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XVI. The only infringement which the plaintiffs could have successfully claimed in the situation here involved would, therefore, have been substantial copying of their literary embellishments of the public domain material which they had chosen for their structural design.

The plaintiffs' argument limited their claims, in this regard, to the last three scenes of the picture which I have discussed above. I find that there was not in those scenes any substantial copying of material, not in the public domain, which was added by the plaintiffs to the plot of the trial.

XVII. I find, therefore, that, whilst the defendants' writers had access to the play and undoubtedly had it constantly before their minds when they were making the scenario for the picture, they did not copy anything therein or take anything therefrom which was protected by copyright, and that, as a matter of law, therefore, they did not infringe the plaintiffs' copyright.

Consequently, a decree dismissing the bill of complaint must be granted herein.

[11] XVIII. This opinion may stand as the findings of fact and conclusions of law herein under Equity Rule 70½, 28 U. S. C. A., 723, and I will sign an order accordingly, either before the final decree dismissing the case is submitted for settlement, or at the time when that is done. Cf. *Lewys v. O'Neill* (D. C.), 49 F. (2d) 603, 618.

[12] XIX. Costs and counsel fees in copyright cases are discretionary, *Fischer, Inc., v. Dillingham* (D. C.), 298 F. 145, and inasmuch as I think the plaintiffs were fully justified in submitting this unusual and very interesting case to judicial arbitrament, I do not grant any costs to the defendants on the dismissal of the complaint.

Settle order on two days' notice.

CLARENCE O. SHERRILL v. LOREN C. GRIEVES, U. S.
INFANTRY ASSN. ET AL.

(*Supreme Court of the District of Columbia, Apr. 23,*
1929)

57 Wash. L. R. 286

1. One who, by a new plan and arrangement and combination of old materials, constructs a book designed for the instruction of either young or old, is entitled to a copyright, and his right

- cannot be displaced by showing that some part of his plan or arrangement or combination has been used before.
2. The right conferred by the Copyright Act is not a right to the use of certain words, but to that arrangement of words selected by the author to express his idea.
 3. To give rise to a cause of action for infringement of a copyright, the copying must be substantial.
 4. Substantial similarity may be evidence of copying, since one may not simply paraphrase the language of another and so defeat a claim of infringement. In suit for copyright infringement, where the bill of particulars enumerates a great number of alleged copyings, the better practice is to refer the case to a master for a finding of fact in regard to each instance of alleged copying.
 5. Where there is substantial identity or striking resemblance of language a presumption of copying by the later author arises; and while the burden of proving copying is on the plaintiff throughout, the burden of going forward with the evidence under the circumstances is on the defendant, and in the absence of any explanation by him plaintiff is entitled to a decree on such prima facie case.
 6. Many instances of suspicious similarities unexplained have a cumulative effect.
 7. Substantial copying by defendant from plaintiff's works held clearly shown and plaintiff entitled to an injunction and accounting.
 8. That plaintiff, while engaged as an instructor in an Army post graduate school at Fort Leavenworth, had prepared parts of the work claimed to have been copied by defendant, and had permitted the printing at the fort of a part of what he had written for use only by the school, held not to make the pamphlet so printed a Government publication within the meaning of the Copyright Act.
 9. A professor in an institution of learning is not obliged to reduce his lectures to writing, and if he does so they do not become the property of the institution employing him; and this rule applies in the case of an employee of the Government.
 10. That plaintiff, for a specific sum, sold to another the right to the use, in a work copyrighted by the latter, of certain materials subsequently included in a work for which plaintiff obtained a copyright, held not to deprive plaintiff of his right to a copyright or to be a dedication of his work to the public.

Hearing upon a bill in equity to enjoin the infringement of a copyright and for other relief. Decree for plaintiff.

Mr. W. E. Richardson and Mr. W. M. Bastian for the plaintiff.

Mr. G. H. Powell, Mr. H. R. Gower, and Mr. W. G. Johnson for the defendants.

Mr. Chief Justice McCoy delivered the opinion of the Court.

This is a suit to enjoin alleged infringement of the copyright of a book entitled "Military Topography for the Mobile Forces, Including Map Reading, Surveying, and Sketching", of which plaintiff is author, and for other relief. The book is in three parts, entitled respectively, (1) "Military Map Reading", (2) "Military Topographical Surveying", and (3) "Military Sketching." It is not claimed that there is any infringement of the matter contained in part two.

The defendant Grieves is the author of two books which are said to infringe. The respective titles of those books are: "Military Sketching and Map Reading for Noncommissioned Officers" and "Military Sketching and Map Reading." The preface of the former states among other things that it was written to meet the urgent requirement of a book "within the comprehension of the average noncommissioned officer of the mobile land forces." The latter book was intended, as its preface says, to meet the requirements "of the curriculum prescribed for educational institutions operating under the provisions of the War Department, also to meet the requirements prescribed in the examination of candidates for commissions in the Reserve Officers' Training Corps, and to provide a suitable course for the officers of the National Guard, and thus standardize the instruction throughout the service." This book will be referred to hereafter as the book for commissioned officers.

Defendant Grieves was not served and has not appeared nor did he testify.

The bill alleges that the defendant Grieves and the defendant United States Infantry Association printed, published, and sold the infringing books. The relations to the case of the other defendants are shown in the above title.

The bill was amended several times and several answers by others than Grieves were interposed, but it is not necessary to the answers in detail. It is sufficient to say that so far as concerns the merits they deny that the plaintiff is the sole author of "Military Topography for the Mobile Forces" and that it was copyrighted in 1912; admit the publication by the association of Grieves' books and the sale thereof; deny that Grieves' books in any way infringe rights of the plaintiff, and allege that if any similarity or identity of statement is found to exist it is due to the fact that both authors were discussing

the same subject and derived their information, data, and ideas from similar sources, namely, courses at the same military school, Government publications, and rules and regulations of the War Department governing the practice of the art; allege that what is found in the books in question may be found in practically every book on the subject, including those antedating plaintiff's book, and that if any similarity exists between plaintiff's work and those of defendant Grieves it is due to the fact that each took the data from earlier copyrighted or uncopyrighted publications; allege that plaintiff's copyrights are void because the same were obtained in violation of law and by concealing from the proper officers of the United States charged with the duty of registration of copyrights the fact that in 1910 he had wrongfully obtained the registration of copyright for the work entitled "Military Sketching" in which no copyright could subsist because it was a publication of the United States Government and by concealing from said officers the fact that other matter had been theretofore, to wit, in 1909, written for, sold to, and paid for by Colonel James A. Moss, United States Army, and by said Moss published and circulated under pretended copyright with his full knowledge and consent. There is a further allegation—

* * * That in said work "Military Topography for the Mobile Forces" are incorporated, the said matters so unlawfully copyrighted, published, and sold under such copyrights and the whole so put together and so treated in the preface of said books as to create the false impression, understanding, and belief in the public and among authors and publishers that the entire work is the lawful subject of copyright.

The alleged copying is denied. The agreement between Grieves and the association for the publication of his books and the sales thereof are admitted.

The defendant's contentions are in substance (1) that there is no substantial copying of the plaintiff by Grieves, (2) that originality "in a broad and basic sense" cannot be claimed for the plaintiff's book, (3) that the larger part of the text claimed to have been infringed is not copyrightable.

1. Before taking up a consideration of the evidence bearing on the question of originality and the question of copying, a few of the authorities will be cited showing the tests that courts have adopted in deciding these questions.

A leading case very frequently referred to by the courts of the United States is *Emerson v. Davies*, 8 Fed. Cas. 615, decided in 1845 by Mr. Justice Story sitting as circuit justice. What Mr. Justice Story says in his opinion is applicable here and is so clearly and concisely stated that paraphrasing will not be attempted. On the question of originality the following is found at page 619 of the report:

In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science, and art, borrows, and must necessarily borrow, and use much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book. He contents himself with the use of language already known and used and understood by others. No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection. If no book could be the subject of copyright which was not new and original in the elements of which it is composed, there could be no ground for any copyright in modern times, and we should be obliged to ascend very high, even in antiquity, to find a work entitled to such eminence.

* * * * *

It is a great mistake to suppose, because all the materials of a work or some parts of its plan and arrangements and modes of illustration may be found separately, or in a different form, or in a different arrangement, in other distinct works, that therefore, if the plan or arrangement or combination of these materials in another work is new, or for the first time made, the author, or compiler, or framer of it (call him what you please), is not entitled to a copyright. The reverse is the truth in law, and, as I think, in common sense also (page 620).

* * * * *

An author has as much right in his plan, and in his arrangements, and in the combination of his materials, as he has in *his thoughts, sentiments, opinions, and in his modes of expressing them*. The former as well as the latter may be more useful or less useful than those of another author; but that, although it may diminish or increase the relative values of their works in the market, *is no ground to entitle either to appropriate to himself the labor or skill of the other, as embodied in his own work.* (Page 620.) (Italics ours.)

* * * * *

It has been truly said, that the subject of both of these works is of such a nature that there must be close resemblances between them. But the real question on this point, is, not whether such resemblances exist, but whether these resemblances are purely accidental and undesigned, and unborrowed, because arising from

common sources accessible to both the authors, and the use of materials open equally to both; whether in fact, the defendant Davies used the plaintiff's work as his model, and imitated and copied that, and did not draw from such common sources or common materials. (Page 625.)

Judge Learned Hand in *Fred Fisher, Inc. v. Dillingham*, 298 Fed. 145, at page 150, says:

It appears to me very obvious that the rule as to infringement has, and indeed must have, as its correlative, the rule that originality is alone the test of validity. Any subsequent person is, of course, free to use all the work in the public domain as sources for his compositions. No later work, though original, can take that from him. But there is no reason in justice or law why he should not be compelled to resort to the earlier works themselves, or why he should be free to use the composition of another, who himself has not borrowed. If he claims the rights of the public, let him use them; he picks the brains of the copyright owner as such, whether his original composition be old or new.

The foregoing authorities lay down the broad general principles which are to be applied in cases of this kind. However, there are found in the cases what may be called refinements of application of those principles or better perhaps a technique due in part to the wide range of subject matter in printed composition—ranging from mere lists or works purely of the imagination. Those refinements will not be discussed. The books being considered here lie between the extremes just mentioned. The subject matter with which the books deal is old, but they are in the class of textbooks which are said to be the products “of intellectual labor and literary skill the results of which are unique each time the subject is handled independently even though the same materials are dealt with.” *Anderson Co. v. Baldwin Law Publishing Co.*, 27 Fed. (2d) 82 at 89.

In the *Emerson* case, *supra*, it is said:

He who constructs by a new plan and arrangement and combination of old materials, in a book designed for instruction, either of the young or old, has a title to a copyright which cannot be displaced by showing that some part of his plan or arrangement or combination has been used before. (Page 619.)

The copyright law provides, 35 Stat. 1075; U. S. C. A., title 17, secs. 1 and 3:

SEC. 1. That any person entitled thereto, upon complying with the provisions of this act, shall have the exclusive right: (a) To print, reprint, publish, copy, and vend the copyrighted work: * * * (b) * * * or make any other version thereof * * *

SEC. 3. That the copyright provided by this act shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting * * *.

2. The right conferred by the act is defined in *Holmes v. Hurst*, 174 U. S., 82, at 86:

The right thus secured by the Copyright Act is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air or sunlight; nor is it the right to ideas alone, since in the absence of means of communicating them they are of value to no one but the author. But the right is to that arrangement of words which the author has selected to express his ideas.

3. To give rise to a cause of action the copying must be substantial. This was decided in *Perris v. Hexamer*, 99 U. S., 674, where the court says at page 675:

A copyright gives the author or the publisher the exclusive right of multiplying copies of what he has written or printed. It follows that to infringe this right a substantial copy of the whole or of a material part must be produced.

No single test can be established for determining whether copying is substantial. Drone on Copyright, page 414, says:

In determining whether the part taken is material in extent and importance, a variety of circumstances must be considered: The absolute amount and value of the part; its ratio to the whole from which it is taken, and to the whole in which it is afterward incorporated; its relative value to each of the works in controversy; the purpose which it serves in each; how far the later work may tend to supersede the original, or interfere with its sale; to what extent the original author may be injured, actually or potentially, by the unlicensed use made of his production; and many other special considerations, which need not here be mentioned.

He says further that when unjustifiable copying has been proved—

* * * in determining what amount or what value is sufficient to constitute infringement in cases of this kind, the utmost rigor consistent with right and justice should find place against him charged with wrong.

Each of the tests mentioned by Drone is found in so many cases that the court deems citation of them superfluous except two from which Drone quotes as follows:

When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small portion of the book in quantity. It is not only quantity, but value, that is looked to. It is useless to refer to any particular cases as to quantity. *Bramwell v. Halcomb*, 3 My. & Cr., 738.

In many cases, the question may naturally turn upon the point, not so much of the quantity as of the value of the selected materials. *Gray v. Russell*, 1 Story 20.

4. Substantial similarity may be evidence of copying. One may not simply paraphrase the language of another and so defeat a claim of infringement. *Meccano v. Wagner*, 234 Fed. 912, 922; *Chautauqua School v. National School*, 211 Fed. 1014; *West Publishing Co. v. Edward Thompson Co.*, 176 Fed. 833, 838. In *Lawrence v. Dana*, 4 Cliff. 80, Mr. Justice Clifford of the Supreme Court says:

Copying is not confined to literal repetition, but includes also the various modes in which any publication may be adapted, imitated, or transferred with more or less colorable alteration to disguise the source from which the material was derived.

The plaintiff filed a bill of particulars in which were quoted as evidence of copying extracts from Grieves' books and extracts from plaintiff's book. In a compilation prepared by one of counsel for the defendants the extracts are arranged in parallel columns with extracts from prior authors which are claimed to be proof of lack of originality on the part of the plaintiff and of copying by him from those authors. This compilation was used at the hearing as the bill of particulars. It has greatly lightened the burdens of the court in reaching a conclusion.

There are in the bill of particulars over thirteen hundred quotations. All of them had to be examined carefully and more than once. It is obvious that it would have been better to refer the case to a master to make a finding of fact in regard to each instance of alleged copying, thereby making possible a brief review of the facts by the court in stating its conclusions. The court does not understand, however, that the parties expect it to act as a master, and it has not attempted to do so, but has merely undertaken to set forth in the findings of fact filed herewith some of the clearest evidences of copying. The contexts from which the items in the bill of particulars mentioned in the findings were taken have not been quoted except in a few instances, but if the subject matters of the books, namely military sketching and military map reading, are kept in mind the nature and quality of the items quoted should be evident.

The items contained in the bill of particulars are there numbered consecutively. Those numbered from 1 to 176,

inclusive, are from Grievés' book for noncommissioned officers and those from 177 to 379, inclusive, from his book for commissioned officers. That numbering is followed in the findings in quoting from the bill of particulars. The parts quoted are grouped under the letters A, B, etc., which lettering is that of the court. One of the groupings, C, is under the heading "Sherrill-Grievés-Moss." This grouping is adopted because of the contention urged in the defendants' answers in regard to material sold by plaintiff to Colonel Moss and mentioned above. Another grouping, D, is under the heading "Leavenworth Pamphlet", which is the convenient designation used in the bill of particulars in referring to the work which defendants claim as above mentioned to be a publication of the United States Government. Other so-called "Leavenworth Pamphlets" are quoted from in the same grouping in order to show what previous authors have written, but the plaintiff makes no claim of authorship in respect to them. Such pamphlets are cited in the bill of particulars as "Leavenworth Pamphlet A, B", etc. The facts and the law in regard to the last two-mentioned contentions of the defendants are considered below.

5-6. Applying the authorities cited above the court has reached the conclusion that there is clear evidence of substantial copying from the plaintiff's book by Grievés as shown by many instances detailed in the findings, which instances must be considered in the light of the well-established law, namely, that where there is substantial identity or striking resemblance of language a presumption of unlawful copying by the later author arises (Drone p. 400), and that while the burden of proof remains on the plaintiff throughout to prove copying, the burden of going forward with the evidence under such circumstances is on the defendant, and in the absence of any explanation by him the plaintiff is entitled to a decree on such prima facie case. *Shepard v. Taylor Co.*, 193 Fed. 991; Drone pp. 400, 430. It should be kept in mind also that many instances of suspicious similarities unexplained have a cumulative effect. *Anderson Co. v. Baldwin Co.*, *supra*.

7. As appears from the findings, there are shown to be identity of language, practical identity of language, instances of paraphrasing, inversion of statement, and other evidences of an improper use of plaintiff's book. The instances mentioned in the findings are 31 in num-

ber. The findings show also originality of expression and treatment by the plaintiff.

The substantial nature of the copying as shown by the findings is more apparent when the schemes of the books are considered. The plaintiff states the theory of the art which he is expounding and gives concrete instruction in the art with that theoretical background. Grieves' books are not concerned with theory but lay down the practice of the art, borrowing from plaintiff's book for that purpose. In the preface to his book for commissioned officers Grieves says: "It has been the aim to produce a suitable textbook *at the minimum price, free from all extraneous matter, and yet completely fulfilling the requirements.*" (Italics supplied.) The situation here bears some resemblance to that disclosed in *MacMillan v. King*, 223 Fed. 862. There the defendant was a private tutor. He prepared for the use of his pupils certain sheets based on and quoting from a book copyrighted by the plaintiff. The book was used in a course given in Harvard University. The court makes this comment, speaking of the defendant:

It seems obvious that what he was trying to give, and what his pupils were trying to get, was an acquaintance with the contents of the book, which should resemble as much as possible that acquaintance which they would have obtained for themselves by following with sufficient diligence the university course of instruction for which the book was the appointed textbook. Nor do I see any reason to doubt that, as the author testifies, these "outlines" might readily cause the student to think he (could) meet the minimum requirements without using the book itself.

The plaintiff claims that a comparison of his book with Grieves' book for commissioned officers shows that thirteen percent of the latter is a literal copy and eleven percent a mere paraphrase of the former. As to Grieves' book for noncommissioned officers plaintiff estimates that it shows a still larger percentage of copying. The court has not verified these estimates. It is sufficient to say that there are other evidences of copying than those mentioned in the findings.

Defendants lay considerable stress on a contention that in many instances "no such text exists anywhere in Sherrill's book" as that shown in the bill of particulars. This is undoubtedly true in some instances where the quotations from the plaintiff's book do not show the continuous text though the omissions are indicated. Those items in

the bill of particulars are intended to show what was taken and Grieves can hardly expect to be exonerated because he did not take everything from Sherrill's text, the fact being that what he took was substantial. The court in *MacMillan v. King, supra*, at page 866, has this to say about the sort of thing which Grieves has done in part:

Though the reproduction of the author's ideas and language is incomplete and fragmentary, and frequently presents them in somewhat distorted form, important portions of them are left substantially recognizable.

However, much more than fragmentary use is found in the present case.

A further contention of the defendants is that the plaintiff has borrowed from previous authors. If that be so it is for those authors to complain, but Sherrill's rights in that which in his book is original are not affected thereby.

LEAVENWORTH PAMPHLET

For many years before either Sherrill or Grieves produced any books, the United States had established and still maintains what may be termed a post-graduate school for officers of the United States Army at Fort Leavenworth, Kans. Sherrill and Grieves had both attended that school, and Sherrill was, at one time, an instructor in the school in the topics dealt with in the books here being considered. Officers attending there, whether as students or instructors, were assigned to that duty by the War Department. The subjects dealt with in those books had been for many years subjects of instruction there. A large amount of matter bearing upon those topics had been written and published, as is disclosed by the books and pamphlets given in evidence. These topics are essentially military and highly technical. The school is under the control of the War Department and under the immediate supervision of an officer of the United States Army assigned to that duty by the War Department. There was maintained at the school at the cost of the United States, out of appropriations by Congress administered by the War Department, a printing shop and bookbindery exclusively for the benefit of the school and which, whether by formal official designation or otherwise, became known as the "Leavenworth Press", and was so designated by the plaintiff.

8. While plaintiff was engaged as an instructor on the topics of military sketching, map reading, and surveying there was no suitable textbook in existence for carrying on that work. The plaintiff was preparing material for and did work on such a book in his leisure time, not as an incident to his work as instructor. It took him a year to write the book which was for general use and not for the Army only and has been quite largely used in civil institutions. At the request of the authorities at Leavenworth permission was given by the plaintiff to use a considerable part of what he had written for his book before the book was printed for general circulation. That part related to military sketching. A sufficient number of copies of that part were printed in the form of a pamphlet on the Leavenworth Press to provide the students at the school with them. The authorities were supposed to print only enough copies for the use of the school. The plaintiff went through the forms provided by law for obtaining registration of copyright for this pamphlet and the same was registered in the office of the Register of Copyrights. The pamphlet is entitled "Military Sketching" and bears the imprint "Copyright 1910, by C. O. Sherrill", and also on the bottom of the title page "The Army Service School Press, Fort Leavenworth, Kansas, March, 1910." Subsequently he incorporated this pamphlet in the book entitled "Military Topography for the Mobile Forces" here in question which was copyrighted by him in July, 1910. As stated above, part III of this book is entitled "Military Sketching" and is conceded to be a reprint of the Leavenworth Pamphlet. There was some confusion at the trial as to the exact date of the copyright of this book, "Military Topography for the Mobile Forces", but the date is unimportant, for it is conceded that it was copyrighted before either of Grieves' books, and that it was copyrighted after the Leavenworth Pamphlet was printed as above stated.

The defendants, while claiming that no use was made by Grieves of any part of the Leavenworth Pamphlet, contend that even had such use been made it was legitimate because, as they say, that pamphlet is a "publication of the United States Government." If their premise be conceded, their conclusion is sound, but the court is of the opinion that the Leavenworth Pamphlet was not a publication of the United States Government in the sense

in which that phrase is used in the statute. U. S. C. A., title 17, sec. 7.

9. The evidence shows that the authorities at Leavenworth responsible for the printing asked permission to print the pamphlet for a limited use because it was thought that to do so would facilitate the giving of instruction to the students. Counsel for defendant say that it may be conceded *arguendo* that it was no part of the plaintiff's duty to print the instructions in military sketching, either at his own or at Government expense, but that it was his legal contract duty to the Government to give to the student officers the identical instruction contained in the pamphlet if that was the best treatment of the subject of which he was capable, and that when he adopted as a means of performing his duty written instructions and had them printed at Government expense in a Government printery the court must assume that he had the consent of the superior officers at the school to discharge his duty in that way. But the evidence shows that the plaintiff did not have the pamphlet printed; it was his superior officers who did so. The plaintiff at the time was employed to give instruction just as a professor in an institution of learning is employed. The court does not know of any authority holding that such a professor is obliged to reduce his lectures to writing or if he does so that they become the property of the institution employing him.

At page 23 of the defendants' brief it is stated:

The denial of copyright to any publication of the Government or to any reprint of the whole or a part thereof has the strongest public equity as its base. In all such cases the public has paid the cost of publication and, presumably in all, has also paid the cost of producing the subject matter by salary or other compensation to those who have created or prepared the matter for publication.

This contention is in substance that by entering the employment of the Government a person sells all his energies, physical and mental, to the Government if they relate to any subject matter dealt with by him in performing his duties. If that be so, then neither the plaintiff nor the defendant Grieves had the right to copyright their books; nor had Colonel Moss or any of the officers who have written on military matters such right. The fact is that officers do write such books which are copyrighted and used in Government schools with the ap-

proval of the military establishment, and such books are found in the libraries of those establishments. See *Callaghan v. Myers*, 122 U. S. 617, which interprets *Wheaton v. Peters*, 8 Peters 591, as holding that even though a reporter of the Supreme Court of the United States is paid by the Government a salary for such reports, he may have copyright in his original notes and other original matter in the reports.

There is nothing in the present case to show that there was any improper use of Government money when the plaintiff's pamphlet was printed on the Leavenworth Press under the arrangement testified to by the plaintiff. Such arrangement was made in good faith and was obviously to the advantage of the Government. The Congress appropriated money for the operation of the "Press" for any proper purpose. However, if the printing of the plaintiff's pamphlet was improper, it does not follow that the pamphlet became a Government document except in the mere physical sense. To say otherwise would be to hold that Government officers by the expenditure of money for a purpose not authorized by law acquire for the Government not only that which the officers thought that they were getting but something in addition which was not in contemplation.

The publications involved in the cases cited by defendants contained material taken from documents which were indisputably Government publications.

The Leavenworth pamphlet is not a public document. Nor did the publication of it at Fort Leavenworth put it in the "public domain", as shown by the authorities cited below in connection with the discussion of the effect of the use by Colonel Moss of the plaintiff's material.

MOSS BOOK

10. As stated above, plaintiff sold to Colonel Moss certain material to be incorporated in the book entitled "Noncommissioned Officers' Manual" written by the latter and copyrighted before the publication of plaintiff's book. Defendants claim that so far as the plaintiff is concerned Grieves had the right to copy from Colonel Moss' book.

There is no real contradiction in the evidence as to the agreement respecting such use. The plaintiff for a specific sum sold to Colonel Moss the right to use in that book

which the latter was then writing certain material on military map reading and military sketching, and Colonel Moss by a footnote at page 349 of his book gave credit to the plaintiff as follows:

(1) This chapter and chapter XX are based on the corresponding chapters in *Military Map Reading and Sketching*, by Capt. C. O. Sherrill, Corps of Engineers, Instructor, Army Service Schools, Fort Leavenworth, Kansas. The text and illustrations have been modified so as to meet the special requirements of noncommissioned officers.

It does not appear that the plaintiff had then published a book under the title given in the footnote above quoted, but he did publish in 1909, the same year in which the "Noncommissioned Officers' Manual" by Colonel Moss was published, a book called "Military Map Reading" and in the following year one called "Military Sketching." The fact that there was no book written by the plaintiff entitled "Military Map Reading and Sketching" when Colonel Moss prepared his footnote is of no significance, as it is quite evident that Colonel Moss knew that the plaintiff was preparing to publish a book covering these subjects and Colonel Moss testified that the plaintiff "had the reputation at Fort Leavenworth of being quite an expert in things of that kind."

The following authorities established the proposition that on the evidence here the plaintiff did not dedicate his work to the public by permitting Colonel Moss to use it and did not thereby lose his right to copyright.

In *Paige v. Banks*, 13 Wall. 603, at 614, the Supreme Court says:

Independent of any statutory provision the right of an author in and to his unpublished manuscripts is full and complete. It is his property, and, like any other property, is subject to his disposal. He may assign a qualified interest in it, or make an absolute conveyance of the whole interest.

Judge Story in *Folsom v. Marsh*, 2 Story 111, says:

The general property in manuscripts remains in the writer and his representatives, as well as the general copyright. A fortiori, third persons, standing in no privity with either party, are not entitled to publish them, to subserve their own private purposes of interest, curiosity, or passion.

If there has been what is called a general publication there is an abandonment of the author's right of property, otherwise not.

The question of abandonment to the public was discussed at length in *Werkmeister v. American Lithographic Company*, 134 Fed. 321. The court there summarizes its examination of the authorities as follows:

A general publication consists in such a disclosure, communication, circulation, exhibition, or distribution of the subject of copyright, tendered or given to one or more members of the general public, as implies an abandonment of the right of copyright, or its dedication to the public. Prior to such publication, a person entitled to copyright may restrict the use or enjoyment of such subject to definitely selected individuals or a limited, ascertained class, or he may expressly or by implication confine the enjoyment of such subject to some occasion or definite purpose. A publication under such restrictions is a limited publication, and no rights inconsistent or adverse to such restrictions are surrendered. Restrictions imposed upon use prior to publication protect the copyright.

It follows from what is said above that Grieves had no right to use the material furnished to Colonel Moss by the plaintiff.

The plaintiff may take a decree for an injunction and an accounting. Settle decree on notice.

SIMONTON v. GORDON ET AL.

(District Court, S. D. New York. Feb. 17, 1925)

12 Fed. (2d) 116

1. COPYRIGHTS.

Play "White Cargo" held an infringement of copyrights covering novel "Hell's Playground", in view of numerous similarities in theme, characters, etc.

2. COPYRIGHTS.

For play to infringe copyright of book, and be subject to charge of piracy, there must be a substantial number of incidents, scenes, and episodes which are in detail, arrangement, and combination so nearly identical with those to be found in book as to exclude all reasonable possibility of coincidence, and lead to conclusion that they were taken from book.

3. COPYRIGHTS.

Test of infringement is whether similarities are merely coincidence, or are sufficient to reveal plagiarism, and, if piracy is not shown, whether there is such unintentional infringement as to justify equitable relief.

4. COPYRIGHTS.

Novel, purporting to deal with actual conditions and modes of living of African traders, held not so immoral as to be unentitled to copyright protection, and preclude infringement by play.