

plicable and not within the terms of the section, 955, above cited. All the cases invoked are consistent with this view.

Our conclusion, therefore, is, that the right of action terminated with the death of the defendant. Were it held otherwise, for the reasons urged by counsel, there would be one rule of action in this respect governing suits by the United States for penalties for infractions of its copyright laws in one state, and another in other states, dependent upon local legislation respecting the survival of action.

Vide U. S. v. Richardson, 9 FED. REP. 804; *Sarony v. Burrow-Giles Lith. Co.*, *infra*.

SARONY v. BURROW-GILES LITHOGRAPHIC CO.

(Circuit Court, S. D. New York. April Term, 1883.)

1. CONSTITUTIONALITY OF STATUTE—WHEN COURT WILL DECLARE VOID.

The court should hesitate long, and be convinced beyond a reasonable doubt, before pronouncing an act of congress invalid. The argument should amount almost to a demonstration. If doubt exists, the act should be sustained,—the presumption is in favor of its validity.

2. COPYRIGHT—REV. ST. § 4952—PHOTOGRAPHS AND NEGATIVES.

The act of congress (Rev. St. § 4952) granting copyright protection to photographs, and negatives thereof, is not so clearly unconstitutional as to authorize the court at *nisi prius* to declare it invalid.

3. SAME—INSERTING IN COPYRIGHT, NAME, AND DATE.

The object of inscribing upon copyright articles the word "copyright," with the year when the copyright was taken out, and the name of the party taking it out, (Laws 1874, c. 301,) is to give notice of the copyright to the public; to prevent a person from being punished who ignorantly and innocently reproduces the photograph without knowledge of the protecting copyright.

4. SAME—INITIAL OF CHRISTIAN NAME AND FULL SURNAME.

Inserting in such a notice the initial of the Christian name and the full surname is a sufficient compliance with the law; it does not violate the letter of the law, and accomplishes its object

This was an action at law for the violation of the plaintiff's copyright of a photograph of Oscar Wilde, which the defendant had copied by the process known as chromo-lithography. It was admitted on the trial that the plaintiff had taken all the steps required by law to secure the copyright except to insert his Christian name in the notice, and there was no dispute as to the number of copies printed by the defendant, the value thereof, or the number on hand. The notice of copyright on the plaintiff's photographs was as follows: "Copyright, 1882, by N. Sarony." A jury was waived, and the case was argued upon questions of law only, which appear in the opinion.

Guernsey Sackett and A. T. Gurlitz, for plaintiff.

Stine & Calman and D. Calman, for defendant.

COXE, J. This is an action to recover—pursuant to section 4965 of the Revised Statutes—for the infringement of a copyright of a pho-

tograph. Two defenses are interposed: *First*, that the act securing copyright protection to photographs is unconstitutional; *second*, that the plaintiff, in printing upon the photograph the initial letter of his Christian name, N., instead of the name itself—Napoleon—has not given the notice required by the statute.

Article 1, § 8, of the constitution vests in congress the power to make laws "to promote the progress of science and useful arts by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

Upon the authority of this constitutional grant congress extended, or assumed to extend, copyright protection to "any citizen * * * who shall be the author, inventor, designer, or proprietor of any * * * photograph or negative thereof." (Section 4952, Rev. St.)

The contention of the defendant, briefly stated, is this: That there was no constitutional warrant for this act; that a photographer is not an author, and a photograph is not a writing. The court should hesitate long and be convinced beyond a reasonable doubt before pronouncing the invalidity of an act of congress. The argument should amount almost to a demonstration. If doubt exists the act should be sustained. The presumption is in favor of its validity. This has long been the rule—a rule applicable to all tribunals, and particularly to courts sitting at *nisi prius*. Were it otherwise, endless complications would result, and a law which, in one circuit, was declared unconstitutional and void, might, in another, be enforced as valid.

The result of a careful consideration of the learned and exhaustive briefs submitted, and of such further research and examination as time has permitted, is that I do not feel that clear and unhesitating conviction which should possess the mind of the court in such cases. Many cogent reasons can be and have been urged in favor of the validity of the statute. It is, however, sufficient for the purposes of this case to say that in the judgment of the court the question is involved in doubt. This view is sustained by a recent decision of the judges of the eastern district of Pennsylvania, where the precise question was under consideration. The case (*Schreiber v. Thornton*) is not yet reported,¹ but the facts may be found in *Schreiber v. Sharpless*, 6 FED. REP. 175, where there was a controversy evidently growing out of the same transaction.

Regarding the other defense, above stated, I have little doubt. The object of the statute was to give notice of the copyright to the public; to prevent a person from being punished who ignorantly and innocently reproduces the photograph without knowledge of the protecting copyright. It would be too narrow a construction to say that the plaintiff, when he placed "N. Sarony" upon the card, did not comply with the terms of the statute requiring "the name of the party" to be placed there. If the letter of the law is not violated,

¹See *post*, p. 603.

and its object accomplished, it is enough. The strict technical rules of pleading in the criminal courts furnish but slight analogy for the guidance of the court in determining what interpretation shall be given to the statute.

The English courts, construing an act very similar in terms, have frequently upheld notices of copyright obnoxious to all of the defendant's criticisms. Although innumerable notices have in this country been worded in the precise form adopted by the plaintiff, and many of these copyrights and notices have been the subject of judicial investigation, the precise question here presented, though it might have been raised, has not apparently been decided. No American authority directly in point has been cited by counsel or found by the court.

It follows that the plaintiff is entitled to judgment, pursuant to the terms of the stipulation.

LITERARY PROPERTY AT COMMON LAW. At the common law an author had the sole right of first printing and publishing for sale his writings;¹ yet, after such publication made by him, it has been doubted whether he possessed any property rights in the production which could be infringed by republication by a stranger. Such, at any rate, seems to have been the opinion of the supreme court of the United States,² although the house of lords, by a vote of seven to four, laid down the proposition that the author and his assigns had the sole right of printing and publishing in perpetuity by the common law.³ But copyright protection was secured in England by 8 Anne, c. 19, and in this country in 1790, when congress passed the first of our copyright acts. And it is now agreed, both in England and in this country, that copyright exists only by statute;⁴ that an author has no exclusive property in his published works, except when he has secured and protected it by compliance with the copyright laws of the United States.⁵ "When a person enters the field of authorship he can secure to himself the exclusive right to his writings by a copyright under the laws of the United States. If he publishes anything of which he is the author or compiler, either under his own proper name or an assumed name, without protecting it by copyright, it becomes public property, and any person who chooses to do so has the right to republish it, and to state the name of the author in such form in the book, either upon the title-page or otherwise, as to show who was the writer or author thereof."⁶

WHO ARE PROTECTED BY COPYRIGHT. The proprietor or owner of a work has not, in that character alone, any right of copyright. It is only to authors and inventors, or to persons representing the author or inventor, that congress has any authority to grant a copyright. And when a person comes into court, asking for the protection of a copyright, it is necessary for him to show that he is the author or inventor of the work, or that he has an exclusive right, lawfully derived from the author or inventor.⁷ To constitute one an author,

¹ Millar v. Taylor, 4 Burr. 2303. (1761); French v. Maguire, 55 How. Pr. 471; Boucicault v. Fox, 5 Blatchf. 83. 97.

² See Wheaton v. Peters, 8 Pet. 591, 657.

³ Donaldson v. Becket, 4 Burr. 2418.

⁴ Jeffrey v. Boosey, 4 H. L. 838; Reade v. Conquest, 9 C. B. (N. S.) 763; Wheaton v. Peters, 8

Pet. 591; Parton v. Prang, 3 Cliff. 537; Rees v. Peltzer, 75 Ill. 475, 478.

⁵ Clayton v. Stone, 2 Palme, 382; Bartlett v. Crittenden, 5 McLean, 32; Pulte v. Derby, 1d. 323; Stowe v. Thomas, 2 Wall. Jr. 517.

⁶ Clemens v. Belford, 11 Fed. Rep. 723, 730.

⁷ Greene v. Bl-hop, 1 Cliff. 186, 195; Little v. Gould, 2 Blatchf. 181.

he must, by his own intellectual labor applied to the materials of his composition, produce an arrangement or compilation new in itself.¹

DIFFERENCE BETWEEN COPYRIGHT AND LETTERS PATENT. In *Baker v. Selden*,² decided in the United States supreme court in 1879, Mr. Justice BRADLEY stated and illustrated the difference between a copyright and letters patent. The complainant had copyrighted a book explaining a particular system of book-keeping, to which book were annexed certain forms or blanks, consisting of ruled lines and headings illustrating the system, and showing how it was to be used and carried out in practice. It was claimed that the copyright protected the system, because no one could use the system without using substantially the same ruled lines and headings which he had appended to his book in illustration of it. The court held otherwise, and that there was a clear distinction between the book as such and the art which it was intended to illustrate. The copyright protected the book, but the protection of the art was within the province of letters patent. "To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public."

NOM DE PLUME AS A TRADE-NAME OR TRADE-MARK. In *Clemens v. Bedford*,³ better known, perhaps, as the "Mark Twain" case, the novel idea was advanced that an author who had not copyrighted his work had an exclusive right to his literary property under the law applicable to trade-marks, upon the theory that the assumed name under which he had written was a trade-name or trade-mark. This ingenious idea was very seriously urged upon the attention of the court, but all to no purpose; and it was laid down that the invention of a *nom de plume* gave a writer no increase of right over another who used his own name; that an author could not, by the adoption of a *nom de plume*, be allowed to defeat the well-settled rules of the common law, that the publication of a literary work, without copyright, was a dedication to the public, after which any one might republish it. "No pseudonym, however ingenious, novel, or quaint, can give an author any more rights than he would have under his own name."

LECTURES. The delivery of a lecture is not such a publication of it as deprives the lecturer of his property rights therein.⁴ And it seems there is no right to report phonographically or otherwise a lecture which has been delivered before a public audience, and which the lecturer desires to use again in like manner. In England it was provided by statute that no person, allowed for a certain fee to be present at any lecture delivered at any place, should be deemed to be licensed to publish such lecture on account of having been permitted to attend the lecture, etc.⁵

ABRIDGMENTS. Abridgments are considered to be in the nature of new and meritorious works, and if done in good faith they constitute no violation of copyright.⁶ Where books are only colorably shortened the rule would be different.⁷

TRANSLATIONS. For a long time considerable doubt was entertained as to whether the mere act of giving to a literary composition the new dress of another language entitled one to the protection of copyright. But it is now

¹ *A* will v. Ferrett, 2 Blatchf. 39, 46; Gray v. Russell, 1 Story, 11.

² 101 U. S. 99.

³ 14 Fed. Rep. 723.

⁴ See Crowe v. Aiken, 2 Biss. 208; Keene v. Kimball, 16 Gray, 545, 551; Palmer v. De Witt, 47 N. Y. 532.

⁵ 5 & 6 Wm. IV. c. 65. See *Abernethy v. Hutchinson*, 3 L. J. Ch. 209.

⁶ *Gyles v. Wilcox*, 2 Atk. 141; *Dodsley v. Kinnersley*, Ambler, 403; *Whittingham v. Wooler*, 2 Swanst. 428, 430; *Tonson v. Walker*, 3 Swanst. 672.

⁷ See Cop. Copyr. 37.

well settled that a translator may copyright his translation.¹ It is no infringement of the copyright to translate a work which the author has already had translated into the same language, although he may have secured a copyright for that translation.² In the case first cited in the above note, Mr. Justice GRIER said: "To make a good translation of a work often requires more learning, talent, and judgment than was required to write the original. Many can transfer from one language to another, but few can translate. To call the translations of an author's ideas and conceptions into another language a *copy* of his *book*, would be an abuse of terms, and arbitrary judicial legislation."

MUSICAL COMPOSITIONS. In *Thomas v. Lennon*³ the composer of an oratorio permitted the words and vocal parts of his oratorio, set to an accompaniment for the piano, to be published in a book. This publication contained all the melodies and harmonies of the original oratorio. It had in the margin references to the particular instruments which were to be employed in playing the different parts of the piece, or many of them. Two questions were involved in the case. The first was, whether the publication of the book, with the score for the piano and the marginal notes, gave to every one the right to reproduce or copy the orchestral score if he could. And it was answered in the negative. And the second question was, whether a new orchestration, not copied from the original by memory, report, or otherwise, but made from the book, was an infringement of the plaintiff's rights. In answering this question the court said: "An opera is more like a patented invention than like a common book; he who shall obtain similar results, better or worse, by similar means, though the opportunity is furnished by an unprotected book, should be held to infringe the rights of the composer."⁴

DRAMATIC COMPOSITIONS. The representation upon the stage of an unprinted work is not a publication which deprives the author or his assignee of his property rights therein, and does not interfere with his claim to obtain a copyright therefor.⁵ As the mere representation of a play does not of itself dedicate it to the public, it has been held, where a copy of such a play has been unlawfully made by persons witnessing its performance, and who have reproduced it by phonographic report or notes, that its representation from such copy will be restrained by injunction.⁶ In 1860 the supreme court of Massachusetts, in *Keene v. Kimball*,⁷ decided "that the literary proprietor of an unprinted play cannot, after making or sanctioning its representation before an indiscriminate audience, maintain an objection to any such literary or dramatic republication by others, as they may be enabled, either directly or secondarily, to make from its being retained in the *memory* of any of the audience." In 1882 the same question again came up in this same court in *Tompkins v. Halleck*.⁸ The whole question was elaborately argued, and very carefully considered, being rightly deemed one of great importance. An injunction was asked to restrain the representation of a drama called "The World," which had been reproduced by a person who had attended the representation of the play at Wallack's theatre in New York on several occasions, and on each occasion had committed as much of the play as he could to mem-

¹ Millar v. Taylor, 4 Burr. 2348; Burnet v. Chetwood, 2 Mer. 411; Prince Albert v. Strange, 2 De G. & S. 693; Wyatt v. Barnard, 3 Ves. & B. 77; Emerson v. Davies, 3 Story, 763, 781; Shook v. Rankin, 6 Biss. 480.

² Stowe v. Thomas, 2 Wall. Jr. 547. See Murray v. Boque, 17 Jur. 219; 1 Drew, 353.

³ 14 Fed. Rep. 849.

⁴ See, also, to same effect, Boosey v. Fairlie, L. R. 7 Ch. Div. 301; affirmed, 4 App. Cas. 711.

⁵ Roberts v. Myers. U. S. C. C. Mass. Dist. 33 Law Rep. 396; Keene v. Kimball, 16 Gray, 545.

⁶ Boucicault v. Fox, 5 Blatchf. C. C. 87; Shook v. Daly, 49 How. Pr. 336; Palmer v. De Witt, 2 Sweeney, 530; 7 Rob. 530; 36 How. Pr. 232; and 47 N. Y. 532; French v. Maguire, 55 How. Pr. 471; Shook v. Rankin, 6 Biss. 477; Boucicault v. Wood, 2 Biss. 34; Crowe v. Aiken, Id. 203.

⁷ 16 Gray, 545.

⁸ 133 Mass. 32.