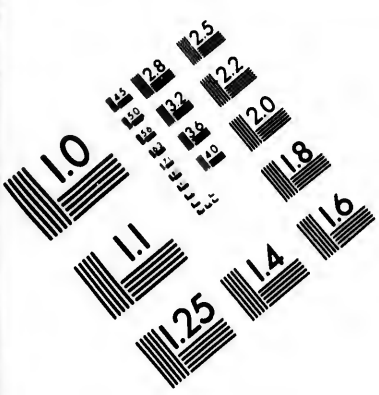

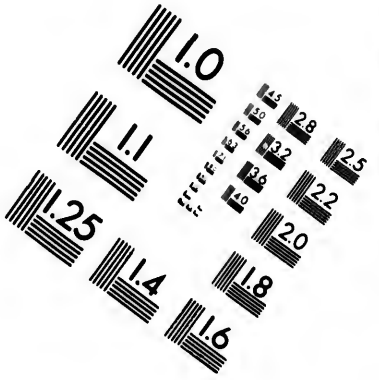

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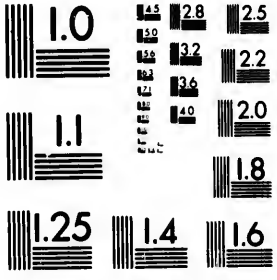

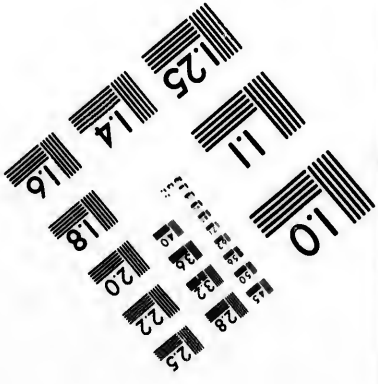

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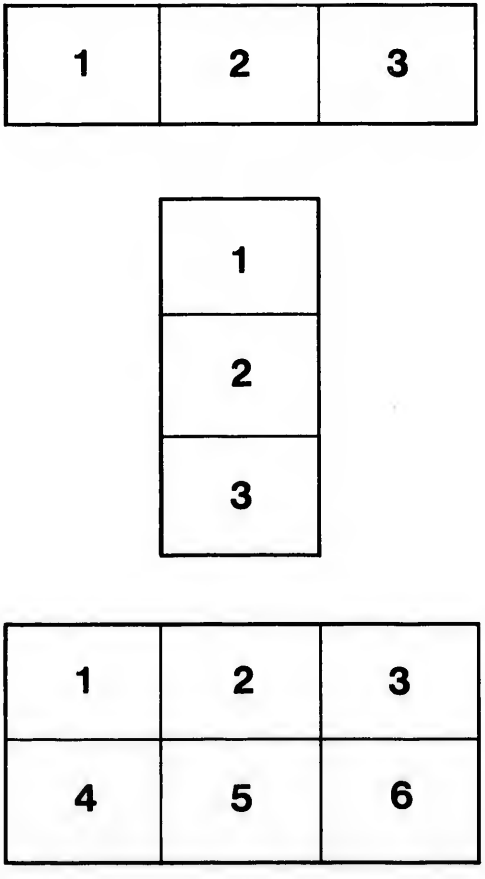

ANGLO-CANADIAN COPYRIGHT.

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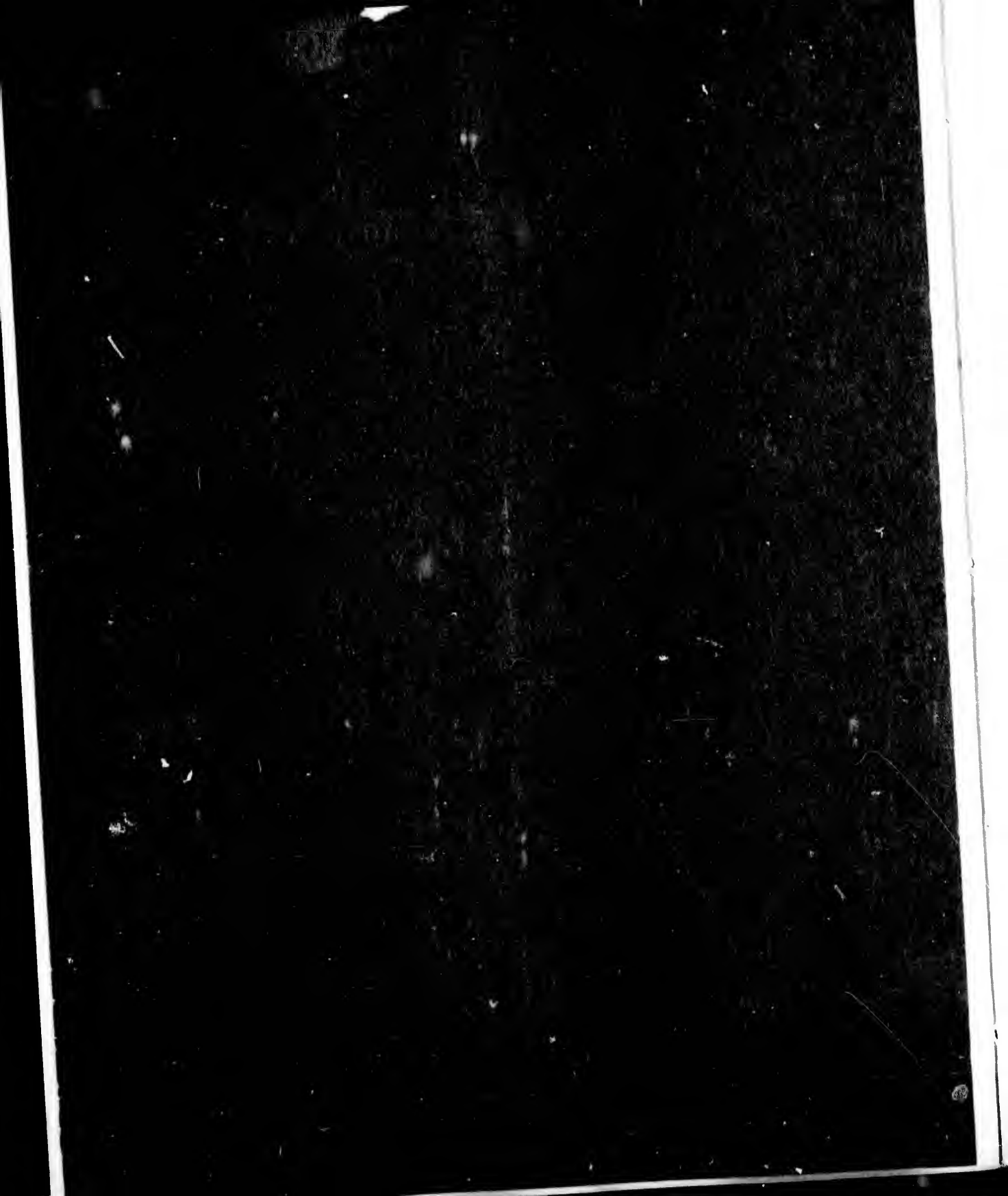

ANGLO-CANADIAN COPYRIGHT.

With special reference to the Canadian Act of 1889.

BY

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OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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1889

(13)

ANGLO-CANADIAN COPYRIGHT.

A SHORT paragraph, which appeared in the August number of THE MUSICAL TIMES, directed attention to an agitation now being carried on in Canada with reference to the Law of Copyright, at present affecting the interests of authors and publishers as between the mother country and the colony. Seeing that this agitation has proceeded so far as to assume the form of an Act, which, having passed the two Houses of the Canadian Legislature, is now awaiting the Royal assent, it is time that the matter formed the subject of grave consideration in this country, where acts of confiscation, affecting any section of the community, are not, as a rule, accepted without a murmur. In the article referred to a point was taken that, before any expression of English opinion upon the merits of the Act in question is called for, there exists a preliminary objection, which Canada should at once be required to dispose of. It was pointed out that, under the laws which now regulate Anglo-Canadian copyright interests, large sums of money are due from, and unpaid by, the Canadian authorities to British copyright owners; and that, until that account is discharged in the usual way, it is premature to discuss a proposals for a change in the law.

A preliminary objection, however, is, as often as not, indicative of a weak case behind it, the object being to put off and embarrass

the more open discussion of the case upon its merits. A careful consideration of the history of the Copyright Law between England and Canada will at once demonstrate that the mother country has no reason to take advantage of any such subterfuge; on the contrary, it will appear that such an investigation will be all in favour of the mother country, and that it will cut the ground from under the feet of the colony in its unwarrantable attempt to place an Act of obvious confiscation upon the Canadian Statute Book. The preliminary objection may be, therefore, waived for the present, although later on it will form a substantial argument; and it will be profitable to at once consider the case historically and critically.

At the outset it may be laid down, without fear of contradiction even in Canada, that the English Copyright Act of 1842, which is still the fountain-head of the English law on the subject, applied to Canada, and to all other English possessions, in precisely the same way as it applied to the United Kingdom. Not only was this expressly laid down by the 29th Section of the Act, but it was held by the House of Lords in the important case of "Routledge *v.* Low" —(1) That an author residing in Canada can, under the Act of 1842, acquire copyright in England; and (2) that British copyright, when once it exists, extends to every part of the British dominions. It is not necessary to go into the detail of the provisions of the Act of 1842; because if it can be shown that Canadian authors and publishers are as well protected under that Act, and subsequent Acts, as British authors and publishers are, the Canadian case for agitation and confiscation is clearly disposed of. To demonstrate that this is so, however, two provisions of the Act of 1842 must be borne in mind—one a condition necessary to be observed before English copyright can exist even in England; the other a provision which prohibits the importation into the United Kingdom or any British colony for

sale or hire, by any person, other than the owner of the copyright work, of any foreign reprint of such work. The condition referred to makes it necessary that the work be *first published in the United Kingdom*. If it is so published, it is protected throughout the British dominions; but if the work is first published in Canada, or any other British Colony, no copyright—*i.e.*, no English copyright—can, under the Act of 1842, be acquired in that work. Of course, the local laws of the colony could protect it in that colony; but outside that colony it was, under the 1842 Act, without protection. Canada, however, by a series of Acts, commencing with an Act of 1841, and continued as recently as 1875, has passed laws which regulate Canadian copyright as regards works published in Canada.

Here, then, was an anomaly. Works first published in the United Kingdom were protected everywhere within British Dominions; but works first published in a colony were only protected in the colony where they were first published; assuming, of course, that the colony had passed a law for the purpose. This anomaly no longer exists; and at the present moment the only distinction which remains between the laws which protect British publications and those protecting colonial publications, is in favour of the colonies.

Already it has been observed that the other provision of the Act of 1842, necessary to be borne in mind, is the prohibition which prevents anyone, other than the owner of the copyright work, from importing into the British Dominions, *for sale or hire*, foreign reprints of British copyright works. Three years later another Act *absolutely* prohibited a similar importation of reprints produced in any other country. Both these Acts, however, failed to check the steady flow of foreign reprints of British copyright works into the colonies, and enormous quantities of these pirated reprints found their way into Canada from the United States. The British protests against this state of affairs may be

without difficulty imagined, and it was to protect the British owner of the copyright, as much as to enable Canada and the other colonies to enjoy the benefit of a literature, which being stolen, as it were, was necessarily sold to them at a cheap rate, that an Act of 1847 was passed in England.

This Act of 1847 enabled Her Majesty, by an Order in Council, to suspend the prohibitions against importation into British colonies of foreign reprints, contained in the Acts of 1842 and 1845, provided the colony chose to accept its benefits by passing a local law which, in the opinion of Her Majesty, made due provision for protecting the rights of British authors there. Canada, in due course, accepted the benefits offered by the Act, and in the year 1850 passed an Act authorising the Governor in Council to impose a duty, not exceeding twenty per cent., on foreign reprints of British copyright works for the benefit of the author of the work; and on December 12, 1850, an Order in Council was issued, under the English Act of 1847, suspending, as regards Canada, the prohibitions contained in the Acts of 1842 and 1845. The duty was fixed at twelve and a half per cent. *ad valorem*.

Here it is necessary to remark that, in consequence of the Confederation of Canada in 1867, and of the passing of an Act by the Canadian Legislature in the following year (31 Vict., c. 7), for the purpose of imposing fresh customs duties for the Dominion generally, it became doubtful whether, owing to the words used in the Customs Act, the Act of 1850 had not been repealed. Accordingly, the Canadian Legislature passed an Act in the year 1868 (31 Vict., c. 56) for the purpose of removing that doubt, and for re-enacting the Act of 1850, so as to make it apply to the Dominion generally. In consequence of the passing of this last Act Her Majesty's Order in Council of December 12, 1850, which had been issued to give effect

to the Canadian Act of 1850, became of doubtful value; and it was necessary to issue a fresh Order in Council to give effect to the Canadian Act of 1868. This was done by the issue of an Order in Council dated July 7, 1868. So that, it will be noted, the Act and Order in Council of 1868 made no change in the law; they merely provided for the continuity of the law by exactly filling the places up to that date occupied by the Act and Order in Council of 1850.

Both Orders in Council, however, proved to be mere waste paper, so far as they concerned the author's interests. The duty—the altar upon which those interests were sacrificed—was, to all intents and purposes, never collected; and the obstruction which was opposed to the author's endeavours to collect it was so carefully organised that British copyright owners soon became conscious of the fact that the duty was a mere pretext; and they have long ago ceased to concern themselves about it, or to rely upon the provisions of the Canadian Act, which, had it been designed for the purpose, could hardly have deprived them more effectually of the compensation which was, in theory, reserved to them. Had this duty really been collected large sums of money, which at present only swell the "bad debts" account in the reckoning, would have been paid by Canadian dealers to British authors and composers.

The Act of 1847 is probably the only statute on the English Statute Book which permits the receiver of stolen goods to reap the benefit of his transactions with the purloiner. It was only because the Act in question made due provision for compensating the owner of the goods that it was possible for it to become a law in England. What then can be said of the receiver, who, permitted to carry on his trade under certain conditions, completes his transactions with the purloiner, but ignores his obligations to the owner, and the conditions subject to which alone his transactions were to be

tolerated? Can it be argued that such a receiver is to be allowed to go one step farther and to snatch the goods from the owner himself? Yet this is what the Canadian Act, now awaiting the Royal assent, is framed to facilitate.

Recapitulating, for a moment, it will be seen that upon the issue by Her Majesty of the Orders in Council of December 12, 1850, and July 7, 1868, the position briefly was as follows:—1. Under the Act of 1842, works first published in the United Kingdom enjoyed copyright throughout the British Dominions; 2. Canada, by publishing in England, could reap all the benefits of that Act precisely as though Canada were an English county; 3. Under Canadian statutes Canadian authors and publishers could enjoy absolute protection in Canada for works copyrighted there; and 4. Under the Orders in Council of December 12, 1850, and July 7, 1868, Canadian dealers could import foreign pirated reprints of English copyright works. On the other hand, the British author had no rights in Canada other than those derived under the Act of 1842; and under no circumstances were British dealers permitted to import into this country the pirated editions referred to, notwithstanding that these editions were being constantly poured into Canada, and, as events proved, with an utter disregard of the duty to which they were subject. The consequence was that, by the importation of these pirated reprints into the Dominion, British owners lost the sale of their works in the Canadian market; while, by the failure of the Canadian Legislature to provide for the collection of the duty, reserved as compensation, they lost that also.

For some six or seven years the situation remained unaltered: British authors were clearly duped; and, as the collection of the duty was practically impossible, their only chance of redress was to be, if possible, admitted to the benefits of the Canadian Copyright

Law, under which, by republishing their works in Canada, they would be in a position to restrain the importation of the pirated reprints of their works into the Dominion. In the year 1875 this very desirable change was effected by the passing of an Act in the Canadian Legislature which, in due course, received the Royal assent.

It is important here to observe that Acts of the Dominion Legislature are usually ratified by the mere assent of Her Majesty. As, however, the Order in Council of 1868 was still in force when the Act of 1875 was passed, a doubt was raised whether the Royal assent could operate so as to modify that Order in Council, in a manner necessary to give validity to the provisions of the Act of 1875. Accordingly a special Act of Parliament was passed to remove all doubt and to enable the Royal assent to be given: and the Canadian Act was duly ratified.

This measure of justice, of 1875, for which full credit must be given to Canada, enabled British and colonial copyright owners to protect their property under the Canadian Law, and to obtain a Canadian copyright, on condition that the work was printed and published, or reprinted and republished, in Canada, with the necessary formalities. And it was provided that nothing in that Act was to prohibit the importation from the United Kingdom of copies of the work lawfully printed there.

Upon this change in the law taking effect the prospects of the British owner very much improved, Canada had enabled him to minimise the evil consequences of the Orders in Council of 1850 and 1868, and all that he had to do was to print and publish, or reprint and republish, in Canada. So far everything looked promising. Yet, before the Act of 1875 had been in force for twelve months, a very gross attempt was made by the Canadian publishing world to

twist and distort its provisions in a manner which, had the attempt proved successful, must have made the Act a far greater stumbling-block for the British copyright owner than the Orders in Council of 1850 and 1868 have proved to be.

It was contended in Canada that this Act of their Legislature had practically repealed, as far as Canada was concerned, the English Act of 1842! It was maintained that the English Act of 1842 and the Canadian Act of 1875 were to be read together, and that the provisions of both Acts were to be duly observed; and that the Act of 1875, being the later, must be taken to have repealed the Act of 1842 to the extent to which its provisions did not harmonize with the Canadian Act. Canadian publishers accordingly asserted that, as their Act required printing and publication in Canada, no works not so printed and published could enjoy copyright in Canada, notwithstanding that, prior to the date of that Act, they had enjoyed it under the Act of 1842. They further supported these monstrous arguments by maintaining that the English Act of Confederation of 1867, commonly known as the British North America Act, which united into one Dominion the various Federated Provinces of Canada, had, by conferring on the Dominion Parliament "exclusive legislative authority" in various matters, including copyright, given Canada the power to legislate on the subject, *not only against the various provincial legislatures, but also against the United Kingdom itself;* and that, even if the Canadian Act of 1875 could not have the force of repealing an English statute, at all events the English Parliament had, by a special Act (referred to above) ratified the Act of 1875, and had, consequently, repealed its own Act of 1842.

On the strength of arguments such as these they not only sought to fritter away the provisions of the Act of 1875, but they went so far as to publish an English copyright work, which had not been

printed and published in Canada. To resist this outrage the famous action of "Smiles *v.* Belford" was instituted in the Canadian Courts. The action was by an English copyright owner to restrain the publication in Canada by the defendant of the plaintiff's work "Thrift," a work in which he claimed copyright in Canada under the Act of 1842, notwithstanding that he had not availed himself of the provisions of the Canadian Act of 1875.

One by one the Canadian arguments were disposed of, and the Canadian Vice-Chancellor by his judgment decided that it is not necessary for the author of a book, which is copyright in England, to copyright it in Canada with a view of restraining a reprint of it there; but that if he desires to prevent the importation into Canada of pirated copies from a foreign country, he must copyright his book in Canada. He further held that the British North America Act did not give the Dominion Parliament any right to legislate on copyright questions as against the United Kingdom, but only as against the various provincial legislatures; that the special English Act confirming the Canadian Act of 1875 could not be held to have repealed any portion of the English Act of 1842; that there was nothing inconsistent between the Acts of 1842 and 1875; that there was nothing to compel a British copyright owner to avail himself of the provisions of the Canadian Act of 1875 if he preferred to protect his copyright under the Act of 1842; and that all he could gain by the Canadian copyright was the right to prevent importation into Canada of foreign reprints of his work; which the combined effect of the Act of 1847 and the Order in Council of July, 1868, would interfere with his doing if he preferred to ignore the Canadian Act of 1875.

The case was carried to the Canadian Court of Appeal, where the Canadian Chancellor and three Judges of Appeal affirmed unanimously, and on all points, the decision of the Court below.

The attempt, therefore, of the Canadian publishers again to filch the property of British owners was, in this instance, completely frustrated by *the decisions of their own Courts of Law;* and to the present day the law remains as it was laid down in 1876 in the case of "Smiles *v.* Belford."

Only one other statute need be referred to before the Act which has provoked this discussion will be considered. The reader will have been struck by one hardship which has throughout affected the interest of the Canadian publisher. It has been observed that he could obtain no copyright in England unless he published in England, and that if he published in Canada his work could only claim the protection afforded by Canadian Acts, which, of course, could not control the mother country, nor diminish the effect of the Act of 1842, which made publication here a *sine quâ non*.

The establishment of an International Copyright amongst the various countries who agreed to be bound by the provisions of the Berne Convention of 1886 afforded the opportunity of removing this one cause of complaint which, at that date, Canada could advance. The English Act of Parliament passed in 1886, to confirm what was undertaken in the name of Great Britain and her colonies at the Berne Convention, enacted that the English Copyright Acts were to apply to a literary or artistic work first produced in a British possession in like manner as they applied to a work first produced in the United Kingdom; and that nothing in the English Copyright Acts was to prevent the passing in a British possession of any Act or ordinance respecting the copyright, *within the limits of such possession*, of works first produced there.

By this last change in the law was swept away the only anomaly which worked to the prejudice of the Canadian; and at the present moment, on all questions of copyright, whether English, Canadian, or

International, the Canadian is, in all respects, in as good a position as the Englishman. To all intents and purposes Canada has become a portion of England, and the only distinction that exists between the two countries is that Canada may, under certain conditions (which are ignored) import foreign reprints of British copyright works, which under no conditions can be admitted into the United Kingdom.

Under these circumstances the proposed new Canadian Act (1889) has, very naturally, created no small stir among British authors and publishers. This Act proposes to grant a Canadian copyright to Canadians, British subjects, and to those foreign countries which are entitled to the benefits of the Berne Convention, only on condition that the work is registered in Canada before, or simultaneously with, its publication elsewhere; and that it is reprinted and republished in Canada within one month of the date of its production elsewhere. Section 3 enacts (i.) that "if the person entitled to copyright under the said Act" (*i.e.*, the Act of 1875) "as hereby amended fails to take advantage of its provisions, any person or persons domiciled in Canada may obtain from the Minister of Agriculture a license or licenses to print and publish or to produce the work for which copyright, but for such neglect or failure, might have been obtained; but no such license shall convey exclusive rights to print and publish or produce any work"; and (ii.) that "a license shall be granted to any applicant agreeing to pay the author or his legal representatives a royalty of ten per cent. on the retail price of each copy or reproduction issued of the work which is the subject of the license and giving security for such payment to the satisfaction of the Minister."

By Section 4 provision is made for the collection of the royalties by the Canadian Inland Revenue; but the Canadian Government is

"not to be liable to account for any such royalty *not actually collected*." Section 5 provides for prohibiting or allowing the importation of copies of works, as to which licenses have been granted, according as the licensees do or do not provide adequately for the public demand. And Section 6 provides that the Act is not to be taken as prohibiting importation from the United Kingdom of copyright works lawfully published there; nor is it to apply to any work for which copyright has been obtained in the United Kingdom or other countries affected by the Act, before the Act comes into force. Such are the main provisions of the Act which now awaits the Royal assent.

That it must be resisted to the utmost, in the interests of British authors and publishers and the nation generally, is made obvious by a mere glance at its provisions; and it is of vital importance that steps be at once taken with that object.

It is impossible within the limits of these columns to exhaust all the arguments which may be advanced against the Act in question. The more serious objections to it will probably be discovered only when it is, if it ever will be, in actual operation. But it will be useful to point out even a few of the more fatal objections which suggest themselves, as attaching not only to the Act itself and its provisions, but to any Act which may be conceived in a similar spirit.

(1.) The Act goes beyond the powers of the Dominion Legislature. The Canadian Courts have decided that the British North America Act of 1867 did not empower the Dominion to legislate against the United Kingdom. So that, even if the Act were to obtain the Royal assent, it would still be powerless to repeal the provisions of the English Act of 1842, which are in direct opposition to the provisions of the Canadian Act. Consequently the Act is premature; the way is bl[illegible]ed by the Act of 1842; and, unless the

Dominion Parliament is to be allowed to repeal Acts on the English Statute Book, the Canadian Act is, *ipso facto*, impossible.

(2.) It is unjust, and contrary to the spirit of all modern legislation, national and international, on the subject; which is to extend, and not to restrict, the measure of protection afforded to those whose intellects are devoted to literature, science, and the arts, from the encouragement of which nations derive so great a benefit.

(3.) The Act is unnecessary. The history of Anglo-Canadian legislation on copyright questions shows that fresh legislation is absolutely uncalled for. At the present moment, and since 1886, Canada, upon all copyright questions (with the one exception already alluded to, which is in favour of Canada), is in exactly the same position as if the colony were geographically a portion of England. Every facility that is afforded to a British subject for the protection of his works is equally available for the benefit of the Canadian. In both cases works, whether first published in the United Kingdom, in Canada, or in any portion of the British dominions, are protected throughout the entire British dominions and in many foreign countries. The markets of the whole world are open to the Canadian no less than to the Englishman, and if, by a fair and open bargain, the Canadian publisher can arrange with an author or composer of any country for the purchase of his works, the Canadian publisher, no less than his English competitor, is protected in the enjoyment of the property which he has acquired. No author or composer, whatever his nationality, will decline to deal with the Canadian publisher merely because he is a Canadian; but the Canadian must pay the author's price, and so acquire in a straightforward way property which Englishmen and most foreigners will respect. If he cannot pay the author's price let him take his hands off property which so many English speaking and foreign

nations have agreed is to be secured to the legitimate owner of it, What more can the Canadian want: unless it be the confiscation of those works or compositions which his own apathy prevents his originating, or which his own want of enterprise prohibits his acquiring in the open market, or openly?

(4.) The Act is unaccompanied by any guarantees. There is no probability that Canadian dealers or publishers will be more honest in the future than they have been in the past. What *certainty* is there that the ten per cent. royalty will be collected? The history of the twelve and a half per cent. duty does not inspire confidence on this point; and nothing short of *absolute certainty* will suffice, having regard to the important interests which are to be placed in jeopardy upon the pretext of a royalty. The Act provides that security is to be given *to the satisfaction of the Canadian Minister;* but the history of the same duty has demonstrated that Canadian Ministers are easily satisfied in these matters; and, when once the Minister is satisfied, the British copyright owner will be at the mercy of the Canadian publisher. Clause 4 of the Act declares that the Canadian Government is not to be liable for any royalty "not actually collected": those words are full of meaning, and give character to the whole Act.

(5.) If the object of the Act is to obtain a cheap literature in Canada, the Canadian Government may go a long way towards that end, without confiscating the property of others, by abolishing an import duty of fifteen per cent., which is attached, as a fiscal tax, to all literature imported into the colony.

(6.) The provisions of the Act are vague and unreasonable; and, if the Act were in other respects acceptable, it must go back to the Canadian Parliament to be redrafted. The expression "each copy or reproduction issued" needs explanation. Does it mean copies

printed, or copies sold and otherwise distributed? There is no machinery provided to enable the author, affected by the grant of a license, to ascertain what number of copies really have been "issued." The provision requiring reprinting and republishing in Canada, within one month of printing and publishing elsewhere, is arbitrary as regards the limit of time; and, as no power to extend it is reserved to anyone, it can only have been inserted as an excuse for expediting the moment for confiscation. The royalty, when collected, is to be paid over to the persons entitled thereto, "under regulations to be approved by the Governor in Council." Are the British and Colonial Legislatures to be consulted in the drawing up of these regulations? It will be interesting to learn how, and when, the payments will be made, and to what deductions they will be subjected.

(7.) The necessity of registration in Canada will oblige the British or Colonial copyright owner to employ agents in Canada to act for him; this will involve trouble and expense, and will leave the copyright of the work at the mercy of the agent, who, by delaying its registration, whether by negligence or by design, may deprive the author of his Canadian copyright for ever.

(8.) *Anyone* may obtain the license on giving the so-called security, so that, unless the conditions as to registration, reprinting, and republication in Canada are complied with, valuable copyright works and musical compositions, the property of Englishmen, will in all probability be utilised as material for Canadian newspapers and periodicals, and sold for a few cents per copy.

(9.) The Canadian reprints will go forth into the world unrevised by the author, to the detriment of his works.

Such are a few of the objections to this Act which are suggested by a casual glance at its provisions. The Act has the obvious

appearance of being a means to an end, and that end is the complete abolition of Anglo-Canadian copyright. If this is what the Canadian desires, let him say so, without resorting to "licenses" and similar pretexts, and we in England will know how to deal with him. Let him assume the position which has been persistently maintained by his American neighbour, who candidly avows his determination to ignore such questions as International Copyright. If he were to adopt this line, English authors and publishers would be on their guard, and fresh legislation in England may be necessary to protect them. But there is one feature in the case to which it will be well to call the very serious attention of these reckless plungers, whose habit apparently is to pass a law to-day for the purpose of distorting it to-morrow. They must not overlook the fact that the familiarity which has bred contempt in their dealings with their English relations is not likely to be thoroughly appreciated in those countries which, by joining in the Berne Convention of 1886, have as important a voice as England has in the settling of this question. The matter becomes an international one. Germany, Belgium, Spain, France, Haïti, Italy, the Republic of Liberia, Switzerland, and Tunis are all entitled to be heard; and before the Royal assent can be accorded to such a measure of universal confiscation as is now put forward, very grave questions will have to be settled to the satisfaction of every one of those countries; and if Canada or England should attempt to deal lightly with interests such as these, it is not impossible to imagine that temerity of that kind will, in many instances, bring about very awkward situations with countries whose goodwill we appreciate, and whose honesty and straightforwardness in dealing with these questions might form a profitable subject for reflection by the colony whose aims and objects have ever been but clumsily disguised.

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