an ingredient of the offense of making a false entry in a report of a national bank, under section 5209 of the Revised Statutes, that the report should be one which it was the legal duty of the association to make? If it is essential that the report should be of that character, then a false entry in any other report would not constitute the offense; and it would therefore be necessary that the indictment should, by apt averments, show that the report in which the false entry is charged to have been made possessed all the elements specified in the statute. Among other things, in addition to the specifications contained in the indictment in this case, it should be averred that the report had been called for by the comptroller, and that he had specified the day in respect to which the report was made as the one for which the report should exhibit in detail the resources and liabilities of the association. But, on the contrary, if it is only necessary that the report should be one that was made in the due course of the business of the association, then all that would be required of the indictment would be to identify the report with a degree of precision and certainty sufficient to apprise the defendant of the particular offense with which he is charged. The distinction which it is essential to observe is that which exists between pleading all the ingredients of a crime, and identifying the particular act for which the defendant is called upon to answer. On the face of section 5209 there is nothing which would naturally limit the offense to reports which the association was legally bound to make. The language of the statute is as follows:

"Every president, director, cashier, teller, clerk, or agent of any association * * * who makes any false entry in any report or statement of the association with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association or any agent appointed to examine the affairs of the association, * * * shall be deemed guilty of a misdemeanor," etc.

This language is as broad as it could well be made,—"any report or statement of the association." It is to be noticed, also, that the fraudulent intent to injure or deceive is not confined either to the association or to the officers to whom the report is required to be made, but extends to "any company, body politic or corporate, or any individual person." It is evidently the intent of the statute to shield each of these classes against the wrongful act mentioned. The only legislative provisions requiring national banks to make reports are contained in sections 5211 and 5212 of the Revised Statutes, and I am unable to discover anything in section 5209 which would restrict its provisions to the reports mentioned in those sections. Suppose the board of directors of a national bank should call upon the cashier and president, as its executive officers, to present to them a report of its condition, and in such report these officers should make false entries with intent to deceive the board of directors; would not their act come within the language of the statute, and also within the mischief which it was intended to provide against? It often happens that the stockholders of such a corporation become alarmed and dissatisfied as to its condition. Suppose that they should call upon the president and cashier to make a report to be submitted to a meeting of the stockholders, and in this report these officers should make false entries for the purpose of deceiving or defrauding the stockholders.

There is nothing in the statute which makes it the legal duty of the association to make any such report, or of the president or cashier to do so. The duty to make the report would arise solely out of the agency of the officers. And yet it is difficult to see why such a false entry does not come within the letter and the mischief of the statute as fully as a similar entry in a report to the comptroller of the currency. It should also be noticed that the statute is not confined to "reports" alone, but also embraces "statements." The only term used in sections 5211 and 5212 is "report," and to confine section 5209 to those reports would certainly have the effect of rendering the term "statement," in that section, nugatory. The authorities on this subject are not entirely harmonious. In the case of U. S. v. Potter, 56 Fed. 83, 97, after a very careful consideration, the conclusion is reached that section 5209 is confined to such reports as the association is bound by law to make. The court says:

"In the absence, therefore, of any authority cited to the contrary, I hold that no report is within the purview of this penal statute unless it is shown to be in conformity with the law in everything except in the matter of the false entry."

In that case a demurrer to an indictment was sustained for the reason that the verification and attesting of the report were not pleaded with sufficient fullness. The only authority cited in support of the ruling was the case of U. S. v. Eqe, 49 Fed. 852. It would seem, however, that the latter case could properly be explained on other grounds. In that case a bank examiner requested the defendant, who was a clerk in a national bank, to make the statement or report in question, "on the ground of the illness of the examiner's assistant," and it appears from the evidence "that it was the custom of the examiner to make such a statement personally, and that it was no part of the duty of the bookkeeper to do it." It is manifest, therefore, that in doing this work the clerk was not the agent of the bank, but of the examiner; and the judge bases his instruction upon that ground, stating that the defendant could not be held responsible "for the services he rendered the examiner. His act in complying with the examiner's request was voluntary. As an officer of the bank he was not required to perform it." That is, as I understand, it was not within the scope of his agency. In the case of Cochran v. U. S., 157 U. S. 286, 15 Sup. Ct. 628, it is expressly held that it is not necessary to allege in the indictment that the report in which the false entry was made was verified by the oath of the president or cashier, or attested by the signatures of the directors. The same rule is also adopted in the case of U. S. v. Hughitt, 45 Fed. 47. I am therefore led to the conclusion that it is not necessary that the report should be one which the association was bound by law to make, but that it is sufficient if the report was made in the due course of the business of the association. From this conclusion it follows that it is not necessary that the indictment should set forth facts from which the court can see that the report was one of the reports mentioned in section 5211 or 5212. It is only necessary to show that the report is one which was made in the due course of the business of the association, and to identify it with sufficient clearness and certainty to satisfy the rules of criminal pleading in that respect. The averments of the indict-

ment in this case are ample for both of these purposes. The other objections raised to the indictment are severally held to be untenable in the case of U. S. v. French, 57 Fed. 382. The demurrer is therefore overruled.

MEAD et al. v. WEST PUB. CO.

(Circuit Court, D. Minnesota. July 14, 1896.)

1. COPYRIGHT—EXTENT OF PROTECTION.
When an author has expended his time and talent upon a book, his property right in it is one which the law will protect against any one who attempts to avail himself of the results of the author's labor. This rule applies not only to works in which the forms of expression are the result of the author's own research and thought, but also to compilations of the works of others upon a common subject.

2. SAME—INFRINGEMENT—RECOMPILATIONS—LAW TREATISES.
Where an author producing a new compilation of an unprotected law treatise by a third person has introduced into the text new chapters upon subjects not treated in the original, it is not an infringement for a still later compiler of the original work to derive from the first compilation the idea of also treating these new topics, provided he does not reproduce any of the new matter in the first compilation.

3. SAME—REPRODUCTION OF CITATIONS.
Where new compilations have been made, by two different authors, of an unprotected law book by a third party, with some additional matter, notes, and citations, the mere fact that the second compiler has reproduced, in connection with the same subjects, some of the new citations found in the first compilation, will not be held an infringement of the copyright thereon, where in nearly all such cases it appears from internal evidence that he made an independent examination of the authorities so cited.

This was a suit in equity by Wilson L. Mead, Charles E. Gill, James E. Callaghan, N. A. Clark, and Frederick Darvill, co-partners as Callaghan & Co., against the West Publishing Company, for alleged infringement of a copyright in an annotated edition of "Stephen's Pleading," entitled "Andrews' Stephen's Pleading." The alleged infringing book was the second edition of a law book entitled "Shipman's Common-Law Pleading," and was prepared and edited for defendant by Mr. W. L. Clark. The cause was heard upon a motion for a temporary injunction.

Shipman on Pleading (first edition) was published August, 1894. Andrews on Pleading was published in November, 1894. Shipman on Pleading (second edition) was published in September, 1895. Shipman on Pleading constitutes one of the "Hornbook Series" now being published by the defendant. Twelve volumes have been already published, and 16 more are in course of preparation. These books are elementary in their character, and primarily intended for the use of law students. Andrews' Pleading, plaintiff's book, is a verbatim reprint of the text and notes of Stephen, except that the titles of the cases cited in Stephen's notes have, in certain instances, been interpolated. In addition thereto, Andrews has annotated the text of Stephen, and added some 60 pages of introductory matter. Shipman's Pleading, defendant's book, is not a verbatim reprint of Stephen, but is based upon that treatise, and adopts the language and arrangement of Stephen throughout. This book is also annotated by the compiler, and some original matter is introduced into the text. The bill states that the first edition of Shipman's Pleading "was unfavorably received and severely criticised, and was and is a very defective and inferior book," and alleges, in substance, that the preparation of the second edition of Shipman involved the use of the editorial labor expended in the compilation of Andrews' Pleading. The affidavit of Mr. West, president of

the defendant corporation, states that it is the policy of the defendant, "as has been repeatedly announced by it to the faculties of the several law schools throughout this country," to publish new editions of the several books comprised in the Hornbook Series "whenever the criticism and advice of those using or desiring to use the books show that such new editions are necessary to meet their requirements; that in pursuance of said policy the said second edition of Shipman's Common-Law Pleading was prepared and published, as was also a second edition of another book of said series, viz. Norton on Bills and Notes." He further states that the second edition of Shipman's Pleading "was prepared in accordance with, and because of, the criticisms and suggestions of certain law-school professors, and other literary advisers" of the defendant, and not in consequence of the publication of Andrews' Pleading, and that said second edition would have been published, for the reasons stated, even if Andrews' Pleading had not been in existence. He further states that Mr. Andrews, compiler of Andrews' Pleading, after said work was published, "visited a large number of the law schools, and personally solicited the use of his book in said schools, and at that time severely criticised said first edition of Shipman's Common-Law Pleading, and that that criticism, as affiant is informed and believes, is the severe criticism of said first edition to which said Andrews refers in his affidavit."

The bill admits that the text and notes of Stephen are common property, not subject to copyright, but charges: (1) That the cases cited in part 1, pp. 1–60, of Andrews' Pleading, were copied by the person who prepared the second edition of Shipman. (2) That part 2, §§ 43–47, pp. 69–77, of Andrews' Pleading, were copied in the second edition of Shipman on pages 6, 11, 120, 121, 126, 127. (3) That over 200 cases were copied from the notes in Andrews' Pleading. (4) That large portions of the notes in Andrews were reproduced in Shipman in the identical language, or with colorable alterations. (5) That the citations in the original notes to Stephen, as corrected and amended by Andrews, were copied in the second edition to Shipman. (6) That a note in Andrews (pages 474–477) is found in substance in the second edition of Shipman. (7) That the index in Andrews "has to a large extent been utilized, referred to, and copied from, and embodied in the second edition" of Shipman. (8) That over 300 cases in the table of cases in Andrews "were taken and copied directly" from said table in the preparation of the table of cases in Shipman, second edition. (9) That the defendant made a wrongful and piratical use of Andrews in the preparation of Shipman, and availed itself "of the labor, pains, care, skill, and experience expended and embodied in said Andrews' Stephen's Pleading."

Mr. Hale, who made the index to the second edition of Shipman's Pleading, makes affidavit that he made same "from the proof sheets of said work, and from them alone," and that "he made no use of or reference to the index of Andrews' Stephen on Pleading."

Mr. Jehle, the foreman of defendant's composition rooms and mechanical department, states, in an affidavit, that the table of cases to the second edition of Shipman's Pleading, prepared under his supervision, was, "in accordance with the usual method employed in preparing such tables," made "from the page proofs of said book, and that no reference whatever was made to the table of cited cases published in the work known as 'Andrews' Stephen's Pleading.'"

It is shown by the affidavit of Mr. Clark that the number of cases cited, respectively, in Shipman (first edition), Shipman (second edition), and Andrews, including the cases in Stephen's original notes, were checked under his supervison, and produced the following results, viz.:

(1) Number of cases cited in the respective volumes:
- (a) Shipman (first edition)..... 2,301
- (b) Shipman (second edition)..... 4,045
- (c) Andrews 2,140

(2) Number of cases common to the respective volumes:
- (a) Shipman (first and second editions)..... 1,940
- (b) Andrews and Shipman (first edition)..... 396
- (c) Andrews and Shipman (second edition)..... 260
- (d) Andrews, Shipman (second edition), and Stephen..... 86
- (e) Andrews and Shipman (second edition) without Stephen.... 174

(3) Citation of cases common to Andrews and Shipman (2d Ed.):[1]

Cases cited from Stephen	233
Cases cited differently	94
Cases quoted differently	15
Cases cited to a different point	89

Mr. Clark states in his affidavit that he cannot now remember the details of his work, nor the circumstances under which each case was cited, but that he does remember the general manner in which his work was done, and the sources from which he obtained his data. The sources consulted in the preparation of the specific chapters are stated by Mr. Clark to be as follows: (1) Chapters 1 and 2, pp. 1–129: (a) Shipman (first edition); (b) Stephen on Pleading; (c) Chitty on Pleading; (d) Clark on Contracts; (e) Cobbey on Replevin; (f) Ewell on Ejectment; (g) other text-books, not now recalled. (2) Chapter 3, pp. 130–141: (a) Shipman (first edition), c. 3; (b) Clark on Contracts, for new matter on page 132, notes 7, 8. (3) Chapter 4, pp. 142–198: (a) Shipman (first edition), c. 2; (b) Stephen on Pleading; (c) Chitty on Pleading; (d) cases cited in the second edition. (4) Chapter 5, pp. 199–256; (a) Shipman (first edition), c. 1; (b) Chitty on Pleading; (c) Stephen on Pleading; (d) cases cited in second edition. (5) Chapters 6–12, pp. 257–499; (a) Stephen on Pleading; (b) Shipman (first edition); (c) Chitty on Pleading; (d) cases taken from Chitty. The sources consulted in the preparation of the whole book, in addition to those already referred to, are stated by Mr. Clark to be as follows: (1) Kinney's Illinois Digest; (2) a Michigan digest; (3) a Massachusetts digest; (4) a Pennsylvania digest; (5) a New York common-law digest; (6) the United States Digest; (7) the American Digest; (8) Ames' Selected Cases on Pleading; (9) the Illinois Reports; (10) the Michigan Reports; (11) the Massachusetts Reports; (12) the Vermont Reports; (13) the New York Common-Law Reports; (14) the New York Court of Appeals Reports; (15) the Indiana Reports; (16) the United States Supreme Court Reports (Co-op. Ed.); (17) the National Reporter System; (18) the American Decisions and Reports; (19) the reports of other states, not now remembered; (20) the English Common-Law Reports; (21) reports also examined at the state law library in St. Paul.

Mr. Clark admits that he made use of Andrews to the following extent, viz.: (1) That "in several instances" he cut the original text of Stephen from Andrews in order to save copying. (2) That he checked his work with Andrews, in common with other works on Pleading, for omitted topics, and that it was thereby suggested to him to treat briefly the following subjects, viz.: (a) Writ of Entry; (b) Forcible Entry and Detainer; and (c) Trespass to Try Title. In treating these topics he did not copy, either directly or indirectly, the language or the ideas contained in Andrews' Pleading. The sources consulted by him were, among others, Blackstone's Commentaries and Ewell on Ejectment. (3) That he did not check Andrews for omitted cases, although it is possible that he may have found a case here and there by reason of its being cited in Andrews; that he did not cite any case from Andrews without first examining the original report. (4) That he had intended to read the work of Andrews, but read only a small part of same,—not as much as half.

Aldrich, Reed, Brown & Allen, for complainants.

W. E. Dodge and Homer Eller, for defendant, filed the following brief:

The Issue in the Case.

The issue in this case is in large measure an issue of fact. The plaintiff charges that the defendant has been guilty of "piracy," or, as it is sometimes called, "literary larceny," in the preparation of the second edition of its book. The defendant denies the charge, without reservation, and claims that this second edition of its book was prepared in a legitimate manner, without making any unlawful appropriation of any sort or kind from the book of the plaintiff. In other words, the plaintiff charges that the second edition of

[1] Some cases are cited more than once.

Shipman was compiled from Andrews' Pleading; that the text and citations found in Andrews were copied, with such colorable changes as were necessary to conceal the fact of copying; and that even the table of cases and index found in Andrews were substantially reproduced in defendant's book. The defendant denies the copying charged, and the alleged use of the material in plaintiff's book. It states in detail the sources from which the matter contained in its book was derived, and explains with great specificness the methods followed by its editor in the compilation of its book. The charge of the plaintiff involves fraud on the part of the defendant of the most reprehensible character. It declares, in effect, that the defendant did not avail itself of the original sources of information, but resorted to the labor-saving expedient of copying citations and other material which the research of the plaintiff had discovered. In such a case the animus furandi (that is to say, "the intention to take for the purpose of saving labor") must be clearly established. Has such fraudulent intent been so clearly established by the plaintiff at this stage of the proceedings as to warrant the granting of a temporary injunction? The affidavit of Mr. Andrews in support of the charges of the bill is very voluminous, covering over 300 pages of typewritten matter. The following facts, shown by the affidavit of Mr. Clark, should be noted in connection with this affidavit of Mr. Andrews, viz.: (1) Two hundred and thirty-three citations referred to as copied from Andrews appear in the original notes of Stephen. (2) Andrews repeatedly refers to statements and notes as being copied from Andrews' Pleading which are part of the original text of Stephen. (3) Andrews repeatedly refers to many cases as being copied from Andrews' Pleading which are cited in the first edition of Shipman. (4) Ninety-four citations claimed to have been copied from Andrews are cited differently, as to titles, volume, or page of the report, in the second edition of Shipman. (5) Fifteen cases and authorities claimed to have been copied from Andrews are accompanied in Shipman's second edition with specific statements of fact or quotations not found in Andrews. (6) Eighty-nine citations claimed to have been copied from Andrews are cited in Shipman to a different point, or in a different connection. (7) Twenty-one alleged errors common to both Andrews' Pleading and Shipman's Pleading (second edition) are referred to in the affidavit. These errors are duly listed with accompanying explanations on page 19 of this brief.[1]

The Rights of the Defendant.

There can be no question that the defendant had a right, in the compilation of its book, to resort to the digests, law reports, and standard text-books in the manner described by Mr. Clark. Gray v. Russell, Fed. Cas. No. 5,728, 1 Story, 11; Emerson v. Davies, Fed. Cas. No. 4,436, 3 Story, 768; Simms v. Stanton, 75 Fed. 6. Were it otherwise, it is obvious the book of the plaintiff would have no standing in this court. "What," says Judge Story, "would become of the treatises in our own profession, the materials of which, if the works be of any real value, must essentially depend upon faithful abstracts from the reports and from juridical treatises, with illustrations of their bearing?" Gray v. Russell, supra. "Take," he continues, "the case of the work on insurance written by one of the learned counsel in this cause, and to which the whole profession are so much indebted; it is but a compilation, with occasional comments upon all the leading doctrines of that branch of the law, drawn from reported cases or from former authors, but combined together in a new form, and in a new plan and arrangement." Id.

The Test of Piracy.

"It may be laid down as the clear result of the authorities," says Judge Story, "in cases of this nature, that the true test of piracy or not is to ascertain whether the defendant has in fact used the plan, arrangements, and illustrations of the plaintiff as the model of his own book, with colorable alterations and variations, only to disguise the use thereof, or whether his work is the result of his own labor, skill, and use of common materials and common sources of knowledge, open to all men, and the resemblances are either accidental, or arise from the nature of the subject. In other words, whether

[1] See note at end of opinion.

the defendant's book is, quoad hoc, a servile or evasive imitation of the plaintiff's work, or a bona fide original compilation from other common or independent sources." Emerson v. Davies, Fed. Cas. No. 4,436, 3 Story, 768; Simms v. Stanton, 75 Fed. 6.

Publication of Second Edition.

The piracy charged cannot be inferred from the fact that the defendant published a second edition of its book within a year after the publication of the plaintiff's book. The second edition of this book would have been published in any event, for the reasons stated in Mr. West's affidavit, even if the plaintiff's book had not been published. Granting, however, that the production of plaintiff's book led to the production of the second edition of defendant's book, no presumption of fraud can be predicated upon that hypothetical fact. The defendant had a right, in the course of legitimate business competition, to protect its book with a new and improved edition, if the publication of plaintiff's book made it necessary from a commercial point of view. "Fair competition is perfectly legitimate, and the fact that one work is affected by the publication of another of a similar nature is no damage or injury, be the loss what it may." Hogg v. Kirby, 8 Ves. 225; Chamier, Copyr. 124. "If a work is successful, it is competent to any other person perceiving that success to set about a similar work, bona fide his own." Id.

Right to Copy Text of Stephen.

The bill admits that the original text and notes of Stephen are reproduced "word for word" in plaintiff's book. It also admits that said text and notes are common property and not subject to copyright. It follows, therefore, that the defendant was at liberty to copy or cut said text and notes, in so far as it saw fit, from the printed pages of plaintiff's book. A mere copyist has no exclusive right, under the statute, to multiply copies of his copy of a book. See Drone, Copyr. 202, 204, 424, 160; Chase v. Sanborn, Fed. Cas. No. 2,628; Banks v. Publishing Co., 27 Fed. 50; Davidson v. Wheelock, 27 Fed. 61; West Pub. Co. v. Lawyers' Co-op. Pub. Co., 64 Fed. 360. The fact that the titles of the cases cited by Stephen were added in certain instances by the plaintiff does not vest a copyright in those titles. The defendant did not copy or cut the text of Stephen from plaintiff's book save in exceptional instances, and the titles of the cases in Stephen's notes were not copied from plaintiff's book, having been already published in the first edition of Shipman.

Right to Read Book of Plaintiff.

It cannot be inferred that defendant copied plaintiff's book from the fact that Mr. Clark admits that he read part of said book. It was both the right and the duty of Mr. Clark, as a conscientious compiler, to read and study all the literature which related to the subject which he was treating. Such investigation tended to increase, rather than to save, the labor of Mr. Clark. In Emerson v. Davies, Fed. Cas. No. 4,436, 3 Story, 768, which was the case of a school arithmetic, Judge Story inferred that the defendant had "examined all the existing works published," including that of the plaintiff, but held that it did not necessarily follow that Davies had copied or adopted any part of the work of Emerson. See, also, Drone, Copyr. 394, and cases cited; Simms v. Stanton, 75 Fed. 6. The fact that this examination of plaintiff's book suggested to Mr. Clark the discussion in defendant's book of the subjects of Writ of Entry, Forcible Entry and Detainer, and Trespass to Try Title, does not involve any presumption of piracy by Mr. Clark in the treatment of those subjects. See Drone, Copyr. 394, and cases cited in note, particularly Jarrold v. Houlston, 3 Kay & J. 708; Banks v. McDivitt, Fed. Cas. No. 961, 13 Blatchf. 163; Simms v. Stanton, 75 Fed. 6. It would have been proper for Mr. Clark, in this connection, to have checked defendant's book with that of plaintiff for omitted cases, if he had seen fit to do so, provided he had subsequently verified these citations with the original reports. See Drone, Copyr. 397, note 1; West Pub. Co. v. Lawyers' Co-op. Pub. Co., 64 Fed. 360; Simms v. Stanton, 75 Fed. 6. Checking of this character is held to be legitimate, even in the case of rival directories. Drone, Copyr. 396. Mr. Clark states that he did not look through plaintiff's book for omitted citations, although he admits that he

may "have found a case here and there" in his incidental examination of the book. This statement is strikingly confirmed by the fact that defendant's book does not cite the case of Hannay v. Smurthwaite, 69 Law T. (N. S.) 677, which is reported in full on pages 445–448 of plaintiff's book; also by the fact that, out of 4,045 cases cited in defendant's book, only 174 of said cases are to be found in plaintiff's book, exclusive of the 86 cases cited in Stephen's notes; also, by the great variation in the form of these citations, as illustrated by the several exhibits attached to the affidavits of Mr. Clark and Mr. Fisher.

Citation of the Same Cases.

It is true that one or more cases cited in the second edition of defendant's book to specific propositions are likewise cited in plaintiff's book to similar propositions. It is obvious, however, that the propositions discussed in the two books must of necessity be more or less identical in their character, and must be supported by the same cases, where the compilers of both books are dealing with a common subject, and drawing their authorities from a common source. In view of the fact that the defendant cites twice as many cases as the plaintiff, it is surprising that only 174 of these cases, exclusive of the cases in Stephen's notes, are common to both books. On the other hand, nearly 400 cases cited in plaintiff's book are to be found in the first edition of defendant's book.

Use of Same Language.

It is true, also, in certain instances, that language found in plaintiff's book is reproduced, in substance or in fact, in defendant's book. This language, however, will be found upon examination to have its origin in every instance in some source from which it was copied by the plaintiff and the defendant. Thus, for instance, the affidavit of Mr. Andrews calls attention to a note in plaintiff's book (page 139) which is reproduced on page 161 of defendant's book. He states that this "is a note prepared by affiant," but, as a matter of fact, it is a copy of the syllabus to the case of Greer v. Young, originally written by the defendant, and published in 11 N. E. 167. The defendant cites the Northeastern Reporter in this connection, but the plaintiff fails to do so. It is shown by the affidavit of Mr. Fisher that specific cases cited in the first edition of defendant's book to given propositions are subsequently reproduced in plaintiff's book in discussing similar propositions; also, that there is in certain instances some similarity or absolute identity in the language used in these two books. The illustrations given by Mr. Fisher do not exhaust the existing identities between the two books, and are merely presented for the purpose of showing that the plaintiff, in dealing with a common topic and working from a common source, could not, any more than the defendant, avoid producing results that were more or less similar.

Common Errors.

It is true that there are some errors in the spelling or paging of cases cited in Andrews which have been reproduced in the second edition of Shipman. These errors are listed and explained on pages 19–30 of this brief.[1] It appears from an examination of this list that several of these alleged errors are not errors in fact. In several instances the alleged error consists in giving the page of the report where the point is discussed, or the opinion of the court begins. The errors in spelling are usually trivial in their character,—such, for instance, as substituting "m" for "n"; spelling a name with two "t's" instead of one, or with one "l" instead of two. In several instances these errors occur in citing the original cases found in Stephen's notes. In other instances they can be traced back to Chitty on Pleading, or some other original source. Similar errors are to be found in the first edition of defendant's book, and have been subsequently reproduced in plaintiff's book. In some instances these errors are to be found in both the first and second editions of defendant's book and in plaintiff's book. Many errors are also to be found in plaintiff's book which have not been followed in the second edition of defendant's book. In one or two instances two or more errors found in a single note of plaintiff's book are reproduced in a single note of defendant's book. Thus, in note 1,

[1] Reproduced in the note at end of the opinion herein.

p. 386, of plaintiff's book, are found four errors which are reproduced in note 24, p. 456, of defendant's book. The specific errors are, with one exception, trivial in character; and the plaintiff cites in the same note seven cases not cited by the defendant, while the defendant cites in the corresponding note ten cases which are not cited by the plaintiff. The natural inference would seem to be that these errors were derived from a common source. It is hardly to be presumed that plaintiff's editor, who claims to be a careful and experienced compiler, would have made so many original errors in a single short note. If it is assumed that these errors were originally made by the plaintiff and subsequently copied by the defendant, then it is fair to presume that the defendant subsequently verified the propositions of law supported by the cases, but failed to correct the spelling and paging of the citations. In this connection it must be borne in mind that all these alleged errors are purely clerical in their character, and that the citations were sufficiently definite to guide an investigator to the cases cited; also, that the cases cited support the legal propositions to which they are cited. In one instance it is claimed that this is not the case, but an examination of the authority cited proves otherwise.[2] It is evident that neither Mr. Andrews nor Mr. Clark gave close attention to the clerical accuracy of their citations. Their attention was concentrated on the propositions of law which they were investigating, and they did not take time to consider whether "Panton" should be spelled with an "e" or an "a," or whether the words "and Marine" should or should not be included in the title of the "Clay Fire and Marine Insurance Company." The verification of such matters is purely clerical, and is usually delegated to competent experts after the manuscript is completed, when such verification is deemed material. In this instance the defendant did not consider that such verification was material; taking it for granted, as the result proves, that Mr. Clark's citations would be substantially correct, in view of the fact that he would necessarily examine every case which he cited, in order to determine whether it would support the proposition to which he proposed to cite it. If the defendant had merely copied the citations from plaintiff's book, as is charged, the defendant would naturally, and as a mere ordinary precaution, have clerically verified all the citations, in order to conceal the fact of copying. Banks v. McDivitt, Fed. Cas. No. 961. A case of this kind must be distinguished from that of a directory, where the correct spelling of the name and correct number of the place of residence is the ultimate and essential fact. The reproduction of such errors in a competing directory necessarily creates a presumption of copying. In such cases, however, this presumption is fortified not merely by clerical errors, but by the reproduction "of names of persons who never existed," and "of names of deceased persons," or other conclusive errors of fact. Publishing Co. v. Keller, 30 Fed. 772, 774. The question is, in the present instance, were the cases cited examined by the subsequent compiler? And it is not to be presumed that they were not examined, if they can be found as cited, even though there are slight errors in the spelling of the names, or the pages given are not the pages on which the reports of the respective cases begin. Lawrence v. Dana, 15 Fed. Cas. 64. In such a case as this, which involves the question of dependent labor in the compilation of a legal treatise, those errors only are material which involve a misstatement of the points of law decided in the specific cases. Callaghan v. Myers, 9 Sup. Ct. 177, 128 U. S. 617; West Pub. Co. v. Lawyers' Co-op. Pub. Co., 64 Fed. 360; Drone, Copyr. 428–430, note 2; Simms v. Stanton, 75 Fed. 6. If this view is not correct, then it is true that clerical errors of the character described, common to the first edition of Shipman and the book of plaintiff, show that the plaintiff made a piratical use of the first edition of defendant's book in the preparation of Andrews' Pleading which he now claims is infringed by the second edition of Shipman's Pleading. Banks v. McDivitt, Fed. Cas. No. 961.

Segregation of Notes Alleged to Infringe.

If it be held that the common errors found in one or more of the notes in defendant's book establish the fact that this note or notes were copied from plaintiff's book, then the injunction must be restricted, in any event, to said

[2] See instance No. 12 in note at end of case.

note or notes. This is not a case in which the matter claimed to have been pirated cannot be readily separated from the original material in defendant's book. Banks v. McDivitt, Fed. Cas. No. 961; West Pub. Co. v. Lawyers' Co-op. Pub. Co., 64 Fed. 360; Lawrence v. Dana, Fed. Cas. No. 8,136; Farmer v. Elstner, 33 Fed. 494.

Alleged Infringement Immaterial.

In the event of segregation there would be nothing to enjoin, under this hypothesis, but two or three short notes, which the defendant would be at liberty to reproduce upon correcting the spelling and paging in the cases cited. In such a case, where the infringement is immaterial, and fair use has been pleaded, the court will not grant an injunction. Farmer v. Elstner, 33 Fed. 494, 498; Lawrence v. Dana, Fed. Cas. No. 8,136. In Farmer v. Elstner the defendants did not plead fair use, the animus furandi was established, and some 11 pages of defendants' pamphlet were enjoined. But Judge Brown, now of the supreme court, added: "It is true there are about 20 extracts in the following 50 pages; but we think the court may take judicial notice of the fact that most, if not all, of them, are of facts which were not originally published by plaintiff, and which the defendants could easily, if they did not actually, obtain from other works readily accessible to the public." See, also, Simms v. Stanton, 75 Fed. 6.

LOCHREN, District Judge (orally). This is the first case of the kind that has come before me, and comes under a branch of the law with which I am not entirely familiar, so far as an examination of decided cases is concerned. The law provides, and properly, that, when an author has expended his time and talent upon a book, his property right in it is one which the law will protect against any one who attempts to avail himself of the results of the author's labor. This rule applies, as I understand the law, to books written by an author, of which the forms of expression are his own, and the result of his own research and thought, and also to compilations of the works of other parties upon a common subject. To that extent, there is no doubt that extracts from works of others, combined so as to add to the value of a book, become properly the subject of copyright. Many books, after having labor of that kind expended upon them, become much more valuable than before they were so treated. Lawyers are familiar with such books: Saunders' Reports, for instance, as they came from the hands of the author, were of little value until they were enriched by the notes of Serjeant Williams, when they became of great value to the profession. The same may be said of Phillips on Evidence, which was really a book of but little value as it was issued by the author, but when there was added to it Cowen & Hill's notes it became one of the most valuable works on the subject of Evidence published at that time. There is no doubt that the authors in these or similar cases are entitled to copyright to preserve to themselves the benefits resulting from their labors. The case of Lawrence v. Dana was referred to by counsel in their argument, from which I understand a new edition of Wheaton's International Law was annotated by Mr. Lawrence, and afterwards a later edition of the same was gotten out by Mr. Dana. It was claimed, and seems to have been established, that the latter used the labor and thought of Mr. Lawrence in aid of his own work, and it was held that Dana had infringed the copyright of Lawrence.

Now, in the case that we have before us, works upon Pleadings,—especially where each is a reproduction of the work of an older author (both of these books being a reproduction of the work of Stephen on Pleading, and professedly claiming to bring that work down to the present time), there is little room for original literary work. It is rather the work of an editor, compiling, in connection with the original work, new rules which have since grown up through the decisions of the courts, exceptions to the old rules, and notations as to things which have become obsolete in matters of practice, from changes in the practice of the courts. But, while this may be merely the work of an editor or compiler, there is no question that, in producing a work of this kind, such changes, additions, and explanations can be made and added as would make a book of far greater value than the original, and that such new matter would be the subject of copyright.

It seems that about the same time these two publishing houses, without any consultation, and without the knowledge of each other's intention, set about and acted upon substantially the same idea, to wit, putting upon the market the work of Mr. Stephen on Pleading, carried down to the present time, and that each employed its own men to prepare that work. The result of this employment was the first edition of Shipman by the defendant, and the edition by Mr. Andrews published by the plaintiff. Almost immediately after these two books came out, a new edition was commenced and prepared by Mr. Clark for the defendant. The complaint is that in the second edition Mr. Clark absorbed, or made illegal and improper use of, the work of the edition of Stephen which had been prepared by Andrews, as the plaintiff's book. There is no objection, and there could be none, to editions of this kind being issued by either of these publishing houses, and one company could not restrain the other from issuing a work of that kind; but neither would have the right to use the work and labor of the other. In this case it is claimed that the defendant did use and reproduce the work and labor of plaintiff's editor, Mr. Andrews.

It is admitted that the book issued by plaintiff was used by defendant's editor, to some extent, in preparing the second edition of defendant's book. It is also admitted, as I understand it, that, as far as the original text of Stephen is concerned, the same was cut, to a certain extent, from plaintiff's edition, and used as copy by defendant, but it is denied that any substantial use was made of Andrews' book any further than that. Of course, plaintiff could have no copyright upon this text of Stephen as it was embodied in plaintiff's book; and I do not understand that the use made of it by defendant, as I have described it, is complained of. It is also admitted by the affidavit of defendant's editor that he got the idea of adding to his work certain matters upon the subjects of Forcible Entry and Detainer, Writ of Entry, and Trespass to Try Title, which were subjects not treated of in the old treatise of Stephen, by perusing the plaintiff's book; and that it occurred to him, from seeing these subjects there treated of, that it would be well to have something

in his second edition upon those subjects. He says that he did thereupon insert in his second edition some subjects of the law and practice under those subheads. I do not understand that it is claimed that he had not a perfect right so to do. The mere fact that Mr. Andrews has added, to matters treated by Stephen, these other subheads, would not prevent any other publisher from taking the same course. But the latter would not have the right to reproduce or copy the matter which Mr. Andrews had inserted in his book,—to take it from that, and transfer and reproduce it in his own book. I do not understand there is any claim that he did so. There have been no resemblances pointed out to me, indicating that there was such a transfer from one book to the other. It is true, the idea of treating these subjects was obtained from Mr. Andrews' book, but I do not think it is claimed that the defendant appropriated any of the treatment of those subjects made by Mr. Andrews; that is, that he took any of such matter and inserted it in his own book.

The matter comes down really to the question of taking the authorities in one book, and inserting them in the other. No case has been pointed out to me, and I do not think one exists, as far as I have been able to observe by an examination of the books, where sentences have been transferred from one book to the other; but complaint is made that, on the same subjects, references to text-books and reports were taken from plaintiff's book and inserted in defendant's second edition, and that this is an invasion of the plaintiff's copyright. It would certainly be impossible, in treating of the different rules of pleading, and the exceptions to those rules, their extent and limitation, not to express the same ideas, though probably in different language; for the same ideas would have to be expressed in both books, especially where the same original work was taken as a basis of those two books. That could not be avoided. The authorities upon which these rules and the exceptions and limitations rest would naturally be the same, and different authors treating the subject would ordinarily refer to the same authorities, if they made the same research. Therefore it is not a matter of surprise to find the same authorities cited to substantially the same proposition. It is claimed, on account of the fact, which is doubtless true, that about a dozen of these authorities occur in which the same errors appear in both of these books, that these citations were copied, without any examination of the original authorities, from Mr. Andrews' to the defendant's book. In the course of the argument, my attention has been called to many more of such cases, in which it appears that there must have been further research made by Mr. Clark, even if he obtained these references from the plaintiff's book, for the reason that in many of these instances he quotes an additional book where the citation may be found. For instance, where Mr. Andrews' book gives the American Decisions as his authority, Mr. Clark gives the citation in the original reports where the case may be found. There is also another class of cases where the same reports appear in the series published by the West Publishing Company, such as the Northeastern and Northwestern and other Reporters, and in many of these cases Mr. Clark has added to the original reference the page and

volume of these Reporters where the case may be found. So there is this evidence, as far as it goes, that those cases were not just simply copied from Mr. Andrews' work, but that there was further work and labor expended upon them by Mr. Clark. How far, perhaps, we cannot tell, but certainly to the extent of ascertaining and showing whether these cases in the original reports were in other publications, or in the West series, and of making the notations accordingly. The number of cases in which it is claimed there is proof that these authorities were taken from Mr. Andrews' book becomes small. In some of them, of course, the mistakes may have been obtained by reference to another authority in which the same mistake occurs; and, as suggested, they may have been taken from Mr. Andrews' book, and, after being examined in the original reports, the mistake may have been overlooked and not corrected.

The question, upon the whole case, is whether there has been such an appropriation of the work of Mr. Andrews as to injure the plaintiff in this case to such an extent that the sale of defendant's book should be restrained by an injunction. After full and careful consideration of the whole case, I do not come to that conclusion. It seems to me that this injunction ought not to be granted, and the motion will be denied.

List of Errors Referred to in Andrews' Affidavit.

The following errors, common to both Andrews' Pleading and the Second Edition of Shipman's Pleading, are referred to in the affidavit of Mr. Andrews. Each error is followed by an explanation in behalf of the defendant. The explanation in each instance is based upon the affidavit of Mr. Clark, together with such additional suggestions as seem pertinent upon a further comparison of the books in controversy.

1.

Davis v. Easley, 13 Ill. *192*	**Ship. 111, n. 305**
for	
Davis v. Easley, 13 Ill. *192*	**Andr. 58, n. 6**

Error. None.
Explanation. The report of the case begins on page *192*.
See Clark's affidavit, page 9.

2.

***Morris* v. Graves**	**Ship. 164, n. 48**
for	
***Norris* v. Graves**	**Andr. 143, n. 8**

Error. *Morris* for *Norris*.
Explanation. Andrews cites Oates v. Clendenard, *87 Ala. 734*.
Shipman cites Oates v. Clendenard, *87 Ala. 734, 6 South. 359*.
Shipman cites *three* cases not cited by Andrews.
Andrews cites *twenty* cases not cited by Shipman.
See Clark's affidavit, 13.

3.

Roberts v. *Moore*, 5 Term R. *488* — **Ship. 165, n. 52**
for
Roberts v. *Moon*, 5 Term R. *487* — **Andr. 189, n. 1**

Error. *Moore* for *Moon*.
Explanation. Correct citation is page *487*.
Shipman cites *three* cases not cited by Andrews.
Andrews cites *six* cases not cited by Shipman.
See Clark's affidavit, 13.

4.

Whittaker v. Izod, 2 Taunt. *114* — **Ship. 174, n. 75**
for
Whitaker v. Izod, 2 Taunt. *115* — **Andr. 160, n. 4**

Errors. *114* for *115*.
"tt" for "t."
Explanation. 2 Taunt. cites *114* in the index.
2 Taunt. cites *114* in the table of cases.
2 Archb. Prac. (1838) 170, cites *114*.
Archb. Prac. (1840) 1023, cites *Whittaker*.
See Clark's affidavit, 9.

5.

Hazen v. *Lundy*, 83 Ill. 241 — **Ship. 259, n. 2**
for
Hazen v. *Pierson*, 83 Ill. 241 — **Andr. 150, n. 1**

Error. *Lundy* for *Pierson*.
Explanation. Andrews cites Shaw v. Redmond, *11 S. & R. 277*.
Shipman cites Shaw v. Redmond, *11 Serg. & R. (Pa.) 27*.
The correct page is 27.
Andrews cites *Everett v. DeGroff*, 1 Cow. 213.
Shipman cites *Everitt v. DeGraff*, 1 Cow. (*N. Y.*) 213.
Correct citation should be *Everitt v. DeGroff*, 1 Cow. (N. Y.) 213.
Andrews cites Whiting v. Cochran, 9 Mass. *533*.
Shipman cites Whiting v. Cochran, 9 Mass. *532*.
The report of Whiting v. Cochran begins on page *531*.
Andrews cites *Gillespie* v. Smith, 29 Ill. 476.
Shipman cites *Gillespie* v. Smith, 29 Ill. 476.
Gillespie v. Smith is the correct title.
Gillespie v. Smith begins on page 473.
See Clark's affidavit, 14.

6.

Herlakende*u*'s Case — **Ship. 321, n. 164, 165**
for
Herlakende*n*'s Case — **Andr. 275, n. (z) & (a)**

Error. "u" for "n."
Explanation. Cited from the original note of Stephen.
Andrews cites (n. 1, page 275) *four* cases not cited by Shipman.
See Clark's affidavit, 11.

7.

Arlett v. Ellis, 7 *Taunt.* 346 — **Ship. 344, n. 24**
for
Arlett v. Ellis, 7 *Barn. & C.* 346 — **Andr. 296, n. 1**

Error. "*Taunt.*" for "*Barn. & C.*"
Explanation. Chitty, 567, n. (y) cites *Taunt.*
2 Saund. Pl. & Ev. part I, 659, cites *Taunt.*
Shipman cites *Osborne v. Rogers*, 1 Saund. 267; Id. 268, n. 1; Id. 269, n. 2.
Andrews (n. y) only cites 1 Saund. 268, n. 1, 269, n. 2.
Shipman cites *seven* cases not cited by Andrews.
Andrews cites *one* case not cited by Shipman.
See Clark's affidavit, 9.

8.

Penton v. Holland, 17 Johns. 93 — Ship. 355, n. 18
for
Panton v. Holland, 17 Johns. 93 — Andr. 305, n. 1

Error. "e" for "a."
Explanation. Shipman cites Executors of *Grenelefe*, Dyer, 42b.
Andrews (n. d) cites Executors of *Grenelife*, Dyer, 42b.
Correct citation is Executors of *Grenelife*, Dyer, 42a.
Andrews cites Comstock v. McEvoy, *52 Mich. 324.*
Shipman cites Comstock v. McEvoy, *52 Mich. 324, 17 N. W. 931.*
Andrews cites *six* cases not cited by Shipman.
Cited *Patten* v. Hollam in 48 Barb. (N. Y.) 409.
Cited *Pauton* v. Holland in 4 Rob. (N. Y.) 467.
Cited *Parton* v. Holland in 45 Mo. 372.
See Clark's affidavit, 10.

9.

Gaffney v. *Colwell*, 6 Hill (N. Y.) 567 — Ship. 357, n. 24
for
Gaffney v. *Colvill*, 6 Hill (N. Y.) 567 — Andr. 307, n. 2

Error. *Colwell* for *Colvill.*
Explanation. Cited to a different legal proposition.
Shipman cites *five* cases not cited by Andrews.
Andrews cites *three* cases not cited by Shipman.
See Clark's affidavit, 11.

10.

Ferguson v. Meredith, 1 Wall. 25 — Ship. 357, n. 24
for
Clearwater v. Meredith, 1 Wall. 25 — Andr. 307, n. 2

Error. *Ferguson* for *Clearwater.*
Explanation. Cited *Clearwater* in the Co-operative Edition of the Supreme Court Reports. See Digest, 1209, and indexed citations.
Shipman cites *Robinson v. Rayley, 1 Burrows, 316.*
Andrews (n. 1) cites *1 Burr. 320.*
Shipman cites *six* cases not cited by Andrews.
Andrews cites *three* cases not cited by Shipman.
See Clark's affidavit, 10.

11.

Watris*r* v. Pierce, 36 N. H. *236* — Ship. 374, n. 68
for
Watris*s* v. Pierce, 36 N. H. *232* — Andr. 318, n. 1

Error. *236* for *232.*
Explanation. Cited Watris*r* in Shipman, Watris*s* in Andrews.
Report commences on page *232.*
Opinion commences on page *236.*
Cited *236* in Shipman, *First Edition*, 265.
Cited *236* in Shipman, *Second Edition*, 374, 456.
Cited *232* in Shipman, *Second Edition*, 370, 424.
Cited *236* in Chitty (16th Ed.) 286, 566, 588, 680.
Cited *236* in 18 Amer. & Eng. Encyclopedia of Law, 562, 564, 572.
Andrews cites *four* cases not cited by Shipman.
See Clark's affidavit, 10.

12.

Miliken v. Jones, 77 Ill. 373 — Ship. 374, n. 68
for
Millikin v. Jones, 77 Ill. 373 — Andr. 318, n. 1

Error. *Miliken* for *Millikin*.
Explanation. Andrews cites *four* cases not cited by Shipman.
Andrews alleges that the case does not support the text. The text is to the effect that "it is necessary, as we have seen, to obtain the leave of the court to make use of several matters of defense, the application for leave being addressed to the discretion of the court."
The second paragraph of the syllabus to the case cited reads as follows.
"2. Where a defendant, after filing the general issue, and the continuance of the cause, discovers that he has a substantial defense not admissible under the general issue, he should, at the earliest convenient day, ask for special leave of the court to file an additional plea, so as not to take the plaintiff by surprise or delay the business of the court."
This case will be found digested in Kinney's Illinois Digest, pp. 2228, 2229, 2232.
See Clark's affidavit, 10.

13.

Clay *Fire Insurance Company* v. Wusterhausen — for — Ship. 374, n. 68
Clay *Fire and Marine Insurance Company* v. Wusterhausen — Andr. 318, n. 1

Error. "And Marine" omitted.
Explanation. Shipman, 336, *includes* "and marine."
Andrews, 293, *omits* "and marine."
See Clark's affidavit, 12.

14.

Childs v. *Wescott* — Ship. 411, n. 96
for
Childes v. *Wescot* — Andr. 350, n. m

Error. *Childs* for *Childes*.
Wescott for *Wescot*.
Explanation. Cited from the original note of Stephen.
Cited *Childs* v. *Wescot* in 2 Cro. Eliz. 470.
Cited *Childes* v. *Wescot* in 2 Cro. Eliz. 482.
Cited *Child* v. *Westcot* in 14 Vin. Abr. 479.
Cited *Child* v. *Westcoat* in 23 Vin. Abr. table of cases.
Cited *Childes* v. *Westcot* in Stephen (Heard) 314.
Cited *Childs* v. *Westcot* in Stephen (Heard) table of cases.
See Clark's affidavit, 12.

15.

Wyat v. *Alaud*, 1 Salk. 324 — Ship. 449, n. 1; 450, n. 5
for
Wyat v. *Aland*, 1 Salk. 324 — Andr. 381, n. e; 382, n. h

Error. *Alaud* for *Aland*.
Explanation. Cited from the original note of Stephen.
Shipman (449) cites *Siblay* v. Brown, 4 Pick. (Mass.) 137.
Andrews (381, n. 1) cites *Libbey* v. Brown, 4 Pick. 137.
The case should be cited *Sibley* v. Brown, 4 Pick. (Mass.) 136.
Shipman (450, n. 5) cites *Sibley* v. Brown.
Shipman (450, n. 6) cites *Rex* v. Stevens, 5 East, 255.
Andrews (382, n. h) cites *King* v. Stevens.
See Clark's affidavit, 10.