

Case No. 4,215. DWIGHT ET AL. V. APPLETON ET AL.
[1 N. Y. Leg. Obs. 195.]

Circuit Court, S. D. New York.

Jan. 7, 1843.

COPY-RIGHT—DAMAGES FOR INFRINGEMENT—COPY-RIGHT
NOTICE—DELIVERY OF VOLUME TO SECRETARY OF STATE.

1. The plaintiff was proprietor of a theological work, the copy-right of which was secured according to the provisions of the act of congress, and the defendants, who were booksellers, imported a number of copies thereof from England, purchased there from a London bookseller, some of which he sold in New York, and the other copies of which were in his possession. *Held*, that the jury were authorized in finding a verdict of fifty cents for every sheet contained in the whole number of volumes found to have been in the defendants' possession at any time, or which they had imported for sale, or sold without leave of the plaintiff.
2. Where a work is published in several volumes at different times, the insertion of the record in the page next following the title-page of the first volume of the work, is a sufficient compliance with the provisions of the statute to secure the whole work. The same record may be inserted in another edition of the same work published in a different number of volumes without impairing the copy-right.

[Cited in *Lawrence v. Dana*, Case No. 8,136.]

3. The delivery to the secretary of state of the first volume of a work within six months after its publication, and the rest of the volumes before the offence is committed, or the action

is brought, is a sufficient compliance with the law to enable the plaintiff to recover.

This was an action of debt qui tarn in favor of the plaintiffs, [Timothy Dwight and others], who sued as well for the United States as for themselves, against the defendants, D. and Wm. H. Appleton, demanding the sum of three thousand six hundred dollars debt, due by reason of a violation of the plaintiffs' copy-right for Dwight's Theology, published by the plaintiffs in five volumes. The declaration stated that the plaintiffs were the proprietors of a book called "Theology Explained and Defended, in a Series of Sermons, by Timothy Dwight, S. T. D., L.L.D., late president of Yale College, with a Memoir of the Life of the Author, in five volumes," entered and secured according to the act of congress in the year 1818, and that they had complied with the provisions of the acts of congress in such case made and provided, whereby the plaintiffs had become the legal proprietors of said work. That the defendants, well knowing the premises, and in fraud of the rights of the plaintiffs, and without their consent, and in violation of the acts of congress in such case provided, on the 15th day of October, 1837, and on divers days between said date and the date of the writ issued in this case, did import, or cause to be imported, forty copies of said book, each containing sixty sheets, contrary to the acts aforesaid, &c. By reason whereof, &c. The declaration contained a second count for having in their possession, exposed to sale, and offering for sale, and selling forty other copies, &c., containing sheets, &c. By reason whereof, &c. Plea, Nil debet.

This cause came on for trial December 2, 1840. In support of the action, the plaintiffs introduced a record from the clerk of the district court of the United States for the district of Connecticut, in the following words; namely:

"(L. S.) District of Connecticut, ss. Be it remembered, that on the fifth day of January, in the forty-second year of the Independence of the United States of America, Timothy Dwight, and William T. Dwight, both of said district, administrators of the Rev. Timothy Dwight, now deceased, and late of the said district, have deposited in this office the title of a book the right whereof they claim as administrators aforesaid, and proprietors in the words following, to wit: 'Theology Explained and Defended, in a Series of Sermons, by Timothy Dwight, S. T. D., LL. D., late President of Yale College, with a Memoir of the Life of the Author in five, vol. 1,'—in conformity with the act of the congress of the United States, entitled 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies during the term therein mentioned.' R. J. Ingersol, Clerk of the District of Connecticut.

"A true copy of record examined and sealed by me. R. J. Ingersol, Clerk of the District."

A copy of this record was printed on the back of the title-page of the first volume, a copy of which record was duly published within two months, according to the law as it then was. And it was proved that Dr. Dwight, the author, resided at the time of his death,

which was in February, 1817, in New Haven, in the district of Connecticut; and that the volumes of said work issued from the press and were published, the first volume on the 7th of February, 1818; the second volume on the 6th of June, 1818; the third volume on the 3d of August, 1818; the fourth volume on the 29th of October, 1818, and the last or fifth volume on the 10th of March, 1819. As to the delivery of the work to the secretary of state of the United States, as the law requires, the plaintiff proved that the first and third volumes were both delivered to the secretary of state within six months from the publication thereof as the law requires. As respects the second volume, it appeared that it was not deposited with the secretary of state until about seven months after its publication; or rather, there was no evidence that it was in the office at an earlier period. As respects the fourth and fifth volumes, there was proof that the whole five volumes were in the office of the secretary of state on the 20th of January, 1820, but at what precise times the volumes, except the first and third, were deposited in the office, was matter of inference from the depositions and receipts read in evidence.

To show that the defendants had violated the plaintiffs' copy-right, they introduced an invoice from the custom-house of twenty-five copies of Dwight's Theology, published by the defendants and purchased of a London bookseller by the defendants. This invoice was signed by the defendants, and was the one upon which said books were entered and duties paid, and the plaintiffs insisted, was evidence that the defendants had imported so many copies of the work, which in this London edition was in one volume. The plaintiffs also introduced several witnesses who testified that they had purchased sundry copies of Dwight's Theology at the defendants' bookstore in Broadway, in the city of New York, at different times before the commencement of this suit, which copies appeared to have been published in Glasgow, and with Dr. Dewar's Essay on the Inspiration of the Scriptures prefixed, some of which copies were produced in court, in which the whole work was contained in one volume, and compared with the work described in the invoice, which had been given in evidence. The witness also testified that they had, during the same period of time, seen a number of copies of the same work in the defendants' bookstore for sale, similar in all respects to the copies produced in court. The plaintiffs then introduced as evidence the original work as first published

in five volumes in the year 1818, and soon after the death of its author. The defendants introduced a witness to prove that any other sermon, delivered by any other minister, independently of this work, would not be an improper addition to it, and that if any sermon was taken from the work, it would still be left a system of theology, complete for what he knew; that he had seen the work as published in five volumes, and also in four volumes. That he understood each sermon was complete in itself,—that he was aware that two volumes of sermons, by the same author, had been published, distinct from the system of theology. Here the evidence closed.

While the counsel were summing up to the jury, THE COURT suggested that it would be better to reserve the points of law, and let the jury find a verdict, if for the plaintiffs, for an amount sufficient to cover the sum which the plaintiffs had shown they were entitled to, according to this view of the evidence, subject to the opinion of the court on the questions of law, the amount to be reduced, if required, to conform to the opinion of the court. This was agreed to by the counsel on both sides.

THE COURT, after summing up the evidence to the jury, instructed them, if they found for the plaintiffs, to find specially how many volumes were deposited in the office of the secretary of state, and when, and how many volumes were imported, sold or exposed for sale by the defendants, or found in their possession, within the meaning of the law as explained by the court; which was, that the defendants were liable for all the sheets which had at any time been in their possession as importers or as venders of the same, or as having the same at any time for sale. The jury found for the plaintiffs two thousand dollars; and that the first and third volumes were deposited in the office of the secretary of state within six months from the time of their publication; and that the second, fourth and fifth volumes were not deposited in said office within six months after the time of their publication; and that the defendants had had in their possession thirty-eight copies of the English work complained of.

Upon this verdict the plaintiffs moved for judgment on the following grounds:

First That Dr. Dwight's Theology was one entire complete work, constituting a system of theology in which every sermon and every part stood connected with some other part and with the whole. That this was apparent, from the analysis at the commencement of the work, and the summary at the end. That no one sermon, nor any other part of the work, could be withdrawn without impairing the system and rendering it imperfect. That it was immaterial whether this work was published in five or four volumes, like the American copies, or in one volume like the English copy. That whether the work was published in one volume, or five or four, was a mere matter of convenience to the publisher and binder, and regulated by the taste of the reader and the expected profit of the publisher. It is not like an author's writings upon separate, independent subjects, published at different periods, in separate volumes. If the above position is sound, then it follows: (1) That

the deposit of the title-page of the work, as found in the first volume, in the office of the clerk of the district court, and the record thereof, was sufficient for the work, although got out in more volumes than one; and that the number of volumes was immaterial. (2) That the publication of the record from the district court, on the title-page, or page next to the title-page of the first volume of the work, effectually secured the copy-right to the whole work, although published in more volumes than one. If the title became thereby vested at all, it was vested in the work, not in the first volume only of the work. (3) The publication in the newspaper of the record of the title of the work as inserted in the first volume, protected the work, not merely that volume of the work. The object of such a publication was to let the world know that the author had taken out a copy-right of his work, not of the first volume of his work merely: (4) And hence it follows, fourthly, that the deposit of the first volume of the work, within six months after the publication thereof in the office of the secretary of state, is sufficient to secure the right and protect the work, provided the whole work is deposited there in a reasonable time, and before the reprint or attempt to reprint the work by any one else. The provision of the act on this subject is directory, and the object twofold. One object is to have a place, established by law, in which a copy of the work may be found, that the public may at all times know what works are private and what public property; and this notice is effectually given by deposit of the first volume in this case. The other object is to compel the author to furnish, for the use of the public library of congress, a copy of his work when complete. Both these objects have been answered in the present case. The whole work was furnished and delivered to the secretary of state within a very short time after its publication, and two of the volumes, the first and third, within six months. (5) And hence it follows, in the fifth place, that the insertion of the record on the page next following the title-page of the first volume of the work was a sufficient compliance with the statute. It was complying with the reason and spirit of the act; for it was giving sufficient notice that the work was secured by copy-right, and was private property. No one looking at the work with a view to a publication would omit to examine the first volume. Besides, it is submitted to the consideration of the court that the terms "book" or "books," as used in this section of the act, mean work

or works, not volume or volumes of a work.

Secondly. It is urged by the defendants, in the next place, that the record of the title of the work inserted on the page next following the title-page of the first volume of the first edition of the work, in five volumes, protects only that and such other editions of the work as might be published in five volumes; that the words "five volumes" make a part of the title of the work. In answer to this objection, it is insisted: (1) The number of volumes in which the author declares he means to put his work into, makes no part of the title of the work. That the subsequent alteration of the number of volumes in which the work may be published, is no change of the title of the work or book. (2) If this objection is valid, an author could not, after taking out a copy-right, in which he had specified the number of volumes, ever change the number of volumes in which he might wish to publish his work without losing his copy-right. (3) As this would be most unreasonable, it may be said that the author may record his title anew, specifying the number of volumes in which he might wish to publish. But, if this would be of any effect, it would be taking out a new copy-right for precisely the same work, only in a different number of volumes; and from this date his second copy-right would again commence, and if this would be legal, a man might perpetuate his copy-right as long as he pleased.

Thirdly. The counsel for the plaintiffs insisted that the plaintiffs had a right to recover fifty cents for every sheet contained in the whole number of volumes found to have been in the defendants' possession at any time, or which they had imported for sale, or sold without leave from the plaintiffs.

The defendants made the following points:

1. If the work in question was, by the deposit of its title-page, copy-righted, as an entire work, including the five volumes, the plaintiffs cannot recover, because they have not complied with the acts of congress in depositing in the department of state a copy thereof within six months after its publication.

2. The copy-right, secured by the deposit of the title-page, was a copy-right in the first volume only. (1) The language of the entry and title-page deposited, expresses this idea in express terms. (2) A series of publication issued from the press, at distant intervals, cannot be brought within the protection of the copy-right acts, by observing in respect to the first in number in the series, the forms prescribed by those acts.

3. Whether the copy-right extended to the whole work, or only to the first volume, the plaintiffs relinquished the benefit and protection thereof. (1) By publishing and selling for profit an unprotected edition in England. (2) By printing and publishing here ten editions of the entire work, in four volumes each, with different title-page. (a) The identity of the work, published with that copy-righted, is advertised to the public by the title-page alone. (b) If a man issue his own copy-righted work, with a title-page other than that mentioned in the copy-right, he thereby relinquishes the protection of the copy-right acts. (c) A citizen

is not bound at his peril to buy a copy of both works and compare the text, in order to ascertain whether the work with a new name is identical with the copy-righted work. (d) This objection applies with peculiar force, if the copyright extends only to the first volume of first edition, for then the copyright extends to perhaps the middle of a page in first volume of second edition, and there stops.

Staples, S. P., and Ketchum, E.; for plaintiffs.

O'Connor, McElrath, and Bloomfield, for defendants.

Cur. ad. Vult.

THOMPSON, Circuit Justice. The statutes made to secure the copyright to authors in their works are somewhat obscurely expressed; and the English decisions shed very little light on the subject; though these acts are penal, yet they are remedial also, and made in favor of the aggrieved party, and to secure his rights, and the forfeiture goes in part to him. The jury were authorized to give fifty cents for every sheet contained in the volumes found at any time, within the period stated in the declaration, to have been in the possession of the defendants. The law applies to all the copies which the defendants had imported, or sold, or held for sale, contrary to the rights of the plaintiffs; and the insertion of the record on the page next following the title-page of the first volume of the work was a sufficient compliance with that provision of the statute. This was not like a periodical work, but was an entire work embracing a system of theology, which system appeared from the author's analysis, as well as his summary found in the work. That the number of volumes, in which it was stated the work would be published, made no part of its title, and might be rejected as surplusage; and that the plaintiffs might insert the same record in another edition published in a different number of volumes, without impairing their copy-right.

That the delivery to the secretary of state of the first volume of the work within six months after its publication, and the rest of the volumes, before the offence complained of, was committed, or the action brought, was a sufficient compliance with the law to enable the plaintiffs to recover. That this case was distinguishable from the case of *Wheaton v. Peters*, 8 Pet. [33 U. S.] 591. In that case, it did not appear that the volumes had been delivered to the secretary of state at any time, and to ascertain this with other facts, a trial at law was ordered; that, in this case, full notice had been given to the

public of the plaintiffs' claim of a copy-right in this work, and, in the opinion of the court, the law had been substantially complied with, and that the title to the copy-right in the work had become well vested in the plaintiffs.