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THE LAW ON ABRIDGMENT OF COPYRIGHTED LITERARY MATERIAL

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In an effort to meet the modern demand for pre-digested literary material, there has appeared a growing number of digests and abridgements, each with circulations running into millions. Most conspicuous of these is the *Reader's Digest,* which boasts of a paid circulation of over four million readers. This increased popularity of digests and abridgements has made the legal aspect of such works important and a restatement of rights of a copyright holder of a literary work in relation to an abridger of such work seems advisable.

The present status of the law concerning abridgement is uncertain. It not infrequently happens that when the foundation of what is without hesitation taken or asserted as an established legal principle is sought, it is found to be of no more solid character than an accumulation of dicta made in the course of a series of decisions relating to other branches of the same general subject. There may be, in fact, not a single case in which the precise point has arisen, and yet dicta on that point have been so often, so broadly, and so confidently enunciated that they bear the semblance of authority. Therefore, when a case actually arises which calls for a direct and positive decision upon the very question, the judicial mind, misled by appearances, may yield to the supposed pressure of authority and feel compelled to decide in accordance therewith, against the bent of its inclination. It may not be without practical bearing, therefore, to examine the earliest expressions of the rule concerning abridgements and trace its development in judicial thought.

In the *Anonymous Case*[1] of 1774 Lord Chancellor Aspley, after he had consulted Mr. Justice Blackstone, whose knowledge and skill in his profession were universally known, held:

> "That to constitute a true and proper abridgment of a work the whole must be preserved in its sense; and then the act of abridgment is an act of understanding, employed in carrying a large work into a smaller compass, and rendering it less expensive, and more convenient both to the time and use of the reader. Which made an abridgment in the nature of a new and a meritorious work . . . an abridgment, where the understanding is employed in retrenching unnecessary and uninteresting circumstances, which rather deaden

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[1] Hawkworth v. Newbury, 1 Lofft. 775, 98 Eng. Rep. 913 (1774).

the narration, is not an act of plagarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work."[2]

If this principle, as enunciated here, is representative of the law, it authorizes barefaced literary thefts. It would mean that by merely omitting certain matter which the abridger considered as "unnecessary and uninteresting" the characters, the plot, the language and the ideas of an author could be republished, interfering with the sales of and in competition with the original work. As such, it would be an infringement on the copyright of the same.

The rule concerning abridgements was first stated by the English court as dicta in *Gyles* v. *Willcox*,[3] in 1740, in which case an injunction was granted on the ground that the work complained of was a "merely colorable" shortening of the original work. But, to prevent the decision from being considered as authority for more than was before the court, Lord Hardwick, by way of dictum, said:

"Abridgments may with great propriety be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shown in them, and in many cases are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of the author."[4]

It is this dicta which is the foundation of the modern rule. The question was again presented to the English Court in *Dodsley* v. *Kinnersley*,[5] in 1761. The opinion indicates that the law was not vigorously argued before the court, the plaintiff's contention being that the abridgement did not do justice to the original work. The court refused to issue the injunction on the ground that the author himself had published an abridgement of the original in a periodical and therefore was not injured by this publication. The uncertainty and vagueness of the opinion make it impossible to evolve any clear principle from the case,

[2] Anonymous Case, *supra* n. 1, 914.

[3] 2 Atk. 141, 26 Eng. Rep. 489 (1741).

[4] Gyles v. Wilcox, *supra* n. 3, 490. This dictum was commented on by Lord Campbell in 5 *Lives of the Lord Chancellors* (1846) 56. ". . . . I much question another rule he laid down with respect to literary property, although it has not yet been upset." After quoting from Gyles v. Wilcox, he continues, "Gyles v. Wilcock, 2 Atk. 142; and see Lofft. 775; 1 Bro. C.C. 451. I confess I do not understand why an abridgment tending to injure the reputation, and to lessen the profits of the author, should not be considered an invasion of his property."

[5] 1 Amb. 403, 27 Eng. Rep. 270 (1761).

but it is evident that the work complained of was little more than a critical review, which is permissible.

The next case upon this point was the *Anonymous Case*[6] (1774), before Chancelor Aspley, in which he refused the injunction requested and so extended the law as to make any "colorable shortening" a "just and fair" abridgement. The soundness of the decision was questioned by Lord Kenyon in *Trusler* v. *Murray*,[7] in 1789, who, after classifying the publication in that case as a piracy, continued by saying that he and Lord Bathurst had been of that opinion with respect to the "Abridgement of Cook's Voyage Round the World," which was the subject of the controversy in the *Anonymous Case*.

If this rule, as expressed by Chancellor Aspley, was ever the law of England, it was certainly overruled by *Bohn* v. *Bogue*[8] (1846), in which Bogue defended his publication as an abridgment by saying, "Here and there an illustration really illustrative occurs, and of all such I have, to a greater or less extent, availed myself."[9] The injunction was granted by Vice-Chancellor Shadwell restraining the publication of the so-called abridgment on the ground of infringement, pointing out that this "substitute" might have a very material effect on the sale of the original book,[10]

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[6] *Supra* n. 1.

[7] 1 East 362 (1789).

[8] 7 Lond. T.O.S. 277, 10 Jur. 420 (1846).

[9] Bohn v. Bogue, *supra* n. 8, 873: ". . . . he first of all throws overboard as utterly worthless, as of no use whatever to anybody,—of no interest whatever,—the greatest part of the work, and then, feeling the value of what he was going to take, feeling that it might be beneficial to him to take it, and at the same time running down as much as possible the value of the thing, he uses this language: 'Here and there an illustration really illustrative occurs,' showing, by this act, that he thought the thing valuable, and using words at the same time which tend to depreciate the substance of the theft."

[10] Bohn v. Bogue, *supra* n. 8, 874: "Now, I will take this case: we all know that there has been a very valuable Greek Lexicon published by Mr. Liddell and another friend of his at Oxford; no person who published that Lexicon, omitting three or four words at the end of each letter of the alphabet, could have done a work of which it could be said that it might be taken as a substitute—for nobody would take it as a substitute. But can it be doubted, that it might have a very material effect in diminishing the price of the first book? For though nobody would take it as a substitute, many people might not care about (that) so much, and might take it cheaply for what it really did contain, which might be more that (than) ninety-nine hundredths of the whole; and yet it would in no manner be a "substitute. . . ."

In *Dickens* v. *Lee*[11] (1844), Vice-Chancellor Knight Bruce granted an injunction restraining a so-called abridgment of Charles Dickens' "A Christmas Carol," saying:

"I am not aware that one man has the right to abridge the works of another. On the other hand, I do not mean to say that there may not be an abridgment which may be lawful, which may be protected; but to say that one man has the right to abridge, and so publish in an abridged form the work of another, without more, is going much beyond my notion of what the law in this country is."[12]

In *Tinsley* v. *Lacy*[13] (1861), Vice-Chancellor Wood said:

"The court has gone far enough in that direction; and it is difficult to acquiesce in the reason sometimes given, that the compiler of an abridgment is a benefactor to mankind, by assisting in diffusion of knowledge."[14]

The Chancellor said that no analogy could be drawn between an abridgment of a work and the lawful use which Shakespeare made of the writings of Boccacio. Counsel for the defendant relied upon *Whittingham* v. *Wooler*[15] (1817) as authority supporting the publication of an abridgment, but the court distinguished the *Wittingham Case* by pointing out that in that case the works complained of were reviews, "consisting of criticisms and extracts to serve as foundation for criticism," while in the case at bar the works complained of were abridgments designed to substitute for the original work.

Of all the English cases in which the publication complained of was defended on the ground that it was an abridgment, in only one, the *Anonymous Case*,[16] was that defense successful. That case has been overruled by subsequent decisions, and the test of abridgment used in it has been again and again rejected. The only other case favorable to the propriety of abridgment is *Dodsley* v. *Kinnersley*[17] which was decided upon another point. In all other cases the publication of the abridgment has been

[11] 8 Jur. 183 (1844).
[12] Dickens v. Lee, *supra* n. 9, 184.
[13] 1 Hem. & M. 747; 2 New Rep. 438, 32 L.J. Ch. 535, 27 J.P. 676, 11 W.R. 876, 71 Eng. Rep. 327 (1863).
[14] Tinsley v. Lacy, *supra* n. 11, 329.
[15] 2 Swan. 428, 36 Eng. Rep. 679 (1817). Defendant had published in two numbers of a periodical devoted to theatrical criticism an article of some forty pages, in which were included six or seven pages from a farce written by the plaintiff interspersed with criticisms. The courts refused the injunction on the basis of a critical review.
[16] *Supra* n. 1.
[17] *Supra* n. 5.

uniformly enjoined.[18] However, in each of these cases the court has praised a "just and proper abridgment" as a "new and meritorious work." It was the "weight" of this "authority" that bound Justice McLean in *Story* v. *Holcombe*[19] (1847) and thus established American precedent. His statement was:

"If this were an open question, I should feel little difficulty in determining it. An abridgment should contain an epitome of the work abridged—the principles in the condensed form of an original book. Now it would be difficult to maintain that such a work did not affect the sale of the book abridged. The argument that the abridgment is suited to a different class of readers by its cheapness and will be purchased on that account by persons unable and unwilling to purchase that work at large is not satisfactory. This, to some extent, may be true, but are there not many who are able to buy the original work who will be satisfied with the abridgment. . . . . The reasoning on which the right to abridge is founded therefore seems to me to be false in fact. It does to some extent in all cases, and not infrequently to a great extent, impair the rights of the author—a right secured by law. . . . But a contrary doctrine has been long established in England under the Statute of Anne, which in this respect is similar to our own Statute, and in this country the same doctrine has prevailed. I am, therefore, bound by precedent, and I yield to it in this instance more as a principle of law than a rule of reason or justice."[20]

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[18] Read v. Hodges, cited in 2 Atk. 142, 26 Eng. Rep. 490 (1740); Butterworth v. Robinson, 5 Ves. 709, 31 Eng. Rep. 817 (1801); Vesey v. Sweet, 5 Ves. 709n, 31 Eng. Rep. 818 (1823); Bell v. Walker, 1 Bro. C.C. 451, 28 Eng. Rep. 1235 (1785) (These cases, in addition to the cases cited and discussed above, represent all the English cases upon this subject). An interesting observation was made in D'Almaine v. Bossey, 1 Y & C 288 (1835). The question before the court was the right to make adaptations of music. Lord Lyndhurst observed that it was a nice question, what should be deemed such a modification of an original work as should absorb the merit of the original in the new composition. "No doubt such a modification may be allowed in some cases, as in that of an abridgment or a digest. Such publications are in their nature original. Their compiler intends to make of them a new use; not that which the author proposed to make. Digests are of great use to practical men, though not so, comparatively speaking, to a student. The same may be said of an abridgment of any study; but it must be a *bona fide* abridgment, because if it contains many chapters of the original work, or such as made the work most saleable, the maker of the abridgment commits a piracy. Now, it will be said that one author may treat the same subject very differently from another who wrote before him. That observation is true in many cases. A man may write upon morals in a manner quite distinct from that of others who preceded him, but the subject of music is to be regarded upon very different principles. It is the air, a melody which is the invention of the author, and which may in such case be the subject of piracy. . . ." On subject of digests see, Sweet v. Benning, 16 C.B. 459 (1855).

[19] 4 McLean 308, 23 Fed. Cas. No. 13, 497 (1847).

[20] Story v. Holcombs, *supra* n. 19, 309.

This precedent which Justice McLean considered so binding was the dicta of *Gyles* v. *Willcox,* the overruled *Anonymous Case,* and *Dodsley* v. *Kinnersley,* which was decided on another point. However, an injunction was granted to a part of the work complained of, and the statement of Justice McLean is in itself dicta. The principle was restated as dicta in *Lawrence* v. *Dana*[21] (1869), citing *Story* v. *Holcombe,*[22] *Gayles* v. *Willcox*[23] *Anonymous Case,*[24] and *Dodsley* v. *Kinnersley.*[25]

This problem concerning abridgment and piracy was handled very well by Circuit Justice Story in *Gray* v. *Russell*[26] (1839), where he considered it largely a question of fact, by saying:

". . . if large extracts are made therefrom in a review, it might be a question, whether those extracts were designed bona fide for the mere purpose of criticism, or were designed to supersede the original work under the pretence of a review, by giving it substance in a fugitive form. The same difficulty may arise in relation to an abridgment of an original work. The question, in such a case, must be compounded of various considerations; whether it be a bona fide abridgment, or only an evasion by omission of some unimportant parts; whether it will, in its present form prejudice or supersede the original work; whether it will be adjudged to the same class of readers; and many other considerations of the same sort, which may enter as elements, in ascertaining whether there has been a piracy or not. Although the doctrine is often laid down in the books, that an abridgment is not a piracy of the original copyright; yet this proposition must be received with many qualifications."[27]

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[21] 4 Cliff 828, 14 Fed. Case No. 8, 136 (1869); "Whatever might be thought, if the question were an open one, it is too late to agitate it at the present time, as the rule is settled that the publication of an unauthorized but *bona fide* abridgement or digest of a published literary copyright, in a certain class of cases at least, is no infringement of the original." . . . "Unless it be denied that a legal copyright secures to the author 'the sole right and liberty of printing, reprinting, publishing, and binding the book' copyrighted, it cannot be held that an abridgment or digest of any kind of the contents of the copyrighted publication, which is of a character to supersede the original work, is not an infringement of the franchise secured by the copyright. What constitutes a fair and *bona fide* abridgment in the sense of law is, or may be, under particular circumstances, one of the most difficult questions which can well arise for judicial consideration; but it is well settled that a mere selection or different arrangement of parts of the original work into a smaller compass will not be held to be such an abridgment." In view of this statement consider the reasoning of Chancellor Aspley in the anonymous case, *supra* n. 1.

[22] *Supra* n. 19.

[23] *Supra* n. 3.

[24] *Supra* n. 1.

[25] *Supra* n. 5.

[26] 10 Fed. Cas. 5, 728, 1 Story 11 (1839).

[27] Gray v. Russell, *supra* n. 2.

In 1911 the matter of abridgment was again presented to the court by the publication of mere fragmentary and superficial portrayal of plot and characters from various operas. The court found that it was not an abridgment of the original, since it gave just enough information to put the reader on inquiry, as a syllabus of a law report, the review of a book, or a description of a painting induces the reader to examine further. The injunction was accordingly denied.[28]

In the most recent case, *MacMillan Co.* v. *King*[29] (1914), the defendant, a college professor, was enjoined from distributing mimeographed copies of parts of the plaintiff's original work to his students in connection with classes in economics. This was not a case of abridgment and the court based its decision upon the Copyright Act of 1909, which secures to the owner of a copyright in a literary work in exclusive right to print, reprint, publish, copy, and vend the copyright work and to make any other version thereof.[30] It would seem that this act is no more than a codification of the common law and that if it could be possible to produce a true abridgment, that such would be a "new and meritorious" work, and therefore, would not be subject to this act. Thus, the copyright acts of England and of the United States have no effect upon the status of the law of abridgement.

Since 1774 the courts have been steadily retreating from the definition of abridgment given in the *Anonymous Case*.[31] They have found that the works complained of were either reviews, and thus allowed, or were not bona fide abridgments, and so enjoined. The statement as to what constitutes an abridgment is to be found only in dicta and no case since the *Anonymous Case*[32] (1774) has held that a particular publication is a bona fide abridgment. In each case the work complained of has violated the property right in the original in some respect. Although often stated, if such a rule ever existed, except in the mind of Chancellor Aspley, it has never been applied. Indeed,

[28] Ricordi v. Mason, 201 Fed. 182 (1911).
[29] 223 Fed. 862 (1914).
[30] 3 (Comp. St. 1913, sec. 9519); also see 17 U. S. C. A., sec. 6 (1909); for the English Act see 1-2 Geo. V., C. 46, S. 2, subsec. 6 (1911).
[31] *Supra* n. 1.
[32] *Supra* n. 1

some of the later cases have criticized not only the existence but the reason for the rule of a bona fide abridgment. It is submitted, therefore, that it would be impossible to create a bona fide abridgment which would not be an infringement on the copyright of the original, in spite of the dicta to the contrary.

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