OPINION

OF THE

HON. ALFRED CONKLING,

DISTRICT JUDGE OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK, SITTING IN THE CIRCUIT COURT OF THE UNITED STATES;

UPON THE

QUESTION OF COPYRIGHT IN MANUSCRIPTS,

IN THE CASE OF

LITTLE AND COMPANY AGAINST HALL, GOULDS AND BANKS,

RESPECTING THE

FOURTH VOLUME OF COMSTOCK'S REPORTS.

ALBANY:
JOEL MUNSELL, 58 STATE STREET.
1852.

S
.U5
944
CON

CIRCUIT COURT OF THE UNITED STATES,

FOR THE NORTHERN DISTRICT OF NEW YORK.

EDWIN C. LITTLE & OLIVER SCOVILL,

vs.

LEVI W. HALL, ANTHONY GOULD, WILLIAM GOULD, DAVID BANKS and DAVID BANKS, JR.

CONKLING, Justice.—This is an application for a provisional injunction to restrain the defendants from printing and vending a book entitled, "Reports of Cases argued and determined in the Court of Appeals of the State of New York, with notes, references and an index, by George F. Comstock, Counsellor at Law, Vol. IV."

The motion was argued at the adjourned session of the court, on the last day thereof, and was held under advisement. Before I could find time to undertake its further examination, Mr. Comstock requested permission to furnish a written argument in behalf of the defendants, which was given on condition that he would, without delay after its preparation, transmit a copy of it to the counsel for the plaintiffs. This he did, and very soon afterwards, but not until six days ago, I received Mr. Spencer's reply. Some further delay has been occasioned by my indispensable engagements in the District Court.

The bill sets forth summarily, an act of the Legislature of the state of New York, passed May 12, 1847, requiring the appointment, in the manner therein described, of a

660942

reporter of the decisions of the Court of Appeals, to be denominated "State Reporter," who should hold his office three years unless sooner removed by the concurrent vote of both houses of the Legislature, whose duty it should be to report every case argued and determined in that court which it should direct him to report, and such other cases as the public interests should in his judgment require to be reported, and who should have no pecuniary interest in the reports, but the same should be published by contract, in the manner specified in the act. The reporter, it is alleged, was by law made a public officer, and was entitled to an annual salary in full compensation of services as such.

The bill further states that by another act of the Legislature of the state of New York, passed April 9, 1850, it was enacted that the copy-right of any notes or references made by the said reporter, to any reports of the judical decisions of the Court of Appeals, should be vested in the secretary of state for the benefit of the people of the state; that George F. Comstock, a citizen of the state, was, on or about the 27th day of December, 1847, duly appointed state reporter, and immediately entered on the execution of his duties as such: that in pursuance of the laws of the state requiring the reports to be published under the supervision of the state reporter, by contract to be entered into by the reporter, the secretary of state and comptroller, with some person or persons who should agree to publish and sell the reports on certain specified terms, Mr. Comstock, state reporter, Mr. Morgan, secretary of state, and Mr. Hunt, comptroller, entered into a contract with the plaintiffs, bearing date April 20th, 1850, by which it was agreed that they should have the exclusive benefit of the copy-right to be taken out in behalf of the state, of the notes, references, and other matter furnished by the reporter, connected with the decisions, to be by them published under the contract, which was also therein declared to be an assignment and transfer of the copy-right; the plaintiffs on their part agree-

ing to print and publish in the manner and on the terms prescribed by law and specified in the contract, and to keep the volumes of reports on sale at a price not exceeding $2·50 per copy.

The plaintiffs, by their bill, then aver the preparation by Mr. Comstock and the publication by them, of the third volume of his reports, comprising the decisions and opinions of the court of appeals, rendered and delivered at the December term, 1849, and the April and July terms of 1850, and containing notes and references, of which the copyright was duly secured by Mr. Morgan the secretary of state, in trust for the people of the state, of which the plaintiffs claimed the exclusive benefit, and all with the knowledge and approbation of Mr. Comstock.

The bill then narrates the expiration of Mr. Comstock's term of office on the 27th day of December, 1850, and the appointment of Henry R. Selden, Esq., on the 17th of January, 1851; Mr. Comstock's denial of the validity of the appointment, and the institution by him of a judicial proceeding still pending, for the purpose of obtaining restoration to the office, in virtue of the laws of the state authorizing official incumbents to hold over until the appointment of a successor; the continuance of Mr. Comstock at his post in the court of appeals, as state reporter, during the January term, 1851, with the consent of Mr. Selden and of the judges of the court, in order to prevent any embarrassment from having two reporters of decisions of the same term, and with a view, as expressly declared by them, of enabling Mr. Comstock to accumulate sufficient materials to be added to the decisions previously delivered to him, to complete a volume of proper size; the recognition by the judges of Mr. Comstock as reporter, and the receipt by him of copies of cases and points required by the rules of the court to be furnished to the reporter, and of the decisions and opinions in cases argued at the January term, 1851, as well as the preceding terms,

and the receipt by Mr. Comstock of his salary up to and including January 20th 1851.

The bill also avers that the plaintiffs have in press and are printing with all the expedition in their power, a fourth volume of Reports of the Court of Appeals, comprising its judical decisions and opinions rendered and delivered at the terms thereof, which commenced on the first Tuesday of October, and the 27th day of December, 1850, and on the first Thursday of January, 1851; and the decisions and opinions of the court in cases argued and submitted at these terms, and decided subsequently; and also certain notes and references described in the bill, and avered to have been written, composed and prepared by Mr. Comstock, "under and in pursuance of his employment as state reporter; which said fourth volume is entitled 'reports of cases argued and determined in the court of appeals of the state of New York, with notes, references and an index, by George F. Comstock, counsellor at law, vol. iv;' of which title the plaintiffs have deposited a copy in the office of the clerk of the district court of this district, claiming the copy-right of the work as proprietors thereof, and of which title a copy has, for abundant caution, been also deposited, as they are informed and believe, by Mr. Randall, secretary of state, claiming the book as such secretary, in trust for the people of the state of New York."

The bill charges that in virtue of the contracts with them, and the facts and circumstances set forth in the bill, the plaintiffs became and are the proprietors and legal assignees of all the original matter composed by Mr. Comstock, and contained in the book in question, and as such were entitled to secure the copy-right thereof to themselves; and if not, that they still have such an interest in such original matter as entitles them to the sole and exclusive right to print, publish and sell it, and that the copy-right acquired by Mr. Randall is available to them for the protection of this right. The bill further charges that the defendant Hall, without

the consent of the plaintiffs, has printed and published a large number of copies of a book or volume labelled "Comstock's Reports, vol. 4," comprising the notes and references prepared by Mr. Comstock as already described, and contained in the volume which the plaintiffs allege, as already mentioned, they are engaged in printing; and that the other defendants, with full knowledge of the rights of the plaintiffs, and without their consent, are engaged in selling the volumes so printed by Mr. Hall, and by him delivered to them in great numbers, for that purpose, demanding and receiving therefor the sum of three dollars and a half per copy, being one dollar more than the price stipulated in the contract between the state and the plaintiffs.

The bill prays that the defendants may be required to deliver up to the plaintiffs the copies of the book in question which remain unsold; for an account; and for a provisional injunction.

Appended to the bill is the affidavit of Weare C. Little, in which he deposes that in the month of December, 1850, he informed the defendant Hall, at Syracuse, of the contract set forth in the bill, between the reporter, the secretary of state and the comptroller, in behalf of the state, and the plaintiffs; and that Mr. Hall was moreover, fully apprised of it before July, 1851. Mr. Little further deposes that a bill of complaint was filed in this court, by the plaintiffs against certain of the present defendants, in January, 1850, praying an injunction to restrain them from printing, publishing and selling he third volume of Comstock's Reports; that an injunction was granted and remains still in force, a motion for its dissolution having been made in July last, which was not granted.

Notice having been given to the defendants of the plaintiffs' intention to apply for an injunction, several affidavits were offered and read in opposition to the motion.

The affidavit of Mr. Taber, the counsel for the defendants, states, from his own personal observation in the court of

appeals, that Mr. Selden and not Mr. Comstock has been in attendance on the court as reporter since January term, 1851; that he is familiar with the contract under which the plaintiffs claim the rights insisted on by them in their bill; that it is only for the period of five years, that it purports to have been executed by Mr. Comstock in his official character, and that it is silent as to any consideration for any private agreement by Mr. Comstock.

The affidavit of Mr. Comstock states his appointment and its expiration as alleged in the bill; that during the January term in 1851, of the court of appeals, Mr. Selden received a certificate of appointment; that he, the deponent, questioned the validity of such appointment, and that the question who should act as reporter was submitted by Mr. Selden and himself to the judges of the court, who decided that Mr. Selden's certificate entitled him to assume the office, which he did during the remainder of the same term of the court, several days before its close, Mr. Comstock vacating his post at the same time, and having at no time since claimed to act as reporter, or received or claimed the emoluments of the office; that at the expiration of his office he had completed his superintendence of the printing of the third volume of his reports, though the work had not then been published; that very soon afterwards he had one or more conversations with Mr. Weare C. Little, (who, as Mr. Comstock states, acts as the agent of the plaintiffs with respect to these reports,) "in which deponent distinctly informed said Little that he should make another volume of reports in his individual character, and that such volume would not be in anywise subject to the contract which deponent in his official character as state reporter, together with the comptroller and secretary of state, had made with the plaintiffs; and in one of the said conversations deponent came to an understanding with said Little, at his request, that said Little should have the publication and copy-right of such volume if he offered the same price therefor to

deponent as any one else should offer," but that neither then nor at any time until very recently, did Mr. Little pretend that he or the plaintiffs had any right to the volume in question; that sometime in the spring of 1851, he, the deponent, commenced the preparation of the volume lately published by the defendant Hall, as the fourth volume of Comstock's reports; that having in the course of the spring and summer prepared a considerable proportion of it, he contracted to have it stereotyped on his own account and at his own cost; that soon after, in the month of September, 1851, he wrote to Weare C. Little or to the plaintiffs, inviting a proposal for the copy-right of the work, to which letter he never received any reply; that in ignorance of any claim on the part of the plaintiffs to the fruits of his labor, he proceeded to complete the work, and finished it in November, nearly a year after he had ceased to act as state reporter"; that after writing to Mr. W. C. Little or the plaintiffs, to wit: on the 8th of October, he sold the copy-right of the volume in question to the defendant Hall, for $2500, (the greater part of which was soon afterwards paid), Mr. Hall assuming also to pay for the stereotype plates; that he has had no dealings with the other defendants on the subject, except that he invited proposals from them, which were made and rejected; that no part of the volume in question was prepared by him as state reporter, but wholly in his private and unofficial capacity:" that a portion of the judical opinions contained in the volume were in his hands before he "went out of office," and a portion of them were delivered to him afterwards; that in respect to the former, he was never requested by the plaintiffs to deliver them over to his successor, nor did he suppose he was bound to do so; that in respect to the latter, they were not claimed or received by him in an official character, nor upon any understanding that he was to hold or use them as state reporter, the judges well knowing "that he was not acting or claiming to act" in that character, and never

having given him any intimation to the contrary; that nearly all the printed cases and points in the causes reported in the volume in question, were in his hands when he ceased to act as state reporter, but he was never requested to hand them to his successor, and never understood that he was bound to do so; and that copies of the same causes and points were deposited in the office of the clerk of the court, in the state library, and in the public libraries at Syracuse and Rochester, and were accessible to any one; that in executing the contracts on which the plaintiffs rely, he acted only in his official capacity; and lastly, Mr. Comstock "denies explicitly the statement in the bill in this cause, that the notes and references in the said volume contained, or any part or portion of the said volume, were prepared by him as state reporter, or in virtue of any employment by the state of New York; and he also denies that the plaintiffs in this suit have any transfer or assignment legal or equitable, from this deponent, of his rights as author of the said volume."

There are a long and a short affidavit by the defendant Hall. In the latter, he asserts his belief on information, that the plaintiffs are irresponsible. In the former, he states that he is a publisher and bookseller, residing at Syracuse; that in the month of August last, Mr. Comstock informed him that he had in preparation a volume of reports, which was his private property, and that he should receive proposals for the purchase of the copy-right; that Mr. Comstock proceeded to repeat his ownership of the work of which he was speaking, and his perfect right to secure to himself the copy-right of the notes and references and other matter furnished by him, the same having been wholly prepared by him since he ceased to act as reporter, and he having received no compensation therefor; that Mr. Comstock informed him of his interview with Weare C. Little, and narrated the conversation between them; that some weeks afterwards Mr. Comstock informed him that he had concluded to receive

sealed proposals for the purchase of the work, whereupon the deponent bid $2,505, and assumed to pay the expenses that had been incurred by Mr. Comstock, for stereotype plates, and that his offer was accepted; that the deponent caused the process of stereotyping to be completed, and an edition of nearly two thousand copies of the work in question to be printed, at an expense altogether, of five thousand dollars; and that he has incurred this large outlay in the fullest confidence that he had a right to purchase the copy-right, and to sell the book, this right not having, to his knowledge, been doubted; that Weare C. Little, within two days past, admitted to him in conversation, that the plaintiffs knew, some weeks before the commencement of this suit, that the deponent had purchased the copy-right of Comstock, and was getting out an edition of the work involving great expense, but that they concluded to take no steps to prevent the publication or sale of it until after such publication; that Mr. Randall, the secretary of state, had informed him that he had not entered any copy-right for the volume in question, nor authorized it to be done, of the truth of which information, however, Mr. Randall declined to make an affidavit, on the ground that he wished to take no part in the controversy; that on informing Mr. Little of this denial of the Secretary of State, he told the deponent that the entry had been made by Mr. Selden, the present reporter, but that he also, on inquiry of him, made a similar denial; that the other defendants have no interest or control over the publication; that the deponent has been informed by Weare C. Little, that he has an interest in the publication of the reports of the decisions of the Court of Appeals, and that Mr. Scovill, one of the plaintiffs, informed the deponent on the 24th of January, 1852, that W. C. Little had the sole management of this department of their business; that sales were made of the fourth volume of Comstock's Reports as early as the 12th of January, 1852; that in the conversation already mentioned, Mr. Little informed the

deponent that the plaintiffs had made but little progress in preparing their edition of the volume in question, and that as he is informed, and believes, they are simply copying from a volume of his edition; that he has acted throughout in good faith; that according to the ordinary course of business, it is necessary in the publication of this work, to keep an account of the number of copies printed; and that, as he is advised by his counsel, and believes, he has a good and substantial defence.

The affidavit of William Gould, one of the defendants, denies that his firm have any concern in the publication of the fourth volume of Comstock's Reports; that he has heard the affidavit (not however specifying which,) of Mr. Hall read, and believes it to be true; that he is one of the defendants in the suit mentioned in Weare C. Little's affidavit, and that the motion to dissolve the injunction therein made, as he is informed, and believes, chiefly on the ground that the injunction ought *not* to have been granted, is still before the court undecided. Accompanying these affidavits there is a certificate from the deputy comptroller, that the salary allowed by law to the state reporter has been paid to Mr. Selden from the 21st day of January, 1851.

As the present controversy embraces most, if not all, of the elements of the former controversy mentioned in the affidavits, between the same parties, except the defendant Hall, it is proper at the outset to state the principles decided in that case. It was there held by this court, that by the constitution and laws of the state of New York, the fruits of the literary labors of the state reporter in the preparation of his reports, to the extent specified in the act of April 9, 1850, ch. 245, belonged to the state, and that the legislature had authority to provide in the manner directed by that act, for the preservation and security of this right of property under the act of Congress, entitled "An act to amend the several acts respecting copy-rights," passed February 3, 1831, ch. 16. And it was further held, that in virtue of the contract

entered into pursuant to the act of May 12, 1847, ch. 280, by the state officers therein for that purpose designated, with the plaintiffs, they acquired as assignees, such an interest in the "notes and references" contained in the third volume of Comstock's Reports, as entitled them to claim protection in the enjoyment of their rights so acquired, by injunction. To this extent, therefore, as indeed seemed to be tacitly conceded by the counsel for the defendants, the principles involved in the case are, on the present occasion, to be regarded as *res judicata*.

But the present controversy comprises an additional element of great importance, to which the efforts of the counsel on both sides have been mainly directed, and which I propose therefore in the first place to consider. The former suit related to the third volume of Comstock's Reports, to the publication of which the plaintiffs claimed the exclusive right in virtue of their contract with the state embracing all such reports of the decisions of the court of appeals, as should be compiled by the state reporter during the period of five years from the date of the contract. This volume was prepared for the press by Mr. Comstock, and the printing of it superintended by him, during the term of three years for which he held his appointment. The present suit relates to the fourth volume of Comstock's Reports, to the publication of which the plaintiffs claim the same right under the same contract; but which was not prepared for publication by Mr. Comstock until after the expiration of his term of office, and the appointment of another person in his place. For this reason, it is strenuously and ably contended by the learned counsel for the defendants, and also by Mr. Comstock himself, in a printed argument which, at his request, he has been permitted, since the oral argument, to furnish, that the volume now in question is not embraced by the contract on which the plaintiffs ground their claim, but that the manuscript was the private property of Mr. Comstock, which he had a perfect right to dispose of according

to his own pleasure, and for his own profit, as he has done. This proposition has been assailed, and its soundness denied in an argument of surpassing ability by the distinguished counsel for the plaintiffs; and as already intimated, it presents the most important question involved in the controversy.

In proceeding to the discussion of this question, it is pertinent, and may serve in some slight degree to shed light upon the path I am to tread, just to glance at the course of legislation in this state, for the purpose of ensuring the speedy publication of authentic reports of the decisions of its superior judicial tribunals.

There is in England a kind of prerogative copy-right vested in the crown, which has long been exercised through patentees, and which has lately been solemnly affirmed by the House of Lords in the case of *Manners* v. *Blair*, 3 *Bligh's R.*, (*N. S.*,) 391, 402, (cited *in Curtis on Copy-right*, 119 *n.*), embracing the English translation of the Bible, the Book of Common Prayer, and the statutes, and which is said to be founded in the duty imposed upon the king to superintend the publication of acts of state, and of works upon which the established doctrines of religion are founded; or as Lord Erskine expressed it, in a speech at the bar of the House of Commons, "to promulgate every ordinance which contains the rules of action by which the subject is to live and to be governed." *Curtis on Copy-right*, 119 *n. and* 124 *n.* It will be seen that the people of the state of New York have from an early period, recognized a similar obligation relative to the publication of reports of authoritative judicial decisions. In 1804, an act was passed authorizing the justices of the supreme court, from time to time, to appoint by license, under the hand and seal of the chief justice, during the pleasure of the court, a person as a reporter, whose duty it should be to report the cases decided by them and by the court for the trial of impeachments and the correction of errors, or such thereof as might be

deemed important to be reported, and to cause the same to be printed and published as soon as conveniently might be after the expiration of each term; and that the said reporter should receive a salary of eight hundred and fifty dollars per annum. And the reporter was required, at his own expense, to deliver to the secretary of state, a number of copies sufficient to furnish one copy for the use of each of the courts of common pleas in the state. This act was limited to the term of three years, 3 *Web. Ed. L.* 462. It was continued for a like term by an act passed in 1809, ch. 74, and was re-enacted, without limitation, in 1813, 1 *R. L.*, 321. By an act passed in 1823, the power of appointing the reporter was vested in the president of the senate, the chancellor and chief justice, and he was to hold his office during their pleasure. *Laws of* 1823, 209. By an act passed in 1825, the chancellor was empowered to appoint a reporter of the decisions of the court of chancery, who was to receive a salary of $500 yearly. By an act passed in 1829, the reporter of the decisions of the supreme court and of the court of errors was denominated "state reporter," and the reporter of the decisions of the court of chancery was denominated the "chancery reporter;" and the appointment of any person to either office who was not a counsellor at law or in chancery, of at least five years' standing, was prohibited, 2 *R. S.*, 97, 108. One of the acts extending the original act of 1804, increased the salary of the reporter of the decisions of the supreme court to $1200, and required the dedication by him of an additional number of copies of the reports, to the public use. All these acts were silent as to the copy-right of the reports, and the well known practice of reporters under them was to secure the copy-right for their own emolument. This furnished an apology, though certainly not an adequate justification, for the exaction of exorbitant prices for the volumes of the reports as they successively appeared, and which every legal practiser was obliged to purchase at whatever cost.

This brief review suffices to show very clearly, that the legislature has at no time during the last forty-eight years, been insensible to the duty of making provision for the *early* promulgation of authentic reports of all such judicial decisions as required to be made known to the public. But for the purpose of fully accomplishing this important object one means was still wanting, and that was, the *cheap* publication of such decisions. This defect had long been the subject of complaint, and within the last few years strenuous efforts have been made to supply the deficiency. These efforts constitute, or were designed to constitute, a new and important era in the course of legislation on this subject.

By the constitution of 1846, the legislature is imperatively required to "provide for the speedy publication of all such judicial decisions as it may deem expedient." In obedience to this injunction, at the session of the legislature next after the adoption of the constitution, the act of May 12, 1847, ch. 280, mentioned in the plaintiffs' bill, was passed. This act, as we have seen, expressly *denies to the reporter any pecuniary interest* in his reports, which were to be published by the secretary of state under the supervision of the reporter, *in numbers every second month.* The publication is required to be made by contract to be entered into in the manner prescribed in the act, "with the person who, in addition to furnishing the said secretary sixty-four copies of each volume of said reports, bound in leather, as soon as may be after the same is prepared, shall agree to publish and to sell the same at the lowest price, by the number and volume, according to the pages therein contained." This act enjoins it as a duty upon the judges of the court of appeals if the reporter "shall neglect to discharge his duty faithfully," to "report the fact to the legislature, to the end that he may be removed from office." Another act passed the same day, fixes the annual salary of the reporter at $2000. By an amendatory act passed April 11, 1848, ch, 224, the attorney general was asssociated with the governor and lieutenant governor in the

appointment of the state reporter; and it was again enacted that the reporter should "have no pecuniary interest" in the reports to be prepared by him as such reporter, but that the same should be published under the supervision of the reporter "by contract to be entered into by the reporter, secretary of state and comptroller, with the person or persons who, in addition to furnishing the said secretary of state with sixty-four copies of each volume, shall agree to publish and sell the said reports on terms the most advantageous to the public, and at a rate not exceeding the price of three dollars a volume of five hundred pages, regard being had to the proper execution of the work." The third section of this act is as follows:

§ 3. It shall not be lawful for the reporter or any other person within the state, to secure or obtain any copy-right for said reports, notes or references, but the same may be published by any persons;" and by the 4th section it is enacted that "As often as the reporter shall have prepared for publication sufficient of the said reports with notes and references to constitute two hundred and fifty pages, of the usual size of law reports, he shall cause the same to be published in pamphlet form, with such headings as will appear in the bound volumes, and shall furnish a copy thereof to each county clerk's office, at the expense of the state, and keep the same on sale at contract prices for all persons who may want to purchase; such printing to be done by the person who shall contract to publish the reports under this act, at and in proportion to the prices stipulated in his contract."

While these enactments evince no want of attention on the part of the legislature to the requisites of *expedition* and *authenticity*, which, as we have seen, were never lost sight of by their predecessors, they evince also an earnest attention to the remaining requisite of *cheapness*. But to the attainment of this desideratum in the highest degree, one obstacle still remained in the want of any provision for securing the contractor against an immediate reprint, upon

the appearance of each volume of reports, not only of the opinions of the court, but of the reporter's syllabuses of the points decided (requiring the exercise of great skill and learning in their preparation), by some person or persons exempt from the burthens and disadvantages imposed by law upon the contractor, who might be ruined by such unjust competition. It was doubtless, to remedy this defect that the act of April 9, 1850, ch. 245, was passed. This act vests the copy-right of any notes or references made by the state reporter to "his reports," in the secretary of state and its beneficial effects seem to have been soon manifested by the offer, which, in the latter part of the same month, the state was enabled to obtain from the plaintiffs, for the publication of the volume of reports compiled and prepared by the state reporter, at the very low price of $2·50 a copy. The high motives of policy and duty which dictated the long course of legislation to which I have adverted, the particular objects it was designed to accomplish and the means so studiously devised for their attainment are now, I trust, sufficiently manifest. The acts now in force and on which the rights of the parties depend, require the preparation and publication without any avoidable delay, from time to time, at the lowest attainable prices, of a regular uninterrupted series of authentic official reports, of the decisions of the court of appeals, the highest judicial tribunal of the state; leaving to private enterprise the preparation and promulgation of reports of the decisions of the inferior courts. The acts are mandatory in their terms, and designate agents by whom their provisions are to be executed. This responsible trust is confided to high public functionaries whose offices are never vacant. The state reporter is required to prepare the reports without delay; he, together with the secretary of state and comptroller are required to contract for their publication upon the most favorable terms; the state reporter is required to superintend the printing thereof, and the secretary of state is bound to see that the copy-right thereto is

secured, in trust for the benefit of the people of the state. An attempt is now made to evade these requirements, and to render them nugatory; and it is for the purpose of defeating this attempt that the powers of this court are invoked by the plaintiffs; primarily for their own benefit, but in reality scarcely less for that of the public; for the honor of the state is concerned in the preservation of its plighted faith, and its citizens are interested in the maintenance of its laws. If the attempt can be rendered abortive through the lawful exercise by the court of its proper functions, the claims of public and private justice concur, therefore, in requiring it to be done.

There are certain general propositions very intimately connected with the merits of this controversy which require only to be announced to command the ready assent of every enlightened and impartial mind. One of them is, that any person, by the use of such means as are by law accessible to all, may lawfully compile and publish reports of the decisions, as well of the court of appeals as of all other courts in this state. The law would tolerate the exercise of this right without regard to any supposed public exigency, and even for the express purpose, however discreditable, of obstructing the public policy, or of doing harm to others; and would, moreover, confer a copy-right to the original matter composed by the author of such reports. It is under this licence that the defendants seek shelter. But on the other hand, it is equally true that no state reporter, for the purpose of enriching himself, can lawfully use advantages derived from his official position, in a manner inconsistent with the letter or spirit of the laws whence his official powers and privileges were derived;—that would be to violate a clearly implied fundamental condition of his appointment; and no court would uphold him, whether as plaintiff or defendant, in the assertion of colorable rights thus acquired.

Has the late reporter, by the line of conduct he has seen

fit to adopt, placed himself within the just scope of this principle? I think he has. He received from the judges of the court of appeals and from its clerk, original papers which they were bound by law to deliver to him, and to him alone, constituting the main elements of the next succeeding volume of reports required at the hands of the state reporter; and then, instead of preparing them for publication without delay, as it was his duty to do, and publishing them in pamphlets as soon as the materials he had thus acquired, together with the necessary additional matter to be composed by himself, were sufficient to fill 250 pages, as required by the act of 1848, he retained them in his possession during the whole remainder of his official term, and until three months after, when he deliberately converted them to his own private use, by preparing them for publication, and selling the volume so compiled for a large sum of money; to the utter defeat (if the device shall be successful) of the laws by which his duty as reporter were prescribed; to the dishonor of the state, by a breach of its solemn engagements; and to the great injury of the plaintiffs. Such is the use, unlawful as I think, that the late reporter has attempted to make of manuscripts delivered to him as a public officer for a very different purpose; and I may as well observe here, once for all, that no distinction whatever ought in my judgment to be made between those which came to his hands before, and the few delivered to him after the expiration of his term of office. The latter, not less than the former, are to be considered as having been received by him in his public character, for it was only in that character that he had any right to them. It follows, therefore, that the late reporter has mistaken his obligations and his rights; but it by no means follows from this that the plaintiffs are entitled to the relief they seek.

I proceed, therefore, to state another of the propositions to which I have alluded as unquestionable, and it is this, that either the late reporter or his successor, was bound to a

strict fulfilment with regard to the next succeeding volume of reports, of the statutory provisions defining the duties of the state reporter, and the contract made with the plaintiffs in pursuance thereof. The truth of this proposition I hold to be self-evident. The opposite construction, on which the late reporter has acted, would not only nullify the law, but would hold out a premium to the state reporter for negligence and infidelity to his trust during his continuance in office. Considering the brevity of the prescribed tenure by which the office of state reporter is held, and to what hands it has been seen fit to confide the power of appointment, it may be supposed that if even a remote probability had been forseen, and an attempt like this, to interpolate into the series of official reports, for which provision apparently so ample had been made, a volume to which, according to the pretensions here set up by the counsel for the defendants, no such official character would belong, care would have been taken by express enactments, to guard against so mischievous a perversion.

This has not been done, and it is not to be denied that a legislative act may be so defectively framed as to admit of successful evasion. But it is the duty of courts in the interpretation of statutes, so to construe them, whenever this can be done consistently with their language, as to effectuate their design: and I need not cite authorities to show that where a statute directs something to be done requiring a series of acts in its performance, without specifically prescribing all these acts, it is not to fail of its intended effect on account of this omission; but that a judical tribunal when called upon to deal with proceedings under such a statute, may, if necessary, supply the deficiency by deciding, on the ground of reasonable intendment, in what manner the prescribed duty ought to be executed. For this purpose, the court is to inquire what it may reasonably be presumed would have been the legislative direction, if the legislature had seen fit to give one; and this inquiry virtually resolves

itself into the question what is the most suitable mode of proceeding. In the present case the enquiry concerns only the designation of the agent on whom the duty in question shall be held to have devolved; and as already observed the inquiry is limited to the late and present reporters. The answer to be given to it must of course depend upon the nature of the duty enjoined. The reporter is to attend the court, to observe and take care to understand what passes therein, and take notes of whatever conduces to its decisions, of its decisions, and especially, of the reasons assigned therefor. The practice has long prevailed with the judges of the superior courts of the state of New York, as it still does, of writing out their opinions; but this is not always done, and, as Mr. Comstock himself states, some of the opinions in his fourth volume, were delivered orally. Of course, in all such cases, the report must be prepared from notes taken at the time, of what is said by the judges. Indeed, Mr. Comstock, in his printed argument, states the case more strongly than I, from my previous acquaintance with the subject, should have ventured to do. "The person acting as reporter," he observes, "acquires a knowledge of the cases argued and of the points decided, of the consultations of the judges, and the diversities of opinion among them, which he can not impart to his successor." Mr. Comstock proceeds to speak further of the "superior facility for reporting cases which have been argued and decided, acquired by the state reporter," while acting as such, and very clearly shows that no one else is likely to be as well qualified to complete the task of reporting such cases. Why then may it not with perfect propriety be said, in giving a practical construction to the legislative acts under consideration, that they impose this duty upon each successive reporter? I can perceive no valid objection whatever to this interpretation, nor any hardship at all to the late reporter, in applying it in the present case. Why should this burden be cast, and that too, at a disadvantage, and to the detriment of the

public, upon the shoulders of the new reporter? He must still be obliged, in the best manner he can, to complete the reports of cases argued but not determined during the time of his predecessor. This rule would lead to no unequal division of labor between the out-going and the in-coming reporter: the effect of it in this respect, would only be to lighten the labors of each successive reporter at the commencement of his term of service, and to increase them at the termination. Indeed, it seems to me that it is scarcely necessary to resort to any inferential course of reasoning to justify this interpretation. The state reporter is appointed for three years, and is allowed a very liberal compensation for his services. And what is the service required of him? Is it not to report the cases argued and decided during his term? It is true that to complete his task would require his attention for a while after the expiration of his appointment; but if he had faithfully discharged his duties while in office, no great length of time would be necessary for this purpose; and then it should be remembered that the service required of him at commencement of his term would under this arrangement be comparatively light; so that, in the end, he could hardly be said to have performed more than three years labor for his three years salary.

The argument for the defendants, and especially that of Mr. Comstock, upon this the main point of the controversy, appears to me to be constructed on a false basis throughout. It assumes, that, because the late reporter deferred the preparation of his reports altogether, until after the expiration of his term of office, and had, as he insists, become a private citizen, he thereby became completely exonerated from all official responsibility in regard to them, and might accordingly dispose of them at his pleasure. "Now," says Mr. Comstock, in his printed argument, page 5, "although this superior facility for reporting cases which have been argued and decided, may be acquired by the state reporter, can it, in the nature of things, on his going out of office, become

the property of the state? It can not; for the state has no power to compel him to use that facility, or impart it to another. It is beneficial to himself and no one else. As no one else can appropriate or command it, he may use it for his own benefit, and this can no more be the subject of legal cognizance or complaint than any other supposed benefit incidental to the office of reporter," Now, in my judgement, this reason is wholly fallacious. I think, on the contrary, that the elements of which his book is composed, were at all times the property of the state, (except so far as it had parted with its interest therein by its contract with the plaintiffs,) and that his official responsibility attached to them from the moment when they began to accumulate in his hands, for he became thenceforth their official depositary, and certainly ought, moreover, then to have commenced the work of preparation for the press. I am of opinion, therefore, that Mr. Comstock is wholly mistaken in supposing that he could relieve himself from this responsibility by the wilful neglect of his duties, during the residue of his term. It is argued that there can be but one state reporter at the same term, and but one person, therefore, chargeable with the duties and responsibilities of the office; and great pains have been taken to establish the fact, that although Mr. Comstock did not admit the validity of Mr Selden's appointment, yet that the latter actually took upon himself the duties of the office on the 20th of January, 1851, and has filled it ever since. Undoubtedly, as the legislature has not seen fit to provide for more than one state reporter, there can be but one; but I can discern nothing in this concession at all inconsistent with the supposition that the legislature designed to impose the service in question as a duty upon each successive reporter, or with the assertion that, in discharging this duty, he is, for that purpose, to be regarded as acting in an official character until the service is completed.

To an extent, somewhat greater than ordinarily happens,

the present is, I think, a case *sui generis*, and of first impression; and I have accordingly considered it thus far, mainly without regard to antecedent decisions; but the construction I adopt was shown by the counsel for the plaintiffs to be in accordance with strong and deeply founded legal analogies, sufficient at least to afford it all the support it needs, if not, indeed, to constitute an independent basis on which alone it might be securely placed. I refer to the doctrine of *relation*, by which, for the purpose of promoting justice, legal acts are held to take effect from the date of antecedent acts relating to the same thing, by *relation*. This doctrine is laid down and illustrated by numerous examples, in Burn's Law Dictionary, a book of good authority, and also as stated by the plaintiffs' counsel, in Tomline's Law Dictionary, a work to which I have not had access. Burn defines the doctrine thus: "*Relation*, is where, in consideration of law, two different times or things are accounted as one; and by some act done, the thing subsequent is said to take effect by *relation* from the time preceding." "This device is most commonly to help acts in law, and make a thing take effect, and shall relate to the same thing, the same intent, and between the same parties only; for it shall never do a wrong, or lay a charge upon a person that is no party. And when the execution of a thing is done, it shall have relation to the thing executory, and makes all but one act or record, although performed at different times." One strong illustration given by this author is the familiar rule by which assignments to commissioners in cases of bankruptcy, are held to extend backwards by relation to the first act of bankruptcy, so as to avoid all intermediate conveyances of his goods by the bankrupt; and another illustration no less strong given by the same author, is the common law doctrine by which a sheriff was authorized on a *fieri facias*, to take the property of the defendant sold by him and delivered to the buyer at any time after the *teste* of the writ, though before a levy. This rule was at length altered, but it re-

quired an act of parliament to do it. The doctrine of *relation* is an essential and pervading principle of law. In the case of *Hawkins* v. *Kemp*, 3 *East.*, 410, 422, 429, it formed the chief basis of the argument of the counsel for the plaintiff, and was conceded by Mr. Abbott, afterwards chief justice, the counsel for the defendant. (See also *Shelly's case*, 1 *Rep.*, 99 *b; Haverhill* vs. *Hare*, *Cro. Jac.*, 512.) It is this principle that gives validity to the sale on execution, of the property of the defendant, by a sheriff after he has gone out of office in pursuance of a levy made before; a case, as I think, very analogous to the present. And this power to sell imposes on the sheriff a correspondent duty. He is by law required to sell. (2 *John.'s Ch. R.*, 180.) Mr. Comstock denies the analogy, and likens the case before the court, rather to that of a sheriff quitting office with an execution in his hands on which no levy has been made. "If," he observes, "the writ is merely dormant in the sheriff's hands, he can not act after his term expires. So in this case; the papers were dormant in the hands of the reporter when he went out of office. His labors had not commenced, &c." Conceding the fact to be as here represented, it would still follow from this analogy, that Mr. Comstock was bound to deliver the papers to his successor, but it would by no means follow that he had a right to retain them and convert them to his own profit; any more than a sheriff in the case he supposes, would have a right to retain the execution, sell the defendant's property upon it, and put the proceeds of the sale into his own pocket. But in reality, the analogy supposed by Mr. Comstock, as already shown, does not exist. He did not, as he himself admits, neglect *all* his duties while in office, and the performance of the very first of them essential to the completion of the fourth volume of the reports, was sufficient to bring his case within the very terms *mutatis mutandis*, of the definition adopted by him in his argument, of the obligation of an ex-sheriff to sell. "The execution is an entire thing, and when once acted upon, by taking

property into possession, the person who thus began it must finish it." Indeed, if it were necessary, the case might, I think, with great reason, be stated still more strongly against the argument of Mr. Comstock, by likening the papers he took into his possession in virtue of his office, to property taken by the sheriff in virtue of an execution. The execution is a special authority and command to the sheriff to seize and sell the property of the defendant therein named; the commission of the state reporter is not less a general authority and implied command to receive and apply to their proper use, the requisite materials for reports in all cases as they shall arise. The mandate of the writ to the sheriff is, that of the goods of the defendant, he cause to be made a specified sum of money. The mandate of the law to the state reporter is, that from the manuscripts delivered to him by the judges and clerk of the court of appeals, and from the memoranda he is required to take, he shall cause to be made a series of printed volumes of reports I repeat, therefore, that the analogy asserted by the plaintiffs' counsel is very strong, while the opposite analogy insisted upon by Mr. Comstock wholly fails.

But suppose it should be admitted that the court ought not, for the reasons already mentioned, to repudiate the asserted title of the late reporter to the volume in question, it would still be my duty to inquire whether the defendants can lawfully set up this title against the plaintiffs. It rests entirely upon the assumption that in compiling it, the late reporter acted merely as a private citizen in the exercise of a right common to all. But our laws do not permit a man to assume a particular character for the purpose of obtaining, or whereby he is enabled to obtain, peculiar advantages, and after availing himself of it, to deny that it belonged to him, and by this means avoid the responsibilities pertaining to it, to the prejudice of others. This principle is fully established by the authorities cited by the counsel for the plaintiffs; and another illustration of it occurs to me at this

moment, drawn from the maritime law of this country. For supplies or repairs to a domestic vessel in her home port, no lien is in general implied in favor of the material-man; yet, nevertheless, when, as is sometimes done for the purposes of illicit trade, the domestic vessel is made to assume a foreign guise so as to conceal her true character, the lien is held to attach. In my judgment there are circumstances in the present case which imperatively require the application of this principle. The late reporter was bound to act with sincerity and good faith towards all who were to be influenced or affected by his acts. His official term expired and his successor was appointed during the January term, 1851; and yet he continued to receive the opinions of the judges not only through that term, but, as he admits, after its close. Is it to be imagined that the judges would have delivered them to him if they had been informed of his design, in violation of law, to pervert them to his own private emolument? There can, I think, be but one answer to this question. The like frankness was due also to his successor, whose appointment presented the question for the first time, whether the duty of completing the reports of cases already adjudged, devolved upon the outgoing, or upon the in-coming reporter; and although my opinion is that it most properly belongs to the former; yet, to say the least, this question required consideration; and although Mr. Selden would be excusable for having acquiesced in the voluntary assumption of this duty by his predecessor, if he believed, as he is to be presumed to have done, that the latter was acting in good faith; yet it is also to be presumed that if he had been apprised of Mr. Comstock's design, he would have considered it to be his duty diligently to inquire whether, if he omitted to demand from his predecessor the official papers in his hands, for the purpose of enabling him to perform the required duty himself, the fault would not lie at his own door. The court has not been furnished with any explanations on the subject from the present reporter, and in the actual posture of the case, the only ad-

missible presumption is that he was led, or was at least permitted by his predecessor to believe, that *he* designed to fulfill instead of evading the requirements of the law. In that case he might very naturally have deemed it unnecessary to inquire on which of the two the duty in question, in legal strictness, devolved. If it rested upon his predecessor, as Mr. Comstock seemed to suppose, Mr. Selden was exempt from every responsibility in regard to it, and even if the law cast it upon him he might have deemed it sufficient for him to know that it was to be executed by a competent person, who, for that purpose, would be considered as having acted under his authority, express or implied. The late reporter ought also to have disclosed his design to the secretary of state, who is charged by law with the duty of securing a copyright to each successive volume of these reports, to the end that he might have it in his power to oppose, and if possible defeat, a device resorted to for the express purpose of depriving the state of its rights. The late reporter can not, therefore, now be lawfully permitted to disclaim the public character he assumed; the only one, indeed, in which he had a right to act in the premises at all. Having availed himself of the privileges of his office in the manner he has done, he is estopped from denying its responsibilities.

It becomes necessary, then, next to determine whether the relief sought by the plaintiffs ought to be withheld from them on account of their alleged acquiescence in the acts of which they complain. This ground of defence rests exclusively on the affidavits of Mr. Comstock and the defendant Mr. Hall; narrating conversations between them severally, and Mr. Weare C. Little while acting as the agent of the plaintiffs. The contents of these affidavits have already been stated. Mr. Comstock says, that he informed Mr. Little, soon after he went out of office, of his intention to publish the next volume for his own profit, and that he "came to an understanding" with Mr. Little, "at his request," &c.; that in September he wrote a letter

inviting proposals for his book, to which he received no answer; and that Mr. Little at no time asserted any adverse right on the part of the plaintiffs. Now, it is argued that this language and conduct on the part of the plaintiffs' agent, were deceptive, and inconsistent with the pretensions which they now set up. I confess that on the reading of the affidavits at the argument, this objection appeared to me to be not altogether destitute of force; but I became satisfied upon consideration, that I had at first greatly overrated its importance. It was pertinently remarked by the counsel for the plaintiffs, that there had been no opportunity to cross-examine Mr. Comstock, and it may be added also, that his affidavit does not purport to detail all the conversation that passed on the occasion referred to. Indeed, from the affidavit of Mr. Hall, it is evident that only a small part of it is given by Mr. Comstock. Under what views of the plaintiffs' rights and interests, and under the influence of what particular motives it was that Mr. Little spoke and acted we are not informed, and can, therefore, only conjecture. But as Mr. Comstock was a lawyer who had just retired from a highly important and responsible office demanding integrity, intelligence and legal learning, his unqualified annunciation of his purpose may well be supposed to have staggered the confidence of a bookseller, whose familiarity with law books was not likely to extend far beyond their title pages, in the sufficiency of the plaintiffs' contract with the state to enable them to withstand such an antagonist; and if so, then what is now charged upon him as a deception, becomes but a commendable act of prudential forecast. But suppose he did know or believe, what Mr. Comstock still so strenuously denies, was he bound, at the hazard of forfeiting the rights of his principals by his silence, to object to the step which Mr. Comstock had so unequivocally declared it to be his intention to take? Mr. Comstock was perfectly aware of the plaintiffs' contract, and was himself one of the official

parties to it. What reason had Mr. Little to suppose that any thing he could say would be likely to divert Mr. Comstock from his purpose, or that his silence would strengthen his resolution to persevere? There are other prudential motives also, by which Mr. Little may, and might lawfully have been influenced, but which it is wholly unnecessary to specify, because there is another answer to this objection which appears to me to be conclusive. Mr. Comstock has a deep concern in this controversy, and has seen fit to make a voluminous affidavit, into which he had a right to put any thing he saw fit, which was pertinent and true: but he has not stated that he was in the slightest degree influenced by any thing that passed between him and the agent of the plaintiffs; nor are there any circumstances from which this can be inferred, but quite the reverse. This is equally true also of the statement contained in Mr. Hall's affidavit, of the admission made to him by Mr. Little on the 26th or 27th of January last, of the plaintiffs' knowledge, "several weeks before," that he was engaged in the publication of the volume in question. Mr. Hall does not pretend that if they had then given him notice of their intention to insist on their rights, he should have been benefitted thereby. On the contrary, it will readily appear by a comparison of dates, that the whole cost of the enterprise had in all probability been incurred at the time referred to. Mr. Little swears, moreover, that Mr. Hall was informed of the contract between the state and the plaintiffs, prior to his purchase of the pretended copyright. It appears also, from Mr. Hall's affidavit, that the contract was freely spoken of by Mr. Comstock in the conversation which ultimately led to the purchase. It is true he asserted that the work he proposed to sell was not subject to the contract, assigning for this representation the same insufficient reason that is now so strenuously insisted on, to maintain the like assertion. But Mr. Hall could not have been unmindful that Mr. Comstock was a deeply

interested party, and the very earnestness with which he seems, from Mr. Hall's statement, to have dwelt upon this point, was calculated to excite distrust. Having chosen to rely upon such assurances, Mr. Hall must abide the consequences. But to this ground of complaint there is also another conclusive answer. There is no pretence for saying that in making this admission, Mr. Little was acting as the agent of the plaintiffs, and it can not affect them.

It follows, therefore, that the reports embraced in the volume published by the defendants under the name of Comstock's Reports, vol. iv, are to be considered as falling to all intents and purposes under the operation of the legislative acts prescribing the duties of the state reporter, and of the contract between the state and the plaintiffs: and it only remains to determine whether this court has authority to afford the relief claimed by the bill of complaint.

This is not like the former case in this court already mentioned, an application for an injunction to restrain the defendants from infringing the alledged exclusive right of the plaintiffs to multiply and sell copies of a work already printed, and to which they have secured a copy-right. It is true they alledge in their bill that they have commenced the printing of the work in question; but it is not yet printed; and though, as they state, one step has been taken towards securing a copy-right, viz: the deposit of the title in the clerk's office, (which might have been deferred, as this step usually is, until after the printing was completed,) the proceedings for this purpose are as yet necessarily inchoate. This, therefore, is to be entertained, if at all, as an application for an injunction to restrain the further printing and publication of a manuscript which the plaintiffs claim to have the sole right, as proprietors by assignment from the state, to print. My opinion is that they have shown as good a title to this manuscript, as in the former case to the third volume of the *series* of reports, to which those comprised in this manuscript belong. The manuscript was written by an

agent or servant of the state, hired and paid for that purpose, for the benefit of the state, in pursuance of laws expressly denying to him all pecuniary interest in the fruits of his labor, and enjoining it on another officer to secure a copy-right thereto as the property of the state in trust for the people thereof. In pursuance of express legal enactments the beneficial pecuniary interest in the manuscript has been assigned for a valuable consideration to the plaintiffs, whether absolutely or for a limited period it is not material now to inquire. The late reporter held it in a fiduciary character, and the particular right of the plaintiffs attached to it the moment it was completed. The use the late reporter made of it was unlawful, and the plaintiffs ought not to be prejudiced thereby. The private and exclusive right of the author or proprietor of a manuscript to print and publish it exists independently of any statute, and, like a copy-right, entitles its possessor to an injunction to restrain its infringement. Congress has seen fit expressly to recognize this right, and to provide this form of remedy in the national courts, for its violation, as well as for that of a copy-right to a book already printed. (Act of February 3, 1831, ch. 16, sec. 9, 4 stat. at large, 438.)

An injunction is accordingly granted to restrain the defendants from the further printing, publication and sale of so much of the work described in the bill, as, according to the former decision of the court, is the proper subject of copy-right.

A. CONKLING.

February 23rd, 1852.

I certify that the foregoing is a true copy of an opinion filed with me the 27th day of February, 1852.

SAMUEL BLATCHFORD,

Reporter of the Circuit Court of the United States within the Second Circuit.