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Pre-Copyright Rights

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To occupy himself during his spare moments a prominent citizen wrote a small biographical sketch of a famous old character in the community and upon completion passed around the manuscript to a few close friends. An editor of a local publication gained possession of the manuscript and without permission published the article. Immediately, the question arose, what are the author's rights? The work of course was not copyrighted. In that event he has no rights, you say? Well, perhaps — but be not too hasty in your reply. Copyright law, like the Constitution is a topic which makes fine conversational material among intelligent men, but concerning which very few have actual first hand information — surprisingly so, in view of the fact that copyright concerns almost exclusively intelligent men and women. Artists, professors, musicians, photographers are only a few of those affected by these laws and who should be vitally interested in knowing what their rights are. Most men whether they are teachers, lawyers, doctors, business men or football coaches get an urge to write something sometime during their lives: the teacher dreams of revising the old textbook, the lawyer ponders upon history and philosophy, the doctor debunks mother's favorite cold cures, the business man publishes his memoirs, and the football coach blesses the gamblers with his sure-fire predictions. Yet ignorance is high among such learned men in respect to their literary rights.

Paradoxically, this article will concern itself not with the author's rights and remedies under a copyright, but rather with those rights he possesses before a copyright has been secured. The Constitution of the United States gives Congress the 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.” Pursuant to this power Congress enacted in 1790, its first Copyright Act which has from time to time been amended, revised, or added to. In the present act the following provision is found: “Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.” These common-law rights referred to in this copyright act constitutes the nucleus of this article.

In order to fully comprehend these common-law rights a cursory investigation into the origin and history of literary property would be apropos. The historical account of literary rights and its development through the sixteenth, seventeenth, and first half of the eighteenth centuries are gleaned from the discussions of the judges in *Millar v. Taylor* and which are reviewed in the dissenting opinion of Justice Thompson in *Wheaton v. Peters*, the latter being the landmark case on copyright law in the United States. Prior to 1640, historians generally concede, the crown exercised unlimited authority over the publication of literary works. This control was effectuated through the organization of the Stationers’ Company whose purpose was to regulate the printing of books and articles. It possessed the power of search, confiscation, and imprisonment, its rulings enforced under the jurisdiction of the Star-Chamber. To determine then whether any copyright or property right existed in the author based upon some principle, usage or custom, it is necessary to look into the operation of the Stationers’ Company, the Star-Chamber or into the Acts of State. A reading of the decrees of the Star-Chamber makes it evident that property rights of authors were recognized, for that tribunal often issued decrees forbidding the printing of books with-

1 U. S. Constitution, Art. 1, Sec. 8, Cl. 8.
4 33 U. S. 591, 8 L. Ed. 1055 (1834).
out the consent of the owners. This prohibition must have been based upon one of these two rights: either upon a grant given by the crown or upon a common law right. The judges in *Millar v. Taylor* were certain that it could not be a private right coming as a grant from the crown since that would be beyond his power; therefore they concluded that the decisions of the Star-Chamber must have been predicated upon principles of natural justice, equity, and public convenience. Certainly no act of state could be found which gave authors any literary rights, but the Star-Chamber, nevertheless, meted out punishments and fines for unauthorized printings. In lieu of these actions the only logical conclusion could be that some property right existed in the author. In 1640, the Star-Chamber was abolished, but the rights of authors were still protected to a certain degree by the Stationers’ Company. Due to widespread pirating of literature, however, Parliament enacted various ordinances prohibiting the printing of literary works without the author’s consent, and among those passed one provided that the author was entitled to one half of the fine exacted from the wrongdoer. Such contribution clearly recognized a property right in the author or his assigns. Following this, in 1710, Parliament enacted the Statute of Anne which was entitled: “An act for the encouragement of learning by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.” *Millar v. Taylor* was the first important case decided after the passage of this Act. The suit was brought by an assignee of the author of the book, *The Seasons*. The author sold all his rights and interest to the plaintiff who then began to print the book. The defendant is alleged to have encroached upon the assignee’s rights by printing and selling copies of the book without the consent of the plaintiff. Since prior to the bringing of the action the period of years granted by the Statute of Anne had expired the plaintiff’s case had to rest upon the

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*5 8 Anne c. 19 (1710).*
theory that some rights existed outside those given by the Statute. The questions therefore before the King's Bench were: first, whether the copy of a book, or literary composition, belonged to the author under the common law, and second, if the first be true, whether the common-law rights of authors were taken away by the Statute. By a vote of three to one the court decided that the author did have common-law rights which were not impaired by the Statute of Anne. These questions were soon envolved once more in Donaldson v. Beckett, this time before the House of Lords. Here eleven judges expressed their opinions upon the questions raised. The majority determined that the author at common law had the right of first printing and publication for sale and could maintain an action against anyone who infringed upon that right, that the law did not take away such rights upon publication of the work but that the author's common-law rights were perpetual. But, however, in a six-five decision the court held that the Statute of Anne took away that perpetual right and left the author to his remedy under the Statute for the period of protection limited therein, after which he was forever barred from any further rights. Thus stood the law of England at the time the question came up in the United States.

In this country the rights of an author came up for review for the first time in 1834 in the case entitled Wheaton v. Peters. Wheaton as the reporter for the Supreme Court of the United States was able to obtain the opinions of the judges in United States Supreme Court cases. Attempting to copyright these reports he made certain deposits and notices required by the act, but failed to comply with all of the requisites. For consideration he assigned his rights to one Coney who in turn assigned to the plaintiff, Donaldson. Peters, succeeding Wheaton as reporter, and his publisher, Griggs, published without consent these reports unaltered

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7 33 U. S. 591, 8 L. Ed. 1055 (1834).
along with his own. The plaintiffs contended that the requisites set forth in the Copyright Act were merely directory and not mandatory, and further stated that though mandatory, they would be entitled to relief under their common-law rights independently of the Act. The defendants' contention, sustained by the majority of the court, was that the only rights which the plaintiffs might have had were under the statute but that these were lost through plaintiffs' failure to comply with the requirements. The majority's opinion consisted of the following arguments. To begin with, although a common-law right may have existed in England, the question still remains as to what extent it exists in the United States. If it exists at all it must exist under the common law of the State since there is no common law in the Federal courts. Whether or not it exists in the states will depend upon how extensive the common law of England has been adopted by the various states. This can be determined either by usages and customs or by judicial decisions. But since none of these can be established a serious doubt should arise whether or not such rights do exist.

Furthermore, the courts of England were undecided about the status of an author's rights as late as 1774. Much diversity of opinion existed and heated arguments raged among literary scholars and lawyers over this question for centuries. At the time Pennsylvania became a colony no clear-cut common-law right existed in England; consequently how could it be said that the settlers brought over with them a right, the existence of which was debated for over three hundred years and which had not been settled until almost a century later, when it first came up for judicial investigation? 8

8 Pennsylvania became a colony in 1682, whereas Millar v. Taylor was not decided until 1769, and Donaldson v. Beckett was not handed down until 1774. Even after Donaldson v. Beckett the courts of England hesitated as to the course they should follow and often Courts of Chancery granted injunctions where under the strict construction of the decision of Donaldson v. Beckett, the remedy was under the Statute.
Still another argument is presented, namely that under the copyright act the provision reads that the author, etc. "shall have the *sole right and liberty*° of printing," etc. Now if the exclusive right existed at common law and if Congress were here merely protecting an old right, why should they have used this language? Obviously, from the use of the words, Congress must have had in mind an intention to create a new right and not simply sanction an already existing right.

In a very able opinion Justice Thompson reluctantly dissented from the majority of the court. His pungent observations concerning the status of the common law lessens the weight of the majority's opinion and weakens the props of their main argument. He brings out the fallacy of their argument by pointing to the fact that no case in England can be found where the perpetual right of the author under common law was denied, but that on the other hand in all instances in which a doubt did arise the question came up under the Statute of Anne in which the great dispute consisted in the effect of the Statute upon these rights. He points out that even in *Donaldson v. Beckett* the majority decided in favor of the author's perpetual common-law rights. Determining that no dispute upon that score existed he brought out the fact that Pennsylvania was settled long before the Statute of Anne was passed and that at the time of William Penn's settlement in this country the perpetual right of authors was a well-established common-law right. Further advancing his potent argument, he observes that the principles of the common law of England were adopted by statute in Pennsylvania and were to be in force until altered by the colony. From these established premises he concluded that under the common law of Pennsylvania the plaintiffs had a perpetual right in their literary work upon which recovery should be allowed despite the failure to comply with the Copyright Act.

° Italics mine.
Not contented with shattering one support, he blasted another pillar in the majority's argument. That an affirmative statute does not abrogate the common law is a well settled rule and is not denied, therefore since the act of Congress is an affirmative act it does not affect the common law. As a result Copyright Acts serve merely to give additional security and further remedies to the existing common-law rights. Discussing this point he says: "But if the complainants in the court below have not made out a complete right under the acts of Congress, there is no ground upon which the common-law remedy can be taken from them. If there be a common-law right, there certainly must be a common-law remedy. The statute contains nothing in terms, having any reference to the common-law right: and if such right is considered abrogated, limited or modified by the acts of Congress, it must be by implication; and to so construe these acts, is in violation of the established rules of construction, that where a statute gives a remedy in the affirmative without a negative expressed or implied, for a matter which was actionable at common law, the party may sue at common law as well as upon the statute. . . . This is a well-settled principle, and fully recognized and adopted in the case of Almy v. Harris, . . ." The Statute of Anne, he declared, recites that the author shall have the sole right to print for the time stated in the statute and no longer, thus abrogating the common law by negative words. The decision of Donaldson v. Beckett was therefore warranted.

Despite the reasoning and logic of Justice Thompson's opinion, courts have tenaciously adhered to the ruling of the majority, demonstrating once again that in law public convenience and expediency often control the minds of judges and logic and truth must be subservient to them. As laid

down in subsequent cases a succinct statement of the common-law rights may be gleaned from the following quotation: "... the common-law property right of an author in his manuscript gives him redress against any one who publishes it without his authority. . . . The author of a literary work or production, 'has a right to determine whether it shall be published at all, and if published, when, where, by whom, and in what form. This exclusive right is confined to the first publication. When once published it is dedicated to the public, and the author has not, at common law, any exclusive right to multiply copies of it or to control the subsequent issues of copies by others.'" 11

Having found that some rights do exist at common law the next step is to investigate the effect the statutory provisions have upon these rights. Despite the language in *Holmes v. Hurst* 12 the cases generally agree that the statute created a new right which gave the author an additional period of grace which he would not have had without the act. Consequently, once a work is published without a copyright being secured the author is without remedy. This difference between rights under the common law and under the copyright act is well summarized in *Caliga v. Inter Ocean Newspaper Co.* 13 "Statutory copyright is not (to) be confounded with the common-law right. At common law, the exclusive right to copy existed in the author until he permitted a general publication. Thus, when a book was published in print, the owner's common-law right was lost. At common law an author had a property in his manuscript, and might have an action against anyone who undertook to publish it without authority. The statute created a new property right, giving

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12 "While the propriety of these decisions has been the subject of a good deal of controversy among legal writers, it seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publication is measured and determined by the copyright act, — in other words, that while a right did exist by common law, it has been superseded by statute." 19 Sup. Ct. 606, 607.
to the author, after publication, the exclusive right to multiply copies for a limited period. This statutory right is obtained in a certain way and by the performance of certain acts which the statute points out. That is, the author, having complied with the statute, and given up his common-law right of exclusive duplication prior to general publication, obtained by the method pointed out in the statute an exclusive right to multiply copies and publish the same for the term of years named in the statute. Congress did not sanction an existing right: it created a new one."

Much confusion arises out of the statements of the courts in reference to the perpetual right of authors under the common law. A distinction should be made between the perpetual right in his unpublished work and a perpetual right to publish and sell copies of his work. An author of an unpublished production is forever protected by his common-law rights, that is, as long as he does not publish it no one can infringe upon his property rights and time does not extinguish this right. The American courts, however, have rejected the theory that an author has a perpetual common-law right in his work which gives him the privilege to forever control publication and sale. Under this latter doctrine he could publish all the copies he desired and not until he intentionally dedicated his work to the public could anyone compete with him. Publication and sale destroys all common-law rights in the United States. As to the perpetual right of prohibiting publication the copyright statute neither destroys nor abrogates: "The contention of the plaintiff in error that the passage by congress of the copyright statutes has abrogated the common-law right of an author to his unpublished manuscript is unsupported by authority. These statutes secure and regulate the exclusive property in the future publication of the work after the author shall have published it to the world. But this is a very different right from the ownership and control of the manuscript before publica-

tion. '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 by its publication, cannot be doubted. . . . The argument that a literary man is as much entitled to the product of his labor as any other member of society cannot be controverted, . . . (at least until) he shall have sold it publicly.' . . ." 15

When once published, however, the common-law right is gone and the author's sole recourse is in the copyright act. If he fails to comply with the essential provisions of the act his exclusive right is forever gone. Nor can the author defeat the effect of the copyright act by any agreement or contract with the publisher. Such a result was attempted in *Van Veen v. Franklin Knitting Mills.* 16 The court said: "An answer to the following question would seem to be a solution to the problem: When an owner of a common-law copyright published his work in a magazine without copyrighting it under the federal statute, can he by an agreement with the publisher which is unknown to the public prevent the public from reproducing the form of the work which is so published? The question is answered in the negative."

Determining, therefore, that the author's rights in his unpublished works are not affected by the Copyright Act, the next inquiry is what constitutes publication. The answer puzzles lawyers as well as authors and oftentimes is settled only by judicial determination. In all cases which have come up for judicial review, there has been some sort of publication, but the author generally denies that the publication has been sufficient to constitute a dedication to the public. Dedication depends upon the intention of the author but acts deemed sufficient to constitute a general publication are presumed to evince an intention to abandon the common-law rights. Publication, therefore, is divided into limited and

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16 *260 N. Y. S. 163* (1932).
general. Limited publication is publication restricted so that it is evident from the conditions imposed that the author does not intend to dedicate his work to the public. General publication on the other hand is a dissemination to the public under such conditions that it implies an abandonment of all rights. The distinction is well brought out in *Werckmeister v. American Lithographic Co.*: 17 "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 with or adverse to such restrictions are surrendered."

Although certain restrictions may be imposed upon publication it is not always held limited. A review of the cases will serve to illustrate the problem authors are up against. In the *Werckmeister v. American Lithographic Co.* case 18 the alleged publication was the exhibition of the picture in question at the Royal Academy without notice of copyright. Because of the understanding with the Academy that no copy or notes would be allowed while on exhibition, the practice among artists was to exhibit pictures without copyright. The Royal Academy enforced this arrangement by employing guards to prevent any attempt to pirate the paintings thus protecting the artists' rights. The court concluded that such an exhibition was a limited publication since the pains taken to see that it was not copied showed that there was no intention upon the part of the author to dedicate it to the public.

17 134 Fed. 321 (1904).
18 134 Fed. 321 (1904).
A good illustration of a limited publication which should be of interest to all teachers is *Bartlette v. Crittenden.* Here an accounting professor with twelve years of experience reduced his system of teaching to writing upon separate cards. This made it more convenient to instruct students. He permitted his pupils to copy these cards in order that they might utilize them in teaching their own classes. One of his pupils taught a class in St. Louis. The defendant enlisted in the course, and was able to obtain copies of the system which he incorporated in his book upon how to teach accounting. Upon suit to enjoin the defendant from publishing the book, the defendant pleaded that the book was published. The court decided, however, that there was no such publication so as to relinquish the rights of the complainant. Speaking of the rights of students to take notes upon lectures the court said: "But an author's manuscripts are very different from a machine. As manuscripts, in modern times, they are not, and cannot be, of general use. 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. Any use, therefore of the lectures, which should operate injuriously to the lecturer, would be a fraud upon him for which the law would give him redress. He cannot claim a vested right in the ideas he communicates, but the words and sentences in which they are clothed belong to him."

A very novel case peculiar to our day is *Waring v. WDAS Broadcasting Station.* Fred Waring had a very lucrative contract with the Ford Motor Co. to broadcast over the network. His orchestra, at the height of its popularity, was sought by the Victor Talking Machine Co. to record a few dance pieces. Waring hesitated to accept fearing that the records might be used for broadcasting and hence interfere

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19 Fed. Cas. 1,082 (1847).
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with his contractual rights. An agreement was reached whereby all recordings bore this label, "Not licensed for radio broadcasting." The defendant ignoring the notice broadcasted the recordings and in defense contended that the work was published. The court, determining that the distinctive rendition of a musical number written by another when recorded became property of the orchestra, decided that the restriction upon broadcasting was valid and that the defendant had no right to use the property without permission. The sale was permitted as to phonograph records alone and a purchaser was entitled to play it as such for his own use but he did not have the authority to broadcast it to the general public by reason of his purchase.

Not only are professors and musicians endowed with literary rights but business men are also included in the fold. In *F. W. Dodge v. Construction Information Co.*,²¹ the plaintiff seeks to enjoin the defendant from copying his reports. The plaintiff is in the business of gathering information in regard to the erection of buildings, sewers, roadways, sidewalks and other construction jobs in the field of public utilities. Through this information the recipients are able to make advantageous contracts. The plaintiff established his service at great expense and employed a large staff of employees to obtain, gather and assimilate the information. This knowledge they passed on to their customers either orally, in print, or in writing, and only such information as the customer would be interested in. The customer agreed that he would treat these reports in strict confidence. By arrangement with certain subscribers the defendant obtained the plaintiff's reports which he sold to others. His chief inducement to plaintiff's customers was to offer the identical information at a greatly reduced price. The injunction was granted because the publication was limited to particular persons as well as to the particular facts that the customers would be interested in.

²¹ 188 Mass. 62, 66 N. E. 204 (1903).
Considered in the opinion of the *Dodge* case was a similar case. The plaintiff was engaged in the business of a mercantile agency, that is, a business to give names, addresses, businesses, credit ratings of various business houses and numerous other details. The data bound in a large volume was leased or loaned to their subscribers. With the understanding that all information should be treated in strict confidence the books bearing the plaintiff’s name were placed in the custody of the customers. The defendant used the information in a similar business and suit was brought.²² Contrary to the outcome of the *Dodge* case, the court here was of the opinion that publication did result because a person could abandon his rights by leasing a book as well as selling or giving it away outright. The court reasoned that if there was any distinction between leasing a book and selling or giving it away gratuitously then a person by stretching a one-year lease to ninety-nine or nine hundred and ninety-nine year lease could defeat the copyright laws. Very few persons who desired books would object to renting them upon a ninety-nine year lease. Without any loss of compensation to the author, the statutory period would thus be avoided. A book therefore will be considered published if it is offered to the public in such a way that any person desiring it will be able to obtain it. Much could be said for the reasoning of the court in this case, but the judges in the *Dodge* case distinguished their case upon the ground that here the book was in a permanent form readily accessible to anyone, whereas, in their case the plaintiff furnished only the details necessary for the particular business desired. The court in the mercantile case, however, rested their decision in part upon the theory that publication was limited when given only to friends and acquaintances: “Coppinger, in his work on Copyright, at page 117, after considering the last case cited and others, reached the following conclusion: ‘The distinction is

in the limit of circulation. If limited to friends and acquaintances, it would not be a publication; but, if general, and not so limited, it would be. In this case the circulation was not limited to friends and acquaintances, or even to a class. The limitation was upon the character of the use which a subscriber could make of it. It was the privilege of any and all persons who desired to become subscribers to obtain possession and use of the reference books. The fact that the publisher of the book undertook to place restrictions on the use which individual purchasers could make of it, the effect of which might be to increase, rather than diminish, the public demand for the book, does not constitute such a limitation as takes away from the act of the plaintiff its real character, which is that of publication."

But this obviously cannot be made a test otherwise why should the teacher's manuscript or the phonograph recording be held limited publication? The real test seems to be in the degree of publication the work receives. Thus for instance Waring lost his common-law rights in the manufacturing of the phonographs by publication and sale but he did not lose his exclusive right to broadcast since he limited the publication of the phonograph in such a manner as to exclude the broadcasting of those recordings. The accounting teacher abandoned his rights to restrain his pupils from employing his card system in their own private use, but did not abandon his rights to publish the system in a book which could be sold. Likewise in the Dodge case the plaintiff allowing only such information to be given as was necessary to the particular problem made no general disposition of their work. On the other hand, the mercantile agency compiled all their information in one bound book which was leased out where it could be readily accessible to the general public. This latter reason is undoubtedly the real answer to the problem.

Holding somewhat similar to the mercantile case is Vernon Abstract Co. v. Waggoner Title Co. The plaintiff ab-

abstract had copies in their office of all the records filed in the office of the county clerk. The official records were stolen making the plaintiff's office files the only available source where a complete history of title to one's land could be obtained. Fate had thus given the plaintiff a tremendous business advantage over his business rivals. The defendant in order to complete their work surreptitiously obtained the information from abstracts made by the plaintiff. A suit was brought in which the plaintiff maintained that the publication was limited since abstracts were given to the public for the sole purpose of tracing the title to their real estate and for no other purpose. The court, however, held that it was a general publication since no limitation as to persons capable of obtaining such copies were made: "Here, according to the allegations of the petition, there was no limit as to the number of persons appellant proposed to sell its abstracts to; nor is there in the petition any allegation showing the distribution thereof already made to have been limited to particular persons. The inference is that the distribution had been made to all who on its terms desired copies of the abstracts. This being true, the fact that the copies were procured, or were believed by appellant to have been procured, for the purpose specified, and for no other purpose, would not prevent the distribution from operating as a publication. Even had the parties furnished by appellant with the abstracts contracted to use them only for the purpose specified in the petition, such a limitation of use would not have made the delivery of the abstracts to appellant therefore less effective as a publication, so long as there was no restriction as to the number of persons who on their application therefor would be supplied by appellant with copies thereof. 'Unless the circulation of copies is restricted, both as to persons and purpose, it will amount to a publication...'."

The question of limited publication arises with regularity in the dramatic field. Is the performance of a play a general
or limited publication? The early rule was that performance was a publication in that the play was performed before an indiscriminate audience; but that this publication was general only to the extent that a person in the audience may memorize the play and from his memory alone be entitled to reproduce it without infringing upon the rights of the author. He could not, however, take notes or phonographic recordings for such methods would be beyond the scope of the publication: "In the absence of legislation, when a literary proprietor has made a general publication in any of the modes which have been described, other persons acquire unlimited rights of republishing in any modes in which his publication may directly or secondarily enable them to republish. Therefore, the literary proprietor of an unprinted play cannot, after making or sanctioning its representation before an indiscriminate audience, maintain an objection to any such literary or dramatic republication by others as they may be enabled, either directly or secondarily, to make from its having been retained in the memory of any of the audience. We have seen that the manager of a theatre may prevent a reporter from noting the words of such a play phonographically or stenographically or otherwise. As one of the audience, he would, in doing so, transgress the privileges conceded in his admission. But the privileges of listening and of retention in the memory cannot be restrained." 24

This proposition was sustained in Keene v. Kimball 25 and in Crowe v. Aiken 26 where it was said that although the mere representation of the play did not constitute an abandonment of the common-law rights, nevertheless, a person might obtain the right to reproduce by memorizing it. The honorable judge said: "I am also of opinion that as the law now exists in this country, the mere representation of a play does not of itself dedicate it to the public, except, possibly

25 16 Gray (Mass.) 545 (1860).
26 Fed. Cas. 3,441 (1870).
so far as those who witness its performance can recollect it, and that the spectators have not the right to secure its reproduction by phonographic or other verbatim report, independent of memory.”

This theory has been severely criticized in *Thompkins v. Halleck* where that exact issue was litigated. The defendant memorizing the play began rendering performances whereupon the complainant seeks to enjoin him from further reproductions. The court questioning the soundness of the doctrine concluded that the doctrine could not be sanctioned: "The theory that the lawful right to represent a play may be acquired through the exercise of the memory, but not through the use of stenography, writing or notes, is entirely unsatisfactory. The public, it is true, as is said in *Keene v. Kimball*, 'acquire a right to the extent of the dedication, whether complete or partial, which the proprietor has made of it to the public.' But the question is as to the extent of that dedication. It is not easy to understand why the author, by admitting the public to the performance of his manuscript play, any more concedes to them the right to exercise their memory in getting possession of his play for the purpose of subsequent representation, than he does the privilege of using writing or stenography for that purpose... The spectator of a play is entitled to all the enjoyment he can derive from its exhibition. He may make it afterward the subject of conversation, of agreeable recollection, or of just criticism, but we cannot perceive that in paying for his ticket of admission he has paid for any right to reproduce it. The mode in which the literary property of another is taken possession of cannot be important. The rights of the author cannot be made to depend merely on his capacity to enforce them, or those of the spectator on his ability to assert them. One may abandon his property, or may dedicate it to the use of the public; but while it re-

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mains his, the fact that another is able to get possession of it in no way affects his rights."

The Massachusetts decision was viewed with favor by the federal courts. In *Carte v. Ford* the court commented: "We have no inclination to doubt the entire correctness of the decision of the Massachusetts court, or that it will be generally accepted as an able and authoritative interpretation of the law, ..." This prophecy was borne out by subsequent decisions. The rule is hence stated: "So, where a dramatic performance has been allowed by the author to be acted at a theater, no person has a right to pirate such performance and to publish copies of it surreptitiously; or to act it at another theater without the consent of the author or proprietor; for his permission to act it at a public theater does not amount to an abandonment of his title to it, or to a dedication of it to the public at large."

This rule applied even though the play was written by an English author and published in England where by statute an author loses all his common-law rights by first performance or publication. The English statute having no extraterritorial effect will not defeat the common-law rights of the author or his assignee in the United States.

The rule that performance is not publication has also been invoked in musical recitals. Thus, where a writer of a song requested defendant — as well as others — to sing it at a public performance the defendant's contention that such performance amounted to a publication was not upheld. The court instead replied: "Only a publication of the manuscript will amount to an abandonment of the rights of the author and a transfer of them to the public domain. It was not such a publication to give the song to a limited number of artists.

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30 15 Fed. 439, 443 (1883).
33 Crowe v. Aiken, Fed. Cas. 3,441 (1870).
to sing prior to the date of copyright. There is no evidence or probability that any of the copies were sold, or that they were given out for any purpose but a limited use by a few vaudeville artists." 34

Lectures publicly given are held not a publication although notes are allowed to be taken for the use of the hearer. Thus in Nutt v. National Institute, Inc.35 it was said: "The author of a literary composition as a lecture, may profit from public delivery; but that does not constitute the kind of publication which deprives him of the protection of the copyright statute by later application. . . . Even where the hearers are allowed to make copies of what was said for their personal use, they cannot later publish for profit that which they had not obtained the right to sell. . . . Common-law rights are not lost by a limited publication, as distinguished from the general publication, as the delivery of these lectures before audiences prior to copyrighting was limited publication. The copyright statute does not change the earlier decisions."

In conformity with this view a motion picture of a play is not publication thereof. Accordingly, if the exclusive right to display the motion picture be sold to another, the exhibition would not be a dedication to the public and the owner would not lose his common-law rights in the play.36 Even though the author sells positive films of a play, he does not lose his common-law property but he may restrain any one who attempts to reenact the play or take negatives of it or make a new negative from a positive film. But he cannot after an absolute sale of a positive film restrict the purchaser of that film from exercising his right of performance to any particular country or place.37

35 31 F. (2) 236 (1929).
36 De Mille Co. v. Casey, 201 N. Y. S. 20 (1923).
37 Universal Film Co. v. Copperman, 218 Fed. 577 (1914).
Whether the deposit of the literary work in a public office is publication or not was the subject of controversy in *Blunt v. Patton*.38 The plaintiff, with the assistance of a naval officer, made maps of certain territories. Although made chiefly at the expense of the plaintiff, a copy was filed with the Naval department for the use of the government. The court held that the "pretence that it became a public document from being deposited in the public office was entirely untenable."

On the other hand where an architect drew up specifications for a customer and filed them with the building inspector, a step necessary in furnishing the basis on which he received compensation, such deposit in a public office amounted to a publication and a consequent abandonment of the common-law rights.39 Deposits of the literary work with the Copyright office in compliance with the Act is a publication of the work. This is true even though the copyright is not perfected.40

Although the cases on publication are numerous, the holdings are interesting if not at times novel. In the following instances the courts held that publication having been made the common-law rights were lost. An architect was employed to remodel a house by an association which had entered a building contest. After the house was remodeled and won the prize the public was permitted to inspect it. The architect himself being present explained his plans to the observers. Since the plans were made available to the public the court ruled that he had published his work.41 The wide distribution of pamphlets before copyright has been held a publication, the reason being that the public has been given access to it.42 Photographs put up in post card form and renowned nationally for its cleverness and superior workman-

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38 Fed. Cas. 1,579 (1828).
39 Wright v. Eisle, 83 N. Y. S. 887 (1903).
41 Kurfiss v. Cowshed, 121 S. W. (2) 282 (Mo. 1938).
ship were held published as a result of the sale of the postcards and the author could not restrain defendants from using the same photographs upon their postcards even though that meant competition to the plaintiff. The publication of a story in twelve successive numbers in a monthly magazine moreover was deemed a publication of the book. The author sought to enjoin the defendant who taking the twelve parts and binding them together sold the story as a book. The court was of the opinion that such piecemeal publication was sufficient to defeat the common-law right.

On the other hand, the following were not considered such publication as to amount to a dedication to the public. The publication of new items by one member of an association engaged in the gathering of news was a limited publication. By agreement members would collect all news in their locality and give it to the head office from whence it was distributed to other members. Each member agreed not to give it out to any other person or agency until all members had an opportunity to publish it. Since the intention to publish governs whether a thing is published or not, the fact that each member contributes to and supports the association for the privilege of getting news proves beyond doubt that no intention upon the part of the association to abandon the common-law rights through the publication of that news by one member before all other members had an opportunity to receive it exists.

Where an author contracted with a publisher to print a book but before the latter received and printed the complete manuscript he goes bankrupt, the court ruled insufficient publication took place because general distribution to the public was lacking. The rendition of a program before a radio microphone was not an abandonment of the com-

mon-law rights in the script and the owner could enjoin others from using it.47

A final illustration comes out of the city of Pittsburgh. The Pittsburgh Athletic Co. sold the exclusive broadcasting rights to a breakfast food company. The defendant radio station, not to be outshone, found a location outside the park from which point they could observe the ball game and at the same time broadcast it to their listeners. The court enjoined them from further broadcasts saying that the sale of the broadcasting rights was not such a publication as to indicate an abandonment of the common-law rights in the news value of the game.48

In conclusion a few words upon the remedies available to protect these common-law rights might be appropriate. In the majority of the cases the remedy sought is the injunction.49 The reason is that the damages sustained have not yet amounted to anything substantial for the action is usually brought before distribution of the work has been made. Proof of damages sustained in these cases is also a difficult task. Damages, however, have been awarded in some cases and in the federal courts — a rule peculiar to these courts alone — exemplary damages have been allowed although the plaintiff's damages were only nominal.50 Since most cases come within the jurisdiction of the federal court, it might be well to remember to petition for exemplary damages whenever there is a wilful and wanton encroachment upon an author's common-law rights.

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