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PROPERTY RIGHTS IN LETTERS

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AFTER they have served their immediate purpose, letters are ordinarily discarded or filed and then forgotten. But occasionally such letters become subjects of disputes between the sender and receiver or other interested persons. Perhaps someone has received letters from a literary celebrity and wishes to publish them. A vindictive maid, jilted by her faithless swain, may wish to publish his letters to display his perfidy to the world. Or a writer may desire the return of his letter after he has sent it. When a conflict of this sort precipitates a lawsuit, the courts must decide whether the various interests asserted with respect to the letter involved are entitled to judicial protection, or in the language of the law, whether they constitute property rights. Litigation relating to these problems has mainly concerned three polar issues: the physical document itself, the ideas contained in the letter, and its publication. The meagre case law can be conveniently analyzed in terms of these issues.

Physical Document. The receiver of a letter[1] is said to obtain by gift complete ownership of everything material that passes into his possession when he gets the letter, including the paper, the ink, the envelope, the postage stamp, and the postal mark.[2] Accordingly, he has been granted many of the usual incidents of ownership. He is under no duty to the sender to preserve the letter but may destroy it at will.[3] He may successfully maintain a civil suit to recover letters wrongfully taken from him,[4] and a criminal

1. If a letter which has a return address on the outside fails to reach its intended receiver, it will be returned to such return address If there is no return address on the envelope, the letter is sent to the Dead Letter Office. All these letters are opened by government clerks in an effort to effect delivery or return. Undeliverable printed matter obviously without value is sold as waste paper. Undeliverable or unreturnable letters containing correspondence are burned. U. S. Post Office Dep't—Postal Laws and Regulations (1932) §§ 804–831.

An amazing array of articles is removed from letters and packages sent to the Dead Letter Office. Among things found have been a plush reticule, a woman's rubber circular, a mustache comb, a pair of man's cotton flannel drawers, a fish knife, a uterine supporter, a metal whistle, and innumerable pairs of women's corsets. For a complete list of articles sold at auction by the Dead Letter Office, see U. S. Post Office Dep't—Dead Letter Office Sale (1893).

2. See Grigsby v. Breckinridge, 65 Ky. 480, 486, 493 (1867); Baker v. Libbie, 210 Mass. 599, 606, 97 N. E. 109, 112 (1912); AMDUR, COPYRIGHT LAW AND PRACTICE (1936) 48; 1 MORGAN, LAW OF LITERATURE (1875) 451; Parker, *Jurisdiction of Chancery Courts to Restrain Publication of Letters* (1853) 1 AM. L. REG. 449, 457.

Possession by the receiver of letters addressed to him is prima facie evidence of ownership. Tefft v. Marsh, 1 W. Va. 38 (1864).

3. See Grigsby v. Breckinridge, 65 Ky. 480, 486 (1867); Baker v. Libbie, 210 Mass. 599, 606, 97 N. E. 109, 112 (1912); 1 MORGAN, LAW OF LITERATURE (1875) 448; Parker, *supra* note 2, at 457.

4. Dock v. Dock, 180 Pa. 14, 36 Atl. 411 (1897) (letters surreptitiously removed from trunk); Oliver v. Oliver, 11 C.B.N.S. 139 (1861) (bailee refused to return letters); see MacMillan & Co. v. Dent, [1906] 1 Ch. 101, 108.

action for larceny may lie if the letters have been stolen from him.[5] The receiver likewise has a fairly complete power of alienation during his life, so long as its exercise does not amount to publication of the word-form of the letter.[6] Thus, he usually may sell the letter, as, for example, to a collector or dealer, or he may give it away.[7] In addition to being in large part alienable during the receiver's life, letters are treated much like other personal property at his death. At one time it was suggested that the receiver of a letter had but a life estate in it,[8] as the letter was meant for the receiver

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It has been held that the statute of limitations and adverse possession operate against a receiver who has lost his letters only if he has been informed of such adverse possession or if such possession was dishonest or wrongful. Mayor of New York v. Lent, 51 Barb. 19 (Sup. Ct. N. Y. 1868); *cf.* O'Neill v. General Film Co., 171 App. Div. 854, 157 N. Y. Supp. 1028 (1st Dep't 1916).

5. Whether letters are subjects of larceny depends upon the wording and construction of the statute in the particular jurisdiction. See 2 BISHOP, CRIMINAL LAW (9th ed. 1923) § 904 (1); 1 MORGAN, LAW OF LITERATURE (1875) 443; 2 WHARTON, CRIMINAL LAW (12th ed. 1932) § 1117; *The Law of Stolen Letters* (1908) 15 BENCH & BAR 1.

6. The receiver may show the letter to his friends, or he may read it aloud to them. See Grigsby v. Breckinridge, 65 Ky. 480, 488, 490 (1867); Baker v. Libbie, 210 Mass. 599, 606, 97 N. E. 109, 112 (1912); Gee v. Pritchard, 2 Swans. 402, 416, 424 (1818); Labouchere v. Hess, 77 L. T. R. 559, 563 (1897). But *cf.* Thurston v. Charles, 21 T. L. R. 659 (1905). Or he may make copies of the letter and show them to his friends. 1 MORGAN, LAW OF LITERATURE (1875) 445; Parker, *supra* note 2, at 458. In short, he is free to make any reasonable use of the letter which does not amount to a widespread publication of its word-form. For a discussion of the legal relations incident to publication, see *infra*, p. 498.

7. Grigsby v. Breckinridge, 65 Ky. 480 (1867); see Baker v. Libbie, 210 Mass. 599, 606, 97 N. E. 109, 112 (1912); 1 MORGAN, LAW OF LITERATURE (1875) 448; *cf.* Oliver v. Oliver, 11 C. B. N. S. 139 (1861).

This privilege of alienation is quite similar to the well-recognized privilege of the owner of an unpublished manuscript to sell it. Maurel v. Smith, 271 Fed. 211 (C. C. A. 2d, 1921); see Palmer v. DeWitt, 47 N. Y. 532, 538 (1872); Packard v. Fox Film Corp., 207 App. Div. 311, 313, 202 N. Y. Supp. 164, 165 (1st Dep't 1923).

8. In a case in which a husband unsuccessfully tried to recover letters written by him to his wife which she on her death bed had given to her daughter, Judge Williams dissented as follows: "And though it be conceded that a married woman's ideas, emotions, and affections are her own, and that her husband should neither be a tyrant nor a spy over her, who is neither his slave nor his mistress, but his free and equal companion; still, when she has ceased to live; when no longer capable of emotions and affections; no longer his free and equal companion, but a lifeless, listless, lump of clay; when the intelligent, life-inspiring spirit has fled from its earthly habitation, who has, or can have, as good right to his own compositions, his own confidential, social, and affectionate letters to his wife, before or after marriage, as the husband? . . . But the property of the receiver of letters, unless these be necessary to vindicate rights of property or character, or repel unjust aspersions, in its very nature, is essentially a life estate, the only purposes being for the individual to whom sent, and peculiarly personal to the receiver; hence, when the receiver dies, the whole *special* property in him is extinguished, and then, not only the general, but the entire property, is in the author." Grigsby v. Breckinridge, 65 Ky. 480, at 502 and 504 (1867).

alone and was peculiarly personal to him, and that upon the receiver's death the entire property in the letter reverted to its writer. But this suggestion tends to place upon the receiver an inconvenient duty of preserving letters indefinitely, contrary to general usage, and would make for administrative difficulty in restoring letters to their writers after the receiver's death. Consequently this proposal has never received judicial approval, and upon the receiver's death his letters pass to his personal representative.[9]

There are, however, certain restrictions upon the receiver's ownership of the physical document. The first is suggested by a case in which a truss manufacturing concern, which had received some 60,000 letters in response to its advertisements concerning the curative quality of its wares, contracted to sell these letters to a physician who intended to use them to drum up trade; the court refused to enforce the contract on the ground that public policy opposed this sort of trafficking in such intimate letters.[10] The second limitation is that letters may not be seized by the receiver's creditors in insolvency or bankruptcy proceedings.[11] And finally, although letters pass to the personal representative of the receiver, they are not such assets as may be sold in the course of the administration of the estate in order to pay its debts. Hence the representative of the estate must pass the letter on to the legatees or next of kin.[12] These rules qualify the receiver's property

9. Eyre v. Higbee, 35 Barb. 502 (Sup. Ct. N. Y. 1861); Earl of Granard v. Dunkin, 1 Ball & B. 207 (1809); see Grigsby v. Breckinridge, 65 Ky. 480, 491 (1867). But *cf. In re* Ryan's Estate, 115 Misc. 472, 188 N. Y. Supp. 387 (Surr. Ct. 1921).

Mail addressed to a deceased person is delivered to the executor or administrator of his estate; if there be none, delivery is made to the surviving spouse, unless there be other claimants, in which event the instructions of the Post Office Solicitor as to the particular case are followed. If no legal representative, surviving spouse, or other claimants are found, the letter is sent to the Dead Letter Office. U. S. Post Office Dep't—Postal Laws and Regulations (1932) § 787.

10. Rice v. Williams, 32 Fed. 437 (C. C. E. D. Wis. 1887); see Baker v. Libbie, 210 Mass. 599, 606, 97 N. E. 109, 112 (1912). As this is the only case exemplifying such a restriction, its scope is as yet undefined. Yet this prohibition upon sale probably will apply not only to the receiver, but to his heirs and assigns as well.

11. See Baker v. Libbie, 210 Mass. 599, 607, 97 N. E. 109, 112 (1912); AMDUR, COPYRIGHT LAW AND PRACTICE (1936) 49; *cf.* Bartlett v. Crittenden, 2 Fed. Cas. No. 1076, at 968 (C. C. Ohio 1849). But *cf.* Banker v. Caldwell, 3 Minn. 94 (1859). And *cf.* cases cited in footnote 12, *infra*.

Nor, it seems, are letters taxable as personal property. See Leon Loan and Abstract Co. v. Equalization Board, 86 Iowa 127, 134, 53 N. W. 94, 95 (1892); Note (1896) 51 L. R. A. 353, 381.

12. Eyre v. Higbee, 35 Barb. 502 (Sup. Ct. N. Y. 1861); *In re* Ryan's Estate, 115 Misc. 472, 188 N. Y. Supp. 387 (Surr. Ct. 1921); see Baker v. Libbie, 210 Mass. 599, 607, 97 N. E. 109, 112 (1912).

It has been suggested that the executor of the receiver may be empowered to destroy those letters which in the executor's opinion would be productive of injury if published. See Ingram, J., concurring in Eyre v. Higbee, *supra*. This suggestion, of course, opposes the principle that the letter must be turned over to the next of kin. And as the next of kin cannot publish the letter anyhow, see *infra* p. 503, it is unnecessary to give the executor the power of destruction for that reason.

right in the letter into something private and only semi-commercial: he has a limited right to sell the letter, and a letter is treated as a personal effect, too private to be sold for creditors.[12a]

The only legal interest the writer may be said to possess with respect to the physical document is a possible right to secure copies. For although no case has arisen directly upon the point, it has been suggested in dicta that the writer of a letter may compel the receiver either to give him copies of it or to grant him access to it for the purpose of making copies.[13] Implicit in this suggestion, of course, is the supposition that the letter exists at the time the copy is desired, for surely the receiver cannot be forced to attempt to recall from memory the contents of the letter nor to recount them if remembered.[14] But even if the letter does exist, it is doubtful whether the writer should be given an absolute right to secure copies. While such a right would sometimes aid him in exercising his well-recognized privilege of publishing the letter,[15] he could protect himself fully by making a copy before mailing the letter.[16] And to avoid inconveniencing the receiver unduly by compelling him to conduct a thoroughly exhaustive search among his papers, it would seem better to qualify the sender's right by requiring the receiver merely to make a reasonable effort to locate the letter and to loan it for copying.

Ideas Contained in the Letter. To give the originator of an idea a property right in it is in harmony with the general bias of the law in favor of allowing each man to profit from his own effort. Yet as an intangible idea is so difficult to isolate that it is seldom possible to describe it precisely, to compare it accurately with another idea, or to find its ultimate author, the administrative difficulty of protecting ideas is enormous.[17] Attempts to protect rights in such intangibles result in hopeless confusion, and the courts

12a. The decisions holding that letters are immune to the claims of creditors may be founded on the same policy that affords exemptions to other intimate personal property. Thus, while the debtor is alive, many of his personal effects are exempt. See, *e.g.*, UTAH REV. STAT. ANN. (1933) § 104-37-13 (debtor's library, all hanging pictures or paintings of his family); VA. CODE (Michie, 1930) § 6552 (family Bible, family pictures, debtor's library). The Federal Bankruptcy Act enforces these exemptions. 30 STAT. 548 (1898), 11 U. S. C. § 24 (1934). And some states provide that upon the debtor's death similar property is to be exempt from administration as "assets," and is to be passed to the surviving spouse and children. See, *e.g.*, OHIO GEN. CODE ANN. (Page, 1926) §§ 10654 (2), 10655.

13. See Baker v. Libbie, 210 Mass. 599, 605, 97 N. E. 109, 111 (1912).

14. See 1 MORGAN, LAW OF LITERATURE (1875) 449, 450; Parker, *supra* note 2, at 459.

15. See *infra* p. 498.

16. Such a copy of course belongs to the writer. Ipswich Mills v. Dillon, 260 Mass. 453, 157 N. E. 604 (1927); *In re* Wheatcroft, [1877] 6 Ch. 97; see 1 MORGAN, LAW OF LITERATURE (1875) 450.

17. For an elaboration of these arguments, see (1935) 44 YALE L. J. 1269, 1270.

have usually held that there are no property rights in bare ideas.[18] This is certainly true if the originator of an idea voluntarily discloses it to the public.[19] However, a few cases suggest that bare ideas might be protected if disclosed only upon some contractual basis,[20] as, for example, by contracting to furnish a certain idea of value before divulging to the purchaser its exact nature.[21]

These principles may be applied to abstract ideas contained in letters. Thus, the receiver of an ordinary letter is free to appropriate and use any ideas suggested by it,[22] for the writer has voluntarily disclosed them by sending the letter. Only by a preliminary contractual agreement between the writer of the letter and its proposed receiver concerning the prospective disclosure of a novel idea,[23] or perhaps by a notice on the envelope of the letter that the opening of the letter by the receiver binds him not to appropriate for his own use whatever original ideas may be contained therein,[24] does the writer have any chance of protecting them. But if the letter embodies more than abstract ideas, containing, for example, an advertising scheme, an architect's plan, or a moving picture scenario, the administrative difficulties of protection are not so great, and as a result the courts sometimes will prohibit the unauthorized use of the letter's contents even though voluntarily disclosed.[25] Also, in certain circumstances, judicial protection

18. Burnell v. Chown, 69 Fed. 993 (C. C. N. D. Ohio, 1895); Fendler v. Morosco, 253 N. Y. 281, 171 N. E. 56 (1930); Downes v. Culbertson, 153 Misc. 14, 275 N. Y. Supp. 233 (Sup. Ct. 1934); Mackay v. Benjamin Franklin Realty Co., 288 Pa. 207, 135 Atl. 613 (1927); *cf.* (1927) 25 MICH. L. REV. 886; (1930) 15 CORN. L. Q. 633. The ideas contained in an unpublished manuscript are not such property as may be the subject of an action *quasi in rem*. See (1926) 26 COL. L. REV. 1034; (1926) 40 HARV. L. REV. 137.

19. Hamilton Mfg. Co. v. Tubbs, 216 Fed. 401 (C. C. W. D. Mich. 1908); Haskins v. Ryan, 75 N. J. Eq. 330, 78 Atl. 566 (1908); Stein v. Morris, 120 Va. 390, 91 S. E. 177 (1917).

20. Moore v. Ford Motor Co., 43 F. (2d) 685 (C. C. A. 2d, 1930); Lueddecke v. Chevrolet Motor Co., 70 F. (2d) 345 (C. C. A. 8th, 1934); Bristol v. Equitable Life, 132 N. Y. 264, 30 N. E. 506 (1892); Soule v. Bon Ami Co., 201 App. Div. 794, 195 N. Y. Supp. 574 (2d Dep't 1922).

21. *Cf.* Dodge v. Construction Information Co., 183 Mass. 62, 66 N. E. 204 (1903).

22. *Cf.* Philip v. Pennell, [1907] 2 Ch. 577. But *cf.* 1 MORGAN, LAW OF LITERATURE (1875) 449, 451.

23. Moore v. Ford Motor Co., 43 F. (2d) 685 (C. C. A. 2d, 1930); Lueddecke v. Chevrolet Motor Co., 70 F. (2d) 345 (C. C. A. 8th, 1934); Bristol v. Equitable Life, 132 N. Y. 264, 30 N. E. 506 (1892).

Yet the idea must be original; contracts which have as subject matter ideas of common knowledge will not be enforced even though the idea in fact prove of value to the purchaser. Soule v. Bon Ami Co., 201 App. Div. 794, 195 N. Y. Supp. 574 (2d Dep't 1922) (raising prices to increase profits); Burwell v. Baltimore & Ohio R. R., 31 Ohio App. 22, 164 N. E. 434 (1928) (drilling wells to get water).

24. See Parker, *supra* note 2, at 455.

25. Advertising scheme: Liggett & Meyer Tobacco Co. v. Meyer, 194 N. E. 206 (Ind. App. Ct. 1935), (1935) 44 YALE L. J. 1269; *cf.* Ryan v. Century Brewing Ass'n,

might be extended to news transmitted by letter. Although the writer of a friendly letter probably can retain no dominion over the news which the letter contains, perhaps a business concern disseminating news regularly in the form of letters may control the use of it by the receivers.[26]

Publication. Besides containing abstract ideas and certain combinations of ideas, as in the form of advertising schemes, all letters of necessity have a certain word form. This arrangement of words itself is the subject of property rights. It has long been recognized at common law that the author of a literary manuscript is privileged to publish it whenever he desires.[27] This rule is of course designed to permit an author to profit from sale for publication of his intellectual creations. By analogy to literary manuscripts, the courts have held that the writer of a letter is free to publish it himself, the receiver being powerless to prevent the publication.[28] The writer may use his own copy of the letter, or perhaps may obtain one from the receiver.[29] Or if the writer does not desire to publish himself, he may sell his privilege of publication to another.[30] There may, however, be one exception to this rule. If the letter be written to the government, it has been suggested in dicta that the government may prohibit publication of it despite the wish of the writer, because of certain secrets or confidential information which might be contained therein.[31]

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55 P. (2d) 1053 (Wash. Sup. Ct. 1936). *Contra:* Lueddecke v. Chevrolet Motor Co., 70 F. (2d) 345 (C. C. A. 8th, 1934). Architect's plan: *Cf.* Wright v. Eisle, 86 App. Div. 356, 83 N. Y. Supp. 887 (2d Dep't 1903); Larkin v. Pennsylvania R. R. Co., 125 Misc. 238, 210 N. Y. Supp. 374 (Sup. Ct. 1925); Comment (1927) 75 U. of Pa. L. Rev. 458. Scenario: Thompson v. Famous Players-Laski Corp., 3 F. (2d) 707 (N. D. Ga. 1925).

26. *Cf.* Dodge v. Construction Information Co., 183 Mass. 62, 66 N. E. 204 (1903); Dodge Corp. v. Comstock, 140 Misc. 105, 251 N. Y. Supp. 172 (Sup. Ct. 1931).

Certainly the disseminators could prevent its use by a rival news agency. International News Service v. Associated Press, 248 U. S. 215 (1918), (1919) 32 Harv. L. Rev. 566, (1919) 28 Yale L. J. 387; Gilmore v. Sammons, 269 S. W. 861 (Tex. Civ. App. 1925). *Cf.* Associated Press v. KVOS, 80 F. (2d) 575 (C. C. A. 9th, 1935).

27. Palmer v. DeWitt, 47 N. Y. 532 (1872); Kortlander v. Bradford, 116 Misc. 664, 190 N. Y. Supp. 311 (Sup. Ct. 1921); 1 Morgan, Law of Literature (1875) 387.

28. Folsom v. Marsh, 9 Fed. Cas. No. 4901 (C. C. Mass. 1841); Knights of Ku Klux Klan v. International Magazine Co., 294 Fed. 661 (C. C. A. 2d, 1923); Grigsby v. Breckinridge, 65 Ky. 480 (1867); Pope v. Curl, 2 Atk. 342 (1741).

Although the receiver cannot prevent the writer from publishing the letters, perhaps the receiver can prevent publication by persons not in privity with the author. *Cf.* Earl of Granard v. Dunkin, 1 Ball & Beatty 207 (1809).

In Mexico, private letters usually cannot be published without the consent of both correspondents. See Bowker, Copyright (1912) 421.

29. See *supra* p. 496.

30. No cases have been discovered in which this point is litigated. Yet as the author of a literary manuscript may sell his right of publication, see cases cited in footnote 27 *supra*, it follows that the writer of a letter may do the same. Also, the power of sale is implicit in the recognized right of publication.

31. See Folsom v. Marsh, 9 Fed. Cas. No. 4901, at 347 (C. C. Mass. 1841); *cf.* Curtis, Copyright (1847) 98.

Upon such publication[32] of his letter, the writer loses all his common law rights in it, and it becomes the "property of mankind".[33] Only by means of the copyright statutes may the property right in the word-form of the letter be protected after publication.[34] Although letters are not specifically mentioned in the federal copyright laws,[35] letters may be the subject of copyright.[36] They may be incorporated in a book or they may be entered separately. And if the writer dies before attempting to copyright his letters, presumably this right passes to his heirs,[37] though there is no reported case upon this point.

The common law not only permits the author of a literary manuscript to publish it at will, but also has long protected unpublished manuscripts by giving their authors the power to prevent unauthorized publication.[38] View-

32. It is difficult to state categorically exactly what acts constitute publication. A private exhibition to a few people of a copy of the letter is not enough. *Cf.* Palmer v. DeWitt, 47 N. Y. 532 (1872). Nor is the gift of a copy of the letter. *Cf.* 1 MORGAN, LAW OF LITERATURE (1875) 392. There must be some unequivocal act indicating an intent to dedicate the letter to the public, as, for example, a sale or an exposure for sale. *Cf.* Vernon Abstract Co. v. Waggoner Title Co., 49 Tex. Civ. App. 144, 107 S. W. 919 (1908). Reproduction of the letter in a newspaper or in a book is a publication. *Cf.* Holmes v. Hurst, 174 U. S. 82 (1899). And if the letter is so printed, an appended notice to the effect that no publication is intended is ineffective. *Cf.* Wagner v. Conried, 125 Fed. 798 (C. C. S. D. N. Y. 1903). For a general discussion of this subject, see Comment (1934) 19 ST. L. L. REV. 323; Note (1896) 51 L. R. A. 353.

33. *Cf.* American Code Co. v. Bensinger, 282 Fed. 829 (C. C. A. 2d, 1922); Palmer v. DeWitt, 47 N. Y. 532 (1872); Kortlander v. Bradford, 116 Misc. 664, 190 N. Y. Supp. 311 (Sup. Ct. 1921).

34. *Cf.* Caliga v. Inter Ocean Newspaper Co., 215 U. S. 182 (1909); O'Neill v. General Film Co., 171 App. Div. 854, 157 N. Y. Supp. 1028 (1st Dep't 1916). For the history and development of the copyright laws, see De Borja, *The Law on Literary Property* (1935) 14 PHILLIP. L. J. 366; Rogers, *History of Literary Property* (1908) 7 MICH. L. REV. 101; Rogers, *History of Literary Property* (1911) 5 ILL. L. REV. 551.

Even if the letters are published while uncopyrighted, it is possible that their use by others may be enjoined on the theory of unfair competition. *Cf.* Meyer v. Hurwitz, 5 F. (2d) 370 (E. D. Pa. 1925).

35. See BOWKER, COPYRIGHT (1912) 91.

36. Folsom v. Marsh, 9 Fed. Cas. No. 4901 (C. C. Mass. 1841); see BOWKER, COPYRIGHT (1912) 92; *cf.* MacMillan & Co. v. Dent, [1906] 1 Ch. 101. But *cf.* Parker, *supra* note 2, at 469.

37. See Folsom v. Marsh, 9 Fed. Cas. No. 4901, at 346 (C. C. Mass. 1841). But *cf.* MacMillan & Co. v. Dent, [1907] 1 Ch. 107; OLDFIELD, THE LAW OF COPYRIGHT (1912) 24. This follows by analogy from the related principle that the executor, administrator, or heirs of the author of an unpublished manuscript may copyright his works. 35 STAT. 1077 (1909), 17 U. S. C. § 8 (1934); see BOWKER, COPYRIGHT (1912) 102.

38. See Wheaton v. Peters, 8 Pet. 591, 656 (U. S. 1834); Caliga v. Inter Ocean Newspaper Co., 215 U. S. 182, 188 (1909); 35 STAT. 1076 (1909), 17 U. S. C. § 2 (1934); 1 MORGAN, LAW OF LITERATURE (1875) § 182. Creditors of the author cannot compel him to publish in order to get the profits from such proposed publication. See CURTIS, COPYRIGHT (1847) 85, 218. Of course, if the author publishes voluntarily, creditors can attach the monies obtained from this publication.

ing letters as unpublished manuscripts for this purpose, the courts early decided that the writer of a letter may prevent its unauthorized publication by the receiver. Yet from this analogy a few courts contended that only those letters which were "literary" compositions could be thus protected, and that the writers of ordinary private letters could not prevent their publication.[39] Administration of this rule required the courts to indulge in the solemn comedy of making "literary" judgments. The test of a "literary" letter might be popular opinion as to the ability of the writer; it might be the opinion of the writer himself or of the judge as to the literary merit of the particular letter at issue; it might be the intention of the writer as to publication at some later date; or it might be the price which the letter would bring if sold. Again, in one sense, all letters are literary, for all letters are composed by persons who put on paper certain ideas in certain expressions peculiar to themselves. Impressed with the difficulty of defining a "literary" letter, the courts abandoned this distinction and have not followed it in a reported case since 1848.[40] Equity today generally will afford injunctive relief to the writer against the publication of his letters by the receiver, regardless of the subject matter, the literary merit, or the popular interest in the letters.[41]

Although the rejection of this distinction undoubtedly was caused in part by the difficulty of classifying letters as "personal" and "literary", another reason for the inclusion of private or domestic letters among those products of the mind which are given legal protection may have been the development and recognition of the right of privacy. This right, first discussed at length by Brandeis and Warren,[42] recognizes the social interest in minimizing interferences with privacy. Though no court has expressly relied on the right of privacy in preventing the receiver of a letter from publishing it against the author's wish, and though some courts in so holding expressly

39. Percival v. Phipps, 2 V. & B. 19 (1813); Wetmore v. Scovell, 3 Edw. Ch. 515 (N. Y. 1842); Hoyt v. MacKenzie, 3 Barb. Ch. 320 (N. Y. 1848); see Parker, *supra* note 2, at 470.

40. Folsom v. Marsh, 9 Fed. Cas. No. 4901 (C. C. Mass. 1841); Woolsey v. Judd, 11 How. Prac. 49 (Super. Ct. N. Y. 1855); see 1 MORGAN, LAW OF LITERATURE (1875) § 198.

41. Roberts v. McKee, 29 Ga. 161 (1859); Denis v. LeClerc, 1 Mart. [O. S.] 297 (Sup. Ct. Terr. New Orleans, 1811); Pope v. Curl, 2 Atk. 342 (1741); Gee v. Pritchard, 2 Swans. 402 (1818); Andrew v. Raeburn, 22 W. R. 564 (1874); see Grigsby v. Breckinridge, 65 Ky. 480, 488 (1867); Baker v. Libbie, 210 Mass. 599, 605, 97 N. E. 109, 111 (1912); CURTIS, COPYRIGHT (1847) 92, 94; 2 STORY, EQUITY JURISPRUDENCE (1836) §§ 944-948.

If the letter is published wrongfully, the writer may recover damages for the injury to him. Thurston v. Charles, 21 T. L. R. 659 (1905); see DRONE, COPYRIGHT (1879) 131; WAGNER, DAMAGES, PROFITS, & ACCOUNTING IN PATENT CASES (1926) 113-116; *The Law of Stolen Letters* (1908) 15 BENCH & BAR 1, 3; *cf.* 35 STAT. 1076 (1909), 17 U. S. C. § 2 (1934).

42. Brandeis & Warren, *The Right to Privacy* (1890) 4 HARV. L. REV. 193.

reject the idea as support for their decision,[43] it is apparently the underlying motive in many decisions. The justification usually advanced, however, as the basis of the writer's right to prevent publication is that one has a possessory interest in the rewards of one's own labor,[44] the theory being that if the receiver of a letter is allowed to publish it at will, he can reap any benefits to be derived from such publication, thereby depriving the actual author of the letter of any chance to profit, since a subsequent publication would ordinarily be worthless.

There are, however, at least four exceptions to this rule that the writer may prevent publication of the letter by its receiver. First, the letter may be published by the receiver against the writer's consent in a proper legal proceeding.[45] The receiver may bring the letter into court voluntarily, or he may be forced to do so by court order.[46] Thus, letters may be appended as exhibits to pleadings,[47] or may be introduced as evidence during the trial.[48] For example, in a suit for breach of promise, the plaintiff may bring into court over defendant's objection letters written to her by defendant, in order to prove the marriage contract.[49] However, if the letters would incriminate

43. Wetmore v. Scovell, 3 Edw. Ch. 515 (N. Y. 1842); Woolsey v. Judd, 11 How. Prac. 49 (Super. Ct. N. Y. 1855); Gee v. Pritchard, 2 Swans. 402 (1818); see 2 STORY, EQUITY JURISPRUDENCE (1836) §945; Brand, *Common Law Property in Notion* (1912) 1 BENCH & BAR [N. S.] 100, 109. But see 1 MORGAN, LAW OF LITERATURE (1875) 457.

44. See Grigsby v. Breckinridge, 65 Ky. 480, 485 (1867); Baker v. Libbie, 210 Mass. 599, 604, 97 N. E. 109, 111 (1912). Still another theory which has been advanced to explain the writer's right to prevent publication by the receiver is that of an implied contract or trust relationship between the writer and the receiver. See DRONE, COPYRIGHT (1879) 129; 1 MORGAN, LAW OF LITERATURE (1875) 457.

45. Hopkinson v. Burghley, L. R. 2 Ch. 447 (1867); see Gee v. Pritchard, 2 Swans. 402, 427 (1818); CURTIS, COPYRIGHT (1847) 92; 2 STORY, EQUITY JURISPRUDENCE (1836) §948. The writer cannot get damages for such a publication. See OLDFIELD, THE LAW OF COPYRIGHT (1912) 24. *Cf.* CARROLL, ALICE'S ADVENTURES IN WONDERLAND (1866) 109: "The King turned pale, and shut his note-book hastily. 'Consider your verdict,' he said to the jury, in a low trembling voice.

'There's more evidence to come yet, please your majesty,' said the White Rabbit, jumping up in a great hurry; 'this paper has just been picked up.'

'What's in it?' said the Queen.

'I haven't opened it yet,' said the White Rabbit, 'but it seems to be a letter, written by the prisoner to—to somebody.'

'It must have been that,' said the King, 'unless it was written to nobody, which isn't usual, you know.'"

46. Hopkinson v. Burghley, L. R. 2 Ch. 447 (1867).

47. See Folsom v. Marsh, 9 Fed. Cas. No. 4901, at 346 (C. C. Mass. 1841); Denis v. LeClerc, 1 Mart [O. S.] 297, 319 (Super. Ct. Terr. New Orleans, 1811).

48. Baldwin v. Von Micheroux, 83 Hun. 43 (Sup. Ct. N. Y. 1894); Barrett v. Fish, 72 Vt. 18, 47 Atl. 174 (1899); see BOWKER, COPYRIGHT (1912) 92; *cf.* Laidlaw v. Lear, 30 Ont. Rep. 26 (1898). It has been held that the courts will disregard the manner in which the letters were obtained. Barrett v. Fish, *supra; cf.* Ashburton v. Pape, [1913] 2 Ch. 469.

49. Tefft v. Marsh, 1 W. Va. 38 (1864).

the person required by law to produce them, that person may decline to reveal them.[50] Likewise, if the letters are privileged communications, as, for example, between attorney and client, they cannot be introduced against the wish of the person possessing the privilege.[51] Of course at the end of the trial, the letters must be returned to their owners, and cannot be published after judgment has been rendered.[52] Second, it has been said in dicta that the government may upon occasion publish letters written to it even against the will of the writers.[53] The nature of the documents, perhaps embracing historical, military, or diplomatic information, may make publication desirable if not imperative. No case has arisen directly upon this point. Third, by the doctrine of literary accession, if the literary composition is the result of labor performed by one in the employ of another, the literary property therein belongs to the employer rather than to the writer.[54] Therefore, where an agent writes a letter for his principal, the receiver can publish it against the will of the agent.[55] Fourth, it has been held that the receiver may publish a letter against the will of the writer in vindication of character.[56] Thus, where a publisher printed an article under the name of the author who afterwards denied authorship and attempted to malign the publisher for this alleged deception, the publisher was allowed to publish letters received from the author which proved his authorship and thus vindicated the character of the publisher.[57] Whether the accusation or defamation of character need be publicly made has not been decided.[58] But it seems that this right is personal to the receiver and may not be conferred on other persons.[59] The desirability of this fourth exception appears doubtful. By

50. See Barrett v. Fish, 72 Vt. 18, 21, 47 Atl. 174, 175 (1899). The extent of this exception is as yet undefined by the courts.

51. Ashburton v. Pape, [1913] 2 Ch. 469.

52. King v. King, 25 Wyo. 275, 168 Pac. 730 (1917); Palin v. Gathercole, 1 Coll. 565 (1844).

53. See Folsom v. Marsh, 9 Fed. Cas. No. 4901, at 347 (C. C. Mass. 1841); CURTIS, COPYRIGHT (1847) 98; DRONE, COPYRIGHT (1879) 132. Even if there were no privilege, the writer would have procedural difficulties in bringing suit against the government for injunction or for damages.

54. Howard v. Gunn, 32 Beav. 462 (1863); see Baker v. Libbie, 210 Mass. 599, 605, 97 N. E. 109, 111 (1912); 1 MORGAN, LAW OF LITERATURE (1875) 467.

55. Howard v. Gunn, 32 Beav. 462 (1863). The agent might, however, be specially authorized by his principal to restrain publication.

56. Widdemer v. Hubbard, 19 Phila. 263 (Common Pleas Pa. 1887); see Roberts v. McKee, 29 Ga. 161, 164 (1859); Woolsey v. Judd, 11 How. Prac. 49, 53, 80 (Super. Ct. N. Y. 1855); 1 MORGAN, LAW OF LITERATURE (1875) 464; *cf.* Lytton v. Dewey, 54 L. J. [N. S.] Ch. 293 (1884); Labouchere v. Hess, 77 L. T. Ch. 559 (1897); OLDFIELD, THE LAW OF COPYRIGHT (1912) 24.

57. Percival v. Phipps, 2 V. & B. 19 (1813).

58. It has been suggested, however, that the accusation must be made in public. See Folsom v. Marsh, 9 Fed. Cas. No. 4901, at 346 (C. C. Mass. 1841); CURTIS, COPYRIGHT (1847) 92.

59. See DRONE, COPYRIGHT (1879) 138.

allowing the receiver to publish valuable letters in vindication of his character, the safeguards against unauthorized publication are weakened, and the writer may suffer an invasion of privacy, a loss of profit, or both. Further, by permitting the receiver to determine the extent of the wrong done to him and to decide whether or not to publish the letters and what letters to publish, it is made possible for the receiver to retaliate and perhaps to injure the writer far more than the receiver himself was injured.[60] And finally, the receiver is amply protected without this privilege of publication. For he has an adequate remedy in court for the injury done to him by the writer by a suit in tort for slander or libel.[61] And in such a suit the letters in question could be introduced if necessary under the proper supervision of the court.

The writer of a letter not only may in general prohibit an unauthorized publication of it by its receiver, but also may prevent similar publications by any transferee of the receiver, regardless of whether such transferee obtains the letter by gift, sale, intestacy, will, or in the capacity of personal representative.[62] Nor can those who obtain letters by subterfuge or theft publish them without the writers' consent.[63]

But when the writer of the letter dies, the somewhat different problem arises as to whether his right to prevent publication by the receiver or the receiver's transferees is inheritable. It is not altogether persuasive to argue that the heirs or next of kin should inherit this inchoate privilege of publication, within the policy of giving every person the fruits of his labors. They themselves presumably have done nothing to deserve the profits to be derived from publication; and the only ground on which the argument can be supported is that in order to reward the writer, he should not only be allowed to reap the profits himself, but also be permitted to pass that privilege on at death to whomever he chooses. Nor does the right to privacy afford an entirely satisfactory basis for allowing the writer's heirs or next of kin to prevent publication. The interest in privacy seems to be peculiarly personal by nature and it is difficult to conceive of the heirs or next of kin as having a protectable interest in the privacy of the dead writer. It is true

60. See DRONE, COPYRIGHT (1879) 138; 2 STORY, EQUITY JURISPRUDENCE (1836) § 948; *cf.* Gee v. Pritchard, 2 Swans. 402 (1818).

61. See HARPER, TORTS (1933) §§ 235, 236, 246, 249; *cf.* M'Dougall v. Claridge, 1 Camp. 267 (1808).

62. Grigsby v. Breckinridge, 65 Ky. 480 (1867); Woolsey v. Judd, 11 How. Prac. 49 (Super. Ct. N. Y. 1855); Labouchere v. Hess, 77 L. T. Ch. 559 (1897); Laidlaw v. Lear, 30 Ont. Rep. 26 (1898); see Folsom v. Marsh, 9 Fed. Cas. No. 4901, at 346 (C. C. Mass. 1841); CURTIS, COPYRIGHT (1847) 92; *The Unauthorized Publication of Private Correspondence* (1909) 19 BENCH & BAR 92; *cf. In re* Ryan's Estate, 115 Misc. 472, 188 N. Y. Supp. 387 (Surr. Ct. 1921).

63. Denis v. LeClerc, 1 Mart. [O. S.] 297 (Super. Ct. Terr. New Orleans, 1811); Dock v. Dock, 180 Pa. 14, 36 Atl. 411 (1897); Barrett v. Fish, 72 Vt. 18, 47 Atl. 174 (1899); Ashburton v. Pape, [1913] 2 Ch. 469.

that if the letter contained information about its author which, if published, would seriously affect his reputation, the writer's relatives might well desire to protect his good name from unfavorable publicity by preventing publication. But it seems doubtful whether they would be entitled to relief in view of the analogous rule that the relatives of a deceased person cannot successfully maintain suits for libel or slander of the deceased by third persons.[64] However, the writer's relatives might sometimes be able to prevent publication on the theory that it would violate their own right of privacy. But it would then be necessary either to show that the contents of the letter concerned them directly, or to rely on the rather tenuous argument that publication would damage the deceased's reputation and the resulting publicity would reflect on them as relatives, thus invading their privacy.

Only five reported cases have been discovered holding directly upon this problem of the inheritability of the writer's right to prevent unauthorized publication of his letters. All five hold that the right is inheritable, but merely assume that conclusion without discussion. In four of these cases, the plaintiff was the writer's executor;[65] in the fifth, the plaintiffs were his immediate family.[66] Yet as only one of these cases arose in the United States, this question can hardly be deemed to be settled in this country.[67] Clearly the rule of these cases fully protects both the right of the writer and his heirs to the profits from his intellectual creation and the desire of his relatives for privacy. Also, this rule is in accord with the related principle that the power to prevent publication of an author's manuscript descends to his heirs, even though a copy of the manuscript is in the hands of another.[68] But this protection is at the expense of preventing the publication of many letters of literary or historical interest. Perhaps, then, a better rule would be that the receiver of letters may publish them after the writer's death unless the heirs of the writer can give in court a good reason for preventing publication; and if it is felt necessary to protect the pecuniary

64. See HARPER, TORTS (1933) § 235; ODGERS, LIBEL AND SLANDER (5th ed. 1911) 23, 456, 457; SEELMAN, LIBEL AND SLANDER (1933) § 97.

65. Baker v. Libbie, 210 Mass. 599, 97 N. E. 109 (1912); Thompson v. Stanhope, Amb. 737 (1774); Lytton v. Dewey, 54 L. J. [N. S] Ch. 293 (1884); Philip v. Pennell, [1907] 2 Ch. 577. Since these cases, as well as the one cited in footnote 66 *infra*, arose within a very few years after the death of the writer, perhaps they can be distinguished on the theory that this inheritable right is or should be of limited duration.

66. Cadell v. Stewart, 1 Bell's Com. 116n (Court Sessions Scotland, 1804), discussed in Bartlett v. Crittenden, 2 Fed. Cas. No. 1076, at 970 (C. C. Ohio, 1849) and in 1 MORGAN, LAW OF LITERATURE (1875), at 457.

67. Dicta in at least two other cases supports the rule that the right is inheritable. See Folsom v. Marsh, 9 Fed. Cas. No. 4901, at 346 (C. C. Mass. 1841); Denis v. LeClerc, 1 Mart. [O. S.] 297, 302 (Super. Ct. Terr. New Orleans, 1811); CURTIS, COPYRIGHT (1847) 92.

68. See CURTIS, COPYRIGHT (1847) 86, 217.