RECENT ENGLISH CASES.

Court of Common Pleas, England. Trinity Term, 1855.

SWEET AND OTHERS *vs.* BENNING AND ANOTHER.[1]

1. By stat. 5 & 6 Vict. c. 45, s. 18, when the proprietor of any periodical work shall employ any person to compose any article thereof, and the same shall have been composed on the terms that the copyright therein shall belong to such proprietor, the copyright shall be the property of such proprietor: *Held*, that these terms need not be expressed, but may be implied.
2. Where an author is employed by the proprietor of a periodical work to write for it articles on certain terms as to the price, but without any mention of the copyright, it is to be inferred that the copyright was to belong to such proprietor.
3. The defendants, who were proprietors of a periodical professing to be an analytical digest of equity, common law, and other cases, copied verbatim the head or marginal notes of cases from reports, the copyright of which was in the plaintiffs, without their consent: *Held* to be a piracy, (Maule, J., *dissentiente.*)

This was an action against the proprietors of a periodical called The Monthly Digest, for a piracy of the reports in The Jurist. The declaration alleged that the plaintiffs were the proprietors of The Jurist, and of the copyright of the reports therein, and that the defendants wrongfully, and without the consent in writing of the plaintiffs, printed for sale and sold in the Monthly Digest copies of portions of the reports in The Jurist. The defendants pleaded several pleas, of which the first was not guilty, and the third was a denial that the copyright in the reports was the property of the plaintiffs. They also delivered notice of various objections under the act, to be relied on at the trial, which it is not necessary to set out here, but by which the defendants disputed that The Monthly Digest was a piracy of any of the reports in The Jurist, and that the copyright in such reports was the property of the plaintiffs. The replication took issue on the second and third pleas, and the cause came on for trial at the first sittings in Michaelmas Term, 1853, when a verdict was taken for the plaintiffs, damages 40*s.*, subject to the opinion of the Court on the following case: The plaintiffs are law publishers and booksellers,

[1] 16 Jurist, 543.

and are, and have been from the time of its first publication, proprietors and publishers of the weekly periodical called The Jurist, which has been published every week since the 14th January, 1837, the date of its first publication. On the 30th March, 1853, the plaintiffs caused the following entry to be made at Stationers' Hall, which entry was proved at the trial. [The case here set out a copy of such entry. The plaintiffs were therein described as the proprietors of the copyright of The Jurist.] The Court was to be at liberty to refer to all or any of the numbers or volumes of The Jurist and The Monthly Digest, and to all the books and reports cited in the numbers of the said Monthly Digest, and complained of, and all other law reports and digests, for any purpose necessary to the decision of the case, and to draw all such inferences of fact as a jury would be authorized to draw. The reports of decided cases in The Jurist always have been supplied by gentlemen of the bar, whose names appear at the top of those reports respectively. These gentlemen have been and are employed by the plaintiffs for the purpose, and they compose and furnish, with and as part of their report, a side or head note, or compendious statement of the decision in each case. In The Jurist the said note appears at the head of each report. The arrangement between the plaintiffs and these gentlemen was verbal, and to the effect that the reporters should furnish the plaintiffs with reports of such cases as they thought desirable for publication in The Jurist, upon the terms of being paid so much per printed sheet. There was no reservation by them of any right to publish the cases themselves, or of any copyright in such cases, nor was it expressed between the parties that the copyright should belong to the plaintiffs. In fact, nothing passed between the parties upon the subject. The reports, however, have always been made exclusively for The Jurist, under the employment before mentioned, and have always been inserted without alteration. All the cases, the piracy of which is complained of, were duly paid for according to the terms of the employment. The plaintiffs are the proprietors of Harrison's Digest, and they publish annually a digest as a supplement to that work. The plaintiffs, Stevens & Norton, are the proprietors and publishers of

Jeremy's Digest. These digests, and other digests of a similar nature, are compiled from the head or side notes of the reports published during the year. No leave is asked for such publication, or considered necessary, the plaintiffs respectively, or some of them, being entitled to the copyright of the greater portion of the reports referred to in such digests. The defendants are the proprietors of a periodical called The Monthly Digest, five numbers of which accompanied the case, and which numbers had been given in evidence at the trial. In the compilation of such digest the defendants had recourse to the various publications then extant, including The Jurist, in which the cases were reported, and in some instances to the notes of the defendant, Lovell, taken in court when the cases in those instances were argued. In all the cases in which reference was solely or first made to The Jurist, the side notes were copied from The Jurist. The number of cases purporting to be digested by the defendants, in the five numbers given in evidence, ranged from three hundred to four hundred in each number, and the number of such cases in which the side notes had been copied from The Jurist, were as follows: — Eleven in No. 1; thirteen in No. 2; twenty-six in No. 3; twelve in No. 4; and thirteen in No. 5. The questions for the opinion of the Court were, first, whether the copyright in the reports in The Jurist, or in the head or side notes thereof, or in both, belonged to the plaintiffs; and, secondly, if so, whether the publication in the Monthly Digest of the said head or side notes was or was not a piracy of the plaintiffs' said copyright. If the opinion of the Court should be in favor of the plaintiffs upon the points both of copyright and piracy, the verdict entered for the plaintiffs for 40*s.* was to stand, with the certificate given at the trial, to entitle the plaintiffs to costs. If not, the verdict was to be set aside, and a nonsuit entered.

After argument by *Lush*, (June 5,) (*Byles*, Serjt., was with him,) for the plaintiffs, and

Butt, Q. C., (*P. Burke* with him,) for the defendants,

JERVIS, C. J.—We are clearly of opinion that the copyright is the property of the plaintiffs, but we wish to consider the question of piracy. *Cur. adv. vult.*

There being a difference of opinion among the learned judges, the following judgments were now (June 8) delivered:—

JERVIS, C. J.—In this case, which was argued the other day, and in which the Court took time to consider one of the points, there were two questions, first, whether the plaintiffs had a property in the copyright, under the 5 & 6 Vict. c. 45, s. 18; and, secondly, assuming that they had that right, whether there was a piracy, so as to give them a right to maintain an action. In the course of the argument, I intimated the opinion of the Court that the plaintiffs had a copyright within the meaning of the eighteenth section; and on consideration, I now entertain that opinion; because, where the proprietor of a periodical employs a gentleman to write expressly for that periodical, of necessity it is implied that the copyright of the article written expressly for that periodical, and paid for by such proprietor of the periodical, should be the property of such proprietor; otherwise it might be that the author, the day after the publication of the periodical, might publish his works in a separate form, and there would be no property, or benefit, or corresponding return to the original publisher for the payment made to the author. I think, and the rest of the Court concur in that opinion, that there is an implied condition, undertaking, or arrangement between the parties, that the gentleman employed under those circumstances writes for the publisher and proprietor of the periodical, who acquires a copyright in the article so written and published. The question of piracy was one that at the time seemed to the Court a more difficult one, and on which I regret there is still not an unanimous opinion; but, upon the best consideration I can give to the case, it seems to me that there was a piracy on which the action may be founded. It is difficult to lay down a general rule upon this subject; and I do not adopt or subscribe to the proposition propounded by Mr. Lush, that the printing of every portion of a work would be the foundation of an action. I think it is a question of degree, which must be varied by the different circumstances of each case. In this case there has been, I think, an abuse of the fair right of extract or comment, and, in truth, a republication or reprint of a composition, the pro-

perty in which was in the plaintiffs. The work from which this has been taken, The Jurist, consists of double reports of each case—one in which the reporter professes to give a detailed report of the case, with the argument and the judgment of the Court at length; and the other, an abstract of the case in the shape of a marginal or head note, in which he furnishes the principle of law and a short and summary statement of the facts; they are, in truth, two reports—a long and a short report; and the gentleman who has compiled this digest has taken verbatim, as the case states, the short reports to which I have alluded. If he may be allowed to do that, it is plain that he may take the other, viz. the lengthened one, or he may take both; and the question is, can he, by any different arrangement of the reports, or digest, as he calls it, take them? In my opinion he cannot. I quite subscribe to the doctrine that a digest may be well made without subjecting the party making it to an action, where the author of the digest applies his mind to the subject, and extracts from the case the principle of law by the labor of his own brain, and so produces an original work; but here this is merely (except the analytical arrangement, which is a mere mechanical operation), that of cutting out the whole of the marginal notes, or head notes, as they are called. In my mind, the case referred to, of *Butterworth* vs. *Robinson*, is decisive of this case, because, there the complaint was, that, omitting the arguments, the party who was the alleged pirate had reprinted the reports, including the judgment of the court; and although he had arranged them alphabetically, under appropriate heads, for the purpose of easy reference, it was held not to be a ground of protection, but he was held to have pirated the work of the original author, and the Lord Chancellor granted an injunction. On these grounds, I think, on both points, that the plaintiffs are entitled to recover, and that our judgment must be for the plaintiffs.

MAULE, J.—With respect to the first point, whether the plaintiffs had a property in the reports as the proprietors of the book for which they were written, I think that the case is within the provision of the act of Parliament, which says, that if articles are written for any periodical work, which would comprehend the

work of the plaintiffs, and they are written by a person employed to write for the proprietor, and upon the terms that the copyright shall belong to such proprietor, and shall be paid for by such proprietor, the copyright therein shall be the property of such proprietor. It was urged in this case, that here it was not a contract upon the terms that the copyright should belong to the proprietors, because there were no express words conferring the copyright on the proprietors. I think that although there are no express words to be found here, when a person employs another to write a book, or to do anything else for him, it is to be inferred from that, if there is nothing to show the contrary, that such a writing or work is produced and done by the person so employed, on the terms that it shall belong to the employer. I think, therefore, that the plaintiffs in this case, as proprietors of The Jurist, can maintain the action for a piracy of the work; but, with respect to the act complained of as a piracy, I do not so clearly concur in what my Lord Chief Justice has expressed, and what I understand is the opinion of the other learned judges who will pronounce their opinions after me. It is not very wonderful that there should be some difference of opinion upon such a subject, because it is hardly so much a matter of kind as a matter of degree. It is difficult to draw a line where the act is only a question of quantity, but it is more easy to draw the line where the question is, whether the thing is colorable, and so unlawful. In this case the inclination of my opinion is, that this is a different work, and made with a different object, and with a different result, from the work of the plaintiffs. It may be that some persons may be able to dispense with, or may be induced to dispense with, the work of the plaintiffs, by purchasing or using that of the defendants, though a very imperfect substitute for it; and I should doubt whether, in any case, it would enable a person to dispense with the plaintiffs' reports when he really wanted them. Probably it may enable persons to buy more cheaply the means of finding out what had been decided by the courts, without going to the expense of buying the reports in extenso. When, however, a report is known to exist that may have some probable application to a case, then recourse, I should

think, would be ordinarily had to the report itself at length; and thus it may induce persons to buy the report itself, or have recourse to it in the libraries of institutions, or combinations of persons. But I think its having that effect is no argument in favor of this being a piracy, but rather the contrary, because it seems to do a something which is not required by persons who want to use those reports. Then it is said, and so my Lord Chief Justice considers, that these marginal notes constitute another report. I do not think that that is the case; for though marginal notes in some instances do constitute another report, those are not the best marginal notes, and the reporter has recourse to them when he cannot give what I consider the more legitimate marginal note, which is not a different report of the circumstances of the case, and a statement of the conclusions drawn from them, but a statement of the principle or doctrine of law which is considered to be established by the case at length, without stating at all how it arises. In no sense is it, or is it like, a report; and that takes away what was pressed upon us in the argument — the idea, such as it is, of there being in these cases a double report. They are not, in my opinion, double reports; but they are what they are — marginal notes. In some respects they are occasionally an abridgment of the reports; that is, when the reporter is unable to extract some very clear doctrine of law capable of being stated conveniently in an abstract, he then relates all the circumstances of the case, and says: "If A demises to B by a certain instrument, and afterwards B dies, and makes a will in such and such terms," and so forth. Such a marginal note is no doubt another report; but that is not the usual style of a marginal note. Well, then, it is true that the very words of these marginal or head notes, and the head notes of a considerable number of other reports that are published during the month, are contained in this publication of the defendants. Now, it is agreed that it is not every verbatim extract that is the subject of an action of piracy. It will depend upon the proportion the verbatim extract bears to the whole work. Nobody denies that the mere length of these extracts is not such as to make it the subject of a piracy in that respect. Now, it must be

taken, I conceive, in this action, that the plaintiffs are the only persons who complain of what the defendants have done. What the defendants have done is this — they have devised, or adopted from somebody else, a certain scheme of distribution of the doctrines of law which are promulgated by the courts within the last month, and of putting them into such an order or arrangement as affords convenience to the profession, and those who have occasion to use the law books, in inquiring into questions of law. The order and arrangement the plaintiffs had no right to complain of, as that is not their own; and according to that order and arrangement the defendants have distributed a considerable quantity of matter containing such legal propositions, of which by far the larger part is what the defendants are entitled, under some circumstances, to be considered the owners. Now, certainly, under that state of things, it seems to me that the defendants have made a book differing altogether from the plaintiffs' book, and effecting a different purpose from the plaintiffs' book. I conceive, therefore, they have not, in the sense in which it is unlawful, taken any part from the plaintiffs' book, but that they have dealt no otherwise with it than a person does who, to support some argument or view of his own, makes extracts from the book of another person, without any intention of evading the right of the person to publish the whole or a part of it. As I said before, I have had some difficulty in drawing the line, and very likely I have not taken the right side. If the case had been of sufficient importance, I should have desired more time to be taken to have further considered it; to revise my opinion; and certainly to express more fully and clearly what are the reasons that induce me to come to my present conclusion.

CRESSWELL, J.—With respect to the first point, it is unnecessary for me to add anything to what has fallen from my Lord, with whom I agree; and as to the second point, I agree with my Brother Maule that it is difficult to draw the line in all cases, between that which may be called an extract for the purpose of comment, or for the purpose of illustration, and that which is taken for a mere piracy; but it seems to me that the plaintiffs are on the right side of the line in this case. This portion of the plaintiffs'

work is taken, not for the purpose of illustrating anything, but for the purpose of making it the subject-matter of sale in itself, and for selling it for itself, though it is sold together with other things that are taken from other books. That seems to me to place it on the side of the line the plaintiffs contend for, and that therefore they are entitled to treat it as a piracy. Therefore I think the judgment must be in favor of the plaintiffs.

CROWDER, J.—I have arrived at an opinion similar to that of my Lord and my Brother Cresswell, after much difficulty and doubt; indeed, during the argument, I own that I entertained considerable doubts upon both points, both as to whether the plaintiffs had a property in the work, and as to whether this was a case of piracy; because, looking to the language of the eighteenth section, in which it is said that in order to obtain a property in the composition, the proprietor of the periodical, (who is in the situation of the plaintiffs,) employing others to write for him, must employ them on the terms that the copyright therein shall belong to such proprietor; and looking to the language of this case, where it appears that there was a verbal agreement between the plaintiffs and the proprietors as to the terms of payment, and that nothing was said of any other terms; however, on carefully considering the nature and the whole extent of this section, it would seem that the intention was, not that there should be any express stipulation as to the terms, but that the terms might be inferred from the nature and character of the employment; and sitting here with the powers I have, I have arrived at the conclusion that the inference to be here drawn would be quite inconsistent with the nature of such employment, if the copyright should not pass to the plaintiffs. Upon the second point I had entertained much more doubt, and still, in delivering my opinion, I must do so with very considerable doubt, particularly as my Brother Maule has expressed himself to be of a contrary opinion; the difficulty I have had being, that it certainly is not a publication, upon the part of the defendants, with the same object or result, or with any intention, as it seems to me, to interfere with the property of the plaintiffs. Looking to the nature of the two publications, I think it fair to arrive at that

conclusion. The question is, whether, it not being with the same object, and having a different result, and being without any intention to injure the plaintiffs, it is a piracy. But upon looking to the act of Parliament, I think that, notwithstanding this, it amounts to a piracy within the express provisions of the act; because the fifteenth section of the act of Parliament, when taken with the interpretation clause, amounts distinctly to this—that a person is guilty of piracy who prints, or causes to be printed, for sale, any book, the copyright in which belongs to another, without his consent. Now, the nature of this which has been published by the defendants you find to be clearly a part, and a considerable and very important part, of the work of the plaintiffs. It has been said in argument that there were two reports furnished—one a full and the other an abridged report; and that if the defendants could take the abridged report, they might also take the full one. There is, I think, a good deal in the observations made by my Brother Maule on that point, and I am inclined to think with him, that the marginal note is not a second report; but that does not seem to me at all to forward the argument as against the plaintiffs. The note which is taken by the defendants is not a mere second report, or an abridged report, which could be easily done, but something that requires a still greater exertion of mind in the author, namely, in abstracting, after careful consideration, and writing down in concise language, the point and substance of decision, and the rule of law that arises out of that decision. Is it, or is it not, then, something substantial which the plaintiffs have a copyright in, and which the defendants have sold and published for sale? It seems to me that the object of the defendants was clearly to put together, in a manner of their own, and for a purpose quite different from that of the plaintiffs, a series of results of the cases that took place during the month. Nevertheless they do extract bodily the note which was the substance and brain of the individual who wrote for the work. I find a difficulty in coming to this conclusion. The book of the defendants seems undoubtedly a very good and useful book, and one which it is proper should exist; but I feel bound to

arrive at the conclusion, though reluctantly, that it does seem to me to fall within the language of this act of Parliament; and that for these reasons there must be judgment for the plaintiffs. Judgment for the plaintiffs.

Court of Queen's Bench, England.

BUTCHER *vs.* THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY.[1]

1. Carriers by railway—Delivery of luggage to passengers.
2. A railway company, as common carriers of passengers and their luggage, are bound, on the arrival of a train at the terminus of the journey, to deliver a passenger's luggage into a carriage to be conveyed from their station, if required so to do, and if such is their usual practice.—Affirming Richards *vs.* The London and South Coast Railway Company.[2]
2. Therefore, where a passenger on the arrival of the train got out of the railway carriage on to the platform with a part of his luggage, a small hand-bag, in his hand, which he gave to one of the company's porters to take to a cab, and the porter lost it, the company were held liable as for a non-delivery of the bag; it not being found by the jury that the passenger, by taking the bag into his own possession on the platform, had accepted that as a performance of the company's contract to deliver, according to their usual practice, into a cab.

APRIL 16, 1855.—The declaration stated, that the defendants were owners of a railway for the carriage and conveyance of passengers and their luggage from Farnham station, Hampshire, to Waterloo bridge station, London, and were common carriers for hire in and upon the said railway; that the plaintiff became a passenger on their said railway, to be carried and conveyed from Farnham to the Waterloo bridge station, and that the defendants, as such common carriers, received the plaintiff and divers chattels of the plaintiff, to wit, a carpet-bag, &c., to be safely and securely kept and carried by the defendants as such carriers along their railway, and at the end of their journey to be safely and securely delivered up to the plaintiff for reasonable reward to the defendants in that behalf. Breach, that the defendants did not safely

[1] 24 Law Journ. C. B. 137. The arguments of counsel are omitted.

[2] 7 Com. B. Rep. 839; s. c. 18 Law J. Rep. (N. S.) C. P. 251.

and securely carry or deliver the said chattels, but took so little and such bad care in and about the carrying and conveying the same, that by and through their negligence the carpet-bag was lost.

Pleas, *inter alia*, not guilty, and a traverse that the defendants received the plaintiff with the said chattels to carry, convey and deliver *modo et formâ*. Issues thereon.

At the trial before Maule, J., at the last Spring Assizes at Kingston, it appeared that the plaintiff in November last took tickets for himself and his wife as passengers by the defendants' railway from Farnham to the Waterloo bridge station, and that his luggage consisted of a portmanteau, which was placed in the luggage-van, and a small hand-bag containing money and valuable articles worth £240, which he kept in the carriage with him. On the arrival of the train at the Waterloo bridge station the plaintiff got out of the carriage with the bag in his hand, and the portmanteau was placed on the platform, and his wife sat down upon it. One of the company's lamp-cleaners, who was dressed as a porter, shortly afterwards came up and said to the plaintiff, "Cab, sir?" The plaintiff having said "Yes," the man took the bag from the plaintiff's hand, and disappeared among the rows of cabs attending at the station, and shortly after returned to take the portmanteau. The plaintiff inquired what he had done with the bag, and he said he had put it on the foot-board of a cab, and took the plaintiff to the cab, but the bag was not there, and the driver denied that it had ever been put there. Search was made among the cabs and at the station for it, but without success, and the bag was lost. It appeared also that no persons were allowed to assist as porters at the station but the company's servants; and that it was usual for the porters to assist, without any gratuity being given them for so doing, in removing passengers' luggage from the platform to the cabs which were allowed to attend at the station; and that as each cab left the station, a servant of the company took the number of the cab, and ascertained where it was going to.

On this evidence the defendants' counsel contended that the

plaintiff ought to be nonsuited, but the learned judge left the case to the jury, and they having found a verdict for the plaintiff, he reserved leave to the defendants to move to set the verdict aside, and to enter a nonsuit if the Court should be of opinion that there was no evidence to support the declaration.

E. James having obtained a rule *nisi* accordingly,—

Montague Chambers and *Lush* now showed cause.

Bovill, in support of the rule.

JERVIS, C. J. — At first I was strongly of opinion that this rule ought to be made absolute, as I thought, until I heard the ingenious way in which the case was put by Mr. Lush, that there had been a perfect delivery to the plaintiff, and that he had afterwards given instruction to the porter to get a cab for him, and had made himself responsible for the safety of the bag. But I think that is not so, and that this rule ought to be discharged. It has been decided in *Richards* vs. *The London and South Coast Railway Company*, that it is part of the contract by the company that the delivery of passenger's luggage shall be in the usual mode in which such delivery is made by them on the arrival of the train at their station, that is, in this case, by the porters of the company to cabs within the station. There is no question, though that may be the usual mode of delivery, yet that a passenger may, if he pleases, have something short of that to satisfy the contract; and it was open to the defendants to have shown, (though they might have had some difficulty in doing so with the jury) that the plaintiff, in this instance, had accepted some delivery other than that he had contracted for, and whether he had done so or not was a question for the jury. This rule is to be made absolute only if my Brother Maule ought, on the evidence at the trial, to have nonsuited the plaintiff. Now, in the absence of any finding by the jury that the plaintiff, when he stood on the platform with the bag in his hand, had accepted a delivery in fulfilment of the contract short of what he was entitled to, I cannot say, as argued by Mr. Lush, whether he intended to do so or not, especially as it appears that he intended to have a cab for the rest of his luggage. The further point does not arise, whether the company would have been liable if the bag had been

stolen from the cab before it left the station, because, if there had been no delivery to the plaintiff when he stood with the bag in his hand upon the platform, and that was a question of fact for the jury, the company have not shown what became of the bag after it was taken from the plaintiff. For aught that appears, it was never delivered at all, and then this case is the same as *Richards* vs. *The London and South Coast Railway Company*. This rule must, therefore, be discharged.

CRESSWELL, J.—I am of the same opinion. There was *primâ facie* evidence that the bag in this case was delivered to the company to be carried. If it was contended that that was not the case by reason of the plaintiff taking the bag into his own custody, the question ought to have been put to the jury. Then the question is, did the defendants fulfil their undertaking? According to the decision in *Richards* vs. *The London and South Coast Railway Company*, they were bound to deliver according to their usual practice, that is, into a cab, if the passenger wished it. It is clear that they did not do so in this case. There might be evidence that the plaintiff accepted some other mode of delivery, instead of the usual one, but the defendants did not ask to have that question left to the jury, and they cannot now ask us to find it in their favor. Then there is a third question, whether the plaintiff was himself the cause of the loss, so as to excuse the company. I think that cannot be imputed to him. He delivered the bag, not to a stranger, but to a man wearing the livery of the company and one of their servants, and cannot be said, therefore, to have prevented them from performing their contract.

WILLIAMS, J.—I am of the same opinion, and I think the judge upon the evidence could not have nonsuited the plaintiff without overruling *Richards* vs. *The London and South Coast Railway Company*. It is suggested, that it would be hard upon the company to make them liable for the loss of this bag, if after the lamp-cleaner had been deputed by the plaintiff as his agent to select any cab into which to put the bag, and he had selected one and placed the bag in it, the cabman had driven off with it. Certainly, if that was the case, it is very much to be regretted that it