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Wittenberg: The Law of Literary Property

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task. It is my view that *tradition* will ultimately solve this problem here as it did in England.

The author's essay on the functions, qualifications and selection of jurors leaves nothing to be desired. The brief history of the development of the jury system into its contemporary type should be a great aid to the understanding of what the right to trial by jury means to the citizens of our country. Trial by jury as enjoyed at common law, with minor modifications, is guaranteed by the constitution of every state of the Union as well as by the federal Constitution.

I want to emphasize my wholehearted agreement with Judge Vanderbilt's view that the modern restrictions of the powers of the judges to control the selection of the trial panel and the limitations placed upon the judge's function to charge the jury have measurably lessened the effectiveness of trial by jury as a method of doing justice according to law. We should return to the judges their common-law powers to summarize the evidence and advise the jury on the facts. Altogether too frequently do we find jury verdicts warped by conscious or unconscious illegal considerations, such as the demeanor of the lawyers, their personalities or their attractiveness. One intellectual woman, after serving two weeks on the jury before several judges of our court, came to talk to me about it. She seemed incensed over the influence of some of the lawyers upon the jurors. Her comment ran something like this: "There ought to be a law prohibiting Attorney X from pleading cases before a jury. He fascinates the women to such an extent that they just 'melt' like teen-agers do over a popular crooner."

With an impartial judge helping the jury to analyze the facts, many of these considerations which unfairly condition the minds of jurors would be eliminated. Sometime ago I read (I have forgotten where) a statement that "trial by jury is the first cousin of trial by battle, the latter being a test of physical strength and expertness, the former a battle of wits." The commentator suggested that the only thing that saves the English method of trial by jury from being less than a game is the fact that the trial is presided over by an impartial judge who at the conclusion of the trial instructs the jury as to the law, summarizes the evidence and advises them on the facts.

I sincerely hope that despite his heavy responsibilities Judge Vanderbilt will regard the privilege of guiding the bench and bar toward higher goals in the administration of justice as a mission worthy of his great talents and which as a dedicated person he must continue to serve.

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The Law of Literary Property. By PHILIP WITTENBERG. Cleveland and New York: The World Publishing Co., 1957. Pp. 284. $5.00.

This interesting volume discusses at the outset, "The Concept of Literary Property" and "The Nature of Literary Property." Seventy-six pages are devoted to orienting the reader to the historicity of the topic, which includes a reference to the Star Chamber Decree of 1637, in addition to several leading cases. The role played by printers and publishers is unfolded in relation to the sad lot suffered by authors before copyright statutes were enacted.

The author states in the preface: "Out of the thousands of judicial decisions

there were selected those few for illustrative purposes which could best explain and indicate the statement that was reached as a conclusion of law. Some technical expressions could not be avoided. Some resort to direct quotation from judicial opinions was necessary."[1]

In referring to the formation of copyright an old historical tale was cited. It involoved the quarrel between Saint Columba and his teacher, Finnian of Moville, in the year 567 A.D. A dispute arose over a copy of Finnian's Psalter. King Diarmend was selected to settle the dispute concerning the copy. He handed down a judgment in the following words: "To every cow her calf, and accordingly to every book its copy." The author states it is the first copyright case.

Comment is made upon the publication in 1644 of John Milton's *Areopagitica; a Speech of John Milton's for the Liberty of Unlicensed Printing To the Parliament of England.* The significant thing about it was that in an age of licensing, it was neither licensed nor registered. The author adds: "Milton was to make further publishing history, for his agreement with Samuel Simmons is one of the first agreements calling for the payment of copy money for an original work."[2]

One finds herein, among many others, the leading English case of *Donaldson v. Beckett*[3] on the question of common-law copyright. The leading case of *Jeffreys v. Boosey*[4] has not been overlooked. The case involving the letters of Mary Baker Eddy[5] receives comment as does the case involving one of Mark Twains unpublished manuscripts.[6] In relating the story of artist Hovsep Pushman's "When Autumn is Here," the author details the legal right of reproduction.

Statutory copyright is considered in some detail in the book. In the sequence which starts with Title 17 of the United States Code, which deals with copyrights, the author discusses "Who May Secure Copyright," and makes reference to stateless aliens and ghost writers. "What Is Entitled to Copyright" and "What Is Not Entitled to Copyright" serve to enlighten the reader. It is further pointed out that a copyright may be obtained for material that is copyrightable even though it is mixed with non-copyrightable material. A description of how copyright is obtained and where to place the notice is related.

The significance of the so-called "manufacturing clause" relating to manufacture in the United States receives attention as does the term of copyright (twenty-eight years) and the renewal term (twenty-eight years). The scope of the chapter is further evidenced by paragraphs on "The Term in Unpublished Works," "Ad Interim Copyright," and "Assignment of Copyright." Special consideration is given to the complex subject of international copyright.

Another chapter is on "Plagiarism, Piracy and Infringement." The case of *Cyrano de Bergerac* and many other striking instances such as the Sam Spade story are cited by way of illustration. "Fair use" as a defense to infringement is explained from the viewpoint of English, Canadian, and American law. In determining what constitutes "fair use" various forms of quotation and burlesque may have to be considered. Interesting examples are found in the text. The author also points out that names and titles are not protected by statutory

[1] P. 11. [2] P. 35. [3] 4 Burr. 2408 (1774).

[4] 4 H. L. Cas. 815, 10 Eng. Rep. 681 (1854).

[5] Baker v. Libbie, 210 Mass. 599, 97 N.E. 109 (1912).

[6] Chamberlain v. Feldman, 300 N.Y. 135, 89 N.E. 2d 863 (1949).

copyright, but that under certain circumstances the doctrine of unfair competition may be involved.

In discussing the "Protection of Ideas" several instances are cited in which the idea was not recognized as a property right. But the modern leading case, *Hamilton National Bank v. Belt*,[7] involving the doctrine of "concrete idea," was cited. In that case a bank was charged with using a "concrete idea" relating to a radio show produced by Lloyd K. Belt.[8]

The peril of common law and statutory libel is explained by appropriate examples in modern case law. An outstanding opinion in the general field is that of Judge Harry M. Fisher in the ten million dollar libel suit brought by the City of Chicago against the *Chicago Tribune*.

The "Right of Privacy" or the right to be let alone has been gradually receiving recognition since Brandeis and Warren published their history-making article in 1890. Several examples of the doctrine's scope are given. Illinois, in *Eick v. Perk Dog Food Co.*,[9] gave recognition to the doctrine. The author remarks that "[t]he dangers which were forseen by Brandeis and Warren have never been met by the law. The gossip columnists still continue to violate the privacy of the individual and the home. Only where the use of the name or picture is for trade or advertising does the law protect."[10]

The volume concludes with an analysis of "Literature and Censorship." "The control of the printer and thus of the author, whether by licensing act or by decrees or ordinances of the Star Chamber, or by Parliament, had as their principal object the regulation of the press and the suppression of all writings deemed libelous or obnoxious to the government or the Church."[11]

The author, a New York lawyer, is a noted legal authority on copyright, civil rights, and the legal aspects of writing and publishing. He has been a practicing attorney in the arts for forty years and has lectured on the Law of Literary Property at Columbia University and the New School for Social Research.

The typography of the book is excellent and it contains an index.

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[7] 210 F. 2d 706 (App. D.C., 1953).

[8] An interesting recent case is Reddy Kilowatt, Inc. v. Mid-Caroline Electric Cooperative, Inc., 240 F. 2d 282 (C.A. 4th, 1957).

[9] 347 Ill. App. 293, 106 N.E. 2d 742 (1952).

[10] P. 239.

[11] P. 244.

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