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## CHANCERY JURISDICTION.

AN INQUIRY INTO THE JURISDICTION OF THE COURT OF CHANCERY TO RESTRAIN THE PUBLICATION OF LETTERS. BY JOEL PARKER, ROYALL PROFESSOR IN THE LAW SCHOOL OF HARVARD UNIVERSITY AT CAMBRIDGE.

In the progress of our inquiries into the jurisdiction of the Court of Chancery to issue injunctions, we are led to the consideration of its authority to restrain the publication of letters.

Mr. Justice Story, after stating (2 Story's Eq. Jur. § 944), that the publication, without the consent of the author, of private letters forming literary compositions may be restrained by injunction, says, (§ 946,) "A question has been made, and a doubt has been suggested, how far the like protection ought to be given to restrain the publication of mere private letters on business, or on family concerns, or on matters of personal friendship, and not falling strictly within the line of literary compositions." He adds, "Fortunately for public, as well as for private peace and morals, the learned doubts on this subject have been overruled; and it is now held, that there is no distinction between private letters of one nature and private letters of another." § 948.

Undoubtedly there have been cases in the English courts of equity which give countenance to such a position, or maintain the right of the Court to interfere, by way of injunction, and restrain the party who received and holds possession of letters from publishing them, without any distinction between those which were and those which were not, strictly speaking, "literary compositions." The only ground upon which the jurisdiction has been maintained is a right of property, literary or otherwise, in the writer of the letter, which may be vindicated and upheld by him, and those who represent him in relation to rights of personal property, namely, his executors or administrators.

An inquiry seems to have arisen, whether the Court could interfere and restrain the publication, in order to suppress libelous matter which would tend to a breach of the peace; also, whether the Court might act with a view to prevent injury to the feelings of survivors. In the case of *Lord and Lady Perceval* vs. *Phipps*, 2 Vesey and Beames, 25, (which occurred in 1813,) the Vice-Chancellor, Sir Thomas Plumer, speaking of different classes of letters, remarked respecting the correspondence between friends or relations upon their private concerns, "that it was not necessary there to determine, how far such letters, falling into the hands of executors, assignees of bankrupts, &c., could be made public, in a way that must frequently be very injurious to the feelings of individuals: and that he did not mean to say, that would afford a ground for a court of equity to interpose, to prevent a breach of that sort of confidence, independent of contract and property."

But in *Gee* vs. *Pritchard*, 2 Swanston, 402, Lord Eldon distinctly disclaimed any jurisdiction to make such a decree upon either of these grounds. The counsel for the defendant, in support of a motion to dissolve the injunction, having stated that in Hudson's treatise on the Court of Star Chamber, no trace was found of any interference of that tribunal, by injunction or otherwise, on the subject of letters, unless the publication was libelous, the Lord Chancellor said, "It will not be necessary to trouble you with that view of the case. The publication of a libel is a crime; and I have no jurisdiction to prevent the commission of crimes, excepting, of

course, such cases as belong to the protection of infants, where a dealing with an infant may amount to a crime, an exception arising from that peculiar jurisdiction of this Court." And the counsel then remarking, that an attempt would be made to sustain the injunction, on the ground that the publication of the letters would be painful to the feelings of the plaintiff, his Lordship added, "I will relieve you also from that argument. The question will be, whether the bill has stated facts, of which the Court can take notice *as a case of civil property*, which it is bound to protect. The injunction cannot be maintained on any principles of this sort, that if a letter had been written in the way of friendship, either the continuance or the discontinuance of that friendship affords a reason for the interference of the Court." In his final opinion, his Lordship does not express himself quite so strongly on this point, but his decision is based upon the precedents, as showing a right of property. See also Merivale, 438, 440.

No case is found since that time, controverting these disclaimers of jurisdiction on any other ground, than that of property. On the contrary, the decisions in this country expressly sustain them. Chancellor Walworth so held in *Brandreth* vs. *Lance*, 8 Paige 24. He says, "The bill presents the simple case of an application to the Court of Chancery, to restrain the publication of a pamphlet, on the ground that it is intended as a libel upon the complainant." "It is very evident that this Court cannot assume jurisdiction of the case presented by the complainants bill, or of any other case of like nature, without infringing upon the liberty of the press, and attempting to exercise a power of preventing justice, which, as the Legislature has decided, cannot be safely intrusted to any tribunal." And after commenting upon the impeachment of Sir William Scroggs, Chief Justice of the King's Bench, (8 Howell's State Trials, 198,) for undertaking to exercise in that Court the power of prohibiting a publication on the ground that it was libelous, and showing that a casual remark by Lord Ellenborough, at Nisi Prius, (*Du Bost* vs. *Beresford*, 2 Camp. 511,) in support of such jurisdiction in the Lord Chancellor, was entitled to no weight whatever, he says, "the utmost extent to which the Court of Chancery has ever

gone in restraining any publication by injunction, has been upon the principle of protecting the rights of property." The complainant's bill was accordingly dismissed, on the express ground that, although the work, the publication of which was sought to be restrained, was unquestionably intended as a gross libel upon him, it could not be considered as an invasion of the rights of either literary or medical property, and therefore the Court had no authority to interfere for his protection. The language of Vice-Chancellor McCoun, in *Wetmore* vs. *Scovill*, 3 Edwards' Ch. Rep. 515, 529, is equally explicit. "Independent of property and disconnected therefrom, there is no ground or principle, on which the jurisdiction to restrain the publication of private letters can properly rest." And in *Hoyt* vt. *Mackenzie*, 3 Barb. Ch. Rep. 320, the Chancellor said, "This Court has no jurisdiction to restrain and punish crimes, *or to enforce the performance of moral duties*, except so far as they are connected with the rights of property." Mr. Justice Story himself, in a later edition of his Commentaries on Equity Jurisprudence, has added a section, expressly limiting the jurisdiction to the principle of protecting the rights of property, 2 Story's Com. (ed. 1849) Sec. 948, a. The inquiry is narrowed therefore, in the first place, to the question whether there is a ight of property in the writer of a letter, who has directed and sent it to another in the ordinary mode, upon which the jurisdiction may be sustained.

This inquiry may be divided into two questions:

1st. Whether the writer retains any property in the material of the letter itself, (the paper and ink) as a chattel interest.

2. Whether he has any property in the composition, of a literary character, in the nature of a literary property, which the Court should protect in the manner in which it protects literary compositions and publications, which fall within the law of copyright. The cases seem to treat the matter as if similar rules applied; and it may be expedient, therefore, to state the provisions of the statutes relating to copyright, before proceeding to consider these questions separately.

In the 8th of Queen Anne, (A. D. 1709) Parliament passed an

act "for the encouragement of learning," by which it was provided, (Sec. 1,) that after April 10, 1710, the author of any books already printed, who then had not transferred his right therein, and the bookseller or other person who then had acquired the same, in order to print, should have the sole right of printing them for twenty-one years from that date and no longer. Also that authors of books not then printed and their assigns, should have the sole right of printing them for fourteen years from the same date. Penalties were imposed for such acts as would tend to lessen the value of these rights. By Sec. 11 of the same act, it was also provided that after the expiration of the fourteen years, the sole right of printing or of disposing of copies should return to the authors, if then living, for another term of fourteen years.

Prior to this statute, there had been certain exclusive rights of publication, held or acquired in various ways and for a longer or shorter time. They seem to have been based upon the Charter (and by-laws made under it) of the Stationers' Company,—Royal proclamations and grants,—patents *cum privilegio*,—decrees of the Star Chamber,—some ordinances during Cromwell's time,—licensing acts passed during the reign of Charles II. And perhaps also, in some cases, licenses from the Archbishops. Reference may be had to Ames' Typographical Antiquities, at pages 498, 570; *Millar* vs. *Taylor*, 4 Burrows, 2373, and 2 Brown's Parl. Cases, 136, 137. The instances cited in Ames, are such as these,—the exclusive right to print the Bible in English, the Book of Common Prayer, the Book of Homilies, the Primer, a Treatise on the Eucharist, Turner's Herbal, Froissart's Chronicles, the English and Latin dictionaries, controversial pamphlets, music, various grammars, maps, almanacs, cards, school books, law books, the statutes at large, classical works, etc. But no case is found before the statute, in which a right in a literary publication *at common law* is sustained, or allowed to rest upon any other foundation than such as have been quoted. It is indeed said, that it appears by Lilly's Entries, page 67, that at Hilary Term, 31 Car. II., there was a case of *Ponder* vs. *Braddill*, for printing 4,000 copies of the Pilgrim's Progress, whereof the plaintiff was proprietor; but it was replied,

that this amounts to no more than a declaration in the book of a special pleader, and that, for all that appears, if the defendant printed and exposed to sale 4,000 books, he was left in possession of them. 2 Brown's Parl. Cases, 137.

By the Constitution of the United States, Article 1, Sec. 8, Congress have power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries." Congress passed an Act in 1790, which secured maps, charts and books to authors and proprietors. It was limited to those articles. By a supplementary Act in 1802, the benefit of the former Act was extended to the arts of designing, engraving and etching historical and other prints. The Act of 1821, secures to citizens and residents, who shall be the authors of any book or books, map, chart, or musical composition, or who shall invent, design, etch, engrave, work, or cause to be engraved, etched or worked, from his own design, any print or engraving, and to their executors, administrators, and legal assigns, the sole right and liberty of printing, reprinting, publishing and vending such books, maps, charts, musical compositions, prints, cuts or engravings, for the time specified in said Act. In order to secure the right, however, under this Act, it is made necessary to deposit a printed copy of the title of the book or other work, in the District Clerk's office, before publication; a copy of the book or other work itself also, is to be delivered to the Clerk within three months from the publication, in order that the same may be transmitted to the Secretary of State for preservation; and notice of the copyright is to be given by printing a prescribed form of notice upon the title page, or the page next following, in a book, or upon the face, title or frontispiece of the other works. A subsequent Act passed August 10, 1846, Chap. 178, Sec. 10, requires the author or proprietor to deliver one copy to the Librarian of the Smithsonian Institute, and one copy to the Librarian of the Library of Congress, for the use of the said libraries. Whether this is a condition of copyright, is not settled. In *Jollie* v. *Jacques*, 1 Blatch. 618; Mr. Justice Nelson held that "the obligation to deliver does not attach till the

right is secured." At the same time, he remarks that "some doubt must rest upon the question, until it is settled by paramount authority," and adds, "in the meantime, it will doubtless be most prudent for authors to conform to the provisions of the Act."

Before proceeding farther, it may be proper to say that the present inquiry excludes the consideration or literary compositions, properly so called, and which are not mere correspondence. A person who has composed a literary work in the shape of letters to a friend, of such a character as to be protected by the statutes relating to copyright, if the matter was in the form of an essay, would not lose the protection by the form which it had assumed; and, unless he had in some way failed to secure, or parted with his right, under the statute, another person could not publish the work against his will in his lifetime, or against the will of his representatives after his death. If, however, the matter took the shape of letters addressed to an individual, and they were actually sent to him before copyright was secured, it may deserve consideration whether under Act of Congress any copyright can be afterwards secured.

The inquiry also excludes cases of such agreements on the part of the receiver of the letter, to refrain from publication, that a Court of Equity might interfere under its jurisdiction to enforce a specific performance of agreements, or to uphold and enforce trusts. Some of the cases are of that character. *Gee* v. *Pritchard*, 2 Swanston, 402, 427; ——— v. *Eaton*, cited in *Perceval* v. *Phipps*, 2 Ves. & Beames, 19, 23, 27.

It excludes, also, express conditions annexed by the writer to the receipt of the letter, when it is sent in such a manner that the receiver is fairly held to have assented to the condition when he received it. If the writer of the letter were to cause it to be offered to the party to whom it was directed, upon a condition that it should not be published, the party receiving it must be held to have assented to the condition when he received it, and the case would be one of an implied promise. But no such condition could be imposed after the letter had been received; and such implied promise could hardly be held to arise, if the condition was at the foot of the letter, so that the recipient was not made aware of it

until he had read the contents. And the same rule would seem to hold good if it was within the letter in any part. The condition, expressed in order to raise an implied promise, should be so set forth as that the party to whom the letter is sent, may decline to receive it upon the condition.

Coming then to the ordinary case of letters sent and received in the ordinary course of correspondence, and which relate to matters of business, or contain information respecting passing events, discussions and opinions of the writer upon any subject as a matter of supposed interest to the recipient, and which are sent and received without any agreement, express, or to be implied from the special circumstances repecting the disposition to be made of them, the question is,

1. Whether the writer retains a property in the material of which the letter is composed?

The leading case upon the subject of letters, is *Pope* v. *Curl*, 2 Atk. Rep. 341, in which Lord Hardwicke granted an injunction against the publication of Mr. Pope's letters to some third person, and seems to have based his opinion upon two grounds,—1. That letters are within the grounds and intention of the statute of 8th Anne, securing copyrights. 2. That the writer of a letter retains a property in it aside from any considerations of a literary character.

Upon the objection that when a man writes a letter, it is in the nature of a gift to the receiver, his lordship is reported to have expressed an opinion that it was "only a special property in the receiver," or "at most, that the receiver has only a joint property with the writer," although "possibly the property of the paper may belong to him." If his lordship used this language, it serves to show that he had not considered the subject so as to have formed a definite opinion. A special property and a joint property are very different things. Where one has a special property and another the general property in a thing, their interests are by no means joint interests. It may not be amiss to note that the case came up "*on motion*," and may therefore have had less consideration than it would have had on a regular hearing. See *Gyles* v. *Wilcox*, 2 Atkins, 143, where Lord Harkwicke said in relation to *Read* v

*Hodges*, cited by counsel as in point in the case before him, "the case of *Read* v. *Hodges*, was upon a motion only, and at that time I gave my thoughts without much consideration, and therefore shall not lay any great weight upon it."

Property may be sole or joint, general or special. We will consider each separately, in relation to this subject.

Aside from its literary character, there can be no possible foundation in the ordinary rules regulating property, for the assertion of a sole right in the author of a letter after it has been sent.

Prior to the time of sending, the sole property was in him, and he might do as he pleased with it. The act of sending and delivering without reservation, express or implied, of a right to reclaim or control, aside from its literary character, is in the nature of a gift. And this is true, notwithstanding its contents may be literary. Take the case of a book enclosed in an envelope, and addressed and sent to another, it must be deemed a gift, unless controlled by circumstances. It is clear that the writer of the letter cannot demand its return. If he could, he might treat the refusal as a wrong done to him, and maintain an action at law for the recovery of it, or damages for its detention, or maintain a bill in equity to have it delivered up. But there is not even a *nisi prius* ruling of a common law judge, or the *dictum* of a chancellor indicating any such opinion. The receiver may destroy the letter without any responsibility at law or in equity.

There is quite as little pretence for the assertion of a joint right of ownership. Such a right would constitute the parties tenants in common. But each tenant in common has a right of possession. To be sure, one cannot maintain an action against the other for a mere withholding of possession, because the other has as good a right of possession, but he may take and hold the chattel himself, if he can do so peaceably. He has a right also to an account, and a share of the profits, if any. He may affirm a sale and recover his share of the price. He may treat a destruction of the article as a tortious conversion, and recover the value of his share in damages. There is no suggestion of any such right on the part of the author of a letter, as against the party to whom it is addressed; and the

fact that the receiver may destroy it without accountability is conclusive against a joint property in the article.

There is as little ground upon which to sustain a general and special property in the materials of the letter upon any recognized principles. The fact that the holder may utterly destroy it, not only without the assent, but against the express prohibition of the writer, is conclusive against any such mixed property not joint. Where one has a special property merely in an article, the general property is in some one else, as in the case of a bailment for hire. The bailee has the right of possession and the right to use for a certain period; the remaining interest and the right of possession at the expiration of the time being in the bailor. If the bailee destroys it, or refuses to return it at the expiration of the time, the bailor has his action. The receiver of a letter is not a bailee, nor does he stand in a character analogous to that of a bailee. There is no right to possession, present or future, in the writer. The only right to be enforced against the holder, is a right to prevent publication, not a right to require the manuscript from the holder, in order to a publication by himself.

The right of the receiver, then, is to the whole letter. He may read it himself and to others, and recite it at meetings; he may sell the materials, (certainly, if he efface the contents); he may do everything but multiply copies, and perhaps he may do this if he do not print them. It has been held that a representation upon the stage is not a violation of copyright, under the statute of Anne. *Coleman* v. *Wathen*, 5 D. & E. 245.

Later cases, asserting the jurisdiction, have either followed *Pope* v. *Curl*, as a precedent settling the question, or have put the case more specifically upon the ground that there is a literary property in the writer, which the Court should protect. *Thompson* v. *Stanhope*, 2 Ambler, 740, follows *Pope* v. *Curl*. *Gee* v. *Pritchard*, 2 Swanston, 402, before cited, was decided expressly on the authority of the two preceding cases. The case of *Folsom* v. *Marsh*, 2 Story, 100, where the doctrine that the writer has a property in his letters is fully recognized, may probably be sustained, on another ground, viz: that Mr. Sparks had a copyright in his

work, and that another person could not copy from that, even if he might publish the original letters.

II. We are to consider whether the writer of a letter has any property in the composition, of a literary character, in the nature of a literary property, which the Court shall protect in the manner in which it protects literary compositions and publications which fall within the law of copyright.

It may be remarked here, that if there is such a property in the writer, aside from special agreement or special circumstances, from which it is to be implied that there was an agreement or condition annexed to the reception of the letter, it must be a sole right. There is, upon principle, quite as little foundation for a joint right, or a general and special right of literary property in the contents of the letter regarded as property, as there is in the material of the letter itself.

This is shown by the fact that the receiver may destroy the contents of the letter as well as the material. If the ideas there set forth have no other existence than the record there made of them, the receiver has an absolute power of destruction over them, so far as they have any connection with the letter. Its literary light may be extinguished without a tort committed. If, after its destruction, his memory retains the contents, it is no more obliged to give them up at the call of the writer, than the grave is obliged to give up its dead on his demand. If the writer recollects what he wrote, he may avail himself of his own reminiscences, and this may enable him to make a copy. If he retained a copy, he may have a property in that copy, and in the composition contained in it, which he is not to be regarded as having abandoned by the transmission of the original. But this will not be a property held jointly with the receiver, nor a general property subject to a limited or special property in the receiver. Such a sole property would be entirely consistent with a sole property in the letter itself, and its contents, in the receiver, arising from the gift of the letter to him. There is nothing preposterous or inconsistent with the ordinary rules of law, that two persons should have a property, the one in an original article, and the other in a copy of it; the one in what his original

contains, and the other in what his copy contains; notwithstanding the ideas expressed in each may be identical, and the property in the original may be derived from the gift of him who retains the copy. If, under such circumstances, it were held that both might publish, there would be no joint property in the two; nor would the property of the one be general and the other special.

But if it were even held that there could be but one whole property in the ideas or contents, as a literary composition, and that the entire property did not pass to the receiver, then that whole property must remain in the writer as an entire thing; for it seems very clear, that if in such case he has not transferred the entire property in what is sent, to the receiver, he has not given him any special property to which his own general property is subject, making his right in the nature of a reversionary or servient interest. There may be a general right of property, and there may be one or more special rights or properties in the same thing; yet all these will but constitute the whole property, and the general will be subject to the special right.

That what the writer retains, after the letter is sent, is subject to no right on the part of the receiver, seems clear. He has in that, whatever it be, an entire and a sole property. And so, on the other hand, whatever passes to the receiver is his; and what is his, he does not hold subject to the rights of the party who sent the letter. The property which he has, so far as it extends, is his own; and it is not carved out of, and limiting the rights of the sender, in what he retains, although it may affect the beneficial use of those rights incidentally, as the use of his own, by one in other instances, may affect the use by another of what incontestably belongs to him.

Aside from special reservations or contracts, expressed or implied, there is no sound principle by which the sending of a letter to another, shall be held to pass a part of the literary property in the literary composition. It is not intended to deny, that one person may have the possession of a manuscript, even a letter, with only a limited right of use. This may be by agreement, even when the manuscript has been made by himself, as, for instance, when he has been per-

mitted to take a copy upon conditions. And the limitation of the use may be implied from the circumstances. But this, it is submitted, is not because he has a special property in the manuscript, which he has been permitted to make, the author retaining the general property in the subject matter, but because he takes his property incumbered with restrictions or conditions, which limit its use.

The inquiry, whether the writer of a letter has a literary property in it, which can be enforced against the receiver, may carry us back to the questions, what right of literary property exists, aside from the statutes regulating copyright? and what will amount to abandonment by the author of his rights in his manuscripts or productions?

We have seen that, before the statute of Anne, certain copyright in books existed through patents "cum privilegio," and the like, but in no instance, now known to us, upon the author's inherent right in his own works. After the statute of Anne, it was contended that an author had still a right of literary property at common law in his work; and some injunctions were issued out of chancery to restrain publication, but no final decision had been given. There was the declaration in *Ponder* vs. *Braddill*, already cited, but there is no reason to suppose that it ever came even to argument.

A case between Tonson and Collins had also been commenced in the King's Bench, for the purpose of trying the right at law. After argument, however, it was dismissed, the Court having discovered that it was brought by collusion, for the purpose of testing the question. The question came to a decision in 1769, in *Millar* vs. *Taylor*, 4 Burrows, 2303, 2331, 2398. Four justices gave their opinions; Lord Mansfield, and Justices Aston and Willes deciding in favor of the right, and Mr. Justice Yeates delivering a very able dissenting opinion.

The question was soon after brought before the House of Lords in *Donaldson* vs. *Beckett*, 2 Brown's Parl. Cases, 129, 145. And see 4 Burrows, 2408. This was in the year 1774.

Lord Bathurst had decreed a perpetual injunction. The Lords

sent five questions to the twelve judges, upon which there was a great difference of opinion. Lord Mansfield, being a peer, and having taken part in the judgment in *Millar* vs. *Taylor*, declined giving an opinion. The questions were these:

1. Whether, at common law, an author of any book, or literary composition, had the sole right of first printing and publishing the same for sale; and might bring an action against any person who printed, published and sold the same, without his consent? On this, eight judges were in the affirmative and three in the negative.

2. If the author had such right originally, did the law take it away upon his printing and publishing such book or literary composition; and might any person afterward reprint and sell, for his own benefit, such book or literary composition, against the will of the author? On this, there were four in the affirmative and seven in the negative.

3. If such action would have lain at common law, is it taken away by the statute of 8th Anne? And is an author, by the said statute, precluded from every remedy, except on the foundation of the said statute, and on the terms and conditions prescribed thereby? Six were in the affirmative and five in the negative.

4. Whether the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity, by the common law? Seven judges were in the affirmative, and four in the negative. This vote was similar to that on the second question.

5. Whether this right is any way impeached, restrained, or taken away by the statute of 8th Anne? The division of opinion was similar to that on the third question; six in the affirmative, five in the negative.

Had Lord Mansfield voted, and in accordance with his former opinion, the judges would have been equally divided respecting the operation of the statute to exclude all rights, except those provided for by the statute.

Lord Camden moved to reverse the decision of the Court below. The Lord Chancellor (Bathurst) seconded the motion, and the decree was reversed. The reasons for the judgment of the Lords

are not stated. But this case settled the law in England, that there was after the statute of Anne, no exclusive right of publication, except such as was comprehended within the statute and protected according to its provisions. And of course, there could be no exclusive literary property after publication.

The law is equally well settled in this country. In 1824, in the case of *Ewer* vs. *Coxe*, 4 Wash. C. C. Rep., 487, it was held, that to entitle the author of a book to a copyright, he must deposit a printed copy in the Clerk's office, publish a copy of the record of the title, and deposit a copy of the book in the office of the Secretary of State, according to the terms of the Act of 1790, and that if the author of a book has not a copyright secured, according to law, a Court of Equity will not grant him an injunction to prevent the publication or sale of his work by another.

The matter was more fully considered in 1834, in the great case of *Wheaton* vs. *Peters*. It was a bill in equity, filed in the Eastern District of Pennsylvania, to restrain the publication of Peter's Condensed Reports. On the hearing in that Court, Judge Hopkinson held, that there was no copyright at common law. He referred to the fact, that before the adoption of the Constitution of the United States, many of the States enacted statutes for the protection of authors. And he added, that state, statute and common law rights, if any had existed, had been superseded by the acts of Congress under the Constitution. See 8 Peters, 741.

The Supreme Court, on appeal, held that there was no common law of the United States; that when a common law right was asserted, the Court looked to the State in which the controversy originated; that the right of an author to a perpetual copyright, did not exist by the common law of Pennsylvania; that Congress, by the Act of 1790, instead of sanctioning an existing perpetual right in an author in his works, created the right secured for a limited time by the provisions of that law.

This part of the decision suggests the inquiry, whether if the power vested in Congress is exclusive, there can be any common law or other copyright under state authority. If not, the inquiry

whether there was any right by the common law of Pennsylvania, was immaterial to the decision.

Mr. Justice McLean, in delivering the opinion of the Court said further, "that an author at common law has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy, endeavors to realize a profit from its publication cannot be doubted;" "that the right of an assignee of the manuscript would be protected by a Court of Chancery;" and that this is presumed to be the copyright recognized in the act, and which was intended to be protected by its provisions. And this protection was given as well to books published under such circumstances as to manuscript copies.

Justices Thompson and Baldwin dissented; the former in an elaborate opinion.

In regard to letters possessing the character of literary compositions, such as are within the purview of the statute, so that a copyright can be secured under the acts of Congress; if the terms of the act have not been complied with, the only question must be, whether there has been publication; and this involves the question, what amounts to publication? Until publication has taken place, an author has a property in his manuscript, and the Court will protect its literary contents.

I have found no rule laid down, determining what amounts to publication. It would seem that it must depend on circumstances. There are several cases which bear upon the question.

The *Duke of Queensberry* vs. *Shebbeare*, 2 Eden's Rep. 329, came before Lord Henley in 1758. The plaintiff was administrator of Henry, Earl of Clarendon, who at his death possessed a manuscript copy of the history of the reign of Charles II. to 1667, in the hand writing of Edward, the former Earl of Clarendon, the sole property in which the bill claimed to be in the plaintiff, and he sought to restrain the defendant from publishing said history. The defendant answered that the plaintiff's intestate had, thirty-three years before, delivered to one Gwynne, the original manuscript of the history, that he might take a copy thereof and make use of the

same as he should think fit, that a copy was taken accordingly, and that the defendant had, upon a representation of those facts, made an agreement with Gwynne's administrator, for publishing the same from that copy, and insisted on his right. But the Lord Keeper said it was not to be presumed that Lord Clarendon intended, when he gave the copy to Mr. Gwynne, that he would have the profit of multiplying it in print, though he might make every use of it except that; and he continued the injunction. It would seem that the defendants claim that the copy was given to Mr. Gwynne, with liberty to "make use of the same as he should think fit," could not be sustained in fact, as it appears that he afterwards recovered damages against the administrator of Mr. Gwynne, for a false representation that he had a right to print. 4 Burr. 2331.

Lord Eldon sat in *Southey* vs. *Sherwood et al.*, 2 Merivale, 435. The bill stated that the work was composed in 1794, before the plaintiff reached the age of twenty-one, and that he then left it with a bookseller in manuscript, with the intention of having it published; that living at a distance and being much occupied, he forgot to demand it back, but that he never had assigned the copyright to any one, nor received any remuneration for the same, nor was it ever printed by the bookseller with whom he left it, or by any other person, until the present defendants published it without his consent and against his wishes. The work in question was a poem, called "Wat Tyler," and was understood to contain sentiments very much at variance with Mr. Southey's opinions in 1817, when this bill was filed. How it came into the defendant's hands did not appear. The Chancellor thought it "impossible Mr. Southey could have forgotten it," and he said, "If a man leaves a book of this description in the hands of a publisher, without assigning any satisfactory reason for doing so, and has not inquired about it during twenty-three years, he surely can have no right to complain of its being published at the end of that period."

In the last case the plaintiff's counsel relied upon *Macklin* vs. *Richardson et al.*, Ambler, 694. Macklin was the author of a farce, which had been performed at the theatres several times, but

never without his particular permission, and he received a compensation for its performance. When the farce was over, he used to take the copy away from the promptor. It was never printed or published by him. The defendants were proprietors of a magazine, and employed a person to attend the theatre, and take down the words of the farce as it was played, and from his notes, aided by memory, they published the first act in their magazine, and gave notice that the second act would appear in the next number. Lord Commissioner Smythe said, "It has been argued to be a publication by being acted, and therefore the printing is no injury to the plaintiff; but this is a mistake; for, besides the advantage from the performances, the author has another means of profit, from the printing and publishing; and there is as much reason that he should be protected in that right as any other author. And Lord Bathurst pronounced it a "strong case;" and a perpetual injunction was granted.

*Coleman* vs. *Wathen*, 5 D. & E. 245, has been referred to already. It was an action under the statute 8 Anne, for publishing a play of the copyright of which the plaintiff was proprietor. The Court held, that evidence of its representation upon the stage by the defendant was not of itself evidence of a publication, and on that ground set aside a verdict which had been rendered for the plaintiff.

*Bartlette* vs. *Crittenden et al.*, 4 McLean's C. C. Rep. 300, further illustrates the question. It was an application for an injunction upon the printing and publishing of a work on book-keeping, which the plaintiff had taught for twelve years. He had reduced his system to writing on separate cards, for convenience in instructing his pupils, whom he permitted to copy the cards for their own advantage, and to enable them to instruct others. Jones, who had qualified himself in the plaintiff's school as a teacher, and copied these cards, afterwards engaged in a commercial school in connection with the plaintiff. In this school one of the defendants, while a pupil, was permitted to copy the manuscripts in possession of Jones, and from them, with certain alterations, he made up the first ninety-two pages of the work in question. It was contended, that there had been an abandonment to the public. But the Court

held that the students in the plaintiff's school had no right to a use which was not in his and their contemplation when the consent was first given. Nor could they, by suffering others to copy the manuscripts, give a greater license than was vested in themselves. In that case the learned judge said, "Popular lectures may be taken down *verbatim*, and the person taking them down has a right to their use. He may in this way perpetuate the instruction he receives, but he may not print them. The lecturer designed to instruct his hearers, and not the public at large."

There is a similarity between copyright and patent rights in this respect. *Wheaton* vs. *Peters*, 8 Peters, 657–8. In *Dudley* vs. *Mayhew*, 3 Comstock, 9, they are put upon the same ground in respect to an exclusive right at common law.

When the original inventor gave special parol licenses to two persons to build bridges on his plan, before his patent had been actually taken out, it was held not to be an abandonment of his right. A license restrained to individuals is not an abandonment to the public. *McKay* vs. *Burr*, 6 Barr, 147.

But if a person permits his invention to go into public use without objection, he cannot have a patent. *Pennock* vs. *Dialogue*, 2 Peters, 1. If he gives away his machine to another, with liberty to use it when and where he pleases, he cannot reclaim it, or restrain him from manufacturing the article. *Ibid; Wyeth* vs. *Stone*, 1 Story's Rep. 283.

It may certainly be contended, consistently with all these decisions, that a party who has sent a letter to another in the ordinary mode, without restriction, and has thereby given him a property in the materials, has published it, or at least abandoned any exclusive right in its literary contents.

In Lord Eldon's remarks in *Gee* vs. *Pritchard*, 2 Swanst. 422, 426, it is distinctly implied that he was inclined to the opinion that the jurisdiction could not be sustained on principle, and that, while he would not overrule the decisions of his predecessors, sitting in Chancery, he would, probably, not "doubt" long if the case were in the House of Lords. His language is, "The argument has confirmed doubts, which have often passed in my mind, relating to the

jurisdiction of this court over the publication of letters; but I profess this principle, that, if I find doctrines settled for forty years together, I will not unsettle them. I have the opinions of Lord Hardwicke and Lord Apsley, pronounced in cases of this nature, which I am unable to distinguish from the present. These opinions have been acquiesced in, without application to a higher court. If I am to be called to lend my assistance to unsettle them, on any doubts which I may entertain, I will lend it only when the parties bring them into question before the House of Lords." Again, "The doctrine is thus laid down, following the principle of Lord Hardwicke: I do not say that I am to interfere because the letters are written in confidence, or because the publication of them may wound the feelings of the plaintiff; but if mischievous effects of that kind can be apprehended, in cases in which this Court has been accustomed, on the ground of property, to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised, and refuse to forbid it. Such is my opinion."

In *Lord and Lady Perceval* vs. *Phipps*, 2 V. & B. 19, it is held, that the receiver may publish letters for his own justification. And that case has been recognized in others.—*Gee* vs. *Pritchard*, 2 Swanst. 415, 419; *Folsom* vs. *Marsh*, 2 Story, 100, 111. But this seems entirely inconsistent with the supposition of an exclusive property, literary or otherwise, in the writer. No man can without license publish the book in which another has a copyright, or an exclusive literary property, merely because the multiplication of copies of it will tend to exonerate him from some imputation.

Moreover, the case of the *Earl of Granard* vs. *Dunkin*, 1 Ball & Beatty, 207, seems very distinctly to sustain the doctrine of property in the receiver, and to protect that property. The bill, in that case, was brought to restrain the defendant from publishing letters from Lady Moira and Lady Granard to Lady Tyrawley, who had deceased. The counsel for the plaintiff contended, "That those letters being the property of Lady Tyrawley, the right to them was now vested in Lady Granard, her executrix." The right set up was not that of Lady Granard, the writer of the letter, but

of Lady Granard, the executrix of the receiver; and the injunction which was granted embraced letters received by the testatrix from Lady Moira, as well as those from Lady Granard.

Other questions present themselves. Can there be any copyright secured in single letters sent in the usual mode? Could a title be deposited in the clerk's office, and notice be given according to the statute, and copies deposited in the office of the Secretary of State, the library of Congress, and the Smithsonian Institute? Not unless they are "books" within the meaning of the act, and they can hardly come within the meaning of that term.

And then come these farther questions. If the statute is construed as covering the whole ground, so that no exclusive right exists in books, &c., except under it, can there be any exclusive literary property in anything not embraced in it? Can literary productions not within it stand on any better foundation than the matters embraced in it? In other words, have not Congress determined in what there shall be a literary property?

Again, can any action at law be maintained for a publication by the receiver of a letter sent to him in the ordinary course, upon the ground that it is a violation of the right of literary property of the author, in the manner in which actions are maintained for a violation of copyright under the statutes? No case is found, nor any suggestion that there may be any such remedy. If it be admitted that no such action can be maintained, it will serve as an argument than chancery has no jurisdiction; for there is no pretence that chancery has an exclusive jurisdiction over literary property.

But upon the supposition that chancery may protect the literary property of the writer in letters having the character of literary compositions, the question still remains,—how can the Court of Chancery, consistently with its own principles, restrain the publication of letters upon business, &c., which do not possess a literary character, and to which, for that reason, no literary property can exist? The composition of them is merely as a vehicle to communicate the thoughts of the writer to the receiver, instead of an oral communication, and the property upon which the thoughts are expressed is given to the party to whom the letter is sent. It

needs no extended argument to show that there is no property in the writer of such letters after they are sent, and that the jurisdiction to restrain their publication utterly fails. This is settled by authority also. It came up for consideration in *Wetmore* vs. *Scovell*, before cited, 3 Edw. Ch. Rep. 515, 530, and it was there laid down, that a publication of letters having relation exclusively to matters of private concern, written in the confidence of friendship, and being of a private and confidential nature not intended for the public eye, amounted to nothing more than a gross breach of honor and trust, which, however unwarrantable and wrongful, did not work such an injury as the laws of the state could notice, or the Courts of justice undertake to remedy or prevent by an injunction.

In *Hoyt* vs. *Mackenzie*, 3 Barb. Ch. Rep. 320, Chancellor Walworth considers the decisions in England as settling the jurisdiction of the Court to restrain the publication of letters having a value as literary compositions. But he said, with reference to the case before him, "It is evident, however, in relation to all these letters, that the complainant could never have considered them as of any value whatever as literary productions; for a letter cannot be considered as of value to the author for the purpose of publication which he would never have consented to have published, either with or without the privilege of copyright. It would, therefore, be a perversion of a correct legal principle to attempt to restrain the publication of these letters, upon the ground that the writers thereof had any interest in them as a literary property;"—and after a severe censure upon the violation of moral duty exhibited in the case, of which, however, the Court could not undertake to enforce the performance, he added, referring to the case of *Wetmore* vs. *Scovell*, that the Vice-Chancellor "very correctly decided, that the Court of Chancery could not properly exercise a power to restrain the publication of private letters, on the ground of protecting literary property, when they possessed no attributes of literary composition."