishing, or selling their third edition, as contrary to his wishes, and in fraud of his rights. The court held, that the publishers were not limited, under the contract, to the number of copies which they might strike off at the first impression of the second edition, but might print any number they could sell, as they should be wanted, during the existence of the copyright; and that the author had no right to print an edition for himself, and take out a copyright, so long as the publishers complied with the contract.

The court also held, that though the publishers could not transfer their copyright to a third party, they might sell him the plates, and authorize him to publish, still accounting to the author, pursuant to the contract; and that the publishers were bound to keep the market supplied, and could not refuse to print, if they could sell.

433. As to whether, on the sale of a copyright, the law implies a warranty in the seller, in the absence of an express warranty, or whether the ordinary rule of sales of personal property will be held to govern, there is, it seems, some doubt.[1]

A chattel mortgage on the copyright of a work is not a mortgage on the profits arising from a user of the copyright.[2]

[1] Shortt, p. 280; Simms v. Marryat, 17 Q. B., 281.

[2] Kelly v. Hutton, 3 L. Rep.; 3 Ch. App. 703; 38 L. J. 917; Ch. L. T. N. S., 223.

The questions arising upon an agreement between proprietors that the matter or type of one newspaper shall be used for another, were discussed in the case of Platt v. Walter,[1] which has been already noticed in the chapter on Newspapers.

434. The question as to whether and how far a lien in the nature of a mechanic's lien will subsist in a printer for his services in printing a work, was discussed in England in the cases of Clay v. Yates,[2] Blake v. Nicholson,[3] Bleaden v. Hancock.[4] The question will depend somewhat upon the custom of the trade.[5] But if the book be non-innocent in its character, the printer equally with its author and publisher, is excluded from any protection in connection therewith.[6]

No person who has had anything to do with the composition of an immoral or libelous work, can maintain an action against the person who employed him, to recover remuneration for his labor. One who lends himself to the violation of the public morals, or the laws of the country, cannot have the assistance of those laws to carry his purpose into execution.[7]

435. Copyright may be transferred, the same as all other personal property, either by instrument in

[1] 17 L. T. N. S., 157, *ante*, p. 502.
[2] 1 H. & N., 73.
[3] M. & S., 167.
[4] M. & Mal. 465; 4 C. & P., 152.
[5] Gillett v. Mawman, 1 Taunt. 137; Adlard v. Booth, 7 C. & P., 108. As to custom of the trade of printing in England generally, see also Cunningham v. Fonblanque, 6 C. & P. 44; Hill v. Levey, 3 H. & N., 8; Mawman v. Gillett, 2 Taunt. 323.
[6] Forres v. Johnes, 4 Esp. 97; Clay v. Yates, 1 H. & N., 73; Gale v. Leckie, 2 Stark., N. P., 110; Poplett v. Stockdale, Ry. & M., 337.
[7] Poplett v. Stockdale, Ry. & M., 337.

writing, or by parol; but in the latter case the transfer, in order to be valid in law, must be recorded, as provided by law, in the office where the copyright was registered under the statute.[1]

But it has been held that when the proprietor's intention to assign appears, the contract will be held binding.[2] A mere receipt might be such evidence,[3] and in a late case,[4] a passage in a letter running thus: " . . . In answer to your letter of the 16th instant, I beg to say that I accept the offer you therein make me, and agree to the condition you propose for cancelling my debt to you, viz., to let you have my drama of 'Doing for the Best,' in discharge of £10 of the sum due, and to furnish you with a little piece in a couple of months "—was held to be a complete assignment of the writer's property in the drama mentioned. The rule will probably be, as in all other cases, that between the parties an unrecorded assignment would still be valid.[5] But, in all other cases, the rules of personal property seem to apply. In the case of patents, a right to manufacture and sell may be granted by the patentee, for certain localities. It

[1] Stats. U. S. Revision of 1873–75, Dec. 4955. In England the rule is the same; the assignment must be duly entered at Stationers' Hall, *vid.* also Power v. Walker, 4 Camp. 8; 2 M. & Selw., 7; Clementi v. Walker, 2 Bar. & Cres., 861; De Pinna v. Pothill (ob.), 1; Davidson v. Bohn, 6 C. B., 456; Morris v. Kelly, 1 J. & N., 481; *vid.* aliter Cumberland v. Copeland, 7 H. & N., 118. As to the necessity of witnesses, see Shortt, L. Lit., p. 153, 154.

[2] Leader v. Purday, 7 C. B., 4.

[3] Levi v. Rutley, L. R. 6 C. P., 523.

[4] Lacy v. Toole, 15 L. T. (N. S.) 512; *vid.* Cumberland v. Copeland, Ex., 7 H. & N., 118; 31 L. J., 19 Ex., 4 L. T. (N. S.), 803. Also chapter on Contracts Relating to Contract, *post*, p.

[5] And see Webb v. Powers, 2 Wood & M., 497.

seems to have been thought in England—though the case has never met with an express decision—that copyright is not so divisible,[1] though, it seems, the term of a copyright may be divided.[2] And we have seen, in considering stageright or dramatic copyright, that a right to represent a play may be granted for certain localities.[3]

436. It has been repeatedly decided, that property

[1] In Jeffreys v. Boosey (4 H. L. Cas., 815), in which there had been assignment to the defendant of an opera for publication in the United Kingdom only, Lord St. Leonards, Pollock, C. B., and Parke, B., were strongly of opinion that copyright is indivisible and consequently incapable of being partially assigned. The case was not, however, decided upon that ground. Parke, B., in giving his opinion to the House of Lords, said: "I am of opinion that this is an indivisible right, and the owner cannot assign a part of the right, as to print in a particular county or place, or do anything less than assign the whole right given by the English law. It seems to me analogous to an exclusive right by patent, which cannot, I apprehend, be parcelled out, though licenses under it may." And Lord St. Leonards, still more strongly: "If there is one thing which I should be inclined to represent to your lordships as being more clear than any other in this case, it is that copyright is one and indivisible. I am not speaking of the right to license; but copyright is one and indivisible; or is a right which may be transferred, but which cannot be divided. Nothing could be more absurd or inconvenient than that this abstract right should be divided, as if it were real property, into lots, and that one lot should be sold to one man, and another lot to a different man. It is impossible to tell what the inconvenience would be. You might have a separate transfer of the right of publication in every county in the kingdom." The assignment in this case took place before the passing of the Act 5 & 6 Vict., c. 45, but this act has made no change as to the extent of copyright.

[2] Says Maule, J., in Davidson v. Bohn (6 C. B., 458): "The author or proprietor may assign the right to less than the full term. It never could have been intended to introduce the complicated sort of copyright suggested."

[3] *Ante*, p. 299; Crowe v. Aiken, 2 Biss. R. 208.

in a newspaper passes to the assignees, under proceedings in bankruptcy.[1] Whether the assignees, however, could take a mere right to copyright (sometimes called copyright before publication), does not appear to have been decided.[2] A foreign author, not a resident of the United States, cannot, by an assignment of his copyright to a citizen, evade the statutes of copyright.[3]

437. It seems that an assignment made by parol may be valid, if it be registered in the office where the copyright was entered. In the Scotch case of Kyle v. Jeffreys,[4] the defendant claimed copyright by assignment from the authoress, in the words of a song written by Miss Eliza Cook, and sought to restrain the publication of the song by Kyle. Jeffreys had registered himself as proprietor, at Stationers' Hall, and a certified copy of the registry (by statute, prima facie proof of proprietorship), was produced at the trial. His title being impeached by Kyle, other evidence was offered, consisting of a receipt, by Miss Cook, for a sum of money paid her by Jeffreys, "for copyright of words of a song written by me, entitled 'The Old Arm Chair;'" and also the testimony of a person to whom Miss Cook had stated that she had parted with the copyright in the song to Jeffreys. The court admitted the receipt as evidence, holding that where the prima facie evidence afforded by the certificate of registration was rebutted, the claimant might still support his title, without production of a formal instrument of assign-

[1] Longman v. Tripp, 12 Bas. & P. N. S. 67.

[2] Atcherty v. Vernon, 10 Mod. 518; *vid.* 4 Burr. 2311, Amb. 695.

[3] Jeffreys v. Boosey, 4 H. L. Cas. 815.

[4] Scotch Sess. Cas. N. S. 8.; 18 Scotch Sess. Cas. N. S. 906.

ment. As the evidence of title admitted on the trial in this case was not a writing under seal, the approval by the House of Lords of this ruling decides that a deed is not necessary to a valid assignment of copyright.[1]

438. An agreement to assign a copyright will be treated by equity as a valid assignment, upon the maxim, that equity looks upon that as done which ought to have been done. The most common cases of the application of the rule are under agreements, all such being considered as performed, which are made for a valuable consideration, in favor of persons entitled to insist on their performance. Hence, a man has in many cases a title, recognized and enforced by equity, where he has no title at law. Thus, an agreement to assign is treated by equity as a valid assignment, and infringements of literary property have been restrained where the claimant of the aid of chancery had only an equitable title to relief, and possessed no title recognized at law.[2]

439. Written agreements between author and publisher are often made, by which the copyright is not intended to be passed. A written agree-

[1] Shortt, p. 153.

[2] "Lord Mansfield, indeed, was of opinion that relief would not be given in such a case, and said, in Millar v. Taylor, 4 Burr, 2400, that unless a court of equity saw a law right existing in the author it would not interfere. Such also was the opinion of Lord Eldon, in Rundell v. Murray, 1 Sac. 315 But Lord Lyndhurst, in Chappell v. Purday, 4 Y. & Col., referring to this expression of opinion, observed. "If by this it was meant to be said that a court of equity would only interfere when the legal right was in the party applying for its interference, I will not go so far; because I think that a court of equity will assist any party having an equitable right, where the legal right intervenes to prevent his obtaining justice; otherwise great fraud would ensue."—Shortt, p. 159. *Vid.*, however, Mawman v. Tegg, 2 Russ. 385.

ment between an author and a publishing firm, that the latter "should print, reprint, and publish a work of the author's, at their own risk, on the terms of dividing equally with him any profits that there might be after payment of all expenses; and that if all the copies should be sold, and another edition should be required, the author should make all necessary alterations and additions, and the publishers should print and publish a second and subsequent editions on the same terms; and that if all the copies of any edition should not be sold in five years from the time of publication, the publishers might sell the remaining copies by auction or otherwise, in order to close the account," was held, in Stevens v. Benning,[1] not to be a contract for the assignment of the author's copyright, but a mere personal contract on both sides, not assignable by either party.[2]

[1] 6 DeG. M. & G. 228; 1 Kay & J. 168.

[2] Id. The firm with whom the agreement was made, in that case, having been changed, and their interest having been assigned to a new firm, the latter firm was held not entitled to restrain the publication of a new edition by another publisher with the author's concurrence. *Vid.* also Sweet v. Shaw, 3 Jur. 217; Sweet v. Maugham, 4 Id. 456; Bohn v. Bogue, 10 Id. 421; Mawman v. Tegg, 2 Russ. 402; Sweet v. Cater, 11 Sim. 573; Reade v. Bentley, 3 K. & J. 271. In this latter an agreement was entered into between the plaintiff and defendant that the latter should "publish at his own expense and risk a book written by the plaintiff, and after deducting from the produce of the sale thereof the charges for printing, paper, advertisements, embellishments, and other incidental expenses, including the allowance of £10 per cent. on the gross amount of the sale for commission and risk of bad debts, the profits remaining of every edition that should be printed, to be divided equally between the plaintiff and defendant; the books sold to be accounted for at the trade-sale price, reckoning twenty-five copies as twenty-four, unless it should be thought advisable to dispose of any copies, or of the remainder at a lower price, which was left to the judgment and discretion of the di-

440. The present copyright law of the United States[1] provides that authors shall have the exclusive right to dramatize their own works. It is to be

fendant." The vice-chancellor (Wood) was clearly of opinion that this agreement was not, and was never intended by either party to be, a contract for the sale or purchase of the copyright. The vice-chancellor said: "It is unfortunate that publishers and authors should frame their agreements with so little precision, as from the case of Stevens v. Benning and this case it appears they are in the habit of doing. At the same time, from what I see in this case, I feel more confident than I did in Stevens v. Benning that there was no intention to dispose of the copyright by this agreement, because I cannot suppose that authors or publishers are so unaware of the importance and value of that right, as not clearly to express their intention when they mean the copyright to pass."

When this case came up a second time before the court (*vid.* 4 K. & J. 664), the defendant did not contend that the agreement amounted to a sale of the copyright, but insisted that the plaintiff had thereby granted to the defendant an irrevocable license to print and publish. The vice-chancellor did not, however, adopt this construction of the agreement. He said: "If the defendant's construction be correct, it follows that so long as he lives and is willing to continue publishing fresh editions of the work, so long, according to the doctrine in Sweet v. Cater, the plaintiff will be precluded from asserting a right to publish any competing edition. The defendant could compel the plaintiff to abstain from publishing a single copy of the work, so long as he expressed his readiness to continue publishing. But the plaintiff had no reciprocal power. He could never compel the defendant to publish more than a single edition of the work. His powers are limited to what the contract gives him; and according to the contract, when the defendant has published a second edition the contract on his part is fulfilled. This is a position of considerable hardship for an author, and one which ought to be clearly shown, upon the face of a contract, to have been contemplated by the parties who entered into it. . . . . It cannot be contended that the agreement on the author's part is like a grant, in which the onus is upon the grantor, of showing that he has not parted with all which the grant appears

[1] Stats. U. S. Revision of 1873–74, § 4952.

inferred that this right, like others recognized or conferred by the statute, must be parted with in the same way, and by means of the same formalities, as necessary to the transfer of the copyright itself. It was held in England, in a leading case on this subject,[1] that when an author assigned his copyright, he also parted with the right to its dramatic representation. But this was in the case of matter dramatic in its form, and it has since been enacted by express statute[2] "that no assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry book shall be made of such assignment, wherein shall be expressed the intention of the parties that such right shall pass by such assignment."[3] An assignment of the right

to comprise. The onus is here with the party who contends that this agreement amounts to a license, which, upon the face of it, it does not. It clearly is not an assignment of the copyright. It does not appear to me to create more than a joint adventure; and if license there be at all, it is only a license so far as may be necessary for carrying out that joint adventure, and an implied license for that purpose. That being so, the onus is upon the defendant of showing that the contrary construction is necessary; and that not being shown, a construction which would leave the author fast bound, and the publisher entirely free, after the publication of one edition, is not a reasonable construction to adopt in considering the effect of an agreement of this character?" His honor showed his disapprobation of the loose manner in which the agreement had been framed, by giving no costs, considering each party equally in fault for having entered into an agreement so difficult of interpretation.—Shortt, L. Lit. p. 161.

[1] Cumberland v. Planche, 1 A. & E. 580.

[2] 5 & 6 Vict. c. 45, § 22.

[3] "A valid assignment of the copyright in dramatic and musical compositions, regarded simply as literary productions,

to represent a dramatic or musical composition, must be in writing.[1] But such writing, it seems, may be executed by the proprietor's agent.[2] An assignee of a copyright is substituted entirely in the place of his assignor, and may maintain actions for penalties or damages in regard to the same.[3]

441. The right to first publish a work is exclusively in the author (or in the literary proprietor of the manuscript), and such a right will not be construed as alienated, except by express and unmistakable act of such author or proprietor. And under a contract between author and publisher, whereby the publisher agrees to publish the work, and pay the author, for the copyright, seven-and-a-half cents for every copy of the book published, the publisher does not obtain the exclusive right to publish the work.[4]

442. Until he shall have parted with it formally, and by such formalities as will leave no doubt of his manifest intention so to do, the manuscript itself—the paper and the ink—is a chattel indeed, and, like every other chattel, is seizable for debt; but the intangible literary and not carrying with them the right of representation, may be made either, first, by an instrument in writing which need not be under seal or attested by witnesses, or, secondly, by entry in the book of registry at Stationers' Hall in the form above given (p. 156) for the assignment of books.

"The necessity of writing to confer a title by assignment, valid at law, is apparent from the cases already cited with reference to the assignment of copyright in books, as by the interpretation clause (§ 2) of 5 & 6 Vict. c. 45, the word "book" is used to include "every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, &c." —Shortt, L. Lit. p. 165.

[1] Shepherd v. Conquest, 17 C. B. 427: 25 L. J. 127, C. P.

[2] Lacy v. Toole, 15 L. T. N. S. 512; Moreton v. Copeland, 16 C. B. 517.

[3] Thompson v. Symonds, 5 T. R. 45.

[4] Willis v. Tibbals, 33 N. Y. Superior Ct. 219.