IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1901.

No. 789.

NATIONAL TELEGRAPH NEWS COMPANY, F. E. CRAWFORD AND A. K. BROWN,
Appellants,

vs.

WESTERN UNION TELEGRAPH COMPANY,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

BRIEF FOR APPELLANTS.

MR. RUSSELL M. WING,
MR. THOMAS L. CHADBOURNE, JR.,
MR. CHARLES S. HOLT,
Counsel for Appellants.

BARNARD & MILLER, PRINT, CHICAGO.

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1901.

NATIONAL TELEGRAPH NEWS COMPANY, F. E. CRAWFORD and A. K. BROWN, *Appellants*, *vs.* WESTERN UNION TELEGRAPH COMPANY, *Appellee.*	No. 789.

Appeal from the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

BRIEF FOR APPELLANTS.

STATEMENT.

This case is here for relief from a temporary restraining order enjoining the appellants (defendants below) "from copying from tickers of complainants for the purpose of *publishing*, selling or transmitting through their tickers" * * * any news, and "from *publishing*, selling or using the matter so copied until the lapse of full *sixty minutes* from the time such news items are first printed" by complainant's tickers.

The application for this order in the Circuit Court below was heard upon the original and amended bills of complaint and affidavits of the appellee here, and affidavits filed by the appellants.

Appellee, *in addition to its telegraph business*, since 1881 has leased and operated the electrical publishing plant and apparatus of a corporation known as the Gold & Stock Telegraph Co. This apparatus includes certain appliances known as "tickers," which, through electrical impulse, print in type upon a strip of paper words and figures sent from a distance.

The appellee has contracts with various news centers, such as baseball associations, race tracks, athletic clubs, financial exchanges, etc., whereby it is given the *exclusive control* of the news, quotations, reports and other information arising at such centers, and by means of its instruments installed in such places and its lines of wires therefrom it conveys to one or more of its central offices reports of the events, quotations or happenings from moment to moment of occurrence, from which central offices such reports are instantly again transmitted to the tickers aforesaid and appear there in readable form.

These tickers are leased by appellee to its various patrons—among others to brokerage houses, hotels, pool rooms and saloons, where they occupy a place most accessible to the public, and are used for the avowed purpose of attracting general attention and patronage, and also to publishers, such as K. Flanders & Co., who print certain items of news thus obtained upon placards which they distribute to their patrons a *few moments after such items appear upon the ticker;* the Chicago News Bureau, which prints upon slips financial news thus obtained and distributes it to its patrons every few moments during the day; the Associated Press, which distributes it to its various newspaper subscribers over the country.

These tickers are leased *absolutely without restriction, oral or written, upon the use which may be made of the news appearing upon them* (Rec., 82, 84, 85), and in some cases (Rec., 100) *are set up in public places without any request being made or compensation paid for them.*

The appellants are also the owners of an electrical publishing plant and apparatus, including, among other things, electrical printing "tickers," and in like manner lease these "tickers" to individuals desiring to secure news in this way. The individual appellants and their predecessors in the business, who were made defendants in the original bill and afterwards dismissed, have been engaged in the business of publishing general, sporting and financial news by means of such tickers since 1894. The record may well be said to show them as pioneers in the ticker publishing business in Chicago, since they and their predecessors had in 1894 one hundred tickers leased in this city against fifteen by the Western Union or Gold & Stock Telegraph Co.

At this period of the business (1894) the news gathered by the defendants in New York was being transmitted to them by the *Postal Telegraph Co.*, but that company failed to render prompt service because, as was afterward ascertained, and stands upon this record undisputed, it was being paid $40,000 per annum to *keep out of the news business and discourage others* from entering it. (Rec., 62.)

It is undisputed that from the commencement of the business up to the time of the filing of the bill, appellants have repeatedly *offered to purchase from the respondents the news gathered by them and published on the Gold & Stock tickers, but have never been able to obtain it at any price.* Also that appellants have repeatedly and unavailingly offered to lease tickers from appellee for the purpose of thus securing these news items. (Rec., 64, 48).

It is admitted that to a limited extent appellants have been in the habit of taking from appellee's tickers news items which appellants were thus shut out from procuring in any other way and that they have reproduced them upon their own tickers not in direct competition with the appellee's, but with a class of customers to whom absolutely instantaneous transmission was less essential. The volume of news thus procured is but a small proportion of the total business of either appellants or appellee, and the papers show that appellee has indulged in the same practice with respect to original news produced on the tickers of appellants.

Errors relied on.

The assignment of errors presents the single contention that the Circuit Court erred in granting the preliminary injunction.

This news appropriation has continued with appellee's full knowledge and has been *acquiesced* in by them, as is best evidenced by their continued failure during this entire period (in which defendant's plant has grown from a trifling investment to its present replacement value of $200,000) in any way to forbid it, or request its cessation.

BRIEF.

I.

The evidence shows abandonment by appellee of its property right in the news, of the appropriation of which by appellant, appellee makes complaint.

U. S. Rev. Stat., Sec. 4,956, Chap. 3, Patents and Copyrights.

Callaghan v. *Myers,* 128 U. S., 617.

Ladd v. *Oxnard,* 75 Fed., 729.

Jeweler's Mercantile Agency v. *Jeweler's Weekly Publishing Co.,* 155 N. Y., 241.

Larrowe-Loisette v. *O'Loughlin,* 88 Fed., 896.

D'Ole v. *Kansas City Star Co.,* 94 Fed., 840.

Board of Trade v. *Hadden-Krull Co.,* 109 Fed., 705.

Keene v. *Clark,* 5 Robertson, 38.

Keene v. *Kimble,* 16 Gray, 545.

13 Am. and Eng. Ency. of Law, 918.

Rees v. *Peltzer,* 75 Ill., 476.

Mikado case, 25 Fed., 183.

Vol. 2 Kent's Commentaries, 366.

Drone on Copyright, 122.

Board of Trade v. *Thompson Commission Co.,* 103 Fed., 903.

Wheaton v. *Peters,* 8 Peters, 658.

II

Appellee is a common carrier and has no right in any branch of its business, capacity to perform which grows out of its public privileges, to discriminate in its service to the public.

Louisville Transfer Co. v. *Am. Dist. Tel. Co.*, 24 Albany Law Journal, 283.

People ex rel. Postal Tel. Cable Co. v. *Hudson River Tel. Co.*, 19 Abbott's New Cases.

C. & P. Tel. Co. v. *B. & O. Tel. Co.*, 66 Md., 399.

State ex rel. Am. Union Tel. Co. v. *Bell Tel. Co. of Missouri*, 22 Albany Law Journal, 363.

Samuels v. *Louisville & N. R. Co.*, 31 Fed., 57.

McCoy v. *C. I. St. L. & C. R. Co.*, 13 Fed., 3.

III.

Appellee has entered a business which, by its nature, is impressed with public rights, and cannot discriminate in its service to the public so long as it continues in this business.

Stock Exchange v. *Board of Trade*, 127 Ill., 153.

Freedman v. *Gold & Stock Telegraph Co.*, 32 Hun., 4.

Inter Ocean Publishing Co. v. *Associated Press*, 184 Ill., 438.

Minnesota Tribune Co. v. *Associated Press*, 83 Fed., 350.

IV.

Appellee's long continued knowledge of and acquiescence in the course pursued by defendants should have debarred it from the right to relief until final and full hearing.

Van Veghten v. *Howland,* 12 Abbott's Pr., N. S., 461.

Citizen's Coach Co. v. *Camden Horse Ry. Co.,* 29 N. J. Eq., 303.

7 Am. and Eng. Ency. of Law (2nd Ed.), 587.

Scribner v. *Stoddard,* 21 Fed. Cases, 12,561.

Wood v. *Sutcliffe,* 2 Simon's Chancery Rep., 168.

Saunders & Benning v. *Smith & Maxwell,* 3 Mylne & Craig's Reports, 712. (The High Court of Chancery.)

Platt v. *Button,* 19 Ves., 448.

ARGUMENT.

I.

(The italics in citations hereunder are ours.)

We shall first present and argue the proposition that appellee has abandoned its property right in the news it complains of our taking at the time we take it, *i. e.*, has dedicated the news to the public by an unlimited publication.

If this position is well taken it is obvious that the motives of appellants and the use they make of the information obtained are wholly immaterial. Much was said in the court below about "unfair competition in business." But it is fundamental that there is no unfairness or even moral impropriety in using for any purpose whatever matter that has been dedicated to the public by unlimited publication. Appellee in this case invokes a common law copyright which is in its essence nothing more than the right to forbid the competitive use of the matter which is the subject of the claim. There is no middle ground between matter which is protected and matter which is not protected by this right. If protected all the world is forbidden to use it. If not protected, all the world is at liberty to use it. It is hard to imagine a use that would not be competitive in the sense that a customer purchasing from the second user might have purchased from the first if the second had not been engaged in the business. The doctrines restricting unfair competition, so as to forbid misleading similarity of labels or misrepresentations as to the origin and quality, have no application here, where the sole question is whether the subject matter of the controversy has been so used as to destroy the right of exclusion.

The word "publication" in the United States copyright act, and its construction by the courts, must be conclusive in arriving at a determination of the question whether the publication in the case at bar was a restricted or unlimited publication.

That act, section 4,956, chapter 3, Patents and Copyrights, reads as follows:

> "No person shall be entitled to a copyright unless he shall, *before publication,* deliver at the office of the librarian of congress," etc.

It is too clear for argument that such a publication as debars a publisher from the protection of an act made to perpetuate his common law right, deprives him of that common law right.

Then if the publication of the news and information upon its tickers here shown is such as would, if it preceded the application for copyright, deprive appellee of the protection of the act in the event the matter it publishes were copyrightable, it has made such a publication as to deprive it of its common law right to such news and information so published.

And this is true *under the facts in this case,* regardless of the alleged contracts, oral or written, with its subscribers, restricting the use of the matter published.

An act which insures access of the public or an indefinite portion of the public to a publication without further action on the part of the author makes it an unrestricted publication, regardless of special limitations made or attempted to be made by such author.

The substantial facts in the case of *Callaghan* v. *Myers*, 128 U. S., 617-667, in so far as they are applicable to the case at bar are as follows: Myers brought suit against Callaghan to restrain an alleged infringement of certain volumes of Supreme Court reports in the State of Illinois. The compiler of the reports had filed, according to the Illinois statutes, with the secretary of state, copies of the reports on the 2d of October, 1865, and the work was not deposited under the copyright act until the 17th of January, 1866. The court said:

> "The defendants offered in evidence certificates made by the auditor of public accounts and by the secretary of state of the State of Illinois, showing that, on the 2d of October, 1865, Mr. Freeman delivered to the secretary of state, for the use of the state, 553 copies of volume 32, required by law to be furnished by the reporter, and on the 23d of October, 1866, 553 copies of volume 34. The introduction of this evidence was objected to by the plaintiff on the ground that the papers constituted no evidence of the publication of either of the volumes, and were incompetent. The objection was sustained by the court, and the defendants excepted to the ruling. The exclusion of these papers is assigned as error. The papers also show the payment by the state, for each set of the copies, at the rate of $6 per volume. As the delivery of the copies of volume 32 to the secretary of state, for the use of the state, took place on the 2d of October, 1865, and the work was not deposited in the clerk's office until the 17th of January, 1866, it is contended that such delivery of the copies to the state was a publication of the volume, and that the deposit of it did not take place until three months and fifteen days after publication. We think this assignment of error must prevail; that the evidence offered was competent; that the delivery of the

copies for the use of the state was a publication of the volume; that the deposit of the work was not made in time; and that the copyright of volume 32 therefore fails."

Here there was no publication except this delivery of certain copies required by the statutes of Illinois to be supplied to the state, it could not be further restricted by the compiler without the breach of a statutory duty, and yet the court held that it was such a publication as deprived the compiler of the protection of the copyright act.

In *Ladd* v. *Oxnard,* 75 Fed., 729, which was a suit in equity brought by Ladd against Oxnard for alleged infringement of a copyright, Putnam, circuit judge, delivered the following statement and opinion:

> "The complainants have published annually for several years a book of credit ratings of the marble, granite and stone dealers of the United States and Canada. The volume on which this bill was brought is that of 1894, which case shows was delivered to *179 subscribers,* the complainants receiving therefor $5,430. The *stipulations between the complainants and subscribers* on which the books were issued were that the *book delivered to each subscriber was a loan,* and was not sold; and that, *if any copy was found in any other hands than those entitled to use it by permission of the complainants, the publisher might take possession of it,* and thus all rights to its use by the subscriber would be annulled. The bill complains of infringment and the present issue comes on an application for an interlocutory injunction. * * *
>
> "It should be said in this connection that, while the nature of the use of the complainant's book *was sought to be limited* in the manner which we have explained, there was *no limit placed* by the complainants *on the extent or number of persons*

to whom the book might be distributed under the conditions which they had provided. Though adapted specially for persons engaged in the trades of which we have spoken, yet even these are indefinite in number, and there is no evidence that the circulation was intended to be limited to them. In any view, it might be difficult to sustain this proposition because, as the statute now stands, an author is compelled to complete his title to his copyright before publication, so there is at least one point of time, although it may be a very minute one, when the author, who has entitled himself to a copyright, is also entitled to look to the statutes of the United States for protection, notwithstanding he has not published. Indeed, it may well be questioned whether the mere fact that one has not published, and the consequential fact that he has a remedy at common law deprive him of a concurrent remedy under the statute in the event that he has complied with all the requirements for obtaining a federal copyright. However, we do not rest the case on this point, *because we are satisfied that there has been a publication.*

The respondent cites on this point Scrut. Copyr., section 106, and relies on the well-known cases in each of which there was a private circulation of manuscripts, or of printed books, and yet it was held that the common law right of the several authors was preserved. Scrutton on Copyright is far from precise on this topic, and it cannot be ascertained from what the author says that he intended to lay down a rule which meets the present case. The instances where the private circulation of manuscripts and printed books has been held *not to amount to publication are so essentially different from the case in hand,* that we need not delay to point out the distinction. Neither party has referred us to any decision covering this proposition which we regard as of authority in this court. Coppinger on Copyright (3d Ed.) lays down rules at least partially, if not wholly, defining publication within the meaning of the copyright statutes, which we think are more accurate than the expressions cited by the respondent from Scrutton. On page 117, in distinguishing the effect of a private and gratuitous circulation among friends, he says: *'The distinction is in the limit of the circulation. If limited to friends and acquaintances, it would not be a publication; but if general, and not so limited, it would be.'* Again, on page 119, he says: *'To constitute publication, it is necessary that the work shall be exposed for sale or offered gratuitously to the general public, so that any person may have an opportunity of enjoying that for which the copyright is intended to be secured.'* It is to be noticed that in this last citation the learned author expressly refrains from *limiting the method of disposing of the publication to that of sale, and enumerates no elements necessary to constitute publication, beyond those which exist in the case at bar.* * * *

We know of no recognized practice under the copyright law which would enable the respondent to base upon it any general rule such as is claimed by him in this case. The determinations of various courts that, under some circumstances, *the delivery of lectures, or the representations of plays, to such of the public as may attend, do not constitute publication, must be regarded as rather of an incidental character, arising undoubtedly to some extent from tenderness for authors,* and not establishing any general rule. So far as concerns the interests of the public and the general policy of the copyright statutes, *this case stands in all respects practically the same as though the complainants' publication had been sold by unrestricted* title; and there is no substantial reason why, if the complainants had not obtained copyrights, they should now be protected against infringers."

The New York Court of Appeals in *Jewelers' Mercantile Agency* v. *Jewelers' Weekly Publishing Co.*, 155 N. Y., 241, (41 L. R. A., 847), discusses fully the matter of unlimited and restricted publication upon the following facts, as set forth in the opinion:

"The judgment appealed from enjoined the defendant from making any use of the plaintiff's reference books or confidential sheets, and from copying, appropriating, printing, publishing, or using in any way, information taken therefrom, or furnishing such information to others. The plaintiff, a domestic corporation, has, ever since its corporation in 1883, been engaged in the business of a mercantile agency, which consisted in obtaining information regarding the business, street addresses, kinds and extent of business, commercial standing and mercantile credit of individuals, firms and corporations engaged in the jewelry trade in the United States and Canada. This information is printed twice a year in the form of a reference book. A duplicate of smaller form is also printed. The plaintiff also issues weekly a confidential sheet of changes and corrections. These books and confidential sheets are furnished and lent to subscribers subscribing therefor, upon a contract which reads as follows:

The undersigned employes of the Jewelers' Mercantile Agency, limited, from ....., 189.., to ....., 189.., to aid in answering inquiries by verbal or written reports, reference books, and correction sheets, as to the responsibility, character and standing of persons and firms in the jewelry and kindred trades, within the United States and Canada; said inquiries not to exceed one hundred and to be made within the period of this contract. For such aid and service, including the loan of ...., 189.., and ...., 189.., volumes of reference book, the undersigned will pay to said company $75 at the commencement of this subscription, and for each inquiry exceeding the one hundred, 30 cents on demand. All information which may have been or may be obtained by agents of said company, who are appointed our sub-agent's and communicated to us shall be strictly confidential between the parties hereto, and the sub-agent's name or names are not to be disclosed by said company to the subscriber or other person, and the communicated information is not to be disclosed to the person or persons reported on. No information is guaranteed as to correctness, and the said company is not responsible for act or negligence of the sub-agent or agents. Title to the reference books to remain in said company, and books are to be returned upon expiration of subscription. On return of amount of unexpired term of subscription, said company reserves the right to terminate this contract, and the reference books are then to be returned to it.

Dated ...., 188...

Signature............

(The conditions of this subscription are absolute, and no verbal or other understanding will be considered or allowed by the company.)

The plaintiff's reference book in the larger form bears upon the cover thereof, distinctly printed, the statement: 'This is the property of the Jewelers' Mercantile Agency, Limited. Confidential Reference Book.' And within, conspicuously printed, appears the following: 'This book is the property of the Jewelers' Mercantile Agency, Limited, and is held by ——————————. under agreement of ————————, eighteen ————————, with them.' It does not appear that the reference book was confined exclusively to the jewelry trade, nor does it appear but that any one could obtain a copy of the same by subscribing for it according to the terms of such contract. The defendant is also a domestic corporation, organized in January, 1891. It took the business which had been carried on by the defendant Rothschild, and earlier by both Rothschild and Ulmann. The defendant took and appropriated from the plaintiff's reference book certain material information therein contained, and made use of it in a publication of its own, which came into competition with the plaintiff's publication. It also appeared that on the 28th day of June, 1890, the plaintiff, in pursuance of the copyright laws of the United States, deposited in the copyright office, with the librarian of Congress, the title of the plaintiff's book of July, 1890. And on the 28th day of June, 1890, the plaintiff, in further pursuance of said copyright law, deposited in the office of the librarian of Congress two copies of said reference book. And the said plaintiff printed on the page following the title page in the said book of July, 1890, the following notice: 'Entered according to act of Congress, in the year 1890, by the Jewelers' Mercantile Agency, Limited, in the office of the librarian of Congress at Washington.' The plaintiff, however, insists the copyright failed because of its omission to make publication of the reference book, and stands upon its common law right that there has never been such a publication as to entitle the general public to the use of the book. The acts which defendant urges amounted to a publication were the delivery of the book to such subscribers as cared for it, and were willing to become parties to the contract, *supra,* and the deposit of two of the books in the library of Congress." * * *

The court, in its opinion, then said:

"But publication also operates to destroy the common-law rights, whether a copyright be secured or not. An invention, a painting, or a book is the property of its creator. He may keep it for his own exclusive use or enjoyment if he sees fit. The public has no greater right to it, however useful it may be, than it would have to any other part of his personal property. But if he once publishes it, his property right in it is gone, and every one may make use of it.

A person who writes a book may keep the manuscript without printing it, and prevent any one from seeing it. He may take a still further step, and cause the book to be printed, and then determine that it shall not be seen by the public, and store all the printed copies away, and still he has not made a publication of it within the meaning of the law. It continues to be his property, as he has not yet offered it to the public. If, while the books are thus stored away, a copy should be obtained surreptitiously, and printed, or should the author loan one of the books to a friend to read and return, and in that manner a copy of the book should fall into the hands of some one who should attempt to print it, the author would be entitled to restrain publication, for the reason that he had not undertaken to put within the reach of the general public such thoughts or facts as he may have expressed or stated in the book. * * * *Out of a few cases of the same general character seems to have grown the idea that it is possible for a man, by putting restrictions on the use of his books by subscribers, however numerous they may be, to retain in himself forever the common law right of first publication. If that position be sustained by the judgment of the courts, then will have been obtained judicial legislation of far broader scope and much greater value to authors and others than that offered by the copyright statute.*"

After quoting from *Ladd* v. *Oxnard, supra,* the court again says:

"We find ourselves in agreement with the learned judge, not only in the conclusion reached, but also in the argument which led to it, and, before referring to authorities upon that subject it should be observed that it does not appear from this record *but that every person in the United States was at liberty to become a subscriber of the plaintiff,* and as such entitled to a reference book. Plaintiff's position, therefore, in effect is, that *a distinction should be drawn between selling or giving a book away and leasing it;* that to offer to sell a book to the public or give it to the public libraries, where all the public may have access to it, is to publish it; but to lease it to such of the public as care for it is not to publish it. The latter is certainly an effective method of putting the contents of the book in the possession of such portions of the public as desire it. By this method a party parts with the secret in such a way that the public may know it, provided the individuals composing such public are willing to become subscribers, and lease the book. And, if leasing books to the public generally does not constitute a publication of them, then an author or publisher would have but to extend the period of leasing from one year to ninety-nine or 999 years, as is the case in certain leasings of railroad, in order to secure almost as many lessees as there would be purchasers if the books were offered for sale. The buyer of the average book would be quite content with a restrictive title, which, nevertheless, assures him the possession of a book for either of the periods mentioned. It has not hitherto been understood to be the law that the common law right could be so utilized as to secure to an author or publisher a continuing revenue from the public for a much longer period of time than Congress has been willing to grant to him the exclusive right to publish.

We shall now briefly refer to what has been said on the subject which seems to have persuaded counsel that the judgment in this case can be supported. In the first place, it must be conceded it has not been said, except in Ladd's case, 75 Fed., 705, that leasing a book under an agreement not to show it to any one constitutes a publication of it; and this is so, probably, because it was not until a comparatively recent period that an attempt seems to have been made to obtain for a book subscribers who should agree that they would neither show nor loan it to others. So, when Coppinger and Scruton and Drone and Shortts, in their works on the subject of copyright, assert that, 'to constitute publication it is necessary that the work shall be exposed for sale or offered gratuitously to the general public, so that any person may have an opportunity of enjoying that for which the copyright is intended to be secured,' *they did not intend to imply that the leasing of a book for a year or a term of years to any and all* *persons who would accept it on such terms would not constitute a publication.* They did not have such a situation in mind. The consideration and discussion of the principles established by such cases as they succeeded in finding in England and this country, bearing upon the question of publication, did not suggest to them the possibility of such a claim being made. It will be observed that the general rule which we have quoted from Coppinger asserts, first, that to expose for sale is to constitute publication. It is not necessary that the book be actually sold; it is sufficient if it be offered to the public. The act of publication is the act of the author, and cannot be dependent upon the act of the purchaser. The actual sale of a copy is evidence that it has been offered to the public, but that fact may also be shown by other evidence. It then asserts that, if a book be offered gratuitously to the general public, it will constitute publication. *This may be done by presenting it to public libraries, and this is so because the author or publisher, by that act, puts it in such a place that all the public may see if they choose.* * * *

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

The learned counsel for the respondent, apparently not unmindful that to sustain his contention requires the court to take a very long step in advance of any hitherto taken upon this question, urges the very large pecuniary interest involved for the plaintiff, and insists that courts of equity should find a way to protect property rights such as plaintiff claims, even if there are no precedents for doing so; and refers to the remarks of the court in *Piper* v. *Hoard*, 107 N. Y., 73, in which the court said: 'If the most that can be said is that the case is novel, and is not brought plainly within the limits of some adjudged case, we think such fact not enough to call for a reversal of this judgment.' *If the plaintiff's interests are of so important a character, and the public interest would be best subserved were the law such as plaintiff insists it to be, then is presented a proper subject for legislative action.* But our examination leads to the conclusion that the present state of the law is that, if a book be put within the reach of the general public, so that all may have access to it, no matter what limitations may be put upon the use of it by the individual subscriber or lessee, it is published, and what is known as the common law copyright, or right of first publication, is gone. So far as is disclosed by this record, the plaintiff was in that situation at the time of the commencement of this action."

We have cited at greater length than is perhaps necessary from this case because the contract to restrict publication is very analogous to the contract *formerly* used by appellee in leasing its "tickers."

In *Larrowe-Loisette* v. *O'Loughlin et al.*, 88 Fed., 896, the facts, so far as they relate to the case at bar, were as follows: Loisette was the author of a system for training the memory, which taught by lectures, correspondence and pamphlets. The persons securing such pamphlets were obliged to enter into a contract promising not to communicate to any person any idea or part of his system of memory, without his previous consent therefor in writing. His executrix copyrighted a work entitled "Assimilative Memory; or How to Attend and Never Forget." She brought a bill to restrain the defendants from selling a work entitled "Memory: A Scientific, Practical Method of Cultivating the Faculties of Attention, Recollection and Retention. By A. Loisette." The court said:

> "From the agreed statement of facts it appears, therefore, that Loisette advertised widely and furnished a copy of his book to any one who paid him \$25. Those who chose to form classes of ten could obtain a book for \$10. The books were sold absolutely, no restriction being placed upon the title or upon their use, other than the contract not to communicate to any person any idea or part of Loisette's system of memory. I think this distribution amounted to publication. To hold that a person may offer a book to every person in the world who will buy it and pay a certain price for it with an agreement not to show it to any other person, and that this course of distribution might be continued for many years, and then a copyright secured for the legal term, would be a large advance upon, and wide departure from, any decisions which have been cited in this case. In most, if not quite all, the cases in which a distribution has been held not to be a publication, the author did not part with the title to the books distributed."

The court then referred to the case of the Jewelers' Mercantile Agency, *supra,* as a correct and exhaustive decision.

But in the case at bar it is shown in appellee's affidavits (Rec., 47) that the restrictive contracts which subscribers were formerly required to sign have been wholly abandoned, and that the news is now published without any restriction whatever. This is shown in greater detail in appellant's affidavits. (Rec., 82, 84, 85, 100.) Appellee claims that its publishing apparatus is furnished subscribers with the tacit understanding that the news and information published thereon is to be restricted to the use of such subscribers, but the use to which the news is put and the purposes for which the subscribers purchase it are entirely inconsistent with any such tacit understanding. The papers of both appellant and appellee show that the purpose of these tickers is to attract the public to saloons, brokers' offices, etc.; that they are placed in the most conspicuous parts of their premises and are used freely by any one who comes; that newspaper reporters and others freely copy the information and use it as promptly as they see fit in their business, with which the ticker subscriber has no connection whatever. This is especially emphasized by the Grand Pacific Hotel ticker, which is shown to be in the rotunda of the hotel, having no relation to any special business of the hotel proprietor, placed there without his request and without compensation, and having its sole use in attracting the public. (Rec., 100.)

In *D'Ole* v. *Kansas City Star Co.*, 94 Fed. Rep., 840, which was an action for damages for the infringement of copyright by the publication in a newspaper article of matter taken from a pamphlet copyrighted by plaintiff, the purpose of the pamphlet was to advertise plaintiff's business as a photographer, and a large number of copies of the pamphlets were distributed free, but none were sold or offered for sale. Judge PHILIPS, among other things, said:

> "In the view, however, taken by the court of another branch of this case it is not necessary that the court should further discuss the question of damages. It is conceded that if the fact should be found, on the weight of evidence, that prior to securing the copyright the plaintiff published his pamphlet, he is not entitled to the protection of the statute giving him the exclusive right to publish its contents, and this action would fail. The certificate of the librarian

of Congress shows, as already stated, that the copyright was granted on the 15th day of March, 1897. Beyond cavil, the evidence shows that an edition of this book was printed in Kansas City, paid for by and delivered to the plaintiff, about the middle of December, 1896. This edition amounted to 5,000 copies. Although not authorized by law to do so, this edition, on the reverse side of the title page, contained the following: 'Copyrighted 1896 by W. T. D'Ole, Kansas City, Mo.' The evidence further shows that the plaintiff then stated that he wished to get out these pamphlets for distribution for the holidays—evidently referring to the approaching Christmas, 1896—and that he then knew the print showed that the book purported to have been copyrighted in 1896; and he stated that this made no difference, as nobody would know or pay any attention to it. The inference is therefore persuasive that he obtained these pamphlets for circulation before or during said holidays; and it is an afterthought when he states that he would not distribute the books prior to obtaining the copyright, as he stated that the absence of such certificate of copyright made no difference with him. This evidence is supplemented by the further testimony of a credible witness, sustained by the circumstances of a contemporaneous event well calculated to fix the date in his mind, *that he saw copies of this book at a hotel in this city on or before the 20th day of February, 1897.* This is followed up by the testimony of one of the ladies whose picture appears in this pamphlet, that her father, on or about the 1st day of March, 1897, brought her one or more copies of this pamphlet. *In its ordinary acceptation the word 'publication' means 'the act of publishing a thing or making it public; offering to public notice; or rendering it accessible to public scrutiny.'* In copyright law, it is 'the act of making public a book; that is, offering or communicating it to the public by sale or distribution of copies.' Without undertaking to state the qualifications of this definition, as applied to certain incidents, by which the book might be exhibited by the author, prior to copyrighting it, without amounting to a publication within the spirit of the statute, *it is safe to say that the appearance of a pamphlet, after its delivery to plaintiff by the publisher, in a public hotel, subject to be seen and read by any person about so public a place, certainly was a 'rendering it accessible to public scrutiny', and was likewise a 'communicating it to the public by distribution of copies.'* When copies of it were furnished to the father of the said witness, and put in her hands for her scrutiny, or any person to whom she might show it, it was a sending out of the book."

Judge Seaman, in *Board of Trade of Chicago* v. *Hadden-Krull Co.*, 109 Fed., 705, had before him the fact that the market quotations were obtained from an illegitimate source, namely, from Moody & Co., by whom they were surreptitiously taken and purloined from the private office of a customer of the board, who purchased the quotations for individual use only. The court said:

"The existence of the property right is well established at common law (as stated in the opinion filed in this case on the motion for a preliminary injunction), and is upheld by the Supreme Court of Illinois in reference to these market quotations of the complainant (*New York & Chicago Grain & Stock Exch.* v. *Board of Trade of City of Chicago*, 127 Ill., 153, 19 N. E., 855), with the single qualification that a public interest attached when the quotations were given out, which entitled applicants to receive them 'without unjust discrimination,' and 'for lawful purposes, and upon the same terms' which were given to others. *This common law right of property is preserved until voluntary publication; and, unless such publication intervened before use of the reports by the defendants, either through the transactions of the telegraph companies or of their subscribers.* I am of the opinion that the arrangement with the telegraph companies does not deprive the complainant of his interest to the extent of maintaining this bill.

The difficulty I have found is to ascertain the time when the fact of publication occurs,—whether any of the acts shown amount to a publication before the markets are given out to the press. If the doctrine of *Telegraph Co.* v. *Gregory* (1896), 1 Q. B., 147, is adopted, the placing of the quotations upon the blackboard for the purposes and in the manner shown by the evidence would not constitute such publication as opens their use to the general public. *In recent cases, however, it appears to have been held, in reference to printed matter, that the fact that a limitation was placed upon the nature of the use of copies delivered, would not prevent the delivery from constituting a publication, if access by the public was open, and there was no restriction on the extent or number of persons having such access or use.* * * * (Citing cases *supra.*) These market quotations are peculiar in their property use and value, and, without immediate transmission to the customer, so that he receives them simultaneously with all other customers, and before their publication generally, they possess no purchase value. To make them available, it is essential to have the quotations written or printed in some form for the information of all entitled to their use; and it appears here that they were in some instances so furnished in the 'ticker,' and in others were placed on a blackboard in the office of the customer. *No reason appears for finding a publication in the one method of not in the other, and I am of opinion that neither constitutes a dedication to the public while limited to the use and office of the customer.* The testimony is undisputed that the quotations received by the defendants were wired to them by persons who obtained the reports by stealth and unfair means, without the consent or knowledge of the owner; and the reports so derived are not open to the defendants' use or benefit, unless they were equally open to the general public at the same moment. *No question is involved of discrimination in giving out the reports, or refusal to furnish to the defendants upon equal terms with other dealers, as it is not claimed that any* *request or offer was made to that end*; and, so far as the testimony shows, I find no act or conduct in respect of the quotations prior to such receipt by the defendants to confer upon the general public a right of use."

So far as can be ascertained from a careful reading of the opinion, the record made there differs in every essential feature from the one presented here. On the face of the opinion it would appear that the information complained of was being derived from one source, and that the purchase by those of whom it was purloined was restricted to their own use. No general publication, such as appears in the case at bar, is suggested in the opinion of the court, but, on the contrary, the reference to *Telegraph Company* v. *Gregory*, 1 Q. B., 147, leads to the conclusion that the facts here are more or less the same as they were in that case; and in that case it appeared that the quotations from the stock exchange, the taking of which by defendant was complained of, were exhibited in an office or in a private room to which the customers of complainant had access, and which was not open to the inspection of the public. We hardly think, with the facts of this case before him, the court would have said:

> "The difficulty I have found is to ascertain the time when the fact of publication occurs—whether any of the acts shown amount to a publication before the markets are given out to the press."

Nor could the court have said:

> "and, so far as the testimony shows, I find no act or conduct in respect of the quotations prior to such receipt by the defendants to confer upon the general public a right of use."

Where the audience is unlimited the publication is unrestricted and the publisher loses his common law right of property in the matter exhibited.

Keene v. *Clark*, 5 Robertson, 38.
Keene v. *Kimble*, 16 Gray, 545.
13 Am. & Eng. Ency. of Law, 918.
Rees v. *Peltzer*, 75 Ill., 476.
Mikado case, 25 Fed., 183.

In *Rees* v. *Peltzer, supra,* the syllabus, briefly voicing the court's opinion, is as follows:

"Thus, where a person compiled maps of the City of Chicago, of a particular design, from the public records into an atlas, and, without taking out any copyright under the act of Congress, made several copies of the original in a form suitable for comprising atlases, sold several, and placed one copy in the hands of the city for public use, where any part or the whole of it could be copied and used by any citizen placing no restrictions on their use. Held, that the author thereby made a voluntary publication of the same, dedicated them to the public use, and consequently lost his proprietorship in them, which he had at common law before publication, and they became public property, subject to the free use of the community."

In American & English Encyclopedia of Law, Vol. 13, page 918, it is said:

"It is well settled that when a work is printed and published, the author having obtained no copyright, the dedication to the public of the right to use and reproduce it is complete and the author retains no exclusive right of property therein."

Chancellor Kent, in his Commentaries, Volume 2, page 366, in this connection says:

"Another instance of property acquired by one's own act and power is that of literary property, consisting of maps, charts, writings and books; and of mechanical inventions, consisting of useful machines or discoveries, produced by the joint result of intellectual and manual labor. As long as these are kept *within the possession of the author*, he has the same right to exclusive enjoyment of them as of any other species of personal property; for they have proprietary marks, and are distinguishable property. *But when they are circulated abroad and published with the author's consent, they become common property.*"

The fact that appellee sells this news and information to other publishers (K. Flanders & Co., Chicago News Bureau and Associated Press) conclusively and finally shows that it is not retained under any tacit understanding or restricted by any qualified publication. No court has yet held that any publication approaching that here in point still leaves in the original owner a property right in the matter published.

In the court below much stress was laid upon the Kiernan case (50 How. Pr. Rep., 194), decided by the Supreme Court of New York, and the authorities we have cited have occasionally referred to this case without expressing an opinion thereon. Upon this case we cite at length the remarks of Drone, in his work on Copyright (122, 123 and 124):

> "A recent case in the Supreme Court of New York presents a question as difficult as it is novel. It appeared that the plaintiff, Kiernan, had bought from the Stock and Gold Telegraph Company the exclusive right to use their foreign financial news in a certain part of the City of New York, for the period of fifteen minutes after its receipt. This news was collected in Europe, and transmitted by cable to this country by the Associated Press, from whom the

Stock and Gold Company had acquired the exclusive right of use, in New York City, for the period of thirty minutes after its receipt. As soon as received, the news was telegraphed by Kiernan and the Gold and Stock Company to their respective customers, and in all parts of the city was exposed to public gaze by means of printed tapes connected with stock indicators. The Manhattan Quotation Telegraph Company, which was also engaged in the business of supplying foreign financial news to its customers, had copied telegrams from Kiernan's bulletins and tapes, as well as from those of the Gold and Stock Company. On the ground of an invasion of his common law property, Kiernan applied for an injunction to restrain the Manhattan Company from supplying to their customers the information thus obtained.

It is clear that, before it is forfeited by publication, there is a common law property in valuable facts and information which have been collected and utilized by skill, diligence, and expense. The pivotal question here was, whether there had been a publication in the statutory meaning of that word. It is well settled in this country, that a literary composition is published, within the meaning of the statute, when printed copies are publicly circulated; and that the owner's rights are thereby lost, unless protected by statute. On the other hand, it is equally clear that publicly to represent a drama, or to communicate any literary composition to the public by word of mouth, is not such a publication as will prejudice the owner's common law rights. But which of these rules govern when the communication to the public is by means of bulletins and printed tapes exposed in public places? If this is a publication analogous to the ordinary public circulation of printed copies, it is destructive of the owner's common law rights. If it is not, those rights are not thereby prejudiced. The court was of opinion that this case was governed by the same principle as that which applies in the case of dramatic performances and the delivery of lectures, and held that giving news to the public in the manner described is not such a publication as will destroy the owner's common law rights.

Whether this decision can be successfully defended on established legal principles, is a question attended with much doubt. The difficulty is in satisfactorily determining a question of fact. *If such news had been published in a newspaper, or if it had been given to subscribers on printed sheets, there is little doubt that this would have amounted to a publication within the meaning of the statute. And yet it may be pertinently asked, wherein is the principle different, whether the information be communicated to the public in this way or by means of telegraphic copies printed on bulletins? In both cases the matter is printed, and copies are circulated. In neither is the communication private, or restricted as to persons. In both it may be and is read by the general public as soon as it is printed.* It is true that the news is intended primarily for the benefit of those who pay for its use; but, nevertheless, it is communicated to the general public. The matter in a newspaper or book is primarily for the benefit of buyers; but a general circulation of copies is none the less a publication. *It would seem, therefore, that a communication of the kind under consideration is more nearly analogous to an ordinary publication in print than it is to a publication by word of mouth.* But it is a doubtful and difficult question, whose solution will not be attempted here."

Note that Drone says that the court was of the opinion that this case was governed by the same principle which applied to dramatic performances and to the delivery of lectures, while Judge Parker, in the Jewelers' Weekly Publishing Co. case, *supra,* in referring, without comment, to this case, used the following language:

"In *Kiernan* v. *Manhattan Quotation Teleg. Co.*, 50 How. Pr., 194, it was held that the transmission of news over telegraphic instruments does not constitute a general publication, the argument being that the case was analogous in principle *to the writing and delivery of letters,* the writer having such interest therein as *will authorize* him, *in certain cases, to restrain their publication.* Is there any difference, said the court, because he (the plaintiff) writes to his customers by telegraph?"

It is extremely doubtful in our humble opinion whether this is good law upon the facts presented in that case, unless news printed by electricity is to be distinguished from news printed by hand, steam or any other process.

The means used to produce printed words is the only distinction between the publication there, which was held to be restricted, and from publications which this and other courts have universally decreed to be unrestricted. It is certainly an overweighted argument which contends for an application of the law governing dramatic performances and the delivery of lectures to news and information printed in plain common type upon a sheet of paper, the exact reproduction of which in a newspaper in equally plain common type ten minutes later is nothing other than printed matter and universally held subject to the laws applicable thereto. It would certainly be a flight of imagination few sane men are capable of, to seriously contend that the news and information so compiled and published by the appellee herein is analogous in principle to the writing and delivery of letters in which the writer retains such interest as will authorize him to restrain the publication. If communications transmitted by appellee over its various electrical publishing instruments are letters, they are letters sold to brokers, saloon-keepers, pool rooms, publishers and hotels, and even dedicated to the latter, and to the public who frequent them, without a request being made or consideration being paid for the right to peruse them.

In the Kiernan case the method of distribution and the degree of publicity given to the news in the offices of the subscribers are not clearly shown. It is made clear that the court rests its conclusion of a limited and qualified publication upon a "tacit understanding" that the news was to be used only for the subscriber's personal business. In the absence of such understanding, expressed or implied, the Kiernan decision could not have been made.

The tacit understanding, admitted to exist in the Kiernan case as to restricted publication is unqualifiedly denied here by the very people from whose instruments appellee has complained of our taking its news. If a boy should contract with a person having an office next door that for fifty cents a day he would carry to his patron information derived from this ticker as promptly as it appeared with reference to certain specified subjects, the position of the boy would be in principle not different from that of the appellants. In favor of both it would be perfectly clear that there has been an unlimited publication of the news so as to dedicate it to the public.

Judge Seaman, in the case of *Board of Trade of the City of Chicago* v. *Thompson Commission Co.*, which was decided October 1, 1900, and appears in Vol. 103 Fed., page 903, said:

> "The allegations of the bill both as to nature of the business carried on by the several defendants and as to their representations respecting the market reports received by them are expressly denied. The source from which their market reports are derived is not disclosed, except in the instance of the defend-

ants represented by Mr. Rogers, and in that instance the Central Stock & Grain Exchange is named as furnishing the reports, with an affidavit and allegations which tend to show an *unrestricted publication* of such market reports, aside from its effect by way of particular defense for that defendant. As such allegations are introduced as well on behalf of the other defendants for the purposes of this motion, both the issue of fact and its effect upon the property right asserted by the complainant must be left for determination when the proofs are submitted. * * * As the right of property asserted on behalf of the complainant subsists only until publication—*and from the nature of the transactions* this period is necessarily one of minutes rather than of hours,—I am of opinion that an issue is raised in that regard which can be determined only when the proofs are taken and cannot be prejudged on this motion for preliminary injunction."

This was a case brought by the Chicago Board of Trade to restrain defendant from using its quotations, and the court refused to issue the preliminary injunction.

In the great case of *Wheaton* v. *Peters,* 8 Peters, 658, the court said:

> "In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine? In the production of this, his mind has been as intensely engaged as long, and, perhaps, as usefully to the public, as any distinguished author in the composition of his book.
>
> The result of their labors may be equally beneficial to society, and in their respective spheres they may be alike distinguished for mental vigor. Does the common law give a perpetual right to the author and withhold it from the inventor? And yet it has never been pretended that the latter could hold, by the common law, any property in his invention, after he shall have sold it publicly.
>
> It would seem, therefore, that the existence of a

principle may well be doubted, which operates so unequally. This is not a characteristic of the common law. It is said to be founded on principles of justice, and that all its rules must conform to sound reason.

Does not the man who imitates the machine profit as much by the labor of another as he who imitates or republishes a book? Can there be a difference between the types and press with which one is formed, and the instruments used in the construction of the others?

That every man is entitled to the fruits of his own labor must be admitted; but he can enjoy them only except by statutory provision under the rules of property, which regulate society, and which define the rights of things in general."

If this reasoning is good the conclusion is inevitable that appellee is divested of its property right to the news it complains of our appropriating as much as the inventor of the ticker would be divested of his property right in the device after scattering it broadcast through the land.

II.

Appellee is a common carrier and has no right in any branch of its business, capacity to perform which grows out of its public privileges, to discriminate in its service to the public.

It is undisputed that the appellants have repeatedly demanded that appellee furnish them with this news, the appropriation of which is complained of, and have offered to pay for it, but have been denied it at any price, either direct to their machines as it is furnished to the Gold

& Stock Company's machines, which would enable them to print it on equal terms in point of time with the Gold & Stock tickers, or by lease of a ticker which would put them on equal terms in point of time of receiving it with such publishers as K. Flanders & Co., Chicago News Bureau and Associated Press, who differ from us only in the manner of publication and by a few moments only in time of publication.

It would certainly be a very mechanical view of the question which held that because no other ticker company bought the news from the complainant and sold it to subscribers, therefore no discrimination was used against the appellant. It is not a question of the means of transmission, but of the time when such transmission is allowed, and the class of custom that is served, and on these points the record shows without dispute that the class of custom is much the same, and the time of transmission not substantially different—certainly not enough to affect the principle involved. The News Bureau and Flanders and the Associated Press get their news for transmission at a time when it has money value to them and they can afford to pay for it; it is the appellants alone who are told that they may have it the next hour or not at all. How can the news properly be given out to these publishers for republication by them within five or ten minutes while it is denied to us for one hour?

Appellee is a corporation created for the purpose of erecting, maintaining and operating telegraph lines, has the privilege of eminent domain, and as such is a common carrier stamped with a duty to the public which obligates it to give equal service to all without discrimination in point of time of transmission of messages or charges for transmission of messages. The common law and the statutes of the state of its creation impose this duty, and as its compensation for this obligation to the public it is given the right of eminent domain which enables it to take the public's property, willingly or unwillingly, for the erection of its poles and the laying of its lines.

Can it in any business it undertakes, capacity to perform which in part or in whole grows out of this privilege, discriminate in its service to the public? We think not. Why does not the same duty exist when the same reason for it exists? Appellee reaches the centers from which it receives this news or information by reason of its right of eminent domain by the use of our streets and buildings for the accommodation of its poles and lines of wire. There it gathers the news, transmits it to and over its leased publishing devices, sells it to other publishers differing from appellants as we have stated in method of publication and by a few minutes only in time of publication, but refuses to sell it to us because our method of publication is its own. This business of gathering and selling news was not contemplated at the time appellee received its charter, it being a business which has grown up by public demand for speedy news and electrical invention to supply the same since complainant's creation. It may be urged—was urged in the court below—that if defendants wanted to distribute this news they should collect it at the sources of information and have it transmitted at regular message rates to the points of distribution, but upon the present record this is not pertinent to the inquiry, as it is shown without dispute that appellee sells the same news to other publishers and distributes by its ticker printing method, discriminating only in this respect against appellants. But as a matter of fact appellee's record here shows conclusively that such a process, if attempted by us, would be ineffective since this news or information is transmitted from instant to instant as the events occur by appellees' telegraphers watching and thus recording the events. Of what avail against such rapidity would be the writing and filing of dispatches by appellants at the centers of such news and information, and the delivery of such dispatches to them by the appellee at the centers of distribution? It it not in the record, but it is a matter of common knowledge which we do not think is outside of the province of the court to note, that an hour is an exceedingly short space of time in which to expect delivery of a regularly transmitted telegraphic communication between any two points by any telegraph company, while appellee shows in the case at bar that a record of such events under their system appears upon their tickers within a very few seconds after it takes place.

Ought the appellant's rights to be subjected to the risk of unfair and partial treatment by the appellee with whose business they would come in direct competition? Would it not be too severe a strain upon corporate morals to expect fair handling of this business over appellee's lines? That this query is not merely imaginary appears clearly in the record from the fact that when attempts were formerly made to send information and news in this way over the Postal Telegraph Company's lines intolerable delays in transmission occurred, which made the news valueless, and which were finally accounted for by the fact, later learned, that the Postal Telegraph Company was receiving a large annual subsidy from the appellee for "discouraging" this instantaneous ticker publishing business.

If the fact that appellee has undertaken a news gathering and selling business, which it has the power to transact because the public has given it the privilege of extending its wires and poles all over this country, and of condemning property for this purpose, releases it from its obligation in this branch of its business to treat all alike, let us pursue the argument to its logical conclusion. Suppose there are two morning and two mid-day papers in the City of Chicago, instead of the Gold & Stock and appellant's tickers, and K. Flanders & Co. and the News Bureau. The Western Union Telegraph Company leases one of these morning papers instead of leasing the Gold & Stock Company's tickers, and all the news that it gathers from all parts of the country by reason of the privilege conferred upon it by the public appears in appellee's leased morning sheet and is by it sold to the mid-day papers, but it refuses to sell it to its rival, the morning paper. How long would it be permitted to continue such an abuse of the vast property the public has assisted it to acquire? Excluding consideration of statutory copyright, which is not involved here, the case is exactly parallel to the one at bar, except that this case goes even further, for, going back to our illustration, appellee says, not only do we refuse to give the other morning paper this news in order that they may compete with us, but neither can they publish it later by buying from one of our subscribers, one of our newspapers, and by taking therefrom for republication the portion of our matter which it is impossible for them to get otherwise. And they go still further by contracting with the Postal

Telegraph Company to keep it from supplying the rival morning paper with similar news.

In *Louisville Transfer Co.* v. *Am. Dist. Telephone Co.*, 24 Albany Law Journal, page 283, a case decided in the Louisville Chancery Court (also appearing in Ky. 1 Journal, 144), it was held:

> "The employment of a telephone company is public, and such a company is bound to serve the public without discrimination. The plaintiffs were proprietors of public omnibuses and carriages, and defendants were a telephone company and also proprietors of public carriages. The defendants were restrained from removing their telephones from the plaintiff's offices, and from refusing to transact the plaintiff's telephone business, pursuant to a contract between the parties. The court, EDWARDS, chancellor, said: 'The real contention between the plaintiff and defendant is confined to their carriage and coupe services, defendant insisting that as against plaintiff, a rival in that business, it has a right to monopoly in the use of its own telephonic methods of communicating and receiving orders for coupes; that a mere rival in one branch of its business cannot force it to afford it the facilities which it has provided for another branch of its business. Upon the facts appearing upon the petition and affidavits of plaintiff, it is the opinion of the court that defendant is engaged in two distinct employments—one in operating a telephonic exchange, and the other in operating a carriage or coupe service. Plaintiff and defendant are not rivals in the former business, and as to that part of defendant's business it occupies the same position toward plaintiff as it does toward the rest of the public; that defendant is a *quasi* public servant, and as such is bound to serve the general public, including plaintiff, on reasonable terms, with impartiality; that defendant is governed by the principles of the law of common carriers. See *Bennett* v. *Dutton*, 10 N. H., 581; *New England Express Co.* v. *Maine Central R. R. Co.*, 57 Me., 188; S. C., 2

Am. Rep., 31; *Sanford* v. *Railroad Company*, 24 Penn. St., 381; and *McDuffie* v. *Railroad*, 52 N. H., 417; S. C., 13; Am. Rep., 72; *Munn* v. *Illinois*, 4 Otto, 113. The principles announced in an opinion by Judge Thayer in *American Union Telegraph Co.* v. *Bell Telephone Co.*, should determine this controversy. The mere fact that the defendant may possess dual powers, and is operating or carrying on two distinct kinds of business, cannot exempt it from the general rules governing such corporations, with reference to the general public; and to determine the rights of plaintiff defendant must be considered as a telephone company and as a transfer company. See *Claxton's Admr.* v. *Lexington and Big Sandy R. R. Co.*, 13 Bush., 638. The law must adapt itself to the new subjects that are brought within the range of judicial action. The courts must reason by analogy from things that are settled, in order to establish principles to govern things that are unsettled. 4 Am. Law Reg. (N. S.), 193. The rule that defendant is bound to serve all the public alike under like circumstances, is the one applied by the court in this case and plaintiff is a part of the public, and defendant, as to its telephonic business, is a distinct person from itself as a transfer company, so far as the rights of others are to be determined. The rights of plaintiff do not depend upon contract, but the general principles before stated. Defendant had a right to terminate its contract with plaintiff, but as it holds out as the servant of the public, it must act with perfect impartiality towards its customers."

In *People ex rel. Postal Telegraph Cable Company* v. *Hudson River Tel. Co.*, 19 Abbott's New Cases (N. Y. Supreme Court, May, 1887), 466, it was held that a general messenger business, although carried on by a telephone company at its regular offices, being a distinct business and not essential to its system of transmitting messages by telephone, for which purpose it was incorporated, is not entitled to protection from rivals desiring to use its telephones for their own messenger business.

In *Chesapeake and Potomac Telephone Company of Baltimore City* v. *Baltimore and Ohio Telegraph Company of Baltimore City*, 66 Md., 399, Judge Alvey held that a telephone company, being a common carrier, could not give to the Western Union Telegraph Company the use of its telephone and refuse to give to another telegraph company the same privilege, and that a contract between the defendant telephone company and the Bell Company, by the terms of which the defendant telephone company was restrained from giving telegraph lines other than the Western Union the privilege of telephone use for the transmission of general business messages, market quotations or news for sale or publication in competition with the business of the Western Union Telegraph Company, or of the Gold & Stock Telegraph Company, was void and against public policy.

Albany Law Journal, Vol. 22, page 363, cites a decision made by Judge Thayer (now U. S. Circuit Court judge) in the case of the *State ex rel. American Union Telegraph Co.* v. *Bell Telephone Company of Missouri*, in which Judge Thayer held that the telephone company, a common carrier, serving the public by instruments in private residences and offices, cannot discriminate in the furnishing of its service, and must serve all alike, and that the terms of the contract by which it was forbidden to permit any telegraph company to become one of its subscribers was invalid, even though this contract was made between the defendant and its licensor.

In 31 Fed., 57, *Samuels and another* v. *Louisville & N. R. Co.* (Circuit Court Northern District of Alabama), Judge Bruce laid down the rule that where there are two rival lines of steamboats plying between the same points, and carrying freight for hire to a point where they forward it by railroad, the railroad company could not discriminate against one by charging it more for the same freight than the other.

In *McCoy* v. *C. I. St. L. & C. R. Co.*, 13 Fed., 3, the court held that a railroad company cannot bind itself to deliver to a particular stock-yard all live stock coming over its line to a certain point, but is bound to transport over its road and deliver to all stock-yards at such point reached by its tracks or connections all live stock consigned, or which the shippers desire to consign, to them, upon the same terms and in the same manner as under like conditions it transports and delivers to their competitors; and in the performance of this duty may be compelled by injunction at the suit of the proprietor of the stock-yards discriminated against.

Also 3 Central Reporter, 907 (Pennsylvania Supreme Court).

In reviewing the foregoing decisions it is only necessary for their direct application to keep in mind two facts:

a. That the record shows the absolute inadequacy for this purpose of the transmission of messages in the usual manner, *i. e.*, by filing with the operator at the place of sending and receiving by delivery at the place of publication.

b. That the record shows that appellee supplies other publishers and distributors differing from us in manner of publication and by a few moments only in time of publication with this news and information by a means and at a time refused to us.

III.

Appellee has entered upon a business which, by its nature, is impressed with public rights, and cannot discriminate in its service to the public so long as it continues in this business.

That the news at issue here has become impressed with a public interest sufficient to make it something more than private property is sufficiently evidenced in the cases of *Stock Exchange* v. *Board of Trade,* 127 Ill., 153; *Freedman* v. *Gold & Stock Telegraph Company,* 32 Hun., 4; *Inter Ocean Publishing Co.* v. *Associated Press,* 184 Ill., 438; and *Minnesota Tribune Co.* v. *Associated Press,* 83 Fed., 350.

IV.

Appellee's long continued knowledge of and acquiescence in the course pursued by defendants should have debarred it from the right to relief until final and full hearing.

We argued in the court below that appellee was not entitled to a preliminary restraining order because the record did not show that it would suffer immediate, certain and great injury if it were denied, but on the contrary showed, and from the nature of the case could only show, that the injury was prospective, future and uncertain in its nature. This contention receives powerful support from the fact that appellee during the past six years, with full knowledge of the course of which it now complains, by its ilence and failure to protest at least, acquiesced in and permitted it. If the injury were so immediate, certain and great as to warrant the granting of this restraining order, at what period in the history of these six years did it become so? No effort was made to show that it became so at the time of filing the bill, or that any change from the course acquiesced in by appellee for six years had occurred.

Where a complainant shows a *prima facie* case such a restraining order should not always issue, and where the preliminary injunction restrains the defendant from doing the very acts to restrain which the final judgment is sought, as is the fact in the case at bar, a preliminary injunction should not issue, as in such a case the complainant has succeeded without a trial.

Van Veghten v. *Howland*, 12 Abbott's Pr., N. S., 461.

Citizens Coach Co. v. *Camden Horse Ry. Co.*, 29 N. J. Eq., 303.

7 Am. & Eng. Ency., 2nd Ed., 587.

Scribner v. *Stoddard*, 21 Fed. Cases, 12,561.

Wood v. *Sutcliffe*, 2 Simons' Chancery Reports, 168.

Saunders & Benning v. *Smith & Maxwell*, 3 Mylne & Craig's Reports, 712. (The High Court of Chancery.)

In *Citizens Coach Co.* v. *Camden Horse Ry. Co.*, *supra*, in the Court of Errors and Appeals in New Jersey, which was a case based upon a bill brought by the Camden Horse Ry. Co. in an attempt to restrain the Citizens Coach Co. from driving through and along their tracks, and interfering with their use of the same, the Chief Justice said, among other things, in reviewing and reversing a preliminary restraining order make by the court below:

> "It is entirely settled that a preliminary injunction will never be ordered unless from the pressure of an urgent necessity. The damage threatened to be done and which it is legitimate to prevent during the pendency of the suit must be in an equitable point of view of an irreparable character. Such is the clear language and mandate of the cases from the earliest to the latest."

Also:

> "No rule of equity is better settled than the doctrine that a complainant is not in a position to ask for a preliminary injunction when the right on which he founds his claim is, as a matter of law, unsettled. In the case of *Stevens* v. *Patterson & Newark R. R. Co.,* 5 C. E. Gr., 126, this principle is expressed in these words, namely: 'An injunction will not issue where the right of the complainant which it is designed to protect depends upon a disputed question of law about which there may be a doubt, which has not been settled by the courts of law in this state.'"

In *Platt* v. *Button,* 19 Ves., 448, the court held that when a plaintiff has permitted repeated infringements of his copyright for a great length of time, equity will not interfere (by injunction, at any rate, whether it may be proper to direct account to be kept or not) before the right is determined at law.

In *Scribner* v. *Stoddard, supra,* a bill was brought to restrain a domestic reprint of the Encyclopedia Britannica from using copyright matter. Judge BUTLER said, among other things:

> "There is certainly, however, room for considerable doubt about the right to use it to prevent the reprint and publication of the Encyclopedia in which he has allowed it to appear. I entertain such a

doubt. It doesn't make any odds whether the doubt which the court entertains upon an application such as this arises upon consideration of the facts presented independently of the right upon which the claim is based, or whether it arises as a matter of law respecting the right. The doubt in my mind as respects both of these cases is such that without more I should feel it to be my duty to deny this motion, and decline the issuing of an injunction until the questions thus involved are fully, carefully and deliberately considered and settled. Were I to issue the process in advance of this I would incur the danger of doing serious injustice to the defendant."

Respectfully submitted.

RUSSELL M. WING,

THOMAS L. CHADBOURNE, JR.,

CHARLES S. HOLT,

Counsel for Appellants.